IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR-ES-SALAAM

REFERENCE NO. 1 OF 2023

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS ACT, CAP 366 R.E. 2019

AND

IN THE MATTER OF THE LABOUR INSTITUTIONS ACT, CAP 300 R.E. 2019

AND

INT THE MATTER OF THE LABOUR COURT RULES, G.N. 106 OF 2007 AND IN THE MATTER OF POWERS CONFERED TO THE LABOUR COMMISSIONER UNDER SECTION 58 (2) OF THE LABOUR INSTITUTIONS ACT AND RULE 53 OF THE LABOUR COURT RULES

AND

IN THE MATTER OF CONFLICTING DECISIONS OF THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA, LABOUR DIVISION NAMELY: WILLIAM RYOBA WAMBURA VERSUS GRUMETI RESERVED LIMITED, APPLICATION FOR REVISION NO. 18 OF 2020, HIGH COURT LABOUR DIVISION AT MUSOMA AND SUZANA MWANYAMA VERSUS CARDINAL RUGAMBWA HOSPITAL, REVISION APPLICATION NO. 191 OF 2022, HIGH COURT LABOUR DIVISION AT DAR ES SALAAM

RULING

Date of last order: *31/07/2023*

Date of Ruling: *15/08/2023*

MLYAMBINA, J.

Very occasionally, and singularly un-usual, to my knowledge, as I had never known of this kind of application before the Labour Court. The Labour Commissioner has exercised her powers conferred under *Section 58(2) of the Labour Institution Act [Cap 366 Revised Edition 2019] (herein*

LIA) and *Rule 53 of the Labour Court Rules [G.N No. 106 of 2007]* by making reference to this Court to certify points of law arising from the conflicting decisions of **William Ryoba Wambura v. Grumeti Reserved Limited,** Application for Revision No. 18 of 2020, High Court Labour Division at Musoma (unreported) and the case of **Suzana Mwanyama v. Cardinal Rugambwa Hospital,** Revision No.191 of 2022, High Court Labour Division at Dar es Salaam (unreported), for the purpose of referring the same to the Court of Appeal of Tanzania for determination. *Section 58 (1) and (2) of LIA (supra)* provides that:

> (1) The Labour Commissioner may-
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> (a) refer any point of law, other than the point of law referred to in paragraph (b), to the Labour Court-
>
> (b) refer a point of law to the Court of Appeal if-
>
> (i) there are conflicting decisions of the Labour Court in respect of the same point of law; and
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> (ii) the parties to the proceedings in those decisions have not appealed.
>
> (2) The Labour Commissioner shall serve any reference under subsection (1) on the Council.

Rule 53 of the Labour Court Rules (supra) provides that:

(1) Subject to the provisions of *subsection (2) of section 58 of the Act,* the Labour Commissioner in making reference to the Court of Appeal of Tanzania shall draw up a statement of points of law from the case and their full citation attaching certified copies of all such cases be considers are in conflict and refer the same to the Judge Chairman or any Judge in-charge or any presiding Judge assigned by the Judge Chairman or Judge in -charge who shall certify the existence or non-existence of such points of law or make any comments found desirable for consideration by the Court of Appeal of Tanzania;

Provided that, the Court before issuing a certificate under this rule may invite the Attorney General, Labour Commissioner, an *amicus curiae,* and any interested party, including the parties in the conflicting decisions is the subject of the reference to address the Court.

(2) For avoidance of any doubt, the Court, where it thinks is unnecessary to be addressed by anybody, shall proceed to issue a certificate as it deems fit.

The call by the Labour Commissioner is premised on the meaning of and effect that should be given to a statutory provision of: *One, Section 20 of the LIA (supra)* that provides for powers of Mediators and Arbitrators which literally gives powers to the Mediators to conduct mediations and Arbitrators to conduct arbitrations.

Two, Rule 15 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 which confers powers to Mediators to mediate the dispute if during mediations proceedings issues of jurisdiction relating to mediation arise.

Three, Rules 18 to 27 of the Labour Institutions (Mediation and Arbitration Guidelines), G.N. No. 67 of 2007 which confers powers to Arbitrators to arbitrate and issue Awards in disputes which literally includes the Awards relating to condonation on extension of time.

