

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 233 OF 2023

(Arising from a Ruling delivered on 10/5/2023 by Hon. M. Chengula, arbitrator, in Labour dispute No. CMA/ DSM/ILA/105/2023 at Ilala)

TULIPO MWEREKE..... APPLICANT

VERSUS

TAIFA GAS TANZANIA LTD RESPONDENT

JUDGMENT

Date of last Order: 5/02/2024
Date of Judgment: 22/02/2024

B.E.K. Mganga, J.

This application reminds me the statement by Makame, JA (as he then was) in the case of ***Mwihambi Lumambo v. The Republic*** [1984] T.L.R 336 (CA) at page 340 that “...wonders are many, but the greatest of them all is man.” I have been forced to remember those words due to what I have read in this application. I would say, from the outset that, this is one of the labour disputes where parties are either not properly guided by their counsel or they are properly guided but stick on what they believe. This is an application in which the parties have been pulling muscles against each other since 2017 and using even

dirty means to achieve their means as I will demonstrate in this judgment.

Brief facts of this application are that, on 17th February 2017, Tulipo Mwereke, the abovementioned applicant, filed labour dispute No. CMA/DSM/ILA/R.197/17 before the Commission for Mediation and Arbitration henceforth CMA at Ilala against Mihani Gas Company Limited now Taifa Gas Tanzania limited, the abovementioned respondent. In the Referral Form (CMA F1) applicant indicated that the dispute was relating to termination of employment and prayed to be reinstated without loss of remuneration. She further indicated that her employment relationship with Mihani Gas Company Limited started on **1st March 2016**, but the said employment was terminated on **23rd January 2017**, reason thereof alleged to be incapability. She also indicated that, the principles of natural justice were not adhered to, at the time of termination of her employment which caused termination to be unfair procedurally. In the said CMA F1, applicant did not indicate the amount she was claiming from the respondent due to the said alleged unfair termination. Hon. P.M. Chuwa, arbitrator, who heard evidence of the parties, issued an award that, termination was fair substantively but procedurally unfair. Based on those findings, the arbitrator awarded applicant to be paid

Three Million Five Hundred Fifty Thousand Tanzanian Shillings (TZS 3,550,000/=)only.

Aggrieved with the said award, applicant filed Revision No. 253 of 2019 but the said application was struck out on 31st August 2020 by this court(Hon. Z.G. Muruke, J, as she then was) because the application was supported by a defective Notice. Applicant did not give up. She followed the requisite procedures and managed to file Revision Application No. 65 of 2022. On 18th November 2022, when the said Revision Application No. 65 of 2022 was called on for hearing, Frank Kilian advocate for the applicant and Sosten Mbedule, advocate for the respondent, upon being probed by the court, conceded that proceedings of the Commission for Mediation and Arbitration(CMA) were a nullity because there were irregularities that were fatal. It came out clearly that, Hon. P.M. Chuwa, arbitrator, who arbitrated the parties, hijacked the file and proceeded to arbitrate the parties in violation of the provisions of section 88(2) and 3(a) of the Employment and Labour Relations Act[Cap.366 R.E. 2019] and section 15(1)(b) of the Labour Institutions Act[Cap. 300 R.E. 2019]. Based on those submissions, I issued a ruling that nullified CMA proceedings, quashed, and set aside the award and ordered trial *de novo* before a different arbitrator. See

[Tulipo Mwereke vs Mihan Gas Co.Ltd \(now Taifa Gas Tanzania](#)

Limited (Revs Appl No. 65 of 2022) [2022] TZHCLD 1086 (18 November 2022).

It is alleged that, when the parties went back to CMA, applicant prayed to change the name of the respondent from Mihan Gas Company Limited to Taifa Gas Tanzania Limited, the respondent. It is further alleged that, applicant prayed also to amend the dispute from unfair termination to breach of contract and that, respondent did not have objection. It is said that, based on applicant's prayer, Hon. Lucia Chrisantus Chacha, arbitrator, granted the prayer and ordered applicant to file a new dispute within 21 days.

