IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 378 OF 2022

BETWEEN

SAIMON FRANK MZEE.....APPLICANT

VERSUS

SBC TANZANIA LIMITED.....RESPONDENT

JUDGEMENT

Date of last Order: *03/03/2023*
Date of Judgement: *13/03/2023*

MLYAMBINA, J.

In this case, the Court is called to inquire into the law and decide with precision on binary issues: *One, whether the Mediator had jurisdiction to entertain the preliminary objections. Two, whether the matter before the CMA was res-judicata.* In essence, these two issues require the Court to examine the legality and the propriety, the impropriety or correctness or justice or justness; or fitness or appropriateness or aptitude or suitability or appropriateness or rightness of the impugned order. To achieve that end, the Court will consider Tanzania Labour Law provisions, one of the SADC Country Labour Law provisions and the legal posture emerging from the various decisions of this Court. In so doing, the Court will navigate into a broad spectrum of

factors to be considered in order to yield a health labour law jurisprudence.

In nutshell, the Applicant is challenging the Ruling of the Commission for Mediation and Arbitration (herein referred as CMA) delivered by Honourable M. Chengula, Mediator dated 27th October, 2022 in a *Labour Dispute No. CMA/DSM/ILA/449/2022.* The grounds set forth are that the said Ruling was illegal, unlawful, and improperly procured. The Applicant urged the Court to grant the following orders:

i. To call original records of CMS/DSM/ILA/449/2022 then revise and quash the decision of CMA issued by M. Chengula, the Arbitrator on 27/10/2022.
ii. The Court to hear and determine the dispute based on its jurisdiction.
iii. Issue any appropriate orders as it deems fit.

The application was disposed orally. Before the Court, the Applicant was represented by Mr. Hemed Omary, Personal Representative. Whereas the Respondent was represented by its Principal Officer one Mr. Patrick David Mhina.

Arguing in support of the application, Mr. Hemed submitted jointly that; the Mediator had no jurisdiction to hear and determine the following preliminary objections:

i. That, the matter is *res-judicata,* hence unmaintainable before the eyes of laws.

ii. That, the affidavit contains opinion, arguments, prayer and suggestions, hence defective and bad in law.

Mr. Hemed argued that; pursuant to *Section 86 (3) of the Employment and Labour Relations Act, [Cap 366 Revised Edition 2019] (hereinafter referred ELRA)* the Mediator did not undergo mediation. He stated that the decision on the preliminary objection was illegal for want of jurisdiction. Mr. Hemed drew Court's attention to the case of **Barclays Bank (T) Limited v. Ayyam Matessa**, Civil Appeal No. 481 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported) pp.19 and 21, where it was decided that; the Mediator has no jurisdiction to hear the case. It was the view of Mr. Hemed that the only power of the Mediator is to mediate the case and not to hear the case.

Mr. Hemed went on to submit that; the Mediator did not take into consideration of the type of dispute and the exhibits tendered during hearing of the preliminary objection. That, the Mediator based on exhibits in determining the legal objection. Mr. Hemed argued that since the dispute filed by the Respondent at the CMA was on interpretation of various laws, the CMA had no right of interpreting the law. Thus, the

functions of CMA are defined under *Section 14 of the Labour Institutions Act [Cap 300 Revised Edition 2019] (hereinafter referred LIA).*

Mr. Hemed added that; since the function of CMA is to mediate and not to hear a matter, the Mediator who mediated *Case No. CMA/DSM/ILA/306/2021* erred to decide the matter to the effect that the employer and the employee agreed by basing on *Rule 4 of the Employment and Labour Relations Code of Good Practice Rules, G.N. No. 42 of 2007*. He was of the view that the agreement could be reached between the parties but not before CMA. *Section 94(1) of LIA* vests the Labour Court with exclusive jurisdiction of interpreting the law. It is not CMA.

Further, according to Mr. Hemed, the one who signed CMA F1 was the Legal Manager and not the Human Resource Manager. The Legal Manager had no mandate of initiating the case before CMA.

