

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 338 OF 2022

BETWEEN

JUSTUS MASENGO & 41 OTHERS.....APPLICANTS

VERSUS

TANZANIA PORTLAND CEMENT LTD.....RESPONDENT

JUDGEMENT

Date of last order: 14/02/2023

Date of Judgement: 06/03/2023

MLYAMBINA, J.

This application is for revision of the decision/ruling delivered by Commission for Mediation and Arbitration (to be referred as "CMA") in *Labour Dispute No. CMA/DSM/KIN/254/2021/157* in respect of a preliminary objection raised by the Respondent herein at the CMA. The application has been filed under *section 91(a), (b), 91(2)(a), (b), (c), 91(4)(a), (b) 94(1)(b)(ii) of the Employment and Labour Relations Act Cap 366 Revised Edition 2019 and Rule 24 (1)(2) (a) (b)(c)(d)(e)(f) 3(a)(b)(c), 28(1)(a)(b)(c)(d)(e) 55(1) and (2) of the Labour Court Rules GN. No. 106 of 2007*. The Applicant is seeking for the following orders:

- i. That, this Honourable Court be pleased to call upon CMA records and revise the ruling and set aside the whole decision and proceedings of the Commission for Mediation and Arbitration at Dar es Salaam in the

Labour Dispute No. CMA/DSM/KIN/417/21 delivered by Hon. G.M. Gerald, Arbitrator dated 23rd August, 2022 and the copy be served to the Applicants on 02nd September, 2022 at Dar es Salaam Region, with view to satisfy as to the legality, propriety and the correctness thereof and the material irregularity and errors of law and facts on the face of the records and for it being misconceived to say that the CMA F1 is not prescribed and the nature of dispute is not falling under the jurisdiction of the Commission to entertain the dispute.

- ii. That, this Honourable Court be pleased to determine the dispute in the manner it considers appropriate.
- iii. And give any other relief(s) as the Court may deem fit and just to grant.

Also, the application called upon the Court to determine the following legal grounds:

1. Whether the Hon. Arbitrator erred in law and fact in holding that the CMA had no jurisdiction to entertain the dispute related to the unlawful deduction of employees' salaries.
2. Whether the Hon. Arbitrator erred in law and facts in holding that unlawful deduction of employees' salaries amounts to breach of

contract. At page 2 of the ruling, the Arbitrator analyzed that the complainant had fixed term contract which has been breached by the Respondent.

3. Whether the Hon. Arbitrator erred in law and fact in holding that the Applicants had a fixed term contract.

The application was argued orally. Before the Court, the Applicants were represented by Ms. Mwanakombo Chakonda, learned Counsel, whereas Mr. Rwekama Rwekiza, learned Counsel appeared for the Respondent.

Arguing in support of the application, Ms. Chakonda adopted the Applicants' affidavit to form part of her submission. As regards the first ground, Ms. Chakonda submitted that; the Arbitrator's decision was based on *section 94(1) of the Employment and Labour Relation Act [Cap 366 Revised Edition 2019] (to be referred as 'ELRA')*. She stated that the referred provision gives exclusive jurisdiction to the Labour Court over the application, interpretation and implementation of the ELRA. Ms. Chakonda submitted that; the Arbitrator ruled that it is only the High Court which has jurisdiction to entertain this dispute. Ms. Chakonda was of the view that; it was an error due to the reason that the nature of the dispute specified by the Arbitrator was not correct. She added that; on page 2 of the impugned ruling, the Arbitrator considered the nature of dispute as breach of contract. While form

No.1 before CMA which was the basis of the dispute showed that the nature of the dispute was unlawful deduction of salaries without the Applicants' consent. It was the Counsel's view that the CMA had jurisdiction to entertain the dispute under *Rule 10(2) of the Labour Institution (Mediation and Arbitration) Rules, G.N No. 64 of 2007 (GN. No. 64/2007)*.

It was further submitted that apart from unfair termination, all other disputes can be referred to CMA. The Counsel referred the Court to the decision in the case between **Knight Support (T) Ltd and Chrispinus S. Kaloli**, Labour Revision No. 35 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported). In the referred case, Ms. Chakonda was of the view that since there was no objection as to the dispute referred to CMA then, it means the High Court blessed the decision. On the first ground Ms. Chakonda concluded by saying that; failure of the Arbitrator to determine the proper nature of the dispute is the reason which resulted for him to error in holding that the CMA had no jurisdiction over this matter.

