

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REV NO.92 OF 2023

(Arising from Labour Dispute with Reference No. CMA/DSM/KIN/011/21/102 before Hon. Makanyaga, Arbitrator, Commission for Mediation and Arbitration at Kinondoni, Dar es Salaam)
ATLAS MARK GROUP LTD.....APPLICANT

VERSUS

KENNEDY OUMA OMOTE.....RESPONDENT

JUDGEMENT

Date of last Order: 14/08/2023

Date of Judgement: 08/09/2023

MLYAMBINA, J.

This matter is for an order calling and revising the Award of the Commission for Mediation and Arbitration at Kinondoni (herein CMA) in *Labour Dispute with Reference No. CMA/DSM/KIN/011/21/102*. The application has been supported with the Affidavit Sworn by Conradus Felix, Advocate of the Applicant from Conrad & Associate Advocates. The main issue for determination arising out of the legal preliminary objection before this Court is; *whether the CMA had jurisdiction to entertain the Labour dispute*. By way of orbiter, the Court shall also opine on the issue *whether salaries can be paid in form of the vehicle given to the Respondent by the Applicant*.

It was the Applicant's submission in chief that time Limit is one of jurisdictional issue. Thus, the Law governing time limit for filing disputes

about unpaid salaries at CMA is *Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007*. The provision requires disputes about unpaid salaries be filed within 60 days. To back up the argument, Counsel Conrad cited the case of **Small Industries Development Organisation v. Edwin A Mwagulu** (2013) LCCD No. 51 which ruled as follows:

The Preliminary objection on limitation of time touches the CMA jurisdiction which is fundamental issue that a court, CMA or any office vested with such powers when entertaining the matter before it...

It was the submission of Counsel Conrad that under any circumstance no any person can commence a dispute about unpaid salaries for 16 months without condonation application yet be deemed to file such dispute within prescribed 60 days. The Respondent in this matter commenced a Labour dispute against the Applicant claiming payment of 16 months salaries arrears. It was the Applicant's argument that a matter filed on 7th January, 2022 contravenes the afore cited *Rule 10(2) of the Labour Institutions (Mediation and Arbitration)*. The reason being that on average, a monthly salary is paid after 30 days. Therefore, if at all the Respondent claimed 16 months unpaid salaries, it is good as, the dispute between the Applicant and

Respondent rose 1095 days before it was filed at CMA. To buttress such view, he cited the case of **Tanzania Telecommunication Co Ltd v. Bwire Nyamwero** (2013) LCCD NO. 191 wherein the court had this to say regarding as to when the dispute arose:

(iii)...it is my firm opinion that the dispute arose on 16/10/2018 or on 8/9/2009 when TTCL made it clear that it was not going to oblige Mr. Bwire's request, (iv) in view of that premise, I find that the dispute was filed out of time consequently the CMA had no jurisdiction to deal with it without condonation...

In this regard therefore, it was the Applicant's considered argument that a dispute between parties herein rose the first month when the salary (if any) was not paid.

According to Counsel Conrad, procedurally for such matter to be tenable before the CMA, the Respondent was supposed to preface the Labour dispute with condonation application form (Form No. 7) wherein he ought to have accounted for the delay of 1095 days. Short of that, the trial Arbitrator at the CMA had no jurisdiction to entertain the *Labour Dispute with*

reference number CMA/DSM/KIN/011/21/102 for the matter was filed out of prescribed period of time.

It was further pointed out by Counsel Conrad that, during cross examination in chief of the Respondent's case, the Respondent confirmed the position that a matter was filed after 60 days when trying to list out all 16 months unpaid salaries. Such fact is evident at page number 5 of the impugned award to be February 2018, March 2018, April 2018, May 2018, June 2018 and October 2018 to mention but few. As such, under no any circumstance the CMA can be deemed to have jurisdiction on 7th January, 2022 to try and determine the dispute which arose on February 2018, that being almost 3 years which is equivalent to 1095 days without at least condonation application. On the remedy available for the matter filed out of time, Counsel Conrad cited the Court of Appeal of Tanzania decision in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 (unreported), p. 15 where the Court had this to say:

Finally, therefore there was no basis for the learned High Court Judge to strike out the complaint that had been presented in court after expiration of 60

days...in view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3(1) of the Act to dismiss the complaint instead of striking it out as she did...

On the issue; *whether it is legally allowed by Labour laws to pay salaries in other forms other than monetary ones*, Counsel Conrad submitted that at page number 9 and 10 of the Award, the trial Arbitrator was of the considered reasoning that Respondent's salaries were paid in form of the vehicle given to the Respondent by the Applicant.

It was the view of Counsel Conrad that it is the principle of Labour laws that salaries shall be paid in monetary forms and not otherwise. In this regard, according to Conrad, it is strictly prohibited by the Labour Laws for the employer to pay salaries of the employee in form of say kilograms of beans, sugar, buying them houses etc. It is however allowed by the Labour Laws and in some instances, it has been done by the Applicant to his employees whereby the Applicant gives cars and houses allowances to his employees so that working environment becomes friendly one. But these allowances are never substitute of salaries. It is at this juncture, Counsel Conrad faulted the reasoning of the trial Arbitrator at page 10 whereby he

ruled that the car given by the Applicant to the Respondent was the substitute of his salary arrears.

In response, on whether the trial Arbitrator was moved to grant payment of sixteen months unpaid salaries without condonation application, the Respondent's Counsel one Boniphace Meli distinguished the case of **Tanzania Telecommunication Co. Ltd** (supra) with the matter at end. According to Counsel Meli, in the matter at hand the complainant was claiming his salary arrears while he was still working with his employer and the employer was still paying him salary although not full salary and was not paid on each month, while in the cited case, the complainant was claiming his severance payment after his retirement 5 years back.

