IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 199 OF 2023

BETWEEN

INTERNATIONAL TAX CONSULTANTS LIMITED..... APPLICANT

VERSUS

MACDONALD JUSTUS RWEYEMAMU ..... RESPONDENT

RULING

Date of last Order: *27/10/2023*
Date of Ruling: *10/11/2023*

MLYAMBINA, J.

This application concern that most intractable of challenge: Is the decision of the Commission for Mediation and Arbitration (herein CMA) on condonation matters final or interlocutory decision? In other words, the issue is; *whether the grant of condonation by CMA should be corrected forthwith and independently of the outcome of the main proceedings or whether the Applicant should await the outcome of the main dispute before the decision can be attacked as one of the grounds for revision.* In **Deus Morris Alexander v. Sandvick Mining and Construction (T) Ltd,** Labour Revision No. 14 of 2011 High Court Labour Division at Shinyanga (unreported) p. 6, this Court answered the same challenge to

the effect that the decision on condonation is an interlocutory order. (**First school of thought**). On the other hand, in **Lucky Games Ltd v. Salim Madati**, High Court of Tanzania Labour Division at Dar es Salaam, Revision Application No. 53 of 2023 (unreported) p. 12, this Court answered the challenge to the effect that a decision on application for condonation before the CMA is a final decision. (**Second school of thought**).

At once there is a difficulty for the labour Court. *Rule 50 of the Labour Court Rules, G. No. 106 of 2007* gives only limited guidance on deciding whether the decision on condonation application by CMA is interlocutory or not. It merely bars any appeal, review, or revision to be preferred against interlocutory or incidental decision or orders unless such decision has the effect of finally determining the dispute.

Implicitly, the labour Court is left with discretionary powers to decide on whether the decision by CMA on matters pertaining to condonation is interlocutory or not so as to achieve an outcome which is fair between the parties, for attaining social justice and promoting economic development. To that end, in exercising judicial discretion, the Court must take into account its paramount consideration that it is in the interests of justice and labour law that parties participate in production and service to achieve social stability and economic development.

The purpose of *Rule 50 (supra),* however, is to expedite Court's business by allowing cases to be determined timely instead of having so many revisions which are pre-maturely.

More so, *Section 3 (a) of the Employment and Labour Relations Act Cap 366 Revised Edition 2019 [herein ELRA]* discourages unnecessary litigation which wastes resources and impair social and economic development. The primary objects of ELRA in particular under *Section 3 (a) (supra)* is to promote expeditious resolution of labour disputes to achieve economic development through economic efficiency, productivity and social justice.

At large, the labour Court must have an acceptable degree of consistency of decision and articulate the applicable principles guiding the Court's approach on declaring whether a decision on condonation is final or interlocutory. Such duty has accentuated the need for some further judicial reasoning by this Court on the effect of condonation decision by CMA.

With the above object in mind, I will start to consider the arguments of both Counsel. Mr. Evans Nzowa for the Respondent was of humble submission that this application has been filed prematurely in contravention of *Rule 50 of the Labour Court Rules, 2007 (supra).* The

main argument of Mr. Nzowa was that; after the CMA granted condonation, the dispute is still pending before CMA. The fact that the dispute is still pending before CMA, it makes an order granting condonation to be an interlocutory order. To buttress the argument, Mr. Nzowa cited the case of **Equity Bank (T) Ltd and Abuhussein J. Mvungi,** Labour Revision No. 62 of 2019, High Court of Tanzania Labour Division, Mwanza sub registry (unreported) p. 7, in which the Court held that:

> Application for condonation falls under a category of an interlocutory decision because the impugned decision did not finalize the dispute between the parties, as there is still a suit pending before CMA.

It was Mr. Nzowa's contention that this application is prematurely filed because the Applicant is seeking to revise the interlocutory decision which granted condonation to the Respondent.

According to Mr. Nzowa, the purpose of *Rule 50 (supra)* is to avoid the delay in dispensation of justice without reasonable grounds. It was held in the case of **Vodacom Tanzania Public Ltd Company v. Planetel Communications Ltd,** Civil Appeal No. 43 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 24 last para to p. 25 that:

> An appeal of this nature is tantamount to stalling the progress of the case before the High Court and flooding the Court with unnecessary appeal which has adverse impact in the timely dispensation of justice. In future this should not be condoned.

Mr. Nzowa, therefore, prayed this application be struck out for been filed prematurely.

