IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 418 OF 2022

BETWEEN

BENJAMIN T. MANGULA & 20 OTHERS..APPLICANTS

VERSUS

TANZANIA ZAMBIA RAILWAY AUTHORITY............................1ST RESPONDENT

ATTORNEY GENERAL...2ND RESPONDENT

JUDGEMENT

Date of last order: *27/02/2023*
Date of Judgement: *09/03/2023*

MLYAMBINA J.

Is TAZARA a private or public entity? Such critical question has attracted two distinct point of view from my Brethren and Sisters of this Court. There is a dilemma among legal practitioners as to; *whether TAZARA follows within the definition of public organs.* Some of us have answered such question with a world of reasoning affirming that TAZARA is a private entity. Some have affirmed that TAZARA is a public entity. So is the Applicant and the Respondent herein respectively. I will make a detailed analysis of my reasoning because, in my opinion, the line of arguments taken by both sides, reflect credit upon Tanzania Labour law jurisprudence and it might have an influence to the Republic of Zambia which is the Co-owner of TAZARA. On

that basis, the time has come to draw a line under the authorities to date and make a fresh start as to which factors makes an entity a public organ. Such move is justified by: *One*, the developments of the two schools of thought which have occurred in this area of the law in recent years and in particular by section 32A of *The Public Service Amendment Act No. 13 of 2016. Two*, to assist in avoiding to have unduly, porous or unpredictable position. The starting point will be to consider the brief facts of the case and the submission from both sides.

The application before the Court was filed on 06/12/2022. It is an application to call and revise the Arbitral Order of the Commission of Mediation and Arbitration (hereinafter referred to as CMA) made on 05/08/2022 before Hon. Mikidadi A in *Labour Dispute No. CMA/DSM/TEM/515/2020*, to set aside the said order on two grounds namely: *One*, that, CMA erred in law and facts for dismissing the complaint without regard that the cause of action arose before the enactment of *Written Laws Miscellaneous Amendment Act No. 13 of 2013. Two*, the CMA erred in dismissing the complaint on the ground that TAZARA is a Government entity and therefore CMA lacks jurisdiction.

The application is accompanied with the affidavit of Benjamin Timoth Mangula which sets grounds for setting aside the Arbitral Award. The

Applicants were represented by learned Counsel Ida Rugakingira and senior learned Counsel Thomas Brashi. The Respondent were represented by learned State Attorney Ms. Careen Masunda and Ms. Joyce Yonazi.

With a purpose, I will start to consider the arguments in respect of the second decisive issue before this Court; *whether the Commission for Mediation and Arbitration (CMA) had Jurisdiction to entertain the matter before it on the ground that TAZARA is a Public organ without regard to when the cause of action arose.*

Counsel Brashi had four points to submit. *First*, TAZARA was not established by an Act of Parliament rather a Partnership Agreement between United Republic of Tanzania and Republic of Zambia. *Second*, operations and management by the Council and board of TAZARA is autonomous and therefore not subject to question by the Governments. *Third*, recruitment and termination is done by the board and not the public officers. *Fourth*, mobility of workers of TAZARA. They can work in both States. Their termination does not require endorsement of a public officer.

On the nature of the Respondent (TAZARA), Counsel Brashi was of view that, it is not a public organ in nature. Thus, since its establishment, it was a business partnership between Tanzania and Zambia. It was not

established by the Act of Parliament. It was established by the contract which has been amended from time to time. The last Protocol was signed on 29/09/1993. The Act of Parliament of the United Republic of Tanzania domesticated the Protocol. The preamble to the *Tanzania Zambia Railway Authority Act, Cap 143* read:

> An Act to give effect to the agreement relating to the Tanzania Railway made between the Government of the United Republic of Tanzania and the Government of Republic of Zambia dated 29/09/1993 to provide for the continued existence of the Tanzania Zambia Railway Authority. The Council and the Board to provide for and regulate the manner in which the Tanzania Zambia Railway Authority shall be operated to replace the Tanzania – Zambia Railway Act,1975 and to provide for matters connected with or incidental to the foregoing.

In view of Counsel Brashi, taking the preamble as it is, one will find that TAZARA was not established by the Act of Parliament. Instead, the Parliament domesticated the Protocol.

Counsel Brashi was of further view that; when dealing with TAZARA, it should be treated distinctively from other state organs, like TANESCO, Postal Corporations, Tanzania Harbours Authority. He called upon for the Court to

caution itself in subjecting TAZARA as a public organ. In his view, there has been mis- interpretation of the law.

Counsel Brashi, however, conceded with acknowledgement that the Management of TAZARA is as per the agreement between the United Reublic of Tanzania and the republic of Zambia. It is managed by Two Organs. *First*, it is the Council. *Second*, the Board of Directors. The Council is constituted by the Ministers for the transport in their respective Countries. The Board of Directors is constituted by members from the two Countries but the Managing Director must come from Zambia. The Government of United Republic of Tanzania and Republic of Zambia have no powers to question any act of Board of Directors who have autonomous powers from the decision they make. Quite different from the public entity.

