

A DIGEST OF
LABOUR
LAW
CASES
(2008-2014)

ALPHONCE M. A. URIO
&
JANETH FURAH A. URIO

1. INCAPACITY

In the case of *Said Mohamed Nzegere v. Aarsleff Bam International*¹ the applicant was employed by the respondent on 11/06/2012 and was terminated on 26/04/2013 on account of ill-health, following an opinion from a medical expert. The employer terminated him (the applicant) on the ground of incapacity based on ill health. In terminating him, the employer did not follow the requirements of the Employment and Labour Relations (Code of Good Practice) Rules 2007.² It was held that the employee was unfairly terminated.

Other related cases

MS Tanpack Tissues Limited v. Said Mohamed,³ Section 37 of the Employment and Labour Relations Act and Rule 19 (1) of the Employment and Labour Relations, (Code of Good Practice) Rules, GN. 42 of 2007.

Law Applicable

Rule 19-(1) of G.N No. 42 of 2007

"An employer who is considering terminating an employee on grounds of ill-health or injury shall take into account the following factors to determine the fairness of the reason in the circumstances;

- a) the cause of incapacity;*
- b) the degree of the incapacity;*
- c) the temporary or permanent nature of the incapacity;*
- d) the ability to accommodate the incapacity;*
- e) the existence of any compensation or pension.*

2) *Where an employee is injured at work or is incapacitated by a work-related illness (the cause) an employer shall go to greater*

¹ Revision No. 17 of 2014, High Court of Tanzania (Labour Division) at Sumbawanga (Unreported).

² Rule 19 (1) to (14) GN No. 42 of 2007.

³ Rev No. 290 of 2009, High Court Labour Division at Dar es salaam (Unreported)

lengths to accommodate the employee (the ability to accommodate)

- 3) The employer shall be guided by an opinion of the registered medical practitioner, in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature.
- 4) Where an employee is temporarily unable to work, the employer shall investigate the extent of the incapacity or the injury.
- 5) Where the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer shall investigate possible ways to accommodate the employee or to consider all possible alternatives short of termination.
- 6) Possible alternatives short of termination shall include:
 - a) temporary replacement;
 - b) light duty;
 - c) alternative work;
 - d) early retirement;
 - e) pension, or
 - f) any other acceptable alternative.
7. The factors that may be relevant in this investigation include:
 - a) nature of the job;
 - b) the period of absence;
 - c) the seriousness of the illness or injury; and
 - d) the possibility of securing a temporary replacement or adapting the job.
- 8) Where the cause of the incapacity is due to alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider.

- 9) Where the employee is permanently incapacitated, the employer shall ascertain the possibility of securing alternative employment for the employee or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- 10) Where the employee is incapacitated to a limited degree, the employer shall consider-
 - a) removing those duties the employee cannot perform and if possible adding less onerous tasks; or
 - b) adapting the work environment to accommodate the disability.
- 11) The general test is whether in a particular case the employer can reasonably be expected to accommodate the employee's disability, having regard to-
 - a) the cost, practicality and convenience of such steps; and
 - b) the cause of the employee's incapacity (there is a more onerous duty on an employer where the capacity arose out of a work-related injury or illness.)
- 12) Where it is established that the employee's work circumstances or duties cannot reasonably be adapted to accommodate the disability, the employer shall consider the availability of any suitable alternative work.
- 13) Suitable alternative work will depend on the circumstances, and may include such factors as-
 - a) whether the incapacity was due to a work-related illness or injury;
 - b) the employee's experience and qualification;
 - c) the employee's ability to adapt to a change working environment.

- 14) Where there is a vacancy which the employee could fill with training such vacancy shall be offered to the employee.

Section 37

- 1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.
- 2) A termination of employment by an employer is unfair if the employer fails to prove-
 - a) that the reason for the termination is valid;
 - b) that the reason is a fair reason;
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer, and
 - c) that the employment was terminated in accordance with fair procedure.
- 3) It shall not be a fair reason to terminate employment of an employee:
 - a) for the reason that;
 - i. discloses information that the employee is entitled or required to disclose to another person under this Act or any other law,
 - ii. fails or refuses to do anything that an employer may not lawfully permit or require the employee to do,
 - iii. exercises any right conferred by agreement under this Act or any other law,
 - iv. belongs, or belonged, to any trade union or
 - v. participates in the lawful activities of trade union, including a lawful strike;

b) for reasons-

- i. related to pregnancy
- ii. related to disability and
- iii. that constitute discrimination under this Act.