Mr. Hemed concluded by submitting that; the second matter was for condonation to file application of retrenchment. Therefore, CMA erred to hold that the two matters were *res judicata*. He strongly submitted that; the Mediator who heard the matter had no mandate to hear and decide the matter. He therefore urged the Court to nullify the decision dated 27/10/2022 issued by CMA and order for re-mediation.

In response, Mr. Mhina submitted that; it is impossible in law to mediate two persons, who are not in employment relationship. According to Mr. Mhina, the employment of Simon Frank Mzee ceased on 31/5/2022 at 08:50 am through his resignation email. That, the employer accepted his resignation on 01/6/2022 and required the employee to handle all respective authorities and properties of the company under his custody. On the same date of 01/06/2022, the Applicant served the employer with the letter of Notice of Retrenchment and Goodbye Notice and proposed retrenchment package.

It was submitted by Mr. Mhina that; the dispute before CMA was on three items: *One*, application/interpretation/implementation of any law or agreement relating to employment. *Two*, negotiation about terms and condition about employment. *Three*, terms of separation.

Mr. Mhina was of increasingly submission that; Form No. 1 was filed on 08/6/2022 and stated the outcome of the mediation as proposed in his letter dated 01/6/2022. The parties went to Hon. Mbunda and agreed to pay the Applicant as proposed through certificate of settlement (CMA Form No. 6) under mediation which is in terms of *Regulation 34 (1) of The Employment and Labour Relations General Regulations) GN. No. 47 of 2007.* The Employer agreed to pay the

employee TZS 57 Million and CMA Form No. 7 itemized all the ten (10) payments and the amount of payment.

Mr. Mhina stated that; the practice of retaining medical service after breach of employment relationship is not a common practice and it is not recognized by the law to form part of terminal benefits. However, the employer on his own accord decided to offer the Applicant medical service for one year which was termed as additional agreement. He added that; both parties assented through consent order reached by mediation and there was no any other relationship of the two.

Surprisingly, the same beneficiary (Applicant) came back with another dispute of seeking for condonation to file dispute out of time. The second dispute of the same nature was filed on 29/3/2022. Mr. Mhina submitted that; all rights were mediated and settled and that was the genesis of *res judicata*. He argued that; since the Applicant was paid all of his terminal benefits plus additional payments, his application had no merit. Mr. Mhina made reference to the case of **Benard Idd and 8 Others v. NHC**, Revision No. 373 of 2019 High Court Labour Division at Dar es Salaam (unreported).

Mr. Mhina argued that the cause of action in this matter is one other than employment relationship between the employer and

employee and separation. He stated that; both disputes originated from the same cause of action. He strongly submitted that the CMA had jurisdiction to entertain the matter that is why Hon. Mbunda was moved by CMA Form No. 1 and *Rule 4 of GN. No. 42 of 2007*. To strengthen his submissions, he referred the Court to the decision in the case of **John Butabile v. Tanzania Fisheries Research Institute**, Revision No. 259 of 2019 High Court Labour Division a Dar es Salaam (unreported).

On whether the Mediator had powers to determine the dispute, Mr. Mhina argued that; under *Section 20 (1) of the LIA,* powers of Mediators and Arbitrators have not been separated. He added that; in administrative law, when there is a conflict between written law and case law, written law prevails. He insisted that *Section 20 (1) of LIA* prevails the position in **Barclays Bank (T) Limited v. Ayyam Matessa** *(supra).*

Further, it was the view of Mr. Mhina that *Section 86(4) of ELRA and Section 87 (3) (6) and (b)* of ELRA guides on how to refer the dispute for mediation. He stated that; the Officers of CMA are none other than Mediators and Arbitrators who have been given powers under *Section 86(4) and Section 87 (3) (a) and (b) of ELRA.*

It was further submitted by Mr. Mhina that; *Section 30(1) of LIA* requires a procedure of combining mediation and arbitration proceedings at the same time, a fact which requires to make a decision. He insisted that the provision prevails the case law. Mr. Mhina was of the view that; even if we allow this revision and take them back to CMA, it will be an endless exercise which is not the intention of the Court. He therefore urged the Court to dismiss the application.