Another area put forward by Counsel Brashi in assessing whether TAZARA is a public entity or not is on; who recruits and pays salaries. His answer was that it is the Board of Directors of TAZARA which decides on who should be recruited, fired or promoted. They do not follow the procedures applicable in the public service on who should be recruited, pay of salary, rate of salaries and when they want to fire an employee. They do not require endorsement of a public officer.

The other important area called upon to be considered by Counsel Brashi was on the Policy and Agreement. According to him, workers of TAZARA are mobile. They can work in Zambia or Tanzania. They are under TAZARA Procedure and not under Public Service Act and Procedure. Under *section 3 of the Public Service Act,* there is a definition of person holding or acting in public service office.

Counsel Brashi went on to submit that; it is a paid public office in the United Republic charged with the formulation of the Government Policy and Delivery of Public Service other than a Parliamentary office, an office of a member of a Council, Board Panel, Committee of other similar Board whether or not corporate established by or under any other written law, an office of the enrollment of which are payable at an hourly rate, daily rate or contract term, an office of a Judge or other Judicial officer, an office of Police force or Prison service. TAZARA follows under category two. To buttress such averment, Counsel Brashi cited the decision of my learned Sister Hon. Judge Mruke in the case of **Deodatius John Lwakwipa and Another v. TAZARA,** Revision No. 68 of 2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported). On this point, he concluded that TAZARA is not a public organization in the meaning of the *Public Service Act.*

Counsel Brashi was aware of the decision of the Court of **Tanzania Posts Corporation v. Dominic A. Kalangi**, Civil Appeal No.127 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported) which brought attention of a public servant and non- public servant. It was his submission that; the interpretation of the law in that case was 100% clear and proper because really the Tanzania Posts Corporation is Government entity. The base of the Court of Appeal of Tanzania is at page 7 paragraph 1 of that decision.

According to Counsel Brashi, *section 16 (4) of the Government proceedings Act as amended by Miscellaneous Amendment Act No. 1 of 2020* defines what is a public entity. TAZARA is owned only by 50% shares of the Government of Tanzania and 50% share by the Government of Zambia.

There is an argument that the 50% owned by Tanzania is when you consider TAZARA to its entirety. That when you come to Tanzania, TAZARA become owned by Tanzania 100%. It was Counsel Brashi argument that such argument is not proper because TAZARA cannot exist in the absence of other party which owns 50%. So as it may be, in any way, TAZARA will remain as TAZARA and ownership will remain as provided too in the contract between Tanzania and Zambia.

Counsel Brashi cautioned that if any way this Court declare that TAZARA is public service institution, the Court will be assisting the United Republic of Tanzania to overpower Zambia in respect of the contract. It will also endanger the international relationship between Tanzania and Zambia and render the power of Board of Directors of TAZARA defunctive.

On the basis of the above submission, Counsel Brashi prayed this application be granted to allow the CMA to proceed with the determination of the rights between the parties.

In response to the second ground, learned State Attorney Ms. Yonazi Joyce strongly opposed the contention that the CMA erred in dismissing the complaint on the ground that TAZARA is a Government entity and therefore CMA lacks jurisdiction.

On establishment of TAZARA, Ms. Yonazi submitted that; according to *section 2 (1) of the Tanzania Zambia Railway Act Cap 143 Revised Editions 2009,* TAZARA is a result of agreement between United Republic of Tanzania and Republic of Zambia. One of the functions of this agreement was to facilitate transportation of goods and persons by railway services between the two States. This agreement had no legal force until the Act of Parliament was made to that effect. To bolster up the argument Ms. Yonazi cited the

decision of the Court of Appeal of Tanzania in the case of **Tanzania Posts Corporation v. Dominic Kilangi** *(supra)* and the decision of decision of my brethren Hon. Judge Biswalo E.K. Mganga in the case of **TAZARA v. William Mhame and 36 others**, Revision Application No. 481 of 2021 High Court, Labour Division (unreported), p.7. According to Ms. Yonazi, in the two cited decisions, the Court held that: The fact that an entity is established by an act of parliament, it makes it a public entity. Based on the two decisions, Ms. Yonazi referred the Court to *section 4 of Cap 143 (supra)* which shows that TAZARA is established by this Act. She strongly disagreed with the submission of Counsel Brashi that TAZARA is not established by the act of Parliament.

It was Ms. Yonazi contention that the Acts of Parliament are not made to regulate private arrangement. That, TAZARA meet one of the criteria of being a public entity. That is being established by an act of Parliament. TAZARA does not fall under any of the provided bodies on *item II of section 3 of the Public Service Act* because it is neither an office of members of Council, Board Panel, Committee or other similar body whether or not corporate established by any or under any written law.