Four, in dealing with a dispute, the respective officers must have been specifically appointed thereof in terms *of Section 86 (3) (a) of ELRA* for a Mediator and *Section 88 (2) (a)* thereof for an Arbitrator and their powers must come from statutes meaning from *Section 20 of LIA (supra), Rule 15 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 and Rules 18 to 27 of the Labour Institutions (Mediation and Arbitration Guidelines), (supra).*

At the outset, there is a gainsaying that one of the function of Judges is to incrementally develop the law by faithfully interpreting and applying the statutory law in order to serve the need of a society at a particular time. The Labour Commissioner, however, in this labour reference is of the conviction that this Court on interpreting the cited provisions, gave conflicting decisions through the case of **William Ryoba Wambura** *(supra)* and the case of **Suzana Mwanyama** *(supra).*

In establishing as to whether there is a need of certification of points of law, this Court in terms of *Rule 53(1) of the Labour Court Rules (supra)*, issued invitation letter together with the entire records of the reference to the Attorney General, Labour Commissioner, three *amicus curiae* (in plural *amici curriae*) namely: Dr. Cornel C. Mtaki, Mr. Frank Mwalongo and Mr. Nuhu Mkumbukwa and to the Advocates of the interested parties who were involved in the case of **William Ryoba Wambura** *(supra)* and the case of **Suzana Mwanyama** *(supra), namely*: Mr. Emmanuel Gervas, Godfrey Tesha, Emmanuel Charles Makungu and Mr. Nixon Tugara.

The reasons for the Court to select the *Amici curiae* were that; Dr. Cornel C. Mtaki holds LL. B (Hons) University of Dar es Salaam, Tanzania (1981), LL.M University of Dar es Salaam, Tanzania (1988), PhD University of Ghent, Belgium (2000). He is an Advocate of the High Court of Tanzania

and a member of the Tanganyika Law Society and the East Africa Law Society. As an Advocate, he has carried out extensive solicitor work for both local and foreign clients including higher learning institutions.

Dr. Mtaki has also undertaken a number of consultancies and studies for the Ministries of Labour and Employment for Mainland; Labour and Empowerment for Zanzibar; ILO; ATE; TUCTA; COWI; CMA; Labour Court; the University of Dar es Salaam, the ELCT and the Institute of Judicial Administration, Lushoto.

Dr. Mtaki once served as Chairman of the Commission for Mediation and Arbitration (CMA) between 2012 and 2015. He retired from active service of the University of Dar-es-Salaam in 2013 and rehired on contract basis until July2018. He is currently serving as Dean at the School of Law and Justice, Tumaini University Dar es Salaam College.

Dr. Mtaki has widely written and published on Labour Laws. Among other works, includes; Review of Tanzanian Labour Laws Inconsistent with the EAC Common Market Protocol 2010, commissioned by UNDAP/ILO, Dar es Salaam, June, 2013; "Termination of Employment" (Chapter 4) in Rutinwa B. *et al* (Eds.) The Employment and Labour Relations Law in Tanzania 2011; Labour Rights in Tanzania: Paper Presented at the National Consultation Conference on Legal Empowerment of the poor,

Organised by the High Level Commission on the Empowerment of the Poor, 29th – 30th November, 2006, Kilimanjaro Kempinski, Dar es Salaam; *The Zanzibar Industrial Court Act 1994:* A General Overview: Paper presented at the Sensitization Workshop for Members of the Zanzibar Labour Law Reform Committee on Zanzibar Labour Laws, and Labour Related Legislation, 19th – 21st February 2003, Bwawani Hotel, Zanzibar; The Status of Conciliation Under the Labour Laws in Tanzania; Paper presented at the ILO/SLAREA National Training Workshop on Conciliation and Mediation in Tanzania, 21st – 24th October 2002, Mazsons Hotel, Zanzibar; Consultancy Report and Summary of Labour Law Cases Compiled from the Industrial Court of Tanzania 1980 – 2001 and the High Court of Zanzibar 1985 – 2001; presented at the ILO/SLAREA National Workshop on Validation of SLAREA Projects, September, 2002 Paradise Hotel, Bagamoyo, Tanzania; The Quest for Rule of Law in a Free Market Economy; The Tanzania Experience in Law in Africa, Rudiger Koppe Verlag, Koln, 2002.