In rejoinder, Mr. Hemed submitted that; if you refer to the Counter affidavit, it is obvious that the dispute was mediated by Hon. Pius Mbunda. The Respondent ticked only on application, interpretation and implementation and the rest were not mediated.

Mr. Hemed further submitted that; the Mediator and Arbitrator have different roles under *Section 87 (3) (b) of ELRA.* He added that; in this case, both parties appeared before the Mediator. He could not determine the case by issuing consent order. Mr. Mhina, therefore, urged the Court to refer the matter before CMA because the two matters were not the same.

After considering the rival submissions of the parties, CMA and Court records as well as relevant laws, I will start with the first issue; *whether the Mediator had jurisdiction to entertain the preliminary*

objections. Mr. Hemed strongly argued that the Mediator's function is to assist the parties to mediate the dispute but he/she has no jurisdiction to hear the same in terms *of Section 86 (3) of ELRA.* He relied to the case of **Barclays Bank (T) Limited v. Ayyam Matessa** *(supra).* In the referred **Ayyam Matessa case** *(supra),* the Court of Appeal held that:

> Truly, under the ELRA the jurisdiction of a Mediator as the title dictates, is to mediate, the process which does not include to dismiss and to decide a complaint. That would no doubt be a general rule. Under exceptional circumstances as it is in the provision under discussion, the Mediator is empowered to dismiss the complaint if the referring party fails to appear and decide the same if the party against whom the referral is made fails to appear.

In light of the **Ayyam Matessa case** decision *(supra)*, it is crystal clear that, in some exceptional circumstances, the Mediator is empowered to decide and dismiss a complaint. The issue to be addressed is; *whether the referred exceptional circumstances cover the situation at hand.* As pointed earlier, the preliminary objection challenged by Mr. Hemed is that the matter before the CMA was *res judicata.*

At the first place, though the contention of Mr. Hemed looks attractive, it is my settled view that, the Mediator has jurisdiction to determine such objection, as rightly submitted by the Respondent's Counsel, due to the following reasons:

Firstly, the issue before the case of **Ayyam Matessa case** *(supra)* was determination of the matter on merit which was not the case in the matter at hand. This was also the Court's position in the case of **Rui Wang v. Eminence Consulting (T) Limited,** Revision No. 306 of 2022 High Court, Labour Division Dar es Salaam (unreported) where the Court distinguished the circumstances in the cited case and held that Mediators have powers to determine application for condonation.

Secondly, the functions of Labour Mediators are distinguished from Mediators in normal civil cases. Under *Section 20 of LIA (supra)* as cited by the Respondent's Counsel, Mediators and Arbitrators have the same powers on mediation. In normal civil cases, mediation is done in accordance with *Order VIII Rule 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 of the Civil Procedure Code, [Cap 300 Revised Edition 2019].* Under the referred provisions, the powers of Mediators are specifically stated so as to assist the parties to reach into an amicable settlement. Then, when the mediation fails, the case file is remitted back to the trial

Judge or Magistrate, as the case may be. In labour matters the powers of the Mediator are wide. Mediators are even empowered to determine jurisdictional issues. This is in accordance with *Rule 15 of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007* which provides:

> *Where it appears during mediation proceedings that a jurisdictional issue relating to mediation has not been determined, the Mediator shall require the referring party to prove that the Commission has the jurisdiction to mediate the dispute. [Emphasis added]*