On control test, Ms. Yonazi told the Court that on control issue, there are two aspects. The first one is on ownership. Under *Article 2 of the*

Agreement between Tanzania and Zambia, the ownership of the authority is on equal shares. It means 50% on the part of Tanzania and 50% on part of Zambia. The United Republic of Tanzania owns fully the 50% of shares. There is no division of share to any other private entity. She recited **the case of Dominic Kilangi** at page 7 first paragraph *(supra).*

On the aspect of management, Ms. Yonazi submitted that the Council and Board of Directors comprises of members from both States. It is formed by three Ministers responsible for finance, transport and trade from both States. The Chairman of the Board is the Ministers of Transport who according to the law are required to hold the seal on rotation basis as per *section 21 of Cap 143 (supra).* That means, after financial year, which ends on 30th of June, each year.

On the part of administration, the Board of Directors is provided under *section 11 (1) (a-d) of Cap 143 (supra).* It was Ms. Yonazi's contention that the fact that the Members of the Council, that is Ministers and Members of the Board who are Permanent Secretaries are only Presidential appointees, that itself shows the control of TAZARA is vested in the Government. It is not autonomous as stated.

Regarding the issue of recruitment, Ms. Yonazi submitted that; as per *Part IV of the 1st schedule of Cap 143 (supra),* the employees are recruited, appointed and terminated by the Board. Thus, as stated earlier, the Board comprises of Government officials. Therefore, the employment procedures are applicable on the specific State. To back up the point, Ms. Yonazi referred the Court to *section 23 (3) of Cap 143 (supra).* The authority has to submit annual report to the National Assembly. This shows that TAZARA is not autonomous. It is under control of the Government.

The next test put forward by Ms. Yonazi is on funding of the authority. Under *section 19 (1) of Cap 143 (supra)*, among the sources of funds of the authority is funds appropriated by the Parliament.

Another aspect is on audit. Under *section 22 (2) of Cap 143 (supra),* the accounts of the authority are audited annually by independent auditors appointed from time to time by the Council.

The other test, is on nature for services rendered by the authority. It was the submission of Ms. Yonazi that in terms of *section 7 of Cap 143 (supra),* among other services, the authority provides transportation services rendered to the Public. To support this point, Ms. Yonazi recited **the case of William Mhame and 36 Others** *(supra)* p.7. The nature of services

rendered the tests for identifying a public entity. She therefore insisted that TAZARA is a public entity.

It was further submitted by Ms. Yonazi that; other than the funding tests, all the three other tests were considered by the Court of Appeal in the **case of Dominic Kilangi** *(supra)* in determining whether the institution is the public entity or not.

On the test of ownership, Ms. Yonazi submitted that; when the Court says that the Government used to own shares substantially, the Court meant to imply that as long as the Government have shares, regardless of whether the same are majority or not, that makes an institution a public entity. It does not need to be majority shares since TAZARA is owned by Tanzania by 50% shares, it is a public entity. Ms. Yonazi cited two cases in which this Court was faced with similar circumstances: *One* is **the case of William Mhame** *(supra). Two,* is the decision my learned Sister Hon. Judge Katarina Tengia Revokati Mteule in the case of **EDO Mwamalala v. TAZARA,** Labour Revision No. 249 of 2021, High Court, Labour Division at Dar es Salaam (unreported). In both cases, the Court held that TAZARA is a public entity.

Ms. Yonazi was aware of the conflicting authority in the case of **Deogratius John Wakwipa and Another v. TAZARA**, Revision No.68 of

2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported). However, relying on the case of **Ally Linus and Others v. Tanzania Harbours Authority and Another** [1998] TLR p 6. It was her view that it is not a matter of Courtesy but a matter of duty to act judiciously that require a Judge not lightly to dissent from the considered opinion of his brethren.

Ms. Yonazi, however, beseeched this Court to be guided by the recent decisions. She cited the case of **Ardhi University v. Kiundo Enterprises (T) Limited,** Civil Appeal No. 58 of 2018, Court of Appeal at Dar es Salaam(unreported) and the case of **Zahara Kilindi and Another v. Juma Swalehe and 9 Others,** Civil Application No. 4/05/2017 Court of Appeal at Arusha (unreported), where the Court of Appeal of Tanzania was of the view that; when there are conflicting decision, the Court has to follow the most recent decision. According to Ms. Yonazi, the decision in **the case of Deogratius** *(supra)* was delivered on 17/06/2020. The case of **Edo Mwamalala** *(supra)* **and William Mhame** *(supra)* was delivered on 24/08/2020 and 28/4/2022 respectively. Ms. Yonazi, therefore, prayed for the Court to be guided and persuaded by such authority, confirm the decision of CMA and dismiss the application.

In rejoinder, Counsel Brashi, on the first place, submitted that this case is so wanting. The first reason is that there is a call of justice between the

parties. Another reason is that before the Court there are three decisions with two distinct schools of thought. The two decisions have held that TAZARA is a Public institution. The other one which he supported is saying that TAZARA is not a public institution.

