IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 26 OF 2023

(Arising from an award issued on 20/12/2022 by Hon. Msina, H.H, Arbitrator, in Labour dispute No. CMA/DSM/ILA/110/2022/114/22 at Ilala)

BENJAMIN LAZARO ISSEME ..... APPLICANT

VERSUS

YAPI MERKEZI INSAAT VE SANAYI ANONIM SIRKET ..... RESPONDENT

JUDGMENT

Date of last Order: 29/03/2023
Date of Judgment: 31/03/2023

B. E. K. Mganga, J.

Facts of this application briefly are that applicant was employed by the respondent as a driver. It is alleged that in the year 2019, applicant fell sick and was permitted to attend eye treatment in Mwanza Region. It is further alleged that when he returned in office, on 20th May 2019, respondent terminated his employment. Aggrieved with termination, applicant filed the dispute before the Commission for Mediation and Arbitration(CMA) complaining that he was unfairly terminated.

On 20th December 2022, Hon. Msina H. H, Arbitrator, issued an award dismissing all claims of the applicant. Aggrieved with the said award, applicant filed this application for revision. In his affidavit in support of the application, applicant raised five (5) grounds. On the other hand, respondent filed the Notice of Opposition and the counter affidavit of Benedict Kitare to resist the application. The grounds that were argued by the parties are:-

1. *The arbitrator erred in law and facts in dismissing the dispute by adding the issue upon the period of employment while it was not the issue framed by the parties.*
2. *The arbitrator erred in law and fact in holding that employment contract was below six months while it was proved that it was renewed on 28/02/2018.*
3. *The arbitrator erred in law and facts by making changes in the CMA F1 while applicant's employment was not for fixed term contract.*
4. *That the arbitrator did not consider my statement and annextures that were admitted as exhibits showing that on the date it was alleged that I signed the alleged deed of settlement I was not in Ngerengere.*

When the application was called on for hearing, applicant appeared in person and argued four grounds in support of the application and abandoned one. On the other hand, Mr. Ceasor Kabissa, learned counsel appeared and argued for and on behalf of the respondent.

During hearing of the application, I perused the CMA record and find that at the time of filing the dispute at CMA, applicant also filed an application for condonation. I also noted that, on 9th May 2022, the application for condonation was granted by Mbunda, P.J, Mediator. I therefore asked the parties to address the court as to whether the said Mediator had powers to hear and grant the application for condonation.

Arguing the 1st ground, applicant submitted that at CMA only two issues were framed namely (i) whether termination was fair and (ii) what relief(s) are the parties entitled to. But in the award, the arbitrator added another issue that was not framed.

Arguing the 2nd ground, applicant submitted that he had unspecified period contract from 23rd February 2018 at monthly salary of TZS 500,000/=. Applicant submitted further that respondent terminated his employment on 20th May 2019 allegedly that there was agreement to terminate contract while it was not true. He went on that, on 01st April 2019 he left his duty station at Ngerengere area in Morogoro area to Mwanza for treatment of his eyes because he suddenly became unable to see. Applicant submitted further that; respondent gave him permission to go in Mwanza for treatment. Applicant submitted further that, respondent's

doctor issued him with final medical certificate (Exhibit AP5) and sent it to Human Resource department. He added that respondent signed employee leave application forms (exhibit AP2 collectively). He maintained that he had vision problems which is why he was permitted by the respondent to in Mwanza for treatment. He further submitted that respondent terminated his employment alleging that there was an agreement to terminate employment while there was none. He went on that; respondent did not produce the contract and the alleged agreement to terminate employment even after being served with a notice to produce alleging that they got lost.

Arguing the 3rd ground, applicant submitted that he indicated in the CMA F1 that the dispute was for unfair termination but in the award, the arbitrator held that he had a fixed term contract and that he was claiming 11 months salaries of the remaining period. He strongly submitted that in so holding, the arbitrator erred.