Further, it is my view that the Mediator had jurisdiction to determine the legal objection because determination of the issue as to whether the matter is *res judicata* or not is one of the jurisdictional issues. It is my clear view that; an Act conferring jurisdiction to mediate a case, impliedly grants powers of doing all such incidental acts including of entertaining a preliminary objection on jurisdiction because it is essentially necessary to execution of mediation. As stated in the case of **Zephania O. Adina v. GPH Industries Limited,** Labour Revision No. 27 of 2020, High Court of Tanzania Labour Division at Mwanza (unreported) as cited in the case of **Rui Wang** *(supra),* jurisdictional issue is one of the first thing to be considered when the

Court or Tribunal or Commission is approached. In the referred **Zephania O. Adina'** case *(supra),* it was held that:

> It is trite law, that, the first thing for the Court or Tribunal to consider when approached is whether it has jurisdiction or not. If it is satisfied as to whether it has jurisdiction, it is when it can choose or determine the venue where the proceedings (mediation and arbitration) may be conducted.

Thirdly, when one looks on the purposive interpretation, the whole labour law regime will notice that, it aims at giving equal powers to both Mediators and Arbitrators on mediation. The existing provisions which separate powers is *section 40 (1) of ELRA* read together with *section 88, 89, 90, 91, 92 and 93 of ELRA and Rule 32 GN No. 67.* The said provisions deal with remedies for unfair termination, which is not the case in mediation. In essence, mediation is of the view that no one is at fault.

Fourthly, it is my humble view that; when this Court is determining the matter, it has a sacrosanct duty to look at the effect of the other institutions including CMA. The overriding objective should be to safeguard the institution. If preliminary objections are not determined by the Mediator, it means, a case may be handled by more than one

Mediator and Arbitrator. Such procedure may defeat the intended period of concluding mediation dispute within 30 days as stipulated under *Section 86 (4) of ELRA and Rule 3 (3) of the Labour Institutions (Mediation and Arbitration Guidance) Rules, GN. No. 67 of 2007.* At large, mediation is likely not to be effective or properly conducted.

Fifthly, if this Court decides that the Mediator cannot decide preliminary points of legal objection, it will paralyse to the great extent the functions of mediation department in CMA, as parties may choose not to come to CMA during mediation, knowingly nothing can be done. Such act will defeat the intended hybrid Alternative Dispute Resolution (ADR) provision aimed at binding parties to attend mediation but not to force them agree.

Sixthly, the spilling effect of the results stated in the fourth and fifth ground above may pause another big challenge. The Arbitrators are likely to be overburdened because each case attracting a preliminary objection shall be referred to the Arbitrators for determination. If Arbitrators will be overwhelmed, the speed of determining matters will lower down. The burden will shift to the High Court as the Arbitrators will not determine their assigned cases diligently.

Seventhly, CMA procedures will not be predictable, an act which will take us back to the situation before the enactments of *ELRA and LIA in 2004.* During those immemorial times, disputes were taking long to get finalized due to among other reasons, the unpredictable procedural intricacies.

Eighthly, *Rule 29 (7) to (10) of the Labour Court Rules* governs the Mediator and the Arbitrator. It does not isolate the Mediator or govern the Arbitrator alone. The same applies on the powers given to the Mediators and Arbitrators under *section 20 of LIA* and delegation of powers under *section 18 (5) of LIA* together with the functions of CMA specified under *section 14 of LIA.*

More so, as I observed in **Rui Wang case** *(supra),* the current labour laws framework in Tanzania and SADC members such as South Africa, Botswana and Lesotho in general are designed in a *hybrid manner with unique or peculiar features* distinguished from conventional laws such as ordinary civil procedural laws. To add more in this case, the provision on jurisdiction of Mediators and Arbitrators in such Countries is clearly articulated in their Labour Laws. To bring the point at home, I will revisit *section 7 (9) (a) (iii) of the Trade Disputes Act, No. 6 of 2016* of Botswana which provides:

7 (9) *A Mediator may, in dealing with a trade dispute assigned to him or her*

(a) Determine any question concerning;

(i) N/A

(ii) N/A

(iii) The jurisdiction of the Mediator to mediate the trade dispute; [Emphasis added]

It must further be appreciated that the objectives and purpose of labour laws legislations is not to contradict other pieces of legislations and other formerly laid down principles, rather is to advance economic development, promote social justice, labour peace, industrial harmony and democratization of the work place by fulfilling the primary objectives of labour law legislations. With these peculiar elements, the legislature intention to enact labour law legislations was to achieve the social justice, hence industrial harmony and labour peace.