On the issue; *whether Act No. 13 of 2016 (supra)* was procedural or substantive law or both, it was his view that it was substantive law. It could not be equated to the provision of *section 47 (1) of the Land Disputes Courts Act [Cap 216 Revised Edition 2019]* which is purely procedural.

It is the preamble which constitutes the nature of the Act. In *the Public Service Act [Cap 298 Revised Edition 2019],* there are no procedural rules. Instead, it is from that Act the procedural rules have been made. To support his position, he cited the case of **Tanzania Posts Corporation v. Dominic Kalangi** *(supra),* in which the Court of Appeal was very clear at page 12 – 13 that the law did not act retrospectively. Meaning that the Act was not retrospective.

It was the view of Counsel Brashi that in **the Case of Lala Wino** (supra) delivered on 1/4/2019, the Court of Appeal was very aware that the procedural matters operated retrospectively. One of the Judges who sat in **the Dominic Kalangi's case**, sat in **Lala Wino's case.** According to

Counsel Brashi, assuming that it was procedural using the same wisdom stated, then **the case of Dominic Kalangi** *(supra)* is the most recent decision.

On the issue of status of TAZARA, Counsel Brashi repeated that TAZARA was not established by an Act of Parliament. It was established by an agreement. He advanced two reasons: *First,* the provision of *Clause 2 (2) (b) of the Agreement (supra)* gave mandate to the Member State to enact the law in the respective State. It cannot be said TAZARA was established by an Act of Parliament. *Second, the Tanzania Zambia Railway Act [Cap 143 Revised Edition 2009]* have no binding powers to the activities done in Zambia. So TAZARA can even operate in the absence of an Act of Parliament because there is an agreement. Therefore, Counsel Brashi did not agree with the Respondents that the agreement had no binding force. The agreement was incorporated in the Act of Parliament.

It was the view of Counsel Brashi that TAZARA is a business entity. The Member States are investors. They can contribute by investing some funds. That is their total obligation for smooth operations. But they also expect revenue from such business.

Counsel Brashi reiterated that the inclusion of the Ministers in the TAZARA Council is for the purpose of overseeing the cooperation but they have no control over day to day operations. This is very clear under *section 14 (supra)* on how to operate and manage TAZARA. Also, under *section 14 (1) (supra),* the Managing Director should come from Zambia. Tanzania have no control despite the fact that the Head Quarter is at Dar es Salaam.

The issue of employment, determination of salaries and of employment contract is vested on the Board of Directors. They have the mandate of employment. It is not subjected to Tanzania Public Service Rules. They have their own rules including the currency.

On the issue of audit, Counsel Brashi rejoined that under *section 22 (2) (supra),* the auditing must be done by the private auditing company, but the Public entities must be audited by the National Audit Office and COASCO.

There is no direct control instead of being overseen by the Government. Any investment by the Government must be tabled before the Parliament. That alone does not entitle them a control, the criteria of service rendered is not sole criteria. There are so many private entities rendering public services to the general public. E.g. Daladala and Boda-boda.

On the issue of majority shareholder wholly and substantial, Counsel Brashi rejoined that the Respondent's counsel did not tell about any law which defines what is substantial and there is no case law which defines as to what is substantial. Thus, the provision of *section 16 (4) of Government Proceedings Act as introduced by Written Laws (Misc. amendments Act) 2020 (Act No.1)* defines what constitutes a public institution under TAZARA, there is no majority share. To subject TAZARA to public institution is a violation of the law.

Counsel Brashi admitted that the Government of the United Republic of Tanzania has interest in TAZARA but by way of agreement and the Act of Parliament. The Member States have their way of dealing with the matters.

In the light of the afore arguments, I anxiously find the approach to construction whether TAZARA is a public entity or not needs to be re-examined using *inter alia* six main cumulative balancing tests: *One*, whether TAZARA was created by the Governments through a bilateral agreement (treaty) or by statute. *Two*, the extent of the two-Government involvement or regulation. Is the control and supervision of TAZARA vested in the public authorities? Is TAZARA an instrumentality of the Government? *Three*, ownership of TAZARA. *Four*, the level of funding of TAZARA, the degree of financial autonomy and source of its operating expenses. *Five*, are there

private interests involved? Six, the object of TAZARA. These six tests are only illustrative. There are not conclusive and exhaustive. The tests are inclusive in nature. The Court must interpret such tests with care and caution. Rational and relevant considerations must be the controlling factor.

The first issue; whether TAZARA was created by the Governments through bilateral agreement (treaty) is straight forward and requires understanding of an elementary public international law principle on the effects of a treaty and private international law in regulating employer-employee contractual relationship. There is no dispute by both Counsel that TAZARA was established by two sovereign States through a bilateral agreement which can also be termed as a Treaty or a Convention of 1975. Tanzania like Zambia are Dualist States. Dualist States are States in which no treaties get automatic status of law in the domestic legal system till when such treaty or agreement is domesticated. The TAZARA agreement could not be used to enforce rights and duties without domestication. In order to enforce TAZARA agreement, the two States agreed the treaty be domesticated.