Mr. Frank Mwalongo holds LL. B and LL.M from the University of Dar-es-Salaam and MBA from the Eastern and Southern African Management Institute (ESAMI). Mr. Frank has been in active legal practice as an Advocate of the High Court of Tanzania and other Courts

subordinate thereto from December 2005, hence practicing for over seventeen years, majoring in *inter alia* Litigation and Labour laws.

Mr. Frank has been widely recognized as an expert in labour laws including being invited by the Court of Appeal of Tanzania as an *amicus curiae* in controversial labour disputes, being invited by the High Court Labour Division in Tripartite User Committee as a presenter of issues in Employment Trends, being invited to CMA as the presenter in the Annual Retreat, and Presenter and Trainer to the Tanganyika Law Society organized seminars for eight years majoring on labour laws and practice, professional ethics and mentorship to young practitioners. Presenter on Special Induction Course of Honourable Judges of Zanzibar on the topic "The Court as Tool for Economic Development" held in Zanzibar on 4th August 2022.

Mr. Frank has published among other Articles in TLS journal on: (i) Labour Dispute Handling Procedure in Tanzania and (ii) The Dilemma in the Pecuniary Jurisdiction of the High Court of Tanzania.

Mr. Nuhu Mkumbukwa is an Advocate of the High Court of Tanzania and other Courts subordinate thereto and listed in the list of Arbitrators by the National Construction Council of Tanzania; Tanzania Institute of Arbitrators; and The Architect and Quantity Surveyors Registration Board.

He holds a Bachelor of Laws (LL. B) and Master of Laws (LL.M) of the University of Dar es Salaam. His areas of expertise are *inter alia* on Employment, Construction and Dispute Resolution. He is a trainer of trainer in Alternative Dispute Resolution (ADR).

Mr. Mkumbukwa is a member of the Association of the International Petroleum Negotiators (AIPN) based in Texas, USA; Tanganyika Law Society and East African Law Society, He is also Associate Member of the Chartered Institute of Arbitrators in London (CIArb), and Tanzania Institute of Arbitrators (TIA).

Traditionally, anyone who is not a party to the case and, he/she is in a position to assist the Court on any matter to reach a just decision, may apply to be an *amicus curiae*. Equally, the Court may on certain peculiar issues, seek for an opinion of *amicus curiae.* Such practice by the Court is vivid in *inter alia* cases of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd,** Misc. Civil Appeal No. 1 of 1999, Court of Appeal of Tanzania at Dar es Salaam and **in the matter of conflict of decisions of the Court of Appeal in Civil Appeal No. 19 of 1995 and in the matter of the full bench of the Court** (2000)TLR 288; **Chiriko Haruni David v. Kangi Alphaxard Lugora and and 2 Others,** Civil Appeal No. 36 of 2012; **The Attorney General v. Jeremia Mtobesya,** Civil Appeal

No. 65 of 2016 (on Bail), full bench of the Court (unreported); **Zakaria Mawela and 126 Others v. The Minister of Education and Vocational Training and the Attorney General,** Civil Appeal No. 3 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported).

In the process of handling this matter, the Court noted that there is no rule which provides for the accepted principles of choosing the *amici curiae.* However, in some of common law jurisdictions, notably **in the matter to intervene as *amicus curiae* by Prof. Oloka Onyango & 8 Others** arising from Election Petition No. 1 of 2016 between **Amama Mbabazi (Petitioner) and Yoweri Kaguta Museveni, and 2 Others,** Civil Application No. 02 of 2016, Supreme Court of Uganda at Kampala, in determining the admission of *amicus curiae*, the Court came up with the following accepted principles: *First*, participation of *amici* is purely at the discretion of the Court. *Second*, *Amicus curiae* can be important and relevant in matters where Court is of the opinion that the matter before it requires some kind of expertise which is in the possession of a specific individual. *Third*, the ultimate control over what the *amicus* can do lies exclusively with the Court. *Fourth*, the *amicus* must be neutral and impartial. *Fifth*, the submissions must be intended to give assistance to the Court it would not otherwise enjoy. *Sixth*, limited to engagement with matters of the law. *Seventh*, submissions draw attention to relevant