On 14th February 2023, Applicant filed Labour dispute No. CMA/DSM/ILA/105/2023 before the Commission for Mediation and Arbitration(CMA) at Ilala against Taifa Gas Tanzania Limited, the abovementioned respondent. In the Referral Form(CMA F1), applicant indicated that, her employment relationship with the respondent started on **1st March 2016** when the two entered a two-year fixed term contract of employment. She also indicated that, the dispute between the two arose on **31st January 2017** when the respondent breached the said contract and that, she was not paid repatriation expenses. Based on the foregoing, applicant indicated in the said CMA F1 that, she

was claiming to be paid a total of Forty Million Tanzanian Shillings (TZS 40,000,000/=) only. Applicant attached to the said CMA F1 an order issued on 3rd February 2023 by Hon. Lucia Chrisantus Chacha, arbitrator.

On 28th March 2023, respondent filed the Notice of preliminary objections with two grounds namely:-

- 1. That the Labour dispute is time barred.*
- 2. The Labour dispute is incompetent as the said order was of the Commission is not attached.*

When the matter was called on 12th April 2023, for hearing the aforementioned preliminary objections, Mr. Sosten Mbedule and Hellen Ngelime, advocates, appeared and argued for and on behalf of the respondent while Mr. Frank Kilian, Advocate argued for and on behalf of the applicant. In their submissions in support of the preliminary objections, counsel for the respondent abandoned the 2nd ground and argued only the 1st ground. On 10th May 2023, Hon. M. Chengula, arbitrator, delivered his ruling sustaining the preliminary objection that the application is time barred and dismissed the dispute. In the said ruling, the arbitrator held that, in the CMA F1, applicant included new claims without first filing and application for condonation and without the order for condonation.

Applicant was aggrieved with the aforementioned ruling that dismissed the dispute of breach of contract and the claim of TZS 40,000,000/= for being time barred hence this application for revision. In her affidavit in support of the application, applicant raised two issues namely:-

- 1. Whether it was proper for the trial Mediator to hold that the dispute was time barred.*
- 2. Whether the trial arbitrator properly evaluated the evidence of the parties.*

Respondent resisted this application by filing both the Notice of Opposition and the Counter affidavit sworn by Sosten Mbedule, her advocate.

On 29th November 2023 when this application was called on for orders, the parties prayed to argue it by way of written submissions and the order was issued to that effect. In compliance of this court's order, applicant enjoyed the service of Mr. Frank Kilian, learned advocate while the respondent enjoyed the service of Mr. Sosten Mbedule, learned advocate.

In his written submissions in support of the application, Mr. Kilian, advocate for the applicant submitted that, the arbitrator erred in holding that applicant filed the new dispute without obtaining leave of the Commission while the said leave was sought and obtained without

objection on 14th February 2023 when applicant prayed to amend the name and the cause of action. He submitted further that, the amendment initiated by the applicant was made in accordance with the order of the Commission and that, the allegation that the dispute is time barred has no merit.

Arguing the 2nd issue, Mr. Kilian submitted that, the Mediator did not scrutinize the order that was issued by Hon. Lucia Chrisantus Chacha, arbitrator, that specified the two areas of amendment, hence, ended up erroneously, holding that applicant introduced new prayer without leave of the commission. He argued further that, the Mediator's role was to mediate the parties and after failure of mediation, she was supposed to forward the matter to the arbitrator for purposes of determination of legal issues and not to dismiss the dispute without even mediating the parties. Counsel for the applicant concluded his submissions praying that the application be allowed by revising the impugned ruling, the matter be returned to CMA to proceed with mediation before another competent mediator.

Responding to the 1st issue, Mr. Mbedule, learned counsel for the respondent, briefly submitted that, in 2017 applicant filed the dispute for unfair termination and prayed to be reinstated without loss of remuneration but, on 14th February 2023, she filed a new dispute for

breach of contract praying to be paid TZS 40,000,000/= and that, there was no leave. He maintained that the new dispute was time barred.

In regard to the 2nd issue, counsel for the respondent submitted in few words that, the matter was disposed through preliminary objection and prayed the application to be dismissed for want of merit.

I should point out that, Applicant did not file rejoinder submissions hence there will be no reference to rejoinder submissions in this judgment.

