IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

IN THE MATTER OF COMPLAINT NO 47 OF 2008

BETWEEN

DR. NOORDIN JELLA ..... COMPLAINANT

AND

MZUMBE UNIVERSITY ..... RESPONDENTS

(Original CMA/DSM/KIN-ILA/2832/09)

RULING

15/9/2009 & 6/11/2009.

Rwayemamu, R.M.J;

The complainant filed a dispute /complaint in this court on 11/3/2009 to which the Respondent replied, and raised Preliminary Objection (PO) subject matter of this ruling. The parties were represented in this court by Dr. Mvungi Advocate of South Law Chambers Advocates and Mr. Kobas Advocate of the Professional Centre Advocates for the complainant/employee and respondent/employer respectively.

On 19/8/2009, the PO was ordered to be argued by way of written submission and the court suo mottu, requested the parties to address it on the issue of *whether under the Employment and Labour Relations Act 6/2004* (The Act) *all disputes must commence by mediation at the Commission for Mediation and*

Arbitration (CMA), even where the claim exceeds its pecuniary jurisdiction. I believe the issue to be important, the position of which must be clearly stated in order to remove future confusion regarding proper procedures in determination of disputes like the present. There are a number of cases some still pending in court where that issue has been raised as PO. The parties in their submissions addressed that issue as well as the two grounds raised as PO which are that:-

i. The complaint is hopelessly time barred

ii. The complaint is improperly before this court.

In order to appreciate the parties' arguments and subsequent decision, I find it convenient to first narrate chronologically but in brief, the relevant background information.

1. On 28/1/2008, the complainant referred a dispute of unfair termination to the CMA and claimed general damages suffered as a result of the respondent's action. The sum claimed as general damages was put as shillings 500 million.

2. The said referral was filed together with an application for condonation of the late referral. In its ruling indicated as delivered on 6/6/2008, the CMA condoned the late referral; affirmatively found that the CMA has jurisdiction to mediate a dispute which is beyond its pecuniary jurisdiction; but concluded that *"in the occasion of non settlement the matter will be referred to the High court".*

3. The dispute was unsuccessfully mediated. On 20/6/2008, the Mediator issued a Certificate of Non-settlement, with the following comments:

"The matter will be taken to the High Court because the commission does not have jurisdiction (Pecuniary Jurisdiction)". (Emphasis mine)

4. On 6-10 -2008, (several months later), the CMA forwarded the file to this Court, the letter forwarding the same is quoted later on in this ruling.

5. On 11/3/2009, the complainant filed a dispute to this court in the prescribed manner, to which the respondent timely filed a response on 30/3/2009 raising the PO subject matter of this ruling.

I now proceed to consider PO (i) - the issue of Limitation. It was argued by the complainant and conceded by the respondent that the law, section 86 (7)(b) of the Act, is silent as regards the time within which a party may refer the complaint to arbitration or to court after issue of the certificate of non-settlement. The contested issue is the interpretation to be put to that silence; whether it means a party is free to refer the dispute after any time he chooses, as submitted by counsel for the complainant, or whether the reference must be made within reasonable time as submitted by counsel for the respondent.

The respondent's counsel submitted without citing any authority that in such cases, referral should be within reasonable time; and that reasonable time is 30 days; and further therefore that the present dispute referred after 8 months should be considered time barred and dismissed with costs.

In response, counsel for the complainant submitted that, the failure to prescribe a time limit was not mere oversight, to quote the words used; " ...it was not a mere oversight ....That was purposeful considering the nature of Labour Disputes and the need to do away with unwarranted technicalities which might defeat justice." To buttress that argument, counsel quoted section 3 -the principal objectives of the Act and section 94(1) which requires the court to "pay due regard to the Constitution as aid to interpretation of the Act, and Article 107A of the constitution which urges courts to do away with "undue technicalities and procedures which may tend to defeat justice."The essence of counsel's argument is that the issue of time limit in adjudication of labour disputes is a mere technicality.

I wish to make my position on the issue clear; I completely disagree with the complainant counsel's conclusion that the issue of time limit is a mere technicality. First, on the general level, both this and the superior court have long held the issue of limitation to be fundamental; that "*limitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to court as and when he choose*" CAT in Tanzania Fish processors Ltd. V. Christopher Luhangula, Civil Appeal 161/94 (MZA sub registry- unreported).

The issue is so fundamental as it touches on the fundamental right of fair play in adjudication of disputes such that, where the dispute is time barred, the court lacks jurisdiction to adjudicate it. That is, unless a party seeking to file a dispute which is time barred has applied to the court for extension of time; which application may be granted if good cause for

delay is shown. In adjudication of labour disputes in this court, such powers are provided uncer Rule 56 of the Labour Court Rules, GN 106/2007 (the Rules).