matters of law- useful, focused and principled legal submissions not favouring any of the parties. *Eighth*, the *amici* must have valuable expertise in the relevant area of law and general expertise in law does not suffice. *Nineth*, the points of law to be canvassed should be novel to aid development of jurisprudence. *Tenth*, the participation must be in the wider interest of public justice. *Eleventh*, the interest of the *amicus* is its 'fidelity' to the law. *Twelfth*, an *amicus* should address Court on points of law not raised by the parties but is of concern to the Court. *Thirteenth*, remind the Court of legal matters which have escaped the Court that may cause a wrong interpretation of law. *Fourteenth*, an *amicus* shall not introduce new or fresh evidence. *Fifteenth*, where in adversarial proceedings, parties allege that a proposed *amicus* is biased or hostile towards one or more of the parties, or where the Applicant through previous conduct, appears to be partisan on an issue before the Court the Court will consider such an objection by allowing the respective part to be heard on the issue. *Sixteenth*, the Court will regulate the extent of *amicus* participation in the proceeding to forestall the degeneration of *amicus* role to partisan role. *Seventeenth*, whereas consent of the parties to the proposed *amicus* role is a factor to be taken into consideration, it is not the determining factor. Furthermore, objections raised by the parties is a factor to be taken into consideration but is not the determining factor.

Against the above background, and there being no any objection to the chosen *amici curiae,* I can now approach the crucial question: *Are the two cited decisions raising a conflicting position?*

At the hearing, Deodatus Nyoni, Principal State Attorney while assisted by Ayoub Sanga, State Attorney, Lightness Msuya, State Attorney and Noel Steven Kimaro, State Attorney was of submission that both applications in the case of **William Ryoba Wambura** *(supra)* and of **Suzana Mwanyama** *(supra),* concerned with condonation but this Court came up with conflicting decision. Para 12 of the affidavit brought forth the powers of Mediator to hear and determine application for condonation.

To start with **the case of Wambura** *(supra),* it was the submission of Deodatus Nyoni that the Mediator refused the application for condonation. The reason was lack of sufficient cause. However, before this Court, Hon. Judge Galeba (as he then was) on 11th December, 2020 agreed with the position of the Mediator. He impliedly meant that the Mediator had such powers.

On the other hand, it was the submission of Deodatus Nyoni that; in the case of **Suzana Mwanyama** *(supra),* on 23rd September, 2022 this Court ordered the file be remitted to CMA to be determined by the Arbitrator on reason that the Mediator has no powers to hear and determine application for condonation. In this case, the Court relied on

the decision of **Barclays Bank T. Ltd v. Iyyam Matessa**, Civil Appeal No. 481 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported).

It was the contention of Deodatus Nyoni that in both **case of Wambura and that of Suzana** *(supra),* there is no any appeal. The High Court has issued various decisions including in the case of **Rui Wang v. Eminence Consulting (T) Ltd, Labour Revision No. 306 of 2022,** High Court of Tanzania Labour Division at Dar es Salaam (unreported) p. 17; **Simon Mzee Frank v. SBC Tanzania Limited,** Labour Revision No. 378 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported) p.10.

With the afore positions, it was the standpoint of Counsel Nyoni that there is sufficient point of law regarding the powers of Mediator to hear and determine the application for condonation. It was his prayer for this Court to issue a Certificate on point of law as per *Rule 53(1) of the Labour Court Rules (supra)* for consideration by the Court of Appeal of Tanzania.

In reply, Mr. Emmanuel Gervas Advocate, while stationed at High Court Musoma Sub-Registry proceeded virtually by sharing view with Counsel Nyoni that the decision of **the case of Wambura** *(supra)* and that of **Mwanyama** *(supra)* raises conflicting position. It was his submission that the law does not state at what point of time should the

matter be taken to the Mediator or Arbitrator. As such, there is a point of law to be certified by this Court.

Unfortunate Counsel Godfrey Tesha was unreachable. The Court could therefore not benefit from his input.

On his part, Mr. Emmanuel Charles Makungu, Advocate submitted that this Court is bound with the decision of **Ayyam Matessa** *(supra).* It was his opinion that there is no point of law. Mediators have no powers to determine issues of condonation.

On the other hand, Mr. Nixon Tugara, Advocate shared view that the High Court at Musoma held impliedly that Mediators have jurisdiction to entertain matters pertaining to condonation while this Court had express decision that Mediators lacks such jurisdiction. Mr. Nixon was therefore of position that this Court lacks jurisdiction to continue with this case. To buttress his position, Mr. Nixon made reference to the case of **Jumuiya ya Wafanyakazi v. Kiwanda cha Chapakazi ya Taifa** (1998) p. 146. All Courts are bound by the decision of the Court of Appeal. Thus, what was held by this Court in **the case of Suzana** *(supra)* was right based on the decision in the case of **Ayyam Matesa** *(supra),* p.15. It was his opinion, therefore that, the phrase "to decide" the complaint does not mean to "arbitrate." It was his view that, condonation is arbitration. The Mediators have no powers to entertain mediation.