It could have been different if the two countries are Monists. The latter allows bilateral agreements to apply automatically upon ratification without further action. That means, in Monists States, a treaty has a direct

application and does not need domestication. Examples of Monists States are Germany, Belgium, the Netherlands and France.

As properly submitted by Counsel Brashi, the provision of *Clause 2 (2) (b) of the Bilateral Agreement* gave mandate to the Member State to enact the law in the respective State. That was in essence the domestication of the terms of the bilateral agreement. It follows therefore incorrect to argue that TAZARA was not established by an Act of Parliament.

With the above logical aid of principles of public international law on law of treaties, it is not proper to argue that TAZARA can even operate in the absence of an Act of Parliament. Under the eyes of the law, TAZARA was established through a bilateral treaty and given effect into the Municipal law of the contracting States by way of domestication. The United Republic of Tanzania enacted *The Tanzania Zambia Railway Act Cap 143 of 1975* and the Republic of Zambia enacted *The Tanzania Zambia Railway Act, Cap 454 of 1975.* To that effect, it can be gainsaid that TAZARA became a public entity through *Cap 143 (supra) and 454 (supra)* of the United Republic of Tanzania and Republic of Zambia respectively. It is the said *Cap 143 (supra) and 454 (supra)* which gave birth to TAZARA.

Keeping statutory creation of TAZARA in broad spectrum, it is my further findings that the construction of the TAZARA Treaty should start from the position that the parties, as two sovereign States, under *Clause 2 (2) of the Agreement (supra),* intended the agreement they entered and its protocols to be domesticated and make TAZARA a public entity. The whole agreement should be construed in accordance with this position unless the language makes it clear that TAZARA was intended to be excluded from the two sovereign States as public entity to private entity. Counsel Brashi has not told the Court at what point of time the TAZARA bilateral agreement got the attribute of being a private entity.

On the point of mobility of workers of TAZARA. I join hand with Counsel Brashi that TAZARA workers can work in both States. Indeed, their termination does not require endorsement of a public officer. However, the law guiding them are *pari materia*. Wherever the TAZARA employee works is guided by similar law.

Even if the law guiding TAZARA employees are conflicting from the contracting States, the employer-employee relationship whether in public or private is based on contract. *The Public Service Act (supra)* and its regulations are gap filling default rules. The latter cannot supplant the contract rather they supplement the contract. Under private international

law, the principle of *lexi contractus* comes in to decide any dispute relating to employer/employee relationship. If the TAZARA employee was engaged in the Republic of Zambia, the Zambia Public Service Act will apply. The same applies to Tanzania.

Without prejudice to the above observation, through the principle of *lexi contractus,* when a contract is made in one State and it is to be carried out in another State, the law of the place where it was signed is applicable in the construction of the contract, interpretation of the terms and in deciding the validity of the contract. But with regard to execution of the contract, the law of the State where it is to be carried out applies.

There was an argument by Counsel Brashi that, if this Court declare that TAZARA is public service institution, the Court will be assisting the United Republic of Tanzania to overpower Zambia in respect of the contract. I find such argument is wanting of merits. There are two reasons. *One*, Counsel Brashi has not availed this Court with a decision from the Republic of Zambia which has interpreted that TAZARA is a private entity. *Two*, the existing laws of both sides are similar and pointing to the same direction.

Much as I may agree with Counsel Brashi that this case is so wanting as there is a call of justice between the parties and that before the Court

there are three decision with two distinct schools of thought, I must strongly point out that, TAZARA cannot achieve its purpose if the Courts adopt an approach to construction which is likely to defeat the intentions anticipated by the two sovereign States in their bilateral agreement which has already been domesticated. The insignia of establishing TAZARA is to make it a public entity between two contracting States.

On ownership, there is no dispute by both Counsel that in terms of *Article VII (b) of the TAZARA Agreement (supra)*, TAZARA is owned by Tanzania by 50% shares and by Zambia by 50% shares. As such, the entire share capital of TAZARA is held by the two sovereign contracting States. By all yard of reasoning, such ownership makes TAZARA a public entity to both Tanzania and Zambia. This appears to be the position adopted by this Court in **the case of William Mhame** *(supra)* and **EDO Mwamalala** *(supra)*. In both cases, as submitted by Ms. Yonazi, the Court held that TAZARA is a public entity. I subscribe to such fair finding. I should add that, a combination of 50% share owned by The United Republic of Tanzania and 50% share owned by The Republic of Zambia do not result to private ownership. It results to 100% share owned by the two Republics.