I have examined the CMA record and considered submissions of the parties and find that, it is undisputed that, on 17th February 2017, applicant filed labour dispute No. CMA/DSM/ILA/R.197/17 against Mihan Gas Company Limited now Taifa Gas Tanzania limited, the respondent. It is also undisputed that, in the said labour dispute, applicant complained that she was unfairly terminated and prayed to be reinstated without loss of remuneration. It is further undisputed that, on 18th November 2022, this court nullified CMA proceedings in Labour dispute No. CMA/DSM/ILA/R.197/17, quashed the award arising therefrom and ordered trial de novo before a different arbitrator. See the case of [*Tulipo Mwereke vs Mihan Gas Co.Ltd \(now Taifa Gas Tanzania Limited\)*](#) (Revs Appl No. 65 of 2022) [2022] TZHCLD 1086 (18 November 2022). The dispute that was supposed to be heard by a

different arbitrator, according to the order of this court in the above cited case, is unfair termination and the relief of reinstatement without loss of remuneration. The order of trial de novo was not a ticket for the applicant to change the nature of the dispute. Therefore, any change of the nature of the dispute was supposed to be made subject to the provisions of Rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that provides time within which the dispute can be filed at CMA.

It was submitted by counsel for the applicant that, while before Hon. Lucia Chrisantus Chacha, arbitrator, applicant prayed to amend the nature of dispute from unfair termination to breach of contract and that the prayer was granted as there was no objection by the respondent. It was further submitted on behalf of the applicant that, she was granted 21 days within which to file a new dispute. As pointed at the first paragraph of this judgment, wonders are many. In fact, wonders will never end, and one may also wonder, as to what happened in this application. Indeed, this application reminds me the story by Brendon Thutso in his book titled "Wonders will never end" wherein frankly speaking, he demonstrates how search for truth can be a long process and not uneasy task. The author challenges his readers probably, we judicial officers, as to how we will adjudicate a hypothetical case with

facts showing that it is happening now. Facts of that hypothetical are that, "A respected wealthy musician was murdered. His relatives started scrambling for his assets, since he never claimed to have a spouse or any children. In the midst of his funeral, many women surface and claim to be the wives of the deceased. They all have children that they claim belong to the deceased. The women start fighting each other and the relatives are in denial. They do not believe any of the women's testimonies. All women try to provide proof if they were really the spouses of the deceased and if their children belong to the deceased. The adventure is in discovering who the real wife is, who will get the assets and who killed the deceased."

In the application at hand, I am facing difficulty to find quick answers on the issues whether, applicant was granted 21 days leave to file a new dispute or not and whether, the new dispute he filed was within the ambit of the law or not. To have answers on those issue I have to passionately read the CMA record.

While counsel for the applicant submitted that applicant prayed to amend the dispute and that the prayer was granted as it was also not contested by the respondent in this application, my undertaking is to discover whether the prayer was made by the applicant and the order of refiling the new dispute within 21 was issued or not.

*Mlalamikaji ameomba abadilishe CMA F.1 kwa kuwa mlalamikiwa aliyeandikwa ni Mihan Gas Company Limited. Tumepitia record za BRELA mlalamikiwa anaitwa Taifa Gas Tanzania Ltd tangu tarehe 20/3/2020. Nakala ya cheti cha BRELA ipo hapa. Ikiendelea mlalamikaji hataweza kukaza hukumu, pia **mlalamikaji alikuwa na mkataba wa muda alijaza unfair labour Practice badala ya breach of contract.** Kwa sababu hizo, **naomba kuondoa mgogoro ili kurudi tena.** Mlalamikiwa ameridhia. **Shauri limeondolewa ataleta akihitaji tena kwa sheria.** Nawasilisha.*

Sgd

3/2/2023. (Emphasis is mine)

It is clear from the above quoted proceedings and that, there was no prayer by the applicant to change the name of the respondent and the nature of the dispute. It is also clear that, respondent was not asked to comment contrary to what is recorded in the order that respondent did not have objection. More so, the order itself marked the dispute as withdrawn with leave to refile. The quoted order clearly show that Applicant was not given the alleged 21 days within which to file a new dispute. It may be true that, what was submitted by both counsel in this application that a prayer was made at CMA to withdraw the dispute, but as pointed hereinabove, that is not reflected in the CMA proceedings. I have to be guided by what is recorded in the CMA proceedings and not submissions of the parties because proceedings are presumed to be authentic unless proved otherwise. Since CMA proceedings doesn't show

any prayer by the applicant to withdraw the dispute that was ordered by this court to be heard *de novo* by another arbitrator at CMA, I find that the above quoted handwritten order cannot stand.