4) In deciding whether termination by an employer is fair an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99.

5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto.

2. INCOMPATIBILITY

In the case of *Parastatal Pension Fund v. Siriel Mchembe*,⁴ the applicant applied for the revision of CMA's award which had ruled in favour of the respondent who had filed a trade dispute for unfair termination on account of incompatibility. It was held that the employer (applicant) had no fair reasons to terminate the respondent and procedural fairness was not followed.⁵ The High Court, *inter alia*, found that the respondent:

- a) had been affected and injured on allegation of incompatibility;
- b) was exposed to the world and her society at large by defamatory words; and
- c) was sexually harassed by the defamatory statements of sexuality.

⁴ Revision No 389 of 2013 High Court of Tanzania, Labour Division Dar es salaam (Unreported)
⁵ Rule 13 (1)-(10) of G.N No 42 of 2007.

Law applicable

Rule 13-(1) of G.N No 42 of 2007

- 1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
- 2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.*
- 3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of case, but it shall not normally be less than 48 hours.*
- 4) The hearing shall be held and finalized within a reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.*
- 5) Evidence in support of the allegation against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witness if necessary.*
- 6) Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.*
- 7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.*

- 8) After hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision together with brief reasons.
- 9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office bearer or official of a registered trade union, at a hearing.
- 10) Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commissioner for Mediation and Arbitration under the Act.
- 11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.
- 12) Employers shall keep record of each employee specifying the nature of any disciplinary transgressions, the action taken by the employer and the reasons for the actions.
- 13) In case of collective misconduct it is not unfair to hold collective hearing.

Rule 22

- (1) incompatibility constitutes a fair reason for termination.
- There are two types of incompatibility:-
- a) unsuitability of the employee to his work due to his character or disposition.
 - b) incompatibility of the employee in his work environment in that he relate badly with fellow employees, clients or other persons who are important to the business.

- 2) Incompatibility is treated in a similar way to incapacity for poor work performance.
- 3) The steps required as set out in rule 18 of these Rules are applicable, read with changes required by the context. In particular, the employer shall-
 - a) record the incident of incompatibility that gave rise to concrete problems or disruption;
 - b) warn and counsel the employee before termination. This should include advising the employee of unacceptable conduct; who has been adversely affected by that conduct, and what remedial action is proposed.
- 4) Before terminating employment on this ground, the employer shall give the employee a fair opportunity to-
 - a) consider and reply to the allegation of incompatibility;
 - b) remove the cause for disharmony; or
 - c) propose an alternative to termination.

3. RETRENCHMENT

In the case of *Omary Ali Dodo v. Air Tanzania Company Limited*⁹: the applicant (Omari Ali Dodo) was employed by the respondent Company as a Cabin Service Assistant. He was subsequently retrenched on account of operational requirements of the respondent's business.

It was held that, consultative meetings involving the employer and a trade union was done and that a fair procedure was followed before the applicant was terminated and was paid terminal benefits. He was also given a golden hand shake.

In the case of *Moshi University College of Co-operative and Business Studies, v. Joseph Reuben Sizya*: it was held that the

⁹ Revision No. 322 of 2013, High Court of Tanzania, Labour Division at DSM (Unreported)
Rev. No. 11 of 2012, High Court Labour Division, DSM (Unreported)

respondent's termination for reason of retrenchment was substantively fair.

In the case of *African Martin Sijale v. Ukwamo Industries (T) Ltd.*⁹ it was held that where the workers were adequately involved in the exercise which even involved the Trade Union, the redundancy exercise followed the law and application for revision against the order of the arbitrator had no merits.