In response to the application, Mr. Rweikiza adopted the counter affidavit sworn by Evaline Mushi to form part of his submissions.

In respect of the first ground, he submitted that; paragraph 4 of the counter affidavit states the basis of their opposition. He said, the reason of supporting the decision of CMA is based on *section 94(1) of the ELRA*. Mr.

Rweikiza strongly argued that indeed the CMA had no jurisdiction to entertain the matter before it. The Counsel took the Court through CMA form No. 1 at part 4, where the Applicants expected two outcomes of Mediation as follows:

1. To order the employer to refund the salaries unlawfully deducted from the complainants.
2. To compel the employer to stop deduction of salaries from the complainants.

The Counsel argued that the employees based their complainant on *section 28(1) of ERA* while the employer based on *section 28(5) (9) of ERA*. He further argued that there were two schools. Under *section 94(1)(f) of ELRA*, one of the exclusive jurisdictions of this Court is to determine a declaratory order in respect of any provision of this Act. The Counsel explained that the employees wanted CMA to compel the employer to stop deduction of salaries, an order which can only be made by this Court in accordance with *Section 94(1), (2)(f)(ii) of the ELRA*. Mr. Rweikiza firmly submitted that; it is only the High Court which can issue injunction. Thus, CMA lacks inherent jurisdiction to compel the employer. He added that, even its award must be executed by the High Court. Therefore, his arguments are enough to decide that the case is incompetent before this Court.

Coming to the second ground; *whether the Hon. Arbitrator erred in law and facts in holding that unlawful deduction of employees' salaries amounts*

to breach of contract, Ms. Chakonda submitted that; at page 2 of the impugned ruling, the Arbitrator analyzed that the complainant had fixed term contract which has been breached by the Respondent who contemplated that the nature of this dispute is breach of contract. The Counsel strongly submitted that in this case there is no breach of contract.

Ms. Chakonda argued that; breach is when a party fails to perform his duty to the other party. She stated that; what the employer did was unlawful exercise. He performed what was not agreed. It was Ms. Chakonda's view that there was no breach of contract because the Respondent managed to pay salaries. Hence, she termed this matter as unlawful deduction of employee's salaries without their consent.

Turning to the last issue; *whether the Hon. Arbitrator erred in law and fact in holding that the Applicants had a fixed term contract*, Ms. Chakonda was of the view that; the Arbitrator erred at page 2 of the impugned decision by reasoning that the complainants had fixed term contract. She denied such fact because the Applicants had no fixed term contract. In addition, she submitted that; the nature of the Applicants' contract was not discussed at the CMA. Thus, there is no evidence to suggest that they were on fixed term contract. She therefore prayed for the CMA's Ruling be set aside and the

Applicants' application be granted. She also prayed for the matter to be returned to CMA to be heard on merits.

Turning to the second issue; *whether there is breach or not*; Mr. Rweikiza submitted that; the Applicants' view was that the employer unilaterally deduced their salaries contrary to *section 28(1) of ELRA*. He said, the main duty of the employees is to render service whereas the main duty of the employer is to pay salaries. The Counsel argued that; if the Applicants' argument is that the employer unilaterally deduced their salaries, indeed that was a breach of contract. Since determination of that breach requires interpretation of *section 28(1) of ELRA*, which is the basis of the employees and *section 28(5)(a) of ELRA* which was the basis of the employer to deduce the complained salaries, then it is this Court to interpret the same. He insisted that it is this Court which is vested with the jurisdiction to determine this dispute.

As to the third issue the Counsel stated that it is inconsequential therefore, he did not argue the same.

In rejoinder Ms. Chakonda insisted that the nature of the dispute had been indicated in paragraph 3 of CMA Form No. 1. All grounds of revision in this application will be determined jointly.

First, I find the Court is called upon to determine whether the CMA has jurisdiction to entertain disputes related to unlawful deduction of employees' salaries. As stated above this dispute originates from the CMA's decision/ruling delivered in respect of the preliminary objection raised by the Respondent at the CMA which is to the following effect:

That the Commission lacks jurisdiction to entertain this complaint as it contravenes the provision of *section 94(1) of the Employment and Labour Relations Act (Cap 366 Revised Edition 2019)*.