In response, Mr. Bernard Chuwa for the Applicant was of the view that Mr. Nzowa wrongly construed *rule 50 (supra).* It was his submission that a ruling granting condonation is revisable and the same is not an interlocutory order. Thus, the application before this Court is competent and not in contravention to *Rule 50 (supra).*

According to Mr. Chuwa, the ruling granting condonation is final and that an Applicant has a right to file an application for revision. Therefore, such ruling is not interlocutory because after grant of the application for condonation, there is nothing that remains pending at CMA.

It was Mr. Chuwa's strong contention that the application is competent and is not in contravention of *rule 50 (supra).* The impugned CMA order is not an interlocutory order. It is a final order which determined to its finality the rights of the parties, and the case came to its finality while *rule 50 (supra)* bars revision on interlocutory order. To support that position, Mr. Chuwa cited the case of **Lucky Games Ltd** *(supra).*

In further backing up his supposition, Mr. Chuwa found aid of the definition of the phrase interlocutory order. According to **Black's Law Dictionary,** 10th edition, the term interlocutory order means:

> An order which decides not the cause but settles some intervening matter relating to it.

Mr. Chuwa went on to cite the case of **Tanzania Posts Corporation v. Jeremiah Mwandi**, Civil Appeal 474 of 2020, Court of Appeal of Tanzania (unreported) in which the term interlocutory order has been defined in the following words:

> ...the orders that do not completely dispose of all issues of law and fact that were presented to the Court are interlocutory decisions or orders; and the proceedings from which they emanate, interlocutory proceedings.

In **Israel Solomon Kivuyo v. Wayani Langoyi and Naishooki Wayani** (1989) TLR. 140 this Court quoting from **Jowitt's Dictionary of English Law**, 2nd Edition at page 999 stated:

> An interlocutory proceeding is incidental to the principal object of the action, namely, the judgement. Thus, interlocutory applications in an action include all steps taken for the purpose of assisting either party in the prosecution of their cases, whether before or after judgment; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties

are finally determined; or of executing the judgment when obtained. Such are applications for time to take a step, e.g. to deliver a pleading for discovery, for an interim injunction, for appointment of a receiver, for a garnishee order, etc.

Similarly, in **Agness Simbambili Gabba v. David Samson Gabba**, Civil Appeal 26 of 2008, Court of Appeal of Tanzania at Dar es Salaam (unreported) Kileo, J.A. stated as follows:

> There have been a number of decisions on what amounts to interlocutory or preliminary proceedings. These decisions show that of necessity preliminary or interlocutory proceedings must be in relation to a pending matter in Court. (Emphasis is mine)

From the above cited case laws, therefore, I do agree with Mr. Chuwa that; to define or determine what is an interlocutory order, there has to exist a matter pending in Court. Further, such interlocutory order is one which does determine to its finality the matter or dispute in Court.

However, I don't agree with Mr. Chuwa's contention that there is nothing pending before the CMA to make this revision tenable and proper before this Court. I shall elucidate such position in the course of this ruling.

Mr. Chuwa beseeched this Court not to accord legal weight the case of **Vodacom Tanzania Public Ltd Company** *(supra)* because the legal

issue in that case is different to the legal issue involved in the current case. As a matter of law, Mr. Chuwa distinguished the cited case of **Vodacom** by submitting that the issue in **Vodacom case** was on arbitral proceedings under *Arbitration Act Cap 15* and not a Labour issue like the matter before this Court.

Again, Mr. Chuwa conceded that the **case of Equitty Bank** *(supra)* discussed a similar issue at hand but he distinguished it by bringing into application the doctrine of recent decision. Thus, the case of **Equity Bank** *(supra)* was decided in 2020 but the case of **Lucky Games Ltd** *(supra)* is of 2023.

Both Mr. Nzowa and Mr. Chuwa were of the same view as regards the manner of filing disputes before CMA as provided under *Rule 12 of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64/2007.* They both admitted that one has to file before CMA a complaint through referral form CMA form No. 1 and CMA form No. 2 for condonation application.

The point of departure from Mr. Nzowa's position is that; Mr. Chuwa is of strong view that once the application for condonation has been decided, the same is revisable because that ruling by Mediator or Arbitrator decides the matter on condonation to its finality.

Mr. Chuwa has further borrowed a leaf from South Africa in the case of **Sacca (Pty) Ltd v. Thipe K.M. and Others** (JA65/98) [1999] ZALAC 12 (1 August 1999) in which the Court stated:

> I am therefore satisfied that an order granting 'condonation on' of the late filing of a statement of case is in nature and effect an appealable interlocutory order. In **Era Bricks (Pty) Ltd v Building Construction and Allied Workers Union and Others** (25 March 1997 case no NH 11/2/1296 4), Myburgh JP decided that the granting of condonation is appealable. Kroon JA adopted the same approach in **Gilbey Distillers & Vintners v. Mandla Shinga** (9 March 1999 case No DA 14/98).