Second, is it true that prescribing no time limit is in accord with the spirit of the Act? I believe not, why?

Section 3(a) of the Act provides one of the objectives of the Act, as *"to promote economic development through economic efficiency, productivity and social justice"*. For one, economic development cannot be promoted by allowing labour disputes to remain unresolved for an undue long period, as that would keep both the employer and employee tied up in disputes instead of being productively engaged. Clearly that would be contrary to the spirit of promoting economic development and efficiency as well as hindering social justice. In fact, *"one of the primary objectives of labour legislation is to provide means of resolving labour disputes expeditiously,"* as noted by JOHN GROGAN in his treatise on DISMISSAL, DISCRIMINATION AND UNFAIR LABOUR PRACTICES; JUTA AND CO LTD, Second Edition at page 11. To revert to the submission of counsel for the complainant, I stress that it is in regard to the nature of labour disputes that time limits for initiating actions must be provided.

Two, I am fortified in my conclusion that provision of time limit is in accord with the spirit of the Act, and that such spirit is to ensure that disputes are settled expeditiously and fairly; because the Act, mandates rigorous time schedules for initiating various actions. Examples of this are abound:

Disputes of unfair termination must be referred to the CMA after 30 days from the date of termination or the date the employer made a final decision to terminate, all other labour disputes must be referred after 60 days. See rule 10 of the Labour Institutions and(Mediation and Arbitration Rules) GN 64/2007

The mediator must mediate the dispute within 30 days, (unless the parties extend the period in writing) and if the dispute is not mediated within the prescribed time the parties may refer the same to arbitration or the court – section 86 (4) and (7) of the Act.

- Where the dispute goes for arbitration, the arbitrator is enjoined to arbitrate the dispute fairly and quickly –section 88 (4) of the Act.

- A party wishing to apply for revision of the arbitrator's award to the court must do so within six weeks (45 days) of the date the award was served on the applicant.- section 91 (1) (a) and (b) of the Act, and:

- Where the dispute is referred to the court by the director of the Commission under section 18 of the Labour Institutions Act, 7/2004 (the Institutions Act), the party who referred the dispute

to the CMA must file a statement of complaint to the court within 15 days of being notified by the director that such reference has been made – Rule 6 (2) (a) of the Rules.

Based on the above facts, I agree with counsel for the respondent that after failure of mediation, a referral to arbitration or the court must be made within reasonable time, and that such reasonable time must be 30 days. My conclusion regarding the number of days is inspired by the time schedules under the Act as indicated above. If an appeal against an employer's action to terminate an employee must be made within 30 days, it is not in accord with reason to believe that, where the CMA has failed to mediate a termination dispute, a longer period would be provided. In the time schedules above, the longest period for initiating a dispute is 60 days, under the circumstances, even if time limit had been provided, it could not have been 8 months.

I accordingly find that the complaint was initiated out of time, and I would dismiss it as being time barred, but will not do so, on grounds I will canvass later after I make a decision on the second PO.

The 2nd issue is in principle not controverted. The Act section 86 (7) (b) clearly provides that the mediator has no power to refer a dispute to court after failure of mediation, such referral may only be made by a party to the dispute as conclusively illustrated by the CAT in the case of Nicomedes Kajungu and 1374 Others V. Bulyankulu Goldmine (T) Ltd, *Civil Appeal No. 110/2008.*

The issue for decision however, is whether the present complaint can be said to have been referred to court by the CMA in the manner the Nicomedes case was. Counsel for the complainant thinks not. I agree with him, but for different reasons.

I believe referral in the two cases to be different. To demonstrate the difference, I shall quote in full the two letters used by the CMA in forwarding the file to this court. The letter in the Nicomedes Case went thus:

> "The Registrar,
> Labour Court,
> Division of the High Court,
> P.O.Box 1619,
> DAR ES SALAAM.
>
> RE: DISPUTE NO. CMA/TAB/DISP/248/2007
> BETWEEN
> NICODEMES KAJUNGU AND 1374 OTHER – EMPLOYEES
> AND
> BULYANKULU GOLD MINE (T) LIMITED – EMPLOYEDR
>
> The above mentioned subject refers.
> The above mentioned applicants filed their reference with Commission foe Mediation and Arbitration in accordance with Section 86 (1) of the Employment and Labour Relations Act No. 6 of 2004 and that on 29/11/2006 the MEDIATION failed.
> This dispute was referred for Arbitration under section 88 of ELRA 2004 as amended by Act No. 8 of Written Laws (Miscellaneous Amendments) 2006 and that following the employees, this dispute is referred to Labour Court for Adjudication under section 94 Act No. 6/2004 as amended by the above Mentioned Law, as Arbitrators are ousted jurisdiction to handle the dispute.
>
> C.F. Msigwa
> DIRECTOR
>
> CC: Nicomedes Kajungu and 1374 others
> P.O. Box 891,
> KAHAMA.