To achieve the labour law legislation intention, more effective dispute resolution peculiar procedures and mechanism for both dispute of rights and dispute of interests were put in place to keep the procedures underlying labour litigation simple as possible in order to speed up litigation and avoid unnecessary costs and delays which contradict achievement of social justices in international standards. In order to appreciate the same reasoning, it would be fruitful to go

through the case of **Reli Assets Holding Co Limited v. Japhet Casili & 1500 Others**, Labour Revision No. 10 of 2014, High Court of Tanzania Labour Division at Dar es Salaam (unreported). The same spirit is evident in the ILO Declaration on Social Justice for a Fair Globalization, 2008.

This Court has two further observation. *One*, the nature of the employer-employee relationship, the procedures to attain social justice, industrial harmony and labour peace have been simplified due to its direct significant adverse effect on the relationship between employer and employer's association on one hand and employees and trade unions on the other hand. *Two*, it is impossible to have efficient and effective dispute resolution mechanism and procedures by disregarding the peculiarities which legitimately aimed to achieve specific purpose.

If I may add, the act of ignoring idiosyncrasies of labour laws, can undermine the revolution in form of the reforms whose Worldwide agenda is to achieve MDGs and SDGs. Therefore, it was not a mistake to enjoin mediator with power to clear all preliminaries or raised issues to make sure there is conducive environment for mediation.

Needless, the Court is aware that not all Mediators are lawyers. As such, a non-lawyer is hard to determine a legal issue. However, the

Court should esquire Mediators jurisdiction based on social justice as opposed to legal justice. Here, it must be recalled that Labour Laws are mostly based on social justice which is all about social need as opposed to legal justice which is about adhering to legal principles. The call to achieve progress and social justice in a constantly changing environment is vivid in the *ILO Declaration on Social Justice for a Fair Globalization* adopted on 10 June 2008.

In any case, the Mediator is not barred from exercising his/her powers conferred under *Rule 6 (1) (c) of GN No. 67 of 2007* by referring the matter to the Arbitrator. *Rule 6 (1) (c) (supra)* provides:

> 6 (1) *The Commission may refer a dispute to arbitration before it has been mediated or set down the mediation and arbitration hearing on the same date. In contemplating this, the Commission may consider the following:*
>
> *(c) The effective utilization of the Commission's resources. [Emphasis applied]*

The Mediators are only prohibited to make reference of disputes concerning collective agreements to the Arbitrators. That is the only exception on making reference by the Mediators to Arbitrators. The law requires Mediators, upon failure to mediate, refer the same to the

Labour Court for decision. Such guidance is provided for under *Section 74 of LIA (supra)* which provides:

> Unless the parties to a collective agreement agree otherwise:
>
> (a) A dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for Mediation; and
>
> (b) If the mediation fails, any party may refer the dispute to the Labour Court for a decision.

In the light of the provision of *section 74 of LIA (supra),* If the mediation failed on substance, it is the duty of either party to refer the matter to the Labour Court for a decision. However, it is my view that; in case the Mediator finds incompetent to decide the jurisdictional issue arising before mediation on disputes concerning collective agreement, he/she can refer the same to the Labour Court for decision. If the Labour Court finds the Mediator have jurisdiction to mediate the same, it shall remit the file back to the Mediator for mediation.