On the 4th ground, applicant submitted that exhibits show that on the date it was alleged that he signed the alleged deed of agreement to terminate employment he was not in Ngerengere. He strongly submitted that call register of Vodacom and Tigo (exhibit AP4 and AP6) respectively shows that on 16th May 2019 he was at Igunga. He added that the Bus

ticket (exhibit AP3) shows that on that date, he travelled from Ushirombo to Igunga.

Responding to the issue raised by the court, applicant submitted that mediator has no power to grant condonation and that the Ruling that was issued by the Mediator granting condonation is contrary to the law. Applicant cited the case of ***Vicent Humphrey Joram & 26 Others V. Gin Investment Ltd***, Revision No. 255 of 2022 HC, (unreported) to support his submissions. Applicant concluded his submissions by praying that the Court to nullify CMA proceedings, set aside the award and order trial *de novo*.

Resisting the application, Mr. Kabissa, learned counsel for the respondent argued the application generally. Counsel for the respondent submitted that applicant was employed for unspecified contract from 01st February 2019 but his employment was terminated on 20th May 2019. He went on that, at CMA, two issues were framed i.e., whether termination was fair and what relief(s) the parties are entitled to.

Counsel for the respondent submitted that on 20th May 2019 the parties entered into agreement to terminate the contract (exhibit D2 and D1). He argued that applicant read and signed the said deed of settlement.

He submitted that there is no evidence to show that applicant was at Ushirombo on that date. He went on that there is no record in the respondent's Office showing that applicant had eye problem and that he went to Mwanza for treatment.

Mr. Kabissa submitted that applicant worked for less than six months' and that in terms of Section 35 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] he was not supposed to file the dispute for unfair termination. In his submissions, he conceded that the letter of employment was not tendered by either side and that applicant issued a notice to produce but respondent did not produce. Counsel submitted that it is not true that in the award the arbitrator raised a new issue that was not framed by the parties. He went on that; the arbitrator considered all evidence of the parties.

Responding to the issue raised by the court, Mr. Kabassa, learned counsel for the respondent, concurred with submissions by the applicant that, the Mediator has no power to grant condonation. In support of his submissions, counsel for the respondent cited the case of ***Ndovu Resources Ltd V. Thierry Murcia***, Revision No. 371 of 2022, HC (unreported), ***Nelson Mwaikaja v. Gemshad Ismail & Usangu***

General Traders, Revision No. 382 of 2022, HC (unreported) and ***Barclays Bank (T) Ltd V. Ayyam Matessa***, Civil Appeal No. 481 of 2020, CAT (unreported). Counsel for the respondent drew the attention of the court to the Ruling of the court in the case of ***Rui Wang v. Eminence consulting (t) Ltd***, Revision No. 306 of 2022 wherein it was held that the Mediator has power to hear and grant condonation. Counsel for the respondent went on that, this court is bound by the decision of the Court of Appeal in ***Matessa's case*** (supra) and added that the Court of Appeal has not vacated from that decision. He therefore concluded his submissions by praying that CMA proceedings be nullified; the award be set aside and order trial *de novo*.

I have considered submissions of the parties in this application and wish to start with the issue raised by the court. There is no dispute that the application for condonation was heard and granted by the Mediator, who, having granted the application for condonation, allegedly, proceeded to mediate the parties. It was, in my view, correctly submitted by the parties that the Mediator had no power to grant condonation. I have read the case of ***RUI WANG v. EMINENCE CONSULTING (T) LTD*** (Revision Application 306 of 2022) [2023] TZHCLD 1128 wherein my learned brother

held that the Mediator has powers to grant condonation, and I am still of the different opinion. I entirely agree with the parties in this application that the Mediator has no power to grant condonation because, in an application for condonation or extension of time, applicant must file condonation Form (CMA F2) together with an affidavit stating reasons for the delay in terms of Rule 29(1)(a) and (4)(d) of the Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007. Upon filing the application for condonation, the party opposing the application, must file the Notice of Opposition and the Counter Affidavit as it is provided under Rule 29(5) of GN. No. 64 of 2007 (supra). Once that is done, then, the application has to be heard on merit. In the affidavit in support of the application for condonation, applicant must account for the delay and must show good cause for the delay. See ***Benedict Mumello vs Bank of Tanzania*** (Civil Appeal 12 of 2002) [2006] TZCA 12, ***Nyanza Roads Works Limited vs Giovanni Guidon*** (Civil Appeal 75 of 2020) [2021] TZCA 396, ***Patrick John Butabile vs Bakresa Food Products Ltd*** (Civil Appeal 61 of 2019) [2022] TZCA 224. In fact, Rule 11(3) of GN. No. 64 of 2007(supra) requires and applicant to state the degree of lateness, reason for delay, possibility of the dispute to succeed, any