On the basis of the above preliminary objection, the Arbitrator ruled as follows:

In regard to the cited provision of the law and after passing through the arguments of the Respondent in support of the preliminary objection and after considering the eloquent and humble reply from the Applicants' representative, I am of the humble view that jurisdiction to entertain the dispute of this nature is only vested to the High Court (Labour Division).

It is clear that the CMA F1 is not prescribed and the nature of dispute is not falling under the jurisdiction of this Commission to entertain this matter.

Therefore, this preliminary objection is meritorious and the same is hereby upheld.

Ms. Chakonda insisted that the CMA had jurisdiction to entertain the matter for two reasons. First, that the nature of the dispute referred by the Arbitrator was not correct and second, pursuant to the provision of *Rule 10(2) of GN. 64/2007* the CMA has jurisdiction to entertain dispute of this nature. For the reason which will be apparent hereunder I will start to examine the Counsel's second argument in reliance to the provision of *Rule 10(2)* which provides:

All other disputes must be referred to the Commission within sixty days from the date when the dispute arose.

The wording of the quoted provision above, in my view, does not directly empower the CMA to determine disputes of this nature. The provision provides for time limitation within which all other disputes apart from the dispute of unfair termination may be referred to the CMA. However, the alleged disputes which may be referred are not specified or listed in the provision in question. Therefore, I do not agree with Ms. Chikonda that in reliance to *Rule 10(2) of GN. 64/2007*, the CMA has jurisdiction to entertain this matter.

As to the second reason, that the nature of the dispute referred by the Arbitrator was not correct; in her submissions Ms. Chikonda submitted that the Arbitrator relied on *section 94(1) of ELRA* which provide:

94(1) Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and over any employment or labour matter falling under common law, tortious liability, vicarious liability or breach of contract and to decide:

- (a) appeals from the decision of the Registrars made under Part IV;
- (b) reviews and revision of –
 - (i) arbitrator's award made under this Part;
 - (ii) decisions of Essential services Committee made under part
- (c) reviews of decisions, codes, guidelines or regulations made by the Minister under this Act.
- (d) complaints, other than those that are to be decided by arbitration under the provision of this Act;
- (e) any dispute reserved for decision by the Labour Court under this Act; and
- (f) applications including-
 - (i) a declaratory order in respect of any provision of this Act; or
 - (ii) an injunction.

As clearly stipulated in the provision above, the relevant provision gives the labour Court exclusive jurisdiction over the application, interpretation and implementation of the provision of the Act. The provision also empowers the Labour Court to adjudicate the listed types of disputes.

Again, section 94(2)(a) of ELRA empowers the Labour Court to refuse a complaint which has not been referred to mediation in terms of Section 86 of ELRA. The Mediation under the referred provision of Section 86 of ELRA is conducted by the CMA. Furthermore, under section 94 of ELRA, the Labour Court is also empowered to refer a dispute to the CMA if the same requires arbitration procedure.

More so, section 88(1) of ELRA list disputes which requires compulsory arbitration procedure, breach of contract being one of the listed disputes. On such analysis, it is therefore my humble view that the sole provision section 94(1) of the Employment and Labour Relations Act (Cap 366 Revised Edition 2019) was wrongly relied by the Arbitrator to determine the CMA's jurisdiction. The Arbitrator ought to have examined the provisions which empowers the CMA to determine labour matters. The expectation was on what matters can be determined by the CMA and which ones are within the exclusive jurisdiction of the Labour Court alone. As the CMA F1 indicates the Applicant's nature of dispute at the CMA was on the unlawful deduction of

employees' salaries without their consent, the issue to be addressed is; *whether the CMA has jurisdiction to adjudicate dispute of that particular nature*. It is Mr. Rweikiza's strong submissions that disputes of unlawful deduction of salaries can only be determined by the Labour Court. The Counsel relied on *section 28(1), (5) and (9) of ELRA* which provides:

- 28.-(1) An employer shall not make any deduction from an employee's remuneration unless—
- (a) the deduction is required or permitted under a written law, collective agreement, wage determination, Court order or arbitration award; or
 - (b) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt.
- (5) An employer shall not require or permit an employee to—
- (a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration;
 - (c) acknowledge receipt of an amount greater than the remuneration actually received.
- (7) Any person who contravenes the provisions of this section, commits an offence.