Invariably, the arguments by Counsel Brashi that The United Republic of Tanzania does not own majority share of TAZARA to constitute a public

institution in terms of the provision of *section 16 (4) of Government Proceedings Act [Cap 5 Revised Edition 2019]* is not correct. In fact, TAZARA is wholly owned 100% share by The United Republic of Tanzania and 100% share by The Republic of Zambia in terms of the 50% public shares allotted on each contracting Member State in terms of *Clause 2 (b) of the Agreement (supra).* There is no single share of any private entity in TAZARA from either of the Member State. To subject TAZARA to public institution is proper and it is in accordance to the law and the original aims of the establishing contracting States.

Next, the extent of the two-Government involvement or regulation. Assessing the functionality of TAZARA under the law, one will find that there is a deep and pervasive nature of control by the two States. I fault the argument by Counsel Brashi that inclusion of the Ministers in the TAZARA Council is for the purpose of overseeing the cooperation but they have no control over day to day operations. The reasons are that, TAZARA Body corporate though is a body entity, its duty is to facilitate transactions e.g. Contracts, to sue and be sued etc.

The two Governments controlling or regulating TAZARA can be evidenced in among other areas: *One, section 3 (1) and (2) of the Tanzania Zambia Railway Act Cap 143 (supra),* confers *ex facie* powers to the Council

to give to the Board directions as to the performance by the Board of its functions in relation to matters which appear to the Council to affect the public interest and the Board is mandated to give effect to any such directions.

Two, it is the duty of the Council to give directions to the Board on all matters in respect of which the Board requires the prior consent or approval of the Council under the Act. One of areas which the Board requires prior approval from the Council in terms of *Section 9 (1) (b) of Tanzania Zambia Railway Act Cap 143 (supra)* is raising of additional share capital. The same is *pari-materia* to *section 10 (1) (b) of Cap 454 (supra).*

Three, in terms of *section 10 (d) of Cap 143 (supra),* the Council has duty to give directions to the Board on matters of Public interest. The same is required under *section 10 (f) of Cap 454 (supra).* In terms of *section 10 (d) of Cap 143 (supra),* a report upon the operations of the Authority during that year must be transmitted to the Council which must cause the same to be presented to the National Assembly. Such powers, signify that the two Governments are largely involved in regulating TAZARA.

Again, as properly argued by Ms. Yonazi, in terms of *section 19 (1) of Cap 143 (supra),* among the sources of funds of the authority is funds

appropriated by the Parliament. *Section 19 (1) (a) (supra) is pari-materia to section 19 (1) (a) of Cap 454 (supra).*

Needless, I do agree with Counsel Brashi that the criteria of service rendered is not sole criteria. Indeed, there are so many private entities rendering public services to the general public. E.g. Daladala and Boda-boda. However, it must be taken into mind that primarily large scale and capital-intensive transport service is the duty of the State. Privatization of transport comes in to assist the State from its core duty. The State is a service corporation. It acts through its instrumentalities and private entities. Be it as it may, there is no Daladala or Bodaboda that renders the TAZARA service. Equally, I regard it unthinkable, if not more so, comparing railway transport service with Daladala or Bodaboda service. To put it open, such proposition by Counsel Brashi does not sound and it amounts to trivialization of a serious matter.

TAZARA has been conferred by statute of both States to render transport services of people and goods between Member States. In so doing, it promotes economic activities and commercial activities for the interests of the two States. The significance of the observation is that TAZARA under control of the two contracting States need not carry on Governmental functions. It carries transport commercial activities.

More so, there is a point of Composition of the Board. In terms of *section 11 (1) (a) (b) (c), (2), (3) and (4) of Cap 143 (supra)*, the composition of Board of Directors is of Government officers determined by the two Governments. The same it applies to the composition of Council of Ministers under *section 9 (1), (2) and (3) of Cap 143 (supra).* It is the Governments which have powers to appoint and remove the Board Members and Council of Ministers. At all yardstick, TAZARA is controlled by the two Contracting States. As such, TAZARA is an instrumentality of the two States. Even if TAZARA servants are not subjected to *Tanzania Public Service Rules,* TAZARA being a public authority, it is a State corporation owned by the two contracting States.

Notwithstanding the above findings, it is an elementary principle of law that procedural law is a law that specifies the practice, procedure and machinery for the imposition of rights and duties. Whereas, substantive law is the law that states the rights and obligations of the parties concerned. With such understanding in mind, *Section 32A of the Public Service Act* requires a Public Servant to exhaust Local Remedies. It provides for the procedural machinery and obligations of the public employee for pursuing his/her rights. On the other hand, *section 47 (1) of the Land Disputes Courts Act (supra)* only provides for the procedure for a person who is aggrieved by

the decision of the High Court in the exercise of its original jurisdiction to appeal to the Court of Appeal in accordance with the provisions of the *Appellate Jurisdiction Act (Cap 141 Revised Edition 2019).*

From the above discussion and logical sequitur, the following principle emerge: *One*, TAZARA is a statutory entity wholly owned by the two contracting States on equal share capital. That gives indicia that TAZARA is not a private entity. *Two*, Transport services and commercial activities on transport sector carried on by TAZARA makes it an instrumentality of the two contracting Member States. *Three*, though the instrumentality of TAZARA conducts commercial activities according to business principles under the Board of Directors, still TAZARA is the arm of the two contracting member states through the Council of Ministers. *Four*, though TAZARA has its corporate name, capable of suing and or of being sued, functionally and administratively is dominated by or under control of the two contracting Member States.