In rejoinder, Counsel Deodatus Nyoni, was of submission that; the decision in **the case of Suzana** *(supra),* was a *ratio decidendi*. The Court gave reason and directive. It was very clear. The High Court jurisdiction is inherent, if there is any exception, it must be in accordance to the law.

On his part, Mr. Frank Mwalongo *amicus curiae*, was of the submission that; if one reads the decision in **the case of Wambura** *(supra),* the issue; whether Mediators have powers for entertaining matters on condonation was not raised and determined. But he conceded that in **the case of Suzana** *(supra),* the Court *suo moto* raised the issue of a Mediator, decided and gave direction. The Court held that the Mediator lacks such power.

It was Mr. Mwalongo's humble position that there is no direct conflicting decision between the two cases. There is an indirect implication of conflicting decision because in **the case of Wambura** *(supra),* the Judge decided the issue of condonation on merits. But he conceded that later there are direct decision made by this Court with clear position that a Mediator has power or has no power to entertain matters on condonation.

According to Mr. Mwalongo, at CMA, there are two works. To mediate or to arbitrate. The Mediator mediates after filing the case.

Though referral Form No. 1 is attached, the Labour case is yet registered. Counsel Mwalongo maintained that; a Mediator is not supposed to leave his primary role of mediation. Under *Rule 3(1) & (2) of the Labour Court Mediation and Guidelines (supra)*, the Mediator is an independent person. He is at the middle of the parties. If he is left to decide condonation, the middle role is lost. He already takes a side. *Rule 15 of G.N. No. 64 of 2007 (supra), cannot match with the Parent Act if read by Section 14 (1), 15, 19(1) of LIA and Section 87 of ELRA (supra).* The Rule cannot give substantive powers on jurisdictional issues including on condonation. *Rule 15 (supra)* has ceased the powers of the *main Act*.

Counsel Mwalongo maintained that the Court of Appeal of Tanzania has broadly discussed on the powers of the Mediators, but it has not specifically said if the Mediator has no powers to hear condonation. That is the issue which has to be decided by the Court in this Labour Reference.

On the other hand, Nuhu Mkumbukwa *amicus curiae*, joined hand with Counsel Mwalongo that the cited decisions are not expressly conflicting. In **the case of Wambura** *(supra),* the Court did not expressly state if the Mediator has jurisdiction to determine condonation. In **the case of Suzana** *(supra),* it was not an issue. It was an *obiter dictum.* It is an implied affirmation of jurisdiction position in conflict with an *obiter*.

It was Mr. Nuhu's humble view that, the Court cannot certify a point if it was not an express *ratio decidendi*. There are no points of law conflicting each other. Thus, if the Court pursues the indirect position, there are cases which expressly state that Mediators and Arbitrators have powers to determine condonation.

On the other hand, Mr. Nuhu submitted that there are cases of this Court which affirms an *obiter dictum* stated in **Suzana's case** *(supra).* It was Nuhu's position that Mediator has jurisdiction to determine condonation. One of the reasons is *Rule 15 (supra).* It gives powers to Mediators to entertain jurisdiction issues. There is neither any *Section in the Parent Act* that gives powers of Arbitration to the Arbitrator.

Counsel Nuhu went further to associate himself to the decision of Hon. Mkwizu in the case of **Ibrahim Joseph Mpanduji v. Bulyanhulu Gold Mine Limited,** Labour Revision No. 11 of 2021, High Court of Tanzania Labour Division at Shinyanga (unreported), who defines who is CMA. There is no direct express conflicting position. It was his view that; if the Court finds that there are other decisions which affects labour matters, it may give comments and refer it to the Court of Appeal of Tanzania.

Dr. Mtaki *amicus curiae* adopted his written submission. It was his contention that; what is being refereed here is on compulsory mediation.