Other cases

- ❖ *Alhamdu Ndimkamwa & Others v. Director Victoria Fish*,⁷
- ❖ *Tanzania Building Works Ltd v. Ally Mgomba*¹⁰ (on consultation)
- ❖ *Bernard Gindo and 27 Others v. T.O.L. Gases Ltd*¹¹; (on consultation)
- ❖ *International School of Moshi Ltd. v. Claude S. Tarimo & 15 Others*¹²; See section 38 of the Employment and Labour Relations Act, and Rule 7 of GN No.42/2007.
- ❖ *Sina Abdalah & 17 Others v. Director Tanpack Tissues Limited*¹³ (Unsigned list of applicants)

Law applicable

Rules 23-25 GN. 42/2007

(1) A termination for operational requirements (commonly known as retrenchment) means termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a requirement based on economic, technological, structural or similar needs of the employer.

⁹ Rev. 12 2008 High Court Labour Division, DSM. (Unreported)
⁷ Revision No. 196 of 2009 High Court Labour Division: at Mwanza (Unreported)
¹⁰ Rev. 305 of 2010 High Court Labour Division at DSM. (Unreported)
¹¹ Rev No. 18 of 2012 High Court Labour Division at DSM (Unreported)
¹² High Court Labour Division, at (Moshi) (Unreported).
¹³ Revision No. 174 2008 High Court Labour Division at Dar es salaam (unreported).

- (2) As a general rule the circumstances that might legitimately form the basis of a termination are:
- a. economic needs that relate to the financial management of the enterprise.
 - b. technological needs that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace
 - c. structural needs that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.
- 3) The courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination before the termination is effected.
- 4) The obligations placed on an employer are both procedural and substantive. The purpose of the consultation required by Section 38 of the Act is to permit the parties, in the form of a joint problem solving exercise, to reach agreement on-
- (a) the reasons for the intended retrenchment (i.e. the need to retrench)
 - (b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc.
 - (c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO); subject to the need to

retain key jobs, experience or special skills, affirmative action and qualifications;

(d) the timing of the retrenchments;

(e) severance pay and other conditions on which terminations take place; and

(f) steps to avoid the adverse effects of the termination such as time off to seek work.

(5) The requirement which the employer is required to adhere to under subsection (1) of section 38.

(6) In order for it to be effective, the consultation process shall commence as soon as the employer contemplates a reduction of the workforce through retrenchment so that possible alternatives can be explored. The process shall allow the union to:-

(a) meet and report to employees;

(b) meet with the employer; and

(c) request, receive and consider all relevant information to enable the trade union to inform itself of the relevant facts for the purpose of reaching agreement with the employer on possible alternative solutions.

7) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process may be. Urgency may not, however, be induced by the failure to commence the process as soon as reduction of the workforce was likely. On the other hand, the parties who are required to reach agreement shall meet, as soon and as frequently as may be practicable during the process.

8) Section 38(2) of the Act provides that if no agreement is reached between the parties, the matter shall be referred to mediation by

the Commission for Mediation and Arbitration. An agreement reached between the employer and a trade union recognized as the exclusive bargaining agent, is binding on all employees within the bargaining unit in terms of Section 71 (3)(c) of the Act.

- 9) The employer may not implement the retrenchment within 30 days of the referral to mediation, unless otherwise agreed between the parties. Once this period has passed, the employer may proceed with the retrenchment unilaterally. The fairness of the employer's actions may be disputed and referred to arbitration, once the mediation fails.*

Rule 24 of G.N 42 of 2007

- (1) Where one or more employees are to be selected for termination from a number of employees, the criteria for their selection shall be agreed with the trade union. If criteria are not agreed, the criteria used by the employer shall be fair and objective.*
- (2) Criteria that infringe a right protected by the Act when they are applied can never be fair. These include selection on the basis of union membership or activity, pregnancy or other discriminatory grounds.*
- (3) Selection criteria that are generally accepted as fair include length of service, the need to retain key jobs, experience or skills, affirmative action and qualifications.*

Rule 25

(1) *Retrenched employees shall be given preference if the employer re-hires employees with comparable qualifications, subject to the following:*

(a) *the employee having expressed within a reasonable time from the date of termination, a desire to be re-hired, and*

(b) *a time limit on preferential re-hiring shall also ideally form the subject of agreement between the employer and the union.*