I have also noted that, on 14th February 2023, at the time of filing the new dispute namely, Labour dispute No. CMA/DSM/ILA/105/2023, applicant attached a typed order dated 3rd February 2023 signed by Hon. Lucia Chrisantus Chacha, arbitrator, showing that (i) applicant prayed to amend the name of the respondent and the nature of the dispute from unfair termination to breach of contract, (ii) respondent did not object and that (iii) she granted applicant 21 days within which to file the new dispute. The said typed order reads:-

"This is an order for withdrawing complainant dispute following Advocate for the complainant prayers to, because when the dispute continued the respondent changed name from Mihani Gas Company Limited to Taifa Gas Tanzania Limited (tendered exhibit P1-Certificate of Change of Name no. 52508.

In addition, the complainants' advocate explained that, the complainant was working for fixed term employment contract and cannot challenge termination, a proper nature of the dispute to challenge is breach of contract. The complainant was represented by learned Advocate Frank Kilian and Respondent enjoyed representative service of learned Advocate Africa Mazoea who agreed with Complainants' prayer.

The Commission granted complainants' prayers and struck out CMA F1, complainant is allowed to file the dispute within 21 days. It is so ordered.

*Dated and delivered at **Dar es Salaam** this **03** day of **February, 2023.***

Sgd

...”

The said typed order is also in the CMA file No. CMA/DSM/ILA/R.197/17. Reading the two quoted orders namely, the handwritten and the typed one, I find that, there are discrepancies in the two orders though it is purported to have been issued on the same date in respect of the same prayer by the parties. Normally, when there is discrepancy between typed proceedings or order and the handwritten, the handwritten is presumed to be authentic. I therefore find that, the handwritten order quoted hereinabove is authentic.

It is clear from above that, while the typed order shows that applicant was granted 21 days leave to file another dispute after the one that was pending was struck out, the handwritten order simply shows that the initial dispute was withdrawn with leave to refile without stating time within which to file a fresh dispute. Be as it may, in my view, some words were inserted in the typed order especially, the 21 days leave within which to file a new dispute while the same is missing in the handwritten order. In my view, that was intended to help the applicant to circumvent the Provisions of Rule 10(1) and (2) and Rule 11 both of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 that provided time within which disputes shall be filed at CMA and requirement for the applicant to apply for condonation.

The most disturbing issue in this application is, absence of the prayer by the applicant to amend or withdraw the dispute relating to fairness of termination of her employment or comment by the respondent, yet the order showing that prayers and comments were made. It was the arbitrator who fed in the mouth of the parties, words showing that applicant prayed to withdraw the dispute and that respondent had no objection. For the foregoing, hereby nullify CMA proceedings dated 3rd February 2023, quash, and set aside the above two quoted orders that purported to show that applicant withdrew the dispute relating to termination of her employment and the order that purported to grant applicant 21 days leave to file a new dispute.

As pointed out hereinabove, on 14th February 2023, applicant filed a new dispute relating to breach of contract claiming to be paid TZS 40,000,000/=. The said dispute, without mincing words, was time barred because it was filed without an order granting condonation. I am of that considered view because, Rule 10(2) of GN. 64 of 2007 (supra) Clearly provides that, all disputes other than termination, shall be filed within 60 days from the date the dispute arose. In the new CMA F1, that was filed by the applicant on 14th February 2023, applicant indicated that, the dispute arose on 31st January 2017. Therefore, it was filed out

the 60 days provided under Rule 10(2) of GN. No. 64 of 2007(supra) hence the dispute was time barred. Even if assuming that on 3rd February 2023 applicant prayed to amend the nature of the dispute from unfair termination to breach of contract, of which there is no such prayer in the proceedings as explained hereinabove, that prayer cannot be an application for condonation. I am of that view because, application for condonation is filed at CMA by the applicant filing application for condonation Form (CMA F2) stating *inter-alia* (i) degree of lateness, (ii) reasons for the delay and (iii) serve the other party as per Rule 11(1),(2) and (3) of GN. No. 64 of 2007 (supra). In addition to that, applicant (i) must sign and file the Notice of Application and (ii) attach an affidavit stating *inter-alia* grounds for condonation as it is clearly provided by Rule 29(1)(a), (2), (3) and (4) of GN. No. 64 of 2007 (supra). All these were not complied with, by the applicant. It is my view that, neither the handwritten nor the typed order that was issued by Hon. Lucia Chrisantus Chacha, arbitrator, relied on by the applicant that she was granted condonation, can qualify to be an order for condonation because, there was no such application.