It is a hybrid of traditional mediation. It includes powers to decide on condonation. He concedes that in **the case of William Ryoba Wambura** *(supra),* the Court did not expressly state that the Mediator has jurisdiction. But there is implied position. But in **the case of Suzana** *(supra),* the Court was very explicit that a Mediator has no jurisdiction. It was raised by the Judge. He used the phrase "in my opinion" which means it was an *obiter dictum.*

Dr. Mtaki was of the position that; it is not proper for this Court to certify that there is a point. He was of the view that; it is better for the Labour Commissioner to come afresh with the cases which are very clear with express position.

According to Dr. Mtaki, Section 65 of LIA (supra) gives powers to the Minister in association with LESCO (Labour Economic and Social Council). The regulation made by Tripartite is an expansion of *Section 3 (supra).* It does not derogate or conflict with *the Parent Act.* The Mediator has jurisdiction to determine on condonation. There is no express provision in **Ayyam Matessa's case** *(supra)* that bars them.

Having considered both parties submissions and that of the *amici curiae*, though I stand guided by the decision of the Court of Appeal in the case of **Jumuiya ya Wafanyakazi** *(supra),* I am conscious that, in

this ruling, I cannot make reasoning on which side is correct because that rests in the domain of the Court of Appeal. Even if I do, that will make no contribution towards a rational analysis of the matter. The sole jurisdiction of this Court is to decide *whether there are two conflicting positions of the law occasioned by the two cited decisions meriting consideration by the Court of Appeal* as per the requirement of *Section 58(2) of the LIA (supra)* and *Rule 53 of the Labour Court Rules (supra).*

Needless, I take note that the thrust of the Mediators to entertain matters are based on key five stages of mediation which are: *One*, introduction or opening statement. *Two*, gathering of information or opening remarks. *Three*, joint discussion and development of options. *Four*, private caucusing. *Five*, writing settlement agreement. Out of the five key stages of mediation, there are three phases of mediation which are: *First*, pre-mediation. Here is where form(s) are filled, served and filed if is within time (30- or 60-days rule) and here Mediation days commences when the referral is filed as per *Section 86(6) of ELRA (supra)* and served if there is application for condonation (out of 30- or 60-days rule) as per *Rule 11 and 29 of the G.N. No. 64 of 2007 (supra)* and registered. The delayed referral is referred to the CMA as per *Section 86 of ELRA (supra)* when application for condonation is granted and not otherwise unless

parties agree to consider delay as part of the factor in developing options in second phase.

Second, during mediation; here is when mediation commences, and parties start to negotiate assisted by a Mediator. On this phase, *Section 86 (4) of ELRA and Rule 3 of the G.N. No.67 of 2007 (supra)* comes in.

Third, after or post mediation- here parties sign a form and if there is agreement the next is execution but if there is no settlement, parties are at liberty to refer the matter to arbitration or adjudication or commence industrial action or decide to end up there.

It has to be noted under hybrid mediation, a Mediator is like a Chameleon where in a pre-mediation phase, a Mediator enjoys adjudicatory role. Reference may be made to *Rules 11 and 29 of the G. N. No. 64 of 2007 and Form No.2 of the G.N.No.47 of 2017(supra)*. So here one cannot invoke *Section 86 (4) of ELRA (supra) and Rule 3 of the G.N. No.67 of 2007 (supra)* because the dispute properly so called has not been referred to the CMA. The application has neither been granted nor dismissed.

However, when the application is denied or dismissed, the matter end up at the pre-mediation stage where *Section 86(4) of ELRA (supra) and Rule 3 of the G.N.No.67 of 2007 (supra)* have not been touched at all. But when the application is granted, the matter goes to phase 2 where

Section 86(4) of ELRA and Rule 3 of G.N.No.67 of 2007 (supra) commences to apply. It is presumed to be the date of referral of the dispute. Here reference may be made to *Rule 2, 11, and 29 of the G.N.No.64 of 2007 (supra).*

It is a principle that where a dispute is referred out of time, (the 30-day period) under *Section 86(4) of ELRA (supra)* within which the CMA must Mediate a dispute, only starts to run once condonation has been granted and the CMA has established jurisdiction over the dispute. Therefore, under the current labour laws Mediator is crafted to have hybrid character that is mediatory and adjudicatory powers as distinguished to ordinary or orthodox Mediator who has only mediatory power.