(2) *Where the above conditions are met, the employer shall take reasonable steps to inform the employee including notification to the representative trade union, of the offer of re-employment.*

Section 38 of the Employment and Labour Relations Act:

(1) *In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall-*

(a) *Give notice of any intention to retrench as soon as it is contemplated;*

(b) *Disclose all relevant information on the intended retrenchment for the purpose of proper consultation;*

(c) *Consult prior to retrenchment or redundancy on-*

(i) *the reasons for the intended retrenchment;*

(ii) *any measures to avoid or minimize the intended retrenchment;*

(iii) *the method of selection of the employees to be retrenched;*

(iv) *the timing of the retrenchments; and*

(v) *severance pay in respect of the retrenchments;*

(d) shall give the notice, make the disclosure and consult, in terms of this subsection, with-

- (i) any trade union recognized in terms of section 67;
- (ii) any registered trade union with members in the workplace not represented by a recognized trade union;
- (iii) any employees not represented by a recognized or registered trade union.

4. IRREGULARITY

In the case of *Sina Abdallah & 17 others v. Director of Tanpack Tissues*¹⁴ the applicants referred a dispute to CMA against their employer alleging unfair termination of their employment. They sought for, *inter-alia*, reinstatements and payment for accrued leave.

It was held that the proceedings were conducted irregularly in that the procedure for filing a dispute in representative capacity was not followed. On the other hand, the court held that it was not properly moved as the court has to first grant permission to one employee who wishes to represent others to seek leave of court before so doing.¹⁵

Other Relevant Cases:-

- a) *Humphrey Samwel & 107 others v. Bonite Bottlers Limited*:¹⁶
- b) *Godfrey John & 26 Others v. Dands Inter trade*:¹⁷
- c) *Yona Sarya & 13 Others v. Caspian Limited*:¹⁸
- d) *Eugene Aloyce Kazoka & 87 Others v. Abdalah Msagama & 3 Others*:¹⁹

¹⁴ Rev. No. 174 of 2008

¹⁵ The court cited Rule 44(2)(b) of the Labour Court Rules GN. 106 2007 as the relevant law to that effect

¹⁶ Misc. Labour Appl. No. 10 2014. High Court of Tanzania (Labour Division at Moshi (Unreported).

¹⁷ Rev. No. 193 2010 High Court Labour Division at DSM (Unreported).

¹⁸ Rev. 49 2009. High Court Labour Division at Mwanza (Unreported)

¹⁹ Rev. No. 48 of 2008 High Court Labour Division at DSM (Unreported)

e) Mhoja Mangembe & 16 Others v. Akida General;²⁰

Law Applicable

Rule 44(2) of the Labour Court Rules

"Where there are numerous persons having the same interest in a suit, one or more of such persons may, with the permission of the court appear and be heard or defend in such dispute, on behalf of or for the benefit of all persons so interested, except that the Court shall in such case give at the complainant's expenses, notice of the institution of the suit to all such persons either by personal service or where it is from the number of persons or any other service reasonably practicable, by public advertisement or otherwise, as the Court in each case may direct."

5. NON-CITATION/WRONG CITATION

In *Sosthenes Muyambo & 24 Others v. V. I. Tree Planting Foundation*, the High Court of Tanzania reiterated its position that it is a settled law that non or wrong citation of a specific provision of the law, section or paragraph renders the application before the court misconceived and incompetent before the court.

Other relevant cases;-

- a) Morogoro Water Supply & Sewerage Authority v. Isa Bawa Singano²¹.
- b) Edward Bachwa & 30 others v. The Attorney General & another²²
- c) NBC v. Sadrudin Meghji,²³
- d) Citibank Tanzania Ltd. v. TTCL and 4 Others;²⁴

²⁰ Rev. No. 8 of 2010 High Court Labour Division. at Mwanza. (Unreported).