Indeed, under *Rule 10 of the Labour Institutions (Ethics and Code of conduct for Mediators and Arbitrators) Rules GN No. 66 of 2007,* the Mediator and Arbitrators are mandatorily required to strive to observe

their competence on jurisdictional issues as conferred by the Act. This goes without saying that, if the Mediator finds himself or herself incompetent from determining jurisdictional issue, he/she is not barred from referring the matter to the Arbitrator. Under *Rule 16 (1) of the Labour Institutions (Ethics and Code of conduct for Mediators and Arbitrators) Rules, (supra),* every Mediator and Arbitrator is mandatorily required to decline appointment, withdraw or request appropriate assistance, if he/she believes the dispute is beyond his competence.

Therefore, on the light of the foregoing analysis, it is my view that, Mediators having mandate to determine the jurisdictional issues before the dispute is mediated they equally have mandate to determine a preliminary objection as to whether the matter is *res judicata* or not because *res-judicata* issue is one of the jurisdictional issues.

It is time finally to address the second issue; *whether the matter at the CMA was res judicata*. For a matter to be referred as *res judicata,* the following elements were emphasized in the case of **Panieliotta v. Gabriel Tanaki & Others** [2003] TLR 312, to be established:

i. The former suit must have been between the same litigant parties or between parties under whom they or any of them claim.

ii. The subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue in the former suit either actually or constructively.

iii. The party in the subsequent suit must have litigated under the same title in the former suit.

iv. The matter must have been heard and finally decided.

v. That the former suit must have been decided by a Court of competent jurisdiction.

The Court of Appeal in **Lotta case** *(supra)* went further illustrating the test of *res judicata* by stating that:

> The object of the principle of *res judicata* is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by the court of competent jurisdiction in the subject matter of the suit.

In the instant matter, *Labour Dispute No. CMA/DSM/ILA/306/2021* referred by the Respondent, was about an application, interpretation, implementation of any law or agreement relating to employment and negotiation about terms and conditions of employment. One of the prayers by the Respondent was on the payment of separation agreement. The record reveals that, the parties reached into a settlement agreement.

As per the settlement order dated 10th June, 2022, the parties reached into a consent agreement of undertaking departmental restructuring commenced with Human Resource Department where the Applicant herein had been affected and his position was no longer in place. The Applicant's entitlements were agreed to the following effect:

> The Applicant and Respondent having consented to settle this suit through Mediation agreed as follows:
>
> 1. Applicant shall pay one month salary in lieu of notice, total sum of TZS 4,120,199/= (Tanzania Shillings Four Million One Hundred and Twenty Thousand and One Hundred and Ninety Nine Shillings) to the Respondent.
> 2. The Applicant shall pay of TZS 150,000.00 (Tanzania Shillings One Hundred and Fifty Thousand) for transport to the place of domicile.
> 3. The Applicant shall also according to the agreement pay TZS 1,800,000.00 (Tanzania Shillings One Million Eight Hundred Thousand) for fixed luggage transportation
> 4. Applicant shall pay TZS 350,000 (Tanzania Shillings Three Hundred and Fifty Thousand only for luggage packages
> 5. The Applicant shall pay TZS 21, 947,493/=) Tanzania Shillings Twenty One Million, Nine Hundred Fourty Seven Thousands Four Hundred and Ninety Three) for age based benefit basic 7.2 years of service.

6. The Applicant shall pay TZS 7,315,831/= (Tanzania Shillings Seven Million, Three Hundred Fifteen Thousand and Eight Hundred and Thirty One) for severance pay.
7. The Applicant shall pay TZS 18,289,578/= (Tanzania Shillings Eighteen Million, Two Hundred Eighty Nine and Five Hundred Seventh Eighty) for six month salary in lieu of alternative job.
8. The Applicant shall pay TZS 1,803,904/= (Tanzania Shillings One Million Eight Hundred and Three Thousands, Nine Hundred and Four Shillings) for leave of 18 days.
9. The Applicant shall pay TZS 1,319,618/= (Tanzania shillings One Million, Three Hundred and Nineteen Thousand and Six Hundred Eighteen Shillings being salary up to departure date.
10. Certificate of service shall also be provided.
11. Retention of strategies medical insurance card up to 31st March 2023 shall also be provided.