The law goes further to confer jurisdiction to a District Court or a Resident Magistrate's Court to impose penalty for an offence committed under *section 28 of ELRA*. This is provided for under *section 102 (1)(4) of*

the ELRA. The matter for contravention is the application of *section 102(1)(4) of the ELRA*. Should the matter be referred directly to the District or Resident's Magistrate Court? I will determine the contravention after the determination of the issue whether the claim of unlawful deduction of salaries amounts to breach of contract.

Unfortunately, under Tanzania laws there is no clear definition as to what amounts to breach of contract. Breach of contract can be easily defined as violation of any of the agreed terms of the contract. When a party to the contract breaches or go against any of the agreed terms of the contract, such an act amounts to breach of contract. Payment of remuneration/salaries is one of the important terms to be agreed when parties enters into employment contract. This is also in line with *section 15(1) of the ELRA*. Therefore, any payment against the agreed amount, in my view, the same amounts to breach of contract.

As stated above, the CMA has jurisdiction to entertain a dispute about breach of contract pursuant to the provision of *section 88(1)(b)(ii) of the ELRA*. Therefore, much as this Court has exclusive jurisdiction to entertain the claim of breach of contract, disputes must be filed to lower Courts before the same are instituted to the High Court. Since the CMA has jurisdiction to entertain disputes of breach of contract, it is my view that, the CMA has

jurisdiction to entertain matters concerning the claim of unlawful deduction of employee's salary. Numerous decisions are vivid examples of CMA's jurisdiction to determine disputes of breach of contract. This includes the case of **St. Joseph Kolping Secondary School v. Alvera Kashushura**, Civil Appeal No. 377 of 2021, Court of Appeal of Tanzania at Bukoba (unreported).

Though *section 102(1)(4) of the ELRA* empowers the District Court and Resident Magistrate's Court to impose sanction to the employer of employee who contravened *section 28 of the ELRA*, it is my view that still the CMA or Labour Court is not barred to determine the claim of unlawful deduction of employee's salaries. The CMA was called upon to determine whether the deduction was unlawful or not, an issue which in my view, under the spirit of the labour laws cannot be determined by a criminal Court.

On the nature of the orders sought before the CMA, Mr. Rweikiza strongly submitted that the orders sought at the CMA are injunctive orders which can only be granted by the Court. As rightly submitted by Mr. Rweikiza, there is no clear provision which empowers the CMA to grant injunctive order or to make a declaratory order in respect of any provision of the Act as it is specifically conferred to the Labour Court under *Section 94(1)(f)(i)(ii) of the ELRA*. Now the Court is posed with a question as to; *whether the CMA is*

empowered to determine applications for breach of contract but they cannot make any orders therein to declare or stop such breach or any other order incidental thereto.

It is my further view that, to bar the CMA to make declaratory or injunctive orders in respect of breach of contract would defeat the purpose of empowering them to hear applications for breach of contract. The remedies for breach of contract are not specifically provided in the labour laws. Even in breach of contract, in case of a terminated contract, it is the award of the remaining salaries of the period of the contract which have been adopted through case laws.

Taking the above approach, even the orders in question, in my view, are within the powers of the CMA, so long as CMA have jurisdiction to determine disputes on breach of contract. In doing so, it will enhance the purpose of enacting labour laws and ensure disputes are handled at the earliest stage of institution and not in a prolonged litigation.

In the end result, I find the present application is meritorious. The CMA has jurisdiction to entertain the application. Consequently, the CMA's decision is hereby quashed and set aside. The case file is remitted back to the CMA to proceed on merit. No order as to costs.

It is so ordered.



Y. J. MLYAMBINA

JUDGE

06/03/2023

Judgement pronounced and dated 6th March, 2023 in the presence of the 1st Applicant one Justus Masengo and learned Counsel Tumaini Michael for the Respondent.



Y. J. MLYAMBINA

JUDGE

06/03/2023