Assuming that applicant prayed to amend the nature of the dispute from unfair termination to breach of contract and that the prayer was

granted because respondent did not object, still, that was not a ticket for the applicant not to file an application for condonation. I am of that view because, the amendment caused the earlier dispute to cease to exist. There is a range of case laws to the position that, once pleadings are amended, then, pleadings before amendments cease to apply and cannot be acted upon. See the case of [Aitel Tanzania Limited vs Ose Power Solutions Limited](#) (Civil Appeal 206 of 2017) [2021] TZCA 758 (20 December 2021), [Ashraf Akber Khan vs Ravji Govind Varsan](#) (Civil Appeal 5 of 2017) [2019] TZCA 86 (9 April 2019), [Sarbjit Singh Bharya & Another vs Nic Bank Tanzania Ltd & Another](#) (Civil Appeal 94 of 2017) [2021] TZCA 212 (25 May 2021), [General Manager African Barrick Gold Mine Ltd vs Chacha Kiguha & Others](#) (Civil Appeal 50 of 2017) [2017] TZCA 211 (12 December 2017) And [Morogoro Hunting Safaris Limited vs Halima Mohamed Mamuya](#) (Civil Appeal 117 of 2011) [2017] TZCA 227 (8 June 2017) to mention but a few. In [Mamuya's case](#) (supra) the Court of Appeal quoted and approved the decision of **Warner v. Sampson & Another** [1958] 1 QB 297 in which it was held, *inter alia* that:-

"... once pleadings are amended, that which stood before amendment is no longer material before the court."

I therefore agree with counsel for the respondent that the new dispute relating to breach of contract was time barred. I hereby confirm the ruling issued by hon. M. Chengula, arbitrator.

The 2nd issue that raised by the applicant the arbitrator did not evaluate evidence cannot detain me. It was correctly submitted on behalf of the respondent that, the dispute was disposed by preliminary objection because no evidence was adduced. It was an error on part of Hon. L.C. Chacha, arbitrator to indicate in her typed order quoted hereinabove that applicant tendered exhibit P1-Certificate of Change of Name no. 52508. The least I can say is that, this complaint is misplaced.

It was submitted by counsel for the applicant that Hon. M. Chengula is the Mediator and that her role was to mediate the parties and after failure of mediation, she was supposed to forward the matter to the arbitrator for determination of legal issues and not to dismiss the dispute without even mediating the parties. Unfortunate, counsel for the applicant did not bring evidence showing that Hon. M. Chengula, is a Mediator and not Arbitrator. I have read the impugned ruling and find that, Hon. M. Chengula, indicated that she is arbitrator. For now, I believe that she is arbitrator until it will be proved otherwise. I am aware that, currently, some mediators, when deciding legal issues, tend to

baptize themselves as arbitrators to avoid their ruling or orders to be quashed by this court for lack of jurisdiction to deal with legal issues instead of mediating the parties. As a warning, those who do so, should stop forthwith, because, that is impersonation and or forgery, which, in fact, is a criminal offence. Once caught or proven that a certain mediator impersonated himself or herself as arbitrator and performed duties of arbitrators, she will not be spared because criminal charges will be hanging on his or her neck. As cordial advice, everyone should stay in her or his lane. In no way, from where I am standing, for reasons only best known to me to title myself in my judgments or rulings as justices of Appeal. That cannot happen to any judge of the High Court. Similarly, that cannot happen to any judicial officer. As pointed out, there is no evidence in the application at hand that Hon. M. Chengula is a Mediator. Due to absence of evidence showing that Hon. Chengula is a Mediator and not arbitrator, I find that submissions by counsel for the applicant are unmerited.

For all explained hereinabove, I hereby nullify CMA proceedings conducted by Hon. Lucia Chrisantus Chacha, arbitrator on 3rd February 2023, quash and set aside the above quoted orders issued by the said

arbitrator. Also, for what I have pointed hereinabove, I dismiss this application for want of merit.

Dated at Dar es salaam this 22nd February 2024



B. E. K. Mganga
JUDGE

Judgment delivered on 22nd February 2024 in chambers in the presence of Tulipo Mwereke, the applicant and Frank Kilian, advocate for the Applicant on one hand and Sosten Mbedue and Hellen Ngelime, Advocates for the respondent on the other.



B. E. K. Mganga
JUDGE