The General Manager
Bulyankulu Gold Mine (T)Ltd
P.O. Box 891,
KAHAMA." " (Emphasis mine)

The letter in the present case went thus:

"Ref. CMA/DSM/KIN-ILA/2832/08 6TH October 2008

The District Register,
Labour Court,
Dar es salaam.

DISPUTE No. CMA/DSM/KIN-ILA/2832/08
BETWEEN
DR. NOORDIN A. JELLA ..... APPLICANT
AND
MZUMBE UNIVERSITY ..... RESPONDENT

The above Labour dispute refers.

That the dispute was reported to the commission on 30/4/2008 and Mediated accordingly, However parties could not reconsider. The Commission could not proceed to Arbitrate the same because of lack of pecuniary Jurisdiction since, the amount claimed is 500,000,000.00. It is by that reason that, the matter is submitted to your Honourable Court for determination.

E. Mwidunda
FOR: DIRECTOR

Looking at the two letters, it appears to me that in this case, the CMA mediator simply **forwarded** the file to this court, probably to justify the comments made in the non-settlement certificate that it could not proceed in the case on ground of pecuniary jurisdiction. It cannot be said that the mediator in the above letter, was referring a dispute to the court under section 18 of the Labour Institutions Act, in the manner the Nicomedes case was. I therefore agree with counsel for the complainant's submission; that the Nicomedes case is distinguishable and I dismiss PO (ii).

I note with concern however, that the mediator's letter though not fatal, did create unnecessary confusion. To avoid similar mishaps in future, the mediators should stick to doing what the law provides; that is, they should issue the Certificate to parties in the prescribed manner only. It is up to a referring party to attach the certificate and whatever documents they choose when referring their complaints to court.

It was indicated earlier that I will not dismiss the complaint as I would have done on the question of time limit. The decision as to what order I should give, turns on the legality of the action taken by the mediator in issuing the certificate of non-settlement. The mediator's comment on the certificate issued on 20/6/2008 was that:

> *"The matter will be taken to the High Court because the commission does not have jurisdiction. (Pecuniary Jurisdiction)".*

I should perhaps first state that I am obliged to counsels for the respondent's submission on the issue of CMA's powers to mediate a dispute which exceeds its pecuniary jurisdiction. I agree with counsel's conclusion and that of the CMA mediator that all disputes regarding unfair termination of employment must commence at the CMA regardless the amount claimed.

The next important question however, is a legal one; it revolves around the determination of the amount of pecuniary jurisdiction. In the complaint filed in the CMA, the claimant claimed shillings 500 million as general

damages suffered because of the employer's action. It is however a principle of law that **pecuniary jurisdiction** is not determined by the amount of **general damages** claimed but substantive ones.

My brother Judge Massati J., as he then was, considered the issue in **George David Gordon vs Reliance Insurance Company (T) Limited**, Commercial Case No. 102/2005, and observed (a view I associate with), that normally claims of general damages are not quantified. To buttress the position, the honourable Judge referred to the CAT decision in **Tanzania –China Friendship Textile CO LTD Vs Our Lady of Usambara Sisters**, *Civil Appeal No. 84/2002 (unreported).* In that case the court held among others that:

> *"..... since general damages are awarded at the discretion of the court, it is the court which decides which amount to award. In that respect normally claims of general damages are not quantified. But where they are so erroneously quantified, we think, this does not affect the pecuniary jurisdiction of the court. In our view, it is the substantive claim and not the general damages which determines the pecuniary jurisdiction of the court"* (Emphasis mine)

That general principle applies in labour disputes in terms of which substantive claims would be specific, covering areas like the total amount of salaries due in case the dispute is determined in the employees' favour, and other entitlements specified under the Act. It does not cover general damages, whether quantified or un-quantified.

In view of that, the CMA mediator was wrong in stating on the certificate that the CMA had no pecuniary jurisdiction based on the amount of general damages quantified as shillings 500. I accordingly find that the mediator exercised jurisdiction not vested in him by law, and for that reason, the same is revisable on the court's own motion under Rule 28 (a) of the rules. I revise the mediator's action; quash the certificate and consequently every other action taken by the parties following issue of the impugned certificate.

In consequence of that, the dispute remains at the position it was at on the date mediation failed. The CMA is ordered to summon the parties; issue a fresh certificate of non-settlement according to law, and the parties are advised to take appropriate action thereafter. The period of limitation will begin to count from the date the CMA issues the certificate to the parties.

R. M. Rweyemamu
JUDGE
6/11/2009