Before procceding, there is an issue of conflicting decisions. Ms. Yonazi beseeched this Court to follow the recent decision of the case of **Edo Mwamalala** *(supra)* and **William Mhame** *(supra)* delivered on 24/08/2020 and 28/4/2022 respectively and not the decision in **the case of Deogratius** *(supra)* delivered on 17/06/2020. I find myself persuaded

by the position reached in **the case of Edo Mwamala** *(supra)* **and Willium Mhane** *(supra)* but not for reasons advanced by Ms. Yonazi i.e. the age of the case. I had detailed analysis of such issue in the case of **Republic v. Shaibu Putika and Christopher Kawehanga,** Criminal Sessions Case No. 56 of 2017, High Court of Tanzania Iringa District Registry at Njombe (unreported). Momentarily, I observed to the effect that:

> The Court of records are bound by authoritative precedent. Even the *orbiter dicta* or enunciation of the principle of the Court of record pronounced *ex cathedra* on a point raised and argued before the Court will be binding on the subordinate Court. In event of two conflicting decisions of the Court of record, the subordinate Court have four le-way: *One,* to distinguish facts of the case before them by opting to take one authoritative precedent. *Two,* to follow the decision of the full Bench. *Three,* not to follow the decision made *per incuriam. Four,* to follow the Judgement which appears to it to state the law most accurately, elaborately with logic in the circumstances of given facts.

I also re-emphasized the same findings in the case of **Mlenga Kalunde Mirobo v. The trustees of the Tanzania National Parks and**

the Attorney General, Labour Revision No. 06 of 2021, High Court of Tanzania Iringa Sub Registry at Iringa (unreported) by observing that:

> On the eminence of time, in a situation where Benches are many, there is a likelihood of having various decisions on the same issue at different stations with different stand on the same day. It applies the same to the High Court decisions from one station to another on similar issues, even among Judges of the same station.

I should add in this case, that the vagaries of the doctrine of the most recent decision is difficult to comprehend because our decisions do not indicate the time from which it was rendered. The decisions reflect dates only. It is not easy and highly impossible to know which decision is the most recent one.

In the light of the above discussions and principles, I have no hesitation to hold that TAZARA is a public entity.

The next crucial issue for consideration is; *whether CMA erred in law and facts for dismissing the complainant without regard that the cause of action arose before the enactment of Written Laws Miscellaneous Amendment Act No. 13 of 2016 (supra).* Ms. Idda was of the view that; in Form No. 1, the Applicant stated the cause of action arose in 2005. The

application was filed before CMA on 2020 seeking for condonation, of which they were granted. Thus, the CMA Arbitrator misdirected herself to order that CMA had no jurisdiction to entertain this matter. She based per decision on *Written Laws Miscellaneous Amendment Act No. 13 of 2016*, which was enacted after the cause of action arose 11 years before.

It was Ms. Idda's view that the decision was wrong because *The Written Laws Miscellaneous Amendment Act No. 16 (supra)* had no retrospective effect. The CMA had to consider when the cause of action arose. Ms. Idda cited the case of **Asha Ahmad Issa (Administrator of the estate of the late Ahmad Issa Moyo v. TAZARA and Mwanasheria Mkuu wa Serikali,** Labour Revision No. 54 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported), p.6; and the case of **Joseph Khenani v. Nkasi District Council,** Civil Appeal No. 126 of 2019 Court of Appeal of Tanzania at Mbeya (unreported)pp. 12 – 13.

On his part, Counsel Thomas Brashi adopted the submission put forward by Ms. Ida Rugakingira. Counsel Thomas Brashi was of the view that the decision of CMA was not proper. According to Counsel Brashi, the key issue is*; when the cause of action arose and the requirement of the law at a time.* In his view, be as it may require, the cause of action which arose in 2005 cannot fit the procedures applicable under *the Public service Act as*

amended by the Written Miscellaneous Amendment Act No. 13 of 2016 as it was held by the Court of Appeal in **the case of Joseph Kenani** *(supra).*

Counsel Brashi was of view that subjecting the Applicant to the new law will leave justice crying because they are also going to face the issue of time limit and taking into account as of now it is almost 20 years, there is no way their rights can be well covered through the procedures covered for under *the Public Service Act 9supra).* As it was well stated by the Court of Appeal in **the case of Joseph Kenani** *(supra), the Act No. 13 of 2016 (supra)* was not a procedural rule. It was a substantive law. It had no retrospective effect to the parties.