I have further noted from the written submission of the *amici curiae* there is an observation that the statute must be construed as a whole and not in a piecemeal, otherwise it can lead to absurdity. In addition, mediation must be understood as a whole in the sense of ordinary or orthodox or common as well as modern or statutory one and on the other hand phases must be well understood and at which phase a Mediator plays which role and for which purpose intended to achieve.

With the afore brief points, in addressing the inexplicable issue, I find worth to consider some questions posed by parties in this application.

To start with; *whether this Court has jurisdiction to entertain this application*, the relevance provision is *Section 58(1)(a) of the Labour Institution Act (supra)* and *Rule 53 of the Labour Court Rules (supra)* which gives power to this Court to exercise its discretion power of certifying existence of point of law or not, in case there is a conflicting position.

At this stage, here comes the importance of understanding the following concepts. "Ratio decidendi" or plural *"rationes decidendi"* is a Latin phrase meaning "the reason" or "rationale" for the decision. It is the principle that the case establishes. According to **Black's Law Dictionary,** 9th edition, *"ratio decidendi"* refers to a rule of law upon which the decision is founded. It is a key factual point or chain of reasoning in a case that drives the final judgement. It is a legal rule derived from, and consistent with, those parts of legal reasoning within a judgement on which the outcome of the case depends. It is a binding precedent and, through the doctrine of *stare decisis, "ratio decidendi"* must be applied in all other cases in lower courts that have the same facts or are looking on the same point of law.

Having gone through the entire judgement in **the case of Wambura** *(supra),* there is neither a single argument put by the Advocates or the Parties or their Advocates in the case nor reasoning by the Court on the

issue; *whether Mediators have jurisdiction to entertain matters relating to condonation*. In other words, the issue; *whether Mediators have jurisdiction to entertain matters relating to condonation* was not fought for by the parties and the court never decided it explicitly.

According to **Black's Law Dictionary** *(supra), "Obiter dicta"* literally in plural or "*obiter dictum"* in singular or less commonly *"obiter"*, often shortened to "*dictum"* is a Latin phrase meaning "things said by the way." "Something said in passing". It is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).

"Obiter dicta" are hypothetical situations considered by a Judge that are not part of the Judgement. It can be a minority decision. A remark made or opinion of a Judge say what he would have decided had he not been bound by *stare decisis*. It is a statement of law enunciated by a Judge or a Court merely by way of illustration, argument, analogy or suggestion. It is a rule of law stand by a Judge which was neither expressly or impliedly treated by him as a necessary step in reaching conclusion. It does not bind a Judge in a later case with similar facts or point. *Obiter dicta* are statements of opinion upon the law and its value

and principles in their bearing on the decision. "*Obiter dicta*" usually goes beyond the points necessary to be settled in deciding the case.

In the circumstances, I am of the view that Mr. Nixon's allegation regarding jurisdiction of certifying point of law is devoid of merits, on the reason that this matter requires determination of one issue only, *whether there is a point of law or not in terms of Rule 53(1) of the Labour Court Rules (supra)*. Since there is no appeal filed by any of the parties, in both cited cases, to the Court of Appeal, I am of the increasing view that raising the issue of jurisdiction basing on nature of this application lacks legal back up.

Reverting to the issue; *whether the decision issued in* **the case of Wambura** *(supra),* as far as the powers of a Mediator in condonation are concerned, impliedly meant that Mediators have such powers, but in **the case of Suzana** *(supra) it was a mere obiter dictum.* In answering such question, there three thoughts on the impugned two decisions: *First*, there is an admission that there is a conflicting position. *Second*, there are no conflicting decisions. *Thirdly*, there is indirectly conflicting decision.

The above thoughts justify parties' admission that there is an indirect or no express conflicting decision. In establishing as to whether there is a need of certification, I find worth to consider submission made

by both parties regarding decision issued on the issue of condonation in **the case of Wambura** *(supra)* and in **the case of Suzana** *(supra).*

As regards **the case of Wambura** *(supra),* contrary to the decision issued by the Mediator, the application for condonation was not granted for lack of sufficient or good cause. The reasons adduced including lacking financial resources, ignorance of law or having matrimonial dispute were not grounds warranting condonation. The Court did not expressly state that Mediators have powers to entertain matters pertaining to condonation but impliedly held so.