prejudice to the other party and any other factor. In the above cited cases, the Court of Appeal pointed out clearly and in unambiguous term that, in an application for condonation, CMA or the court is called to exercise its discretion and that, that must be done judiciously. It is my view that, in an application for condonation, the Mediator is called to exercise judicial discretion, which, in my view, is not his duty because the duty of the Mediator is to assist the parties to settle the dispute. The position that powers of the Mediator is to assist the parties to resolve the dispute is provided under section 86(4), (7) and (8) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rule 3(1) and (2) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No.67 of 2007. The said Rule 3(1) and (2) of GN. No. 67 of 2007 (supra) provides: -

> *"3(1) Mediation is a process in which a person independent of the process parties(sic) is appointed as mediator and* ***attempts to assist them to resolve a dispute and may meet with the parties either jointly or separately, and through discussion and facilitation, attempt to help the parties settle their dispute****.*
>
> *(2) A* ***mediator may make recommendations to the parties suggesting for settlement if, the parties to the dispute agree or the mediator believes it will promote settlement****. Recommendations made are not binding on the parties; it is only persuasive and aims to assist the parties to settle a dispute."*

In my view, hearing the parties on submissions in an application for condonation and delivering a ruling granting or refusing to grant condonation, cannot be a process of assisting the parties to amicably settle the dispute envisaged under the provisions of Rule 3(1)and (2) of GN. No. 67 of 2007 (supra). I have read Part II of GN. 67 of 2007 (supra) that relates to mediation process and the powers of the Mediator and find that, in the whole part, there is no rule giving powers to the Mediator to determine legal issues including but not limited to, an application for condonation. In my view, absence of such a rule, was intended to limit the powers and duties of the Mediator and confine the Mediator to the duties of assisting the parties to settle the dispute and not to determine legal issues that are the domain of the Arbitrator.

In the case of ***Tanzania Cigarette Public Ltd Co. vs. Nancy Mathew Kombe*** (Rev. Appl 421 of 2022) [2023] TZHCLD 1138, this court held that, in an application for condonation, an applicant seeks CMA to extend a helping hand of jurisdiction otherwise, CMA will have no jurisdiction to determine the matter. The jurisdiction sought in an application for condonation is not based on territorial, which, in my view, is an exception jurisdictional issue that can be determined by the Mediator

under Rule 15 of the Labour Institutions(Mediation and Arbitrations)Rules, GN. No. 64 of 2007. I am of that opinion because, disputes must be filed in the territorial jurisdiction they arose. It is easy to decide territorial jurisdiction without being engaged in several legal issues unlike to the application for condonation. In my view, once the mediator finds that the dispute occurred within the jurisdiction, can proceed to mediate the parties.

As pointed hereinabove, in hearing the application for condonation, the Mediator, restores jurisdiction that was taken away by limitation of time. In my view, restoration of jurisdiction to CMA does not fall in the powers of the Mediator namely to assist the parties to settle the dispute. It was held in ***Kombe's case*** (supra) that, mediation is rooted in confidence of the parties to the Mediator and that, the losing party in an application for condonation cannot, after the grant of condonation, have confidence in the Mediator. I am of that view because mediation is rooted in confidence of the parties to the Mediator, which is why, the Mediator is supposed to keep all information obtained during mediation process confidential as it is provided for under Rule 8(1), (2), (3) and (4) of GN. No. 67 of 2007 (supra). The said Rule 8 of GN. No. 67 of 2007 provides: -

"8(1) Without prejudice ***mediation is a confidential process aimed helping the parties to a dispute to reach an agreement****.*

(2) Information disclosed during mediation may not be used as evidence in any other proceedings unless the party disclosing that information states otherwise.