²¹ Rev. No 75 of 2010 High Court- Labour Division. (Unreported)

²² Civil Appl. No. 128/2006

²³ Civil Appl. No. 20/1997

²⁴ Civil Appl. No. 64/2003

- e) Sunday Mbilanga v. Tanzania Breweries Ltd.²⁵
- f) Tanzania Revenue Authority v. Morina Mwayole²⁶;
- g) Vitalis Dimosco v. Capuchin Brothers Domiano.²⁷
- h) Salvatory Syridion v. Williamson Diamond Ltd.²⁸
- i) Chama cha Walimu Tanzania v. The Attorney General;²⁹
- j) Wilbard Kilenzi & 3Others v. Permanent Secretary Ministry of Transport and Attorney General;³⁰

6. FAIR PROCEDURE/UNFAIRNESS

In the case of *Peter D. Nene v. Chine New Era International Engineering Corporation*³¹ the applicant had alleged unfair procedure in his termination. The Court held that the applicant was given opportunity to appear before the disciplinary committee hearing but he refused on ground that it was unfair and that he even destroyed the letter that informed him to appear before the committee. The court after considering all the two aspects found that they were enough reflection of misconduct on the party of the applicant and thus his termination was substantively and procedurally fair.

In *Vedastus s. Ntutanyemka & 6 Others v. Mohamed Trans Ltd.*³² The employer did not comply with Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules: GN. 42 of 2007 which talk about fairness of the procedure.

7. MATERIAL IRREGULARITY

In the case of *Antony D. Temba v. Northern Highland Secondary School*,³³ the court held that, by Section 88 of the Employment and

²⁵ Misc. Application No. 10 2009; High Court Labour Division (Unreported).

²⁶ Rev. No. 100 2009 High Court of Tanzania at DSM (Unreported).

²⁷ Rev. No. 196 of 2009 High Court of Tanzania (Labour Division) at DSM (Unreported).

²⁸ Rev. No. 11 of 2010 High Court Labour Division at Shinyanga (Unreported).

²⁹ Civil Application No. 151 of 2008. DSM (2008) E.A

³⁰ Misc. Application No. 6 of 2012. High Court Labour Division at Mwanza (Unreported).

³¹ Rev. No. 29 of 2013. High Court-Labour Division: (Unreported)

³² High Court Labour Division at Shinyanga. (Unreported)

³³ Rev. No. 274 of 2009. High Court Labour Division at Arusha (Unreported)

Labour Relations Act, the arbitrator was bound to issue an award with reasons signed by him within thirty days of the conclusion of arbitration proceedings. An award issued after the said thirty days meant that it was issued with material irregularity.

Other cases;-

- a. In the case of *Dekker Bruins (K) Ltd. v. Mwamvita Mohamed*,³⁴ no notice was given to the parties that mediation/ arbitration were to be conducted together. C.M.A did not observe important stages of each process (Rule 18 (8) of the Labour institutions (Mediation and Arbitration) Rule GN No. 64 of 2007
- b. *Franael N. Raphaél v. Maromboso Baptist English Medium School*.³⁵ Where there are time barred disputes-No new claims.

Law applicable

Section 88 of the Employment and Labour Relations Act provides;

- (1) "For the purpose of this section a dispute means;
 - (a) a dispute of interest if the parties to the dispute are engaged in an essential service;
 - (b) a complaint over-
 - (i) the fairness or lawfulness of an employee's termination of employment;
 - (ii) any other contravention of this Act or any other labour law or breach of contract in which the amount claimed is below the pecuniary jurisdiction of the High Court;

³⁴ Rev. No. 50/2009: High Court Labour Division Arusha (Unreported)

³⁵ Rev. No. 14/2010: High Court Labour Division Arusha (Unreported)

(iii) any dispute referred to arbitration by the Labour Court under section 94 (3) (a) (ii).

2) If the parties fail to resolve a dispute referred to mediation under section 86 the Commission shall-

- (a) appoint an arbitrator to decide the dispute;
- (b) determine the time, date and place of the arbitration hearing; and
- (c) advise the parties to the dispute of the details stipulated in paragraphs (a) or (b)

3) Nothing in subsection(2) shall prevent the Commission from-

- (a) appointing an arbitrator before the dispute has been mediated;
- (b) determining the time, date and place of the arbitration hearing, which date may coincide with the date of the mediation hearing.
- (c) advising the parties to the dispute of the details stipulated in paragraphs (a) and (b).