In the light of the foregoing submissions, it is first necessary to appreciate that the procedure of referring dispute before CMA is provided *under section 86 (1) and (2) of ELRA (supra)* read together with *Rule 12 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules G.N. No. 64 (supra). For easy of reference, Section 86 (1) and (2) of ELRA* provides:

> (1) Disputes referred to the Commission shall be in the prescribed form.
>
> (2) The party who refers the dispute under subsection (1), shall satisfy the Commission that a copy of the

referral has been served on the other parties to the dispute.

Rule 12 (1) (2) (c) of G.N No. 64/2007 (supra) provides:

(1) A party shall refer a dispute to the Commission for mediation by completing and delivering the prescribed form (the referral document)

(2) The referring party shall-

a) sign the referral document in accordance with rule 5;
b) attach to the referral document; a written proof in accordance with rule 6, that the referral document was duly served on the other parties to the dispute;
c) If the referral document is filed out of time, **attach** an application for condonation in accordance with rule 10.

Plainly, the word "attach" under *Rule 12 (2) (c) (supra)* simply contemplates to join or tie something to something else, or something is connected to something else. Therefore, it is correct as submitted by Mr. Nzowa, an application for condonation is not separate and independent application from the dispute. Legally, one cannot file application for condonation separately without a dispute; that is why if granted, it becomes interlocutory decision because the dispute is still unresolved and if it is refused it means the dispute is dismissed.

In the light of *Section 86 (1) and (2) (supra) and Rule 12 (1) and (2) (supra),* it is evident that in initiating the dispute before the CMA out of time, a complainant must file a referral form (CMA form No. 1) and (CMA form No. 2 for condonation). The two are filed as a single package. As rightly submitted by Mr. Nzowa, one cannot file an application for condonation in isolation without CMA form No. 1. The two are filed jointly and in practice (CMA form No. 1) and (CMA form No. 2) are dealt with in a single file though the application for condonation must be determined prior the main complaint. That is the big difference with other suits or applications filed in normal Courts.

In other words, the import of *section 86 (1) (2) of ELRA (supra) read together with rule 12 (1) (2) (c) (supra)* is that a complainant must refer the dispute to the CMA regardless of whether he is on time or he is out of time. If the dispute is out of time, the Complainant is required to attach to the referral document (CMA F 1) an application for condonation form (CMA F2).

I further agree with Mr. Nzowa that the fact that Referral document (CMA F1) has been filed with application for condonation attached to it, that means, the dispute is pending waiting for condonation application to be heard and determined. It is a trite law that the CMA has no jurisdiction

to entertain a dispute which has been referred to it out of the prescribed time. CMA is seized with jurisdiction upon condoning the late referral.

After the CMA condoned the late referral, it is obligated to mediate the dispute within thirty (30) Days. *Section 86 (4) of ELRA (supra)* provides:

> subject to the provision of section 87, the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing.

It is correct that the Mediator is required under *Rule 16 (4) of G.N No. 64 (supra)* to issue the Certificate of settlement within thirty days. *Rule 16 (4) (supra)* provides that:-

> The Mediator shall issue the Certificate within the 30 days period referred to in section 86 (4) of the employment and Labour Relations Act.

It is the Court's position that CMA decision to condone late referral is an interlocutory decision. In the cited case of **Bank of Tanzania v. Elisa Issangya,** Revision No. 17 of 2011 (unreported) this Court at page 4 paragraph three and four held that:

> Mediation was properly called for as section 86 (4) and (7) of the employment and Labour Relations Act No. 6/2004, provide that 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.

I do agree with Mr. Nzowa that there is no double standard, that is what the law requires or demand. It is a standard set by labour laws to facilitate expeditious settlement of labour disputes. The procedure and documentation in the context of a referral CMA form No. 1 and CMA form No. 2 before the CMA are not the same as that of a normal civil case that needs extension of time before ordinary Courts.

Further, the complaint or dispute belongs to the complainant who refereed to the CMA. Once condonation is granted, the Applicant has the right for his dispute to be heard and determined to its finality.

It is significant that application for condonation is not a dispute. It is an application. If ones borrow the definition of a suit under *Section 2 of Law of Limitation Act [Cap 89 Revised Edition 2029]* application is not a dispute. *Rule 50* insists that an order or decision which is revisable has the effect of finally determining the dispute. It is not about determining an application. The purpose of seeking condonation is to enable a person who refereed the dispute to be heard once condonation is granted that is why he has the right to apply for revision when his application is not granted. When condonation is refused, its effect is that the dispute comes

to an end. Its effect is to dismiss the dispute together with the application. That is why the Applicant can come to this Court for Revision.