(3) The mediator may not be compelled to be a witness in any other proceedings in respect of what happened during the mediation(sic).

(4) ***The confidential nature of mediation proceedings prevents the Mediator, the parties and their representatives from disclosing any information obtained during mediation to any third party****."*

In ***Kombe's case*** (supra), this court held that grant or refusal of application for condonation is adjudicatory or arbitration process and not mediation process. I hold that position because, the order of the Mediator granting condonation is not in line with the provisions of section 87(3)(a) and (b) of Cap. 366 R.E. 2019(Supra) or Rule 14(2)(a)(i) and (ii) of GN. No. 67 of 2007(supra) that are exceptional powers of the Mediator or section 20 of the Labour Institutions Act [Cap. 300 R.E. 2019]. In short, the Mediator had no power to either grant condonation or to dismiss the application for condonation.

I have read the provisions relating to mediation in Cap. 366 R.E. 2019(supra), GN. No. 64 of 2007 (supra) and GN. No. 67 of 2007(supra) and I am of the opinion that, it was not the intention of the drafters of the

law that Mediators should have adjudicatory powers including but not limited to grant application for condonation. I am of that view, considering mediation as a process and the role of the Mediator in that process. I have therefore given the ordinary meaning of words "mediation" and "Mediator" and I am of the view that, the mediator has no power to grant condonation. In fact, the court in south Africa in case of ***Minister of Police and Others v Fidelity Security Services (Pty) Limited*** [2022] ZACC 16; 2022 (2) SACR 519 (CC) held:-

> *"Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity. This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution."*

In our jurisdiction, the Court of Appeal has reminded us in the case of ***Trade Union Congress of Tanzania (TUKTA) vs Engineering Systems Consultants Ltd & Others*** (Civil Appeal 51 of 2016) [2020] TZCA 251 when it held that:-

> *"The provision of one section of a statute cannot be used to defeat those of another 'unless it is impossible to effect reconciliation between them' The same rule applies to sub - sections of section"*

Again, in the case of ***Standard Chartered Bank(Hong Kong) Ltd vs Mechamar* Corporation (Malaysia) Berhad and Seven Others** (Civil Revision 1 of 2012) [2012] TZCA 246 the Court of Appeal put it clear that:-

" When the Courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words used in the statute…If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases..."

I have read the above cited laws and formed an opinion that applying the plain meaning of the words Mediation and Mediator and applying the purposive approach or intention of the drafters, Mediators has no power to grant condition. It is my view that, with those principles of statute interpretation in mind, the Court of Appeal in the case of Barclays Bank T. Limited vs AYYAM Matessa, Civil Appeal No. 481 of 2020 [2022] TZCA 189 held that the powers of the Mediator are limited. In ***Matessa's case*** (supra) the Court of Appeal held *inter-alia* 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."* (Emphasis supplied)

For all said hereinabove, I hold as it was held in the case of **Ndovu Resources Limited vs Thierry Murcia**, Rev. Appl. No. 371 of 2022 , ***Kombe's case*** (supra), ***Nelson Mwaikaja vs Gemshad Ismail & Usangu General Traders*** (Rev. Appl 382 of 2022) [0023] TZHCLD 1 and ***Gin Investment Ltd's case*** (supra) that the Mediator has no power to grant an application for condonation. I therefore, nullify CMA proceedings quashed and set aside the award arising therefrom. CMA record is hereby remitted to CMA so that the application for condonation can be heard by the arbitrator, if granted, then, the dispute be heard de novo by another arbitrator without delay.

Dated at Dar es Salaam on this 31st March 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 31st March 2023 in chambers in the presence of Benjamin Lazaro Isseme, the Applicant and Ceasor Kabissa, Advocate, for the respondent.

B. E. K. Mganga
JUDGE