Applying such principle, this Court in **the case of Asha Hamad Issa** *(supra),* confirmed that the provision was not retrospective. For the purpose of conformity, uniformity and avoidance of conflicting decision, it was Counsel Brashi's humble view that this Court be persuaded with the decision of the **case of Asha Ahmad Issa** (supra).

In reply, learned State Attorney Careen Masunda strongly opposed the application and prayed to adopt the counter affidavit sworn by Ms. Lightness Godwin Msuya and filed on 04/01/2023.

In reply to the first ground, Ms. Careen strongly opposed the contention on ground that *section 26 of Act No. 13 of 2016 amended the Public Service Act by adding section 32A (supra)* to provide a mandatory procedure of how *a public servant should pursue his complaint. It was Ms. Careen's view that under section 32A (supra),* a public servant is required to exhaust all remedies under *the Public Service Act (supra)* before resorting to remedies provided in Labour laws. The remedies are for the public servant to refer his complaint before the Public Service Commission. Once aggrieved, the final appellate entity is the President. Once the public servant is aggrieved, he has to go to the High Court by way of judicial review.

It was Ms. Careen submission that *section 32A (supra)* is procedural. It is a settled principle that alterations in terms of procedure are always retrospective unless the legislature says they are not. To back up the point, she cited the case of **Lala Wino v. Karatu District Council**, Civil Application No. 132/02/2018, Court of Appeal of Tanzania at Arusha (unreported), pp 6-7.

As regards a submission that, since the cause of action arose in 2005, it was wrong for the CMA to dismiss the case, Ms. Careen invited the Court to go through page 7 of **Lala Wino's case** where the Court of Appeal held that:

> Where there are procedural amendments to the law, they apply all actions after the date they came into force, even though the actions have begun earlier.

Being guided by the position in **the case of Lala Wino case** *(supra),* Ms. Careen replied that; *Act No. 13 of 2016* came into force on 18/11/2016. The Complaint was referred to CMA by the Applicant on 18/11/2020. It was four years later. She therefore submitted that; since the complaint was filed four years later after the enactment, CMA had no jurisdiction to entertain it. On that note, she cited the case of **Joseph Kenani v. Nkasi District Council**, Civil Appeal No. 126 of 2019 Court of Appeal at Mbeya (unreported) pp.7 and 12. In that case, the Complaint was filed before the enactment while in the instant case the complainant was filed after the enactment. Ms. Careen therefore, prayed that the Court to find CMA was correct to dismiss the application as the matter was filed after the enactment.

I have carefully considered the convincing arguments of both sides; I do entirely agree with Ms. Careen on the following positions. *One, section 32A (supra),* requires a public servant to exhaust all remedies under *the Public Service Act* before resorting to remedies provided in Labour laws. The initial step is for the public servant to refer his complaint before the Public Service Commission. Once aggrieved, the final appellate entity is the President. If the public servant is aggrieved with the decision of the

President, *The Public Service Act (supra*) is silent. *Two,* in terms of the decision of this Court in the case of **Mlenga Kalunde Mirobo** *(supra),* the public servant has to go to the High Court by way of judicial review under the provisions of *the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310.*

The proposition of exhausting local remedies is evident in among other cases, the case of **Tanzania Electric Supply Company Limited v. Mrisho Abdallah and Four Others**, as per, her Ladyship Bahati, J. Labour Revision No. 27 of 2020, High Court of Tanzania Tabora District Registry (unreported); **Asseli Shewally v. Muheza District Council,** as per my brethren Mkasimongwa, J. (as he then was) Revision No. 6 of 2018, High Court of Tanzania, Tanga District Registry, (unreported); **Benezer David Mwang'ombe v. Board of Trustees of Marine Parks and Reserves Unit,** as per, her Ladyship Aboud, J. (as she then was), Misc. Labour Application No. 380 of 2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Simon Josephat v. Dar es Salaam Water and Sewarage Corporation**, as per, her Ladyship M. Mnyukwa, J. Revision No. 941 of 2019, High Court of Tanzania Labour Division at Dar es Salaam District Registry (unreported); **Alex Gabriel Kazungu and Two Others v. Tanzania Eletric Supply Company Limited**, as per my brethren Mdemu,

J. Labour Revision No. 40 of 2020, High Court of Tanzania at Shinyanga District Registry(unreported).

It is also correct that the Complaint was referred to CMA by the Applicant on 18/11/2020 but the *Act No. 13 of 2016* came into force on 18/11/2016. That being four years later. As such, CMA had no jurisdiction to entertain it. The cited decision of the case of **Joseph Kenani** *(supra)* is so emphatic and guiding on that point.

In the end, the application is dismissed for lack of merits. Order accordingly.

Y.J. MLYAMBINA
JUDGE
09/03/2023

Judgement pronounced and dated 9th March, 2023 in the presence of learned State Attorney Francis Wisdom for the Respondent and in the absence of the Applicant.

Y.J. MLYAMBINA
JUDGE
09/03/2023