In south Africa, a person can refer a dispute out of time without attaching condonation form, I quote *Rule 10 of the Rules* for the Conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) for easy of reference provides:

How to refer a dispute to the Commission for Conciliation.

1) A party must refer a dispute to the Commission for Conciliation by delivering a Completed prescribed LRA form 7.11, which may include the Commission electronic referral electronic online portals.
2) When referring a dispute by means other than the official Commission electronic referral online portals as set out in schedule one, the referring party.
    a) Must attach to the referral document written proof, in accordance with Rule 6, that the referral document was served on the other parties to the dispute.
    b) Must attach to referral document, an application for Condonation if the referral is referred after the relevant time limit has expired.
3) Despite Rule 10 (2) (b) where a referral has been referred out of time and if Condonation has not been attached to the referral the Commission will decide whether the Condonation will be determined at a

hearing or by written submissions received from the parties. (Emphasis added)

Needless the afore statutory position of South Africa. I entirely agree with Mr. Nzowa that condonation does not finally determine the rights of the parties. If it is in the interests of justice, the application for condonation is granted. After granting the condonation, the dispute goes to the stage of mediation. If it fails, it goes to the arbitration for determination of the dispute.

The grant of an application for condonation presuppose that the complaint is yet to be determined. After determination of the dispute, the aggrieved party is allowed to come to this Court by way of revision. It does not state who is the winner or loser. Neither party's right is put into jeopardy. The balance of prejudice between the parties must be weighed along with the primary objects of ELRA. In the case of **MIC Tanzania Ltd v. Peter S. Mhando**, Revision No. 431 of 2022, High Court Labour Division at Dar es salaam (unreported) where it was held that:

> Oh that basis I am in agreement with Mr. Kitundu that the purpose of ruling that application for condonation is interlocutory is to avoid prolonged litigations. Being an interlocutory order, the Applicant's right to challenge the contested decision is reserved until final determination of the main application.

The same principle is also reflected in the cases of **Mohamed Enterprises (T) Ltd v. Peter Magesa & 5 Others**, Revision No. 343 of 2015 LCCD (2016) No. 77 and the case of **Tanzania Zambia Railway Authority and Attorney General v. Peter Reuben Masenga**, Revision No. 47 of 2022, High Court Labour Division at Dar es salaam (unreported), where it was held that:

> This has been proved by the CMA records which shows that the matter has been pending at mediation stage waiting for this application to be determined. I am therefore bound to hold, that an order condoning a late application is interlocutory and so not appealable or in this case not subject of revision.

I further take note of the very powerful reasoning given by this Court in the cited case of **Lucky Games Ltd** *(supra)* in which the Court held that:

> An application for condonation is not an interlocutory order. The logic is simple namely the application was decided to its finality against the Applicant. As a matter of fact, if the application for condonation is decided against the Respondent then it is also decided to its finality. Therefore, Respondent had an option to file application for revision. To hold otherwise, in my view, is treating the parties in the same application with double standard namely granting the party who filed an

application for condonation right to file revision but denying the same right to the Respondent. It is my considered view that parties in the same proceedings must be treated equality.

Likewise, I take note of the decision in the cited case of **Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2006 (unreported), wherein it was held:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

I do not disagree with any of the cited cases on interlocutory decision. But pragmatism dictates that the purpose of *Rule 50* is to avoid the delay in dispensation of justice without reasonable grounds. The same point is reflected in **Vodacom Tanzania Public ltd Company v. Planetel Communications Ltd,** Civil Appeal No. 43 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported) page 24 last para to page 25 where it was held that:

> An appeal of this nature is tantamount to stalling the progress of the case before the High Court and flooding the Court with unnecessary appeal which has adverse impact in the timely dispensation of justice. In future this should not be condoned.

As I observed in the case of **Exim Bank Tanzania Limited v. Nobert Deogratias Missana**, Revision No. 223 of 2023, High Court of Tanzania Labour Division at Dar es Salaam (unreported), in most cases, complaints concerning about lawfulness of employee's termination are instituted by the terminated employee. After termination it is presumed that such employee does not have any generated income as he/she is terminated from employment and does not receive his/her salary anymore. In such circumstance, if the procedures to obtain his right against the unfair termination is prolonged by allowing an aggrieved party of a grant of condonation to file revision before the High Court, justice will be delayed to such employee unnecessarily.