    Total amount to be paid by the Applicant = TZS 57,098,623/= (Tanzania Shillings Fifty Seven Million and Ninety Hundred Thousand, Six Hundred and Twenty Three Shillings.)
12. This settlement shall be *effected from 10th June, 2022.* In the event of a default by the Applicant in effecting the *said full and final payment* the Respondent shall be titled to execute this Consent Settlement Order

without giving further notice to the High Court Labour Division.

13. Each party to bear own costs.

Again, in *Labour Dispute No. CMA/DSM/ILA/449/2022,* the Applicant sued for unfair termination on the ground of retrenchment. He prayed for leave payment, remedies for unfair termination from the date of termination to the date of retirement and general remedies. Comparing the two mentioned labour disputes, it is crystal clear that they originate from the same cause of action, retrenchment process. The employer instituted the dispute before the retrenchment process took place.

On the other hand, the employee instituted the dispute after the retrenchment took place. As indicated above, before retrenchment was done the parties had mutual agreement on the process and entitlements thereto.

Therefore, in the circumstances of this case it is as good as stating that the retrenchment process was by mutual agreement of the parties. The Applicant is strongly alleging that his dispute filed at the CMA is distinct from the one filed by his employer. Looking closely at the nature of the referred disputes, there is no doubt that they are related. The

Applicant is reclaiming for leave allowance and compensation for unfair termination which he agreed to be paid before the retrenchment process was conducted. Thus, in this application there was termination by agreement.

Termination by agreement is one of the lawful ways of ending employment contracts in Tanzania as in terms of *Rule 3(2) (a) of GN 42 of 2007* which provides that:

> A lawful termination of employment under the common law shall be as follows:
>
> *(a) Termination of employment by agreement*
>
> (b) Automatic termination
>
> (c) Termination of the employment by the employee, or
>
> (d) Determination of employment by the employer.
>
> [Emphasis supplies]

Termination by agreement is also provided under *Rule 4(1) of GN 42 of 2007 (supra)* where employer and employee are empowered to agree to terminate the contract in accordance to agreement. When the parties enter into mutual agreement by their own free consent, they must abide to the terms agreed therein. This is the Court's position in the case of **McAlwane v. Boughton Estates Limited** [1973] 2 All ER

299 cited in the book by George Ogembo titled: **Employment Law Guide for Employers,** where it was held that:

> *An agreement to terminate an employment contract, if the initiatives arises from the employer, must be interrogated to confirm whether the employee freely consented to the termination. Hence, the Court would not approve an agreement to terminate employment unless it is proved that the employee really did agree with full knowledge of the implications it had for him.*

Again, in the Court of Appeal case of **Miriam Maro v. Bank of Tanzania**, Civil Appeal No.22/2017 (unreported) it was stated that:

> It is the law that parties are bound by the terms of the agreement they they freely enter into. We find solace on this stance in the position we took in **Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises**, Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in **Osun State Government v. Daiami Nigeria Limited**, Sc. 277/2002 to articulate:
>
> *Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the Courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which*

parties find to be onerous. It is not the role of the Courts to redraft clauses in agreements but to enforce those clauses where parties are in dispute. [Emphasis added]

On the basis of the foregoing analysis, it is crystal clear that the parties agreed to terminate the contract through retrenchment process. Thus, the same agreement should be adhered. The agreement was dully made through Mediation process at the CMA.

In the event, as correctly decided by the Mediator, the matter before him was *res judicata* because it has been initially finalized between the same parties. If parties will be allowed to negate to the terms they freely entered to, will attract endless litigation.

In short, I find the present application to be devoid of merits. Both grounds of revision lack stance. Thus, the CMA's decision is hereby sustained.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

13/03/2023

Judgement pronounced and dated 13th day of March, 2023 in the presence Hemed Omary, Personal Representative of the Applicant and learned Counsel Patrick David Mhina for the Respondent.

Y. J. MLYAMBINA

JUDGE

13/03/2023