In view of the foregoing, neither *ratio decidendi* nor *obiter dicta* can be harnessed in **the case of Wambura** *(supra)* in relation to the vexing issue. The Court in **the case of Wambura** *(supra)* expressly stated that it did not find any illegality on the part of the CMA in the manner the CMA dealt with and disposed of the application for condonation. Therefore, by necessary implication, it appears that the Court affirmed that CMA has jurisdiction to determine an application for condonation.

In **the case of Suzana** *(supra),* the matter was dismissed for the reason of omission of signing and inserting date immediately before signing verification clause. The High Court while revising the CMA ruling, issued an order for the matter to start afresh on the reason that it wrongly dismissed the matter. The Court went further to direct that the application

on condonation should be determined by the Arbitrator because Mediators have no such powers. There is neither a single argument put by the Advocates or the Parties in **the case of Suzana** *(supra)* on the issue; *whether Mediators have jurisdiction to entertain matters relating to condonation*. But the Court *suo motu* raised it in its reasoning and went ahead to give a position. Though not litigated, the Court treated the issue of jurisdiction of Mediators as a necessary step in reaching its conclusion. As such, it cannot be said a mere *obita dictum.*

Apart from the fore positions, I must mention in addition that, parties were in dilemma, as to whether **Ayyam Mattesa case** *(supra)* address the issue relating to powers of a Mediator in entertaining application for extension of time by having different view on the same. At length, the discussion in this application is*; whether what were issued in both decisions amount to conflicting decisions meriting consideration by the Court of Appeal of Tanzania.*

Applying the principles espoused in the two cases regarding the jurisdiction of a Mediator to entertain the matter relating to condonation, I am of the view that the reference made by the Labour Commissioner poses implied conflicting decision.

I also agree with the *amici curiae* that this Court has explicitly pronounced itself that Mediators have jurisdiction to entertain matters

pertaining to condonation in other including cases of **Rui Wang** *(supra);* **Simon Mzee Frank** *(supra);* **Koba Said Mdoe v. R and K Trucking Co. Ltd,** Labour Revision No. 410 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported) and the case of **Juma Masunga Mayenga v. Kembo Matulanya Mpagulwa**, Labour Revision No. 56 of 2018, High Court of Tanzania Labour Division at Shinyanga (unreported).

Indeed, as opined by Frank Mwalongo, Nuhu Mkumbukwa and Dr. Cornel Mtaki, *amici curiae*, the cases of **Benjamin Lazaro Isseme v. Insaat Ve Sanayi Anonim Sirket**, Revision Application No. 26 of 2023, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Lucas Abel Bumela and Another v. CRC Groupe Ltd K.N.Y Desert Eagle Hotel,** Revision Application No. 41 of 2023 High Court of Tanzania Labour Division at Dar es Salaam (unreported); and the case of **Tanzania Cigarette Public Ltd Company v. Nancy Mathew Kombe**, Revision Application No. 421 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported); have held that; *the Mediator is not vested with powers to determine condonation.* Hence, there is a need for the Court of Appeal of Tanzania to consider the referred cases by interpreting the provisions of *Section 20 of LIA, Rule 15 of GN No. 64 of 2007 and Section 3 of ELRA* on the context of the enactment of *LIA and ELRA and the Rules* thereof.

For all these reasons, and for the reasons given by my noble and learned friend, Dr. Cornel Mtaki, Mr. Frank Mwalongo and Mr. Nuhu Mkumbukwa (*amici curiae*) in their written submissions and amplified in oral clarification before the Court and that of Deodatus Nyoni, Principal State Attorney on the part of the Labour Commissioner and of Emmanuel Gervas Advocate, Emmanuel Charles Makungu and of Nixon Tugara, on the part of the interested parties, with which I take of the matter, and heartedly taking into consideration that large part of the society appearing before the CMA and the CMA itself are being in dilemma on the powers of the Mediators on condonation matters, I hereby allow this application for clear consideration by the Court of Appeal of Tanzania. It is so ordered.

Y. J. MLYAMBINA
JUDGE
15/08/2023

Ruling delivered and dated 15th day of August, 2023 in the presence of Lightness Msuya, learned State Attorney for the Applicant (Labour Commissioner) and learned Counsel Bernadeta Mwita for the Applicant and Nixon Tugara for the Respondent in *Labour Revision No. 191 of 2022 (supra)* (interested parties).

Y. J. MLYAMBINA
JUDGE
15/08/2023