I also agree that the principle of the right to be heard conferred under *Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977* must be afforded to each litigant. However, by condoning the complainant, it affords the parties right to be heard on the main complaint for determination of their right as the matter will be determined to its finality. The principle of observing right to be heard in condonation has been expounded in the case of **Tatu Ally Muna & 2 Others v. Chama cha Walimu**

Tanzania, Revision Application No. 13 of 2020, High Court Labour Division at Dodoma (unreported) where it was held that:

> There is a constitutional right to be heard so provided for in *Article 13(2) (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [2005 Edition] (The Constitution).* In order to give effect the right to be heard and other relevant legal remedies, the procedural laws, including labour procedural laws, provide for time line and condonation of time to be heard so that a person should be heard accordingly before being condemned. That was the essence of *Rules 10,11,8c 29 (1) (4) (d) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN No. 64 of 2007). The ELRA (supra) in its section 3(f)* gives effect to the provisions of the constitution of the United Republic of Tanzania in the matters of employment and Labour relations.

Another important point is that the objectives of labour laws is to reduce costs in handling labour matters as it is stipulated under *Rule 34 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 (supra) as well as Rule 51 of the Labour Court Rules (supra).* Therefore, allowing parties to challenge the grant of condonation will jeopardize the whole notion of saving costs to employees as well as the principle of timely

justice. In the case of **Zweni v. Minister of Law-and-Order** 1993 (1) SA 523 (A) at 532J-533A as cited in the case of **SACCA (PTY) Ltd v. Thipe K.M. and Maluleke,** Case No Ja65 / 98, Labour Appeal Court of South Africa Held at Johannesburg, it was held:

> The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final resolution.

Furthermore, if parties will be allowed to challenge the grant of condonation, it will affect the principle of ensuring that litigations come to an end. Thus, directly affecting the communities and national at large as parties will spend a lot of time in prosecuting cases hence contradicting the objective of the labour laws as stipulated under *Section 3 of the ELRA (supra)*.

To recapitulate, I do not accept Mr. Chuwa's submission that a grant of condonation is an interlocutory order which does have definitive effect. A ruling granting an application for condonation does not conclude the complaint. As such, it is not revisable forthwith. The rationale behind such position are two. *First*, to avoid piecemeals revision and save our Court's limited resources. *Second*, it brings about just and expeditious decision of the major substantive dispute between the parties.

It must be recalled that the real issue in this matter is; *whether the decision is revisable or can be placed before the High Court in isolation and before the proceedings have run their full course.* One important point to take into account is that a judgement or Order or Award is a decision which, as a general principle, has three attributes: *First*, the decision must be final in effect. *Second*, it must be definitive of the rights of the parties. *Third*, it must have the effect of disposing of at least a substantial portion of the reliefs claimed.

It is the observation of this Court that; if the application for condonation is denied, the order is final in effect. It is definitive of the rights of the parties because nothing remains in place for determination. As such, the aggrieved party will have the right to file revision before this Court. But if the application for condonation is granted, the primary consideration should be to accord the parties with the right to be heard on merits because that course will bring the just and expeditious decision of the major substantive dispute between them.

Needless, Mr. Chuwa has submitted on the application of the doctrine of most recent decision. I had time to address such issue in the case of **Republic v. Shaibu Putika and Another**, Criminal Sessions Case No. 56 of 2017, High Court of Tanzania Iringa Sub Registry at Njombe (unreported). Indeed, I do agree with Mr. Chuwa that this Court

is bound by the most recent decision of the Court of Appeal. But it is not bound by the High Court decision when it has good reason to depart from its earlier decision by laying down the law more elaborately and in conformity with the object of the Act.

Again, it bears mentioning that I do agree with the South African cited decision in the case of **Sacca (Pty) Ltd** *(supra).* However, further search indicates that the South African Courts have adopted a different approach on the same point. In the case of **De beers Marine (PTY) Ltd v. Jacobus Izaaks,** LCA 28/08, the Court held:

> The order of District Labour Court granting approval for lodging of complaint out of time in terms of S. 24 of Act No. 6 of 1992 is a preliminary step to lodging of the complaint and therefore an interlocutory order and so it is not appealable.

In the premises, the cumulative effect of the reasoning concludes that the decision on condonation before CMA is an interlocutory decision. In principle, it follows, that the application is hereby struck out for being preferred against the interlocutory application. The file be remitted back to CMA for determination of the dispute. Order accordingly.

Y.J. MLYAMBINA
JUDGE
10/11/2023

Ruling delivered and dated 10th November, 2023 in the presence of, learned Counsel Nimrod Msemwa for the Applicant and Mr. Evans Nzowa for the Respondent.

Y. J. MLYAMBINA
JUDGE
10/11/2023