Counsel Meli was of submission that it is ostensibly from the CMA record that the Respondent has been writing several letters to the Applicant claiming his salary arrears. However, the Applicant remained silence to heed on the Respondent's claims by continuing paying him low salary compared to what he ought to have been paid. The Respondent tendered a letter of salaries accumulation arrears which was admitted as EXHIBIT K-4 and it was neither objected nor cross examined by the

Applicant.

Counsel Meli maintained that it is in the CMA record that the Respondent testified that his last two salaries was paid via his colleague Bank Account UBA one Esther Kirundi on 24/09/2020 and the other salary arrears at the tune of 10,000,000/= was paid to the Respondent on 13/11/2020 after the Respondent has entered into contract with complainant where the complainant was given a motor vehicle make Toyota 1ST registered as T 802 DTU as part of his salary arrears which was deducted from the Respondent's salaries arrears at the tune of 18,194,730/=. To prove this, the Respondent tendered the Sale Agreement of the said Motor Vehicle which was admitted by the commission as EXHIBI K-5. He cited the case of **Kaserkandis Constraction Transport Co. Ltd v. Sabastian Mathias Sabai**, Labour Revision No.10 of 2020, High Court Labour Division at Musoma (unreported), in which the Court while quoting the Provision of *Section 7 of the Law of Limitation Act Cap 89 Revised Edition 2019* was of the view that:

Where there is a continuing breach of contract or continuing wrong independent of the contract a fresh

period of limitation of time shall begin to run at every moment of the time during which the breach or the wrong, as the case may be continues.

The same above principle was stated in the case of **Registered Trustee of Chamazi Islamic Centre v. Ibrahim Isack Rwegoshora**, Revision No.55 Of 2020 High Court Labour Division at Dar es Salaam (unreported) quoted with approval the case of **Yaaguib Ismail Enzron v. Mbaraka Bawaziri Filling Station**, Labour Revision No.33 of 2018, High of Tanzania Labour Division at Dar es Salaam (unreported).

Having dutifully considered the submissions of both parties at length, the Court is of the findings that payment in kind is non-cash remuneration received by an employee for work performed. This can include food, drink, fuel, clothing, footwear, free or subsidized housing or transport (eg vehicle, bicycle, motorcycle), electricity, car parking, nurseries or crèches, low or zero-interest loans or subsidized mortgages. The **ILO Convention No. 95 on Protection of Wages Convention, 1949 (No. 95)** through its Article 4.1 allows for the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form

of such allowances is customary or desirable because of the nature of the industry or occupation concerned. In such cases, it calls however for measures to ensure that:

- (a) "such allowances are appropriate for the personal use and benefit of the worker and his family"; and
- (b) "the value attributed to such allowances is fair and reasonable".

At National level, *Section 15 (1) (h) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* also allows payment of salaries in kind. It provides:

Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences with the following particulars in writing, namely-

- (a) name, age, permanent address and sex of the employee; (b) place of recruitment; (c) job description; (d) date of commencement; (e) form and duration of the contract; (f) place of work; (g) hours of work; (h) *remuneration, the method of its calculation, and details of any benefits or payments in kind; and* (i) any other prescribed matter.

[Emphasis added]

Though both international and national legislations allow payment of remuneration in kind, it must be kept in mind that such kind of payments tends to limit the financial income of workers. As such, it is likely to be abused. Hence, there is a need for legislative protection at both International and National level.

Needless the above general observation, I entirely do agree with Counsel Conrad that the question of time limitation goes to the root of the jurisdiction of the CMA. In the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula**, Civil Appeal No 161/1994, Court of Appeal of Tanzania at Mwanza (unreported) where it was held that:

The question of limitation of time is fundamental issue involving jurisdiction...it goes to the very root of dealing with civil claims, limitation is a materia point in the speedy administration of Justice. Limitation is there to ensure that a party does not come to court as and when he chooses.

Given the fact that the Respondent herein was late to prefer his claims, he had a legal duty to commence such claims by an application for condonation in which, the CMA could be guided by *Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64/2007* that

requires a party to furnish good cause. Apart from *Rule 31 (supra)*, *Rule 11 (3) of the GN No. 64/2007* provides that:

An application for condonation shall set out grounds for seeking condonation and shall include the referring party's submissions on the following: a) The degree of lateness; b) The reasons for lateness; c) Its prospects of succeeding with the dispute and obtaining the reliefs sought against other party; d) Any prejudice to the other party; and e) Any other relevant factor.

Since the claims was filed out of time, in the light of the decision in the case of **Tanzania Telecommunication Co Ltd** (*supra*), I find that the CMA had no jurisdiction to deal with it without condonation.

Even if I may agree with Counsel Meli that in the matter at hand the complainant was claiming his salary arrears while he was still working with his employer and the employer was still paying him salary, there is an admission that the employer was not paying full salary and was not paying on each month. There was no such claim preferred before the CMA within time limit.

Again, if I may agree with Counsel Meli that the Respondent has been writing several letters to the Applicant claiming his salary arrears without any

success, still such claim may be a good ground on application for condonation but not on the application on merits of the substantive claims.

In the end result, I hereby grant this application. The impugned CMA award *with Reference No. CMA/DSM/KIN/011/21/102* is hereby set aside with no order as to costs.



Y.J. MLYAMBINA

JUDGE

08/09/2023

COURT:

Judgement delivered and dated 8th September, 2023 in the presence of learned Counsel Conrad Felix for the Applicant and Conrad Felix holding brief of Boniface Meli for the Respondent.



Y.J. MLYAMBINA

JUDGE

08/09/2023