4) The arbitrator;

- (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly;
- (b) shall deal with the substantial merits of the dispute with the minimum of legal formalities.

5) Subject to the discretion of the arbitrator as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question witnesses and present arguments.

6) If the parties to the dispute consent, the arbitrator may suspend proceedings and resolve the dispute through mediation.

- 7) In any arbitration hearing, a party to a dispute may be represented by-
- (a) member or official of the party's trade union or employer's association; or
 - (b) an advocate.
- 8) An arbitrator may make any appropriate award but may not make order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner.
- 9) Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator.

8. CRIMINAL PROCEEDINGS

In the case of *Bidco Oil and Soap Ltd v. Robert Matonya and 20 others*³⁶ the court was of the opinion that the remedies an arbitrator may award do not extend to payment of salaries until the criminal case is finalized. The court stated that the above position is so even when termination was effected against an employee facing criminal proceedings contrary to section 37 (5) of the Employment and Labour Relations Act. It was further the opinion of the court that the order for payment of salaries for all period of the case (unfinished) amounted to improper exercise of jurisdiction.

Law Applicable

Section 37(5) of the Employment and Labour Relations Act provides;

"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with the criminal offence which is substantially the same until final determination by the Court and any appeal thereto."

³⁶ Rev. No. 70 of 2009 (High Court Labour Division, Dar es salaam -Unreported)

9. SEVERANCE ALLOWANCE

According to section 42 (3) of the Employment and Labour Relations Act. Severance allowance is not payable to an employee who has committed a misconduct. According to *Issack Chiwinga v. Mbeya Cement Co. Ltd.*³⁷ Severance allowance is not payable to an employee who has not completed a year with the employer (See *Meneja Mama Clementina Foundation*.³⁸ Section 42(3) of the Employment and Labour Relations Act provides;

“The provisions of subsection (2) shall not apply:-

(a) to a fair termination on grounds of misconduct;

(b) to an employee who is terminated on grounds of capacity, compatibility or operational requirements of the employer but who unreasonably refuses to accept alternative employment with that employer or any other employer.

10. GROSS NEGLIGENCE

In the case of *China Railway Jiang Engineering v. Shagifa Juma*,³⁹ it was held among other things, that, allegation of gross negligence, incapacity and dishonesty were serious and therefore they ought to be investigated and respondent be given chance to be heard. The court held further that the procedure for termination was unfair as investigation was done after the respondent was terminated.

11. WHERE A WRONG PARTY IS SUED

In the case of *Kennedy Mahende v. Neema Makorere*,⁴⁰ it was held that the right person to be joined in the dispute was the Huruma Child Ministry Centre, a Non Governmental Organization and not one Kennedy Mahende as a person who had no locus standi.

³⁷ Rev. No. 19 of 2009 High Court Labour Division at Mbeya (Unreported)

³⁸ Rev. No. 2 of 2011 (Unreported) High Court Labour Division at Mbeya (Unreported)

³⁹ Rev. No-91 of 2009: High Court Labour Division at DSM (Unreported).

⁴⁰ Rev. No. 116 2008. High Court Labour Division DSM (Unreported)

Other Cases:

1. Mashaka v. Seven Up Bottling Company (T) Ltd. SBC⁴¹
2. National Oil v. Aloyce Hobokela⁴²;
3. Tanzania Pharmaceutical Industries Limited v. Dr. Ephraim Njau (No 2)⁴³

12. TASK WORK EMPLOYEES

In the case of *Amos Henry and 5 Others v. Tanzania Telecommunications Company Ltd (TTCL)*,⁴⁴ the applicants alleged that they were unfairly terminated both in procedure and substance. They sought for reinstatements, terminal benefits and refund of underpaid salaries. It was held that the applicants performed specific work for the respondent and got paid for the work done. They were employed for specific task and that their employment ended after completion of such tasks and therefore they were not covered by unfair terminations under the provisions of the Employment and Labour Relation Act.

13. MEDIATORS AND ARBITRATORS

In the case of *M/S Pamera Group Industries (T) Ltd. v. Juma Zimbwe & 58 Others*,⁴⁵ it was stated, *inter-alia*, that the law gives distinct responsibilities to mediators and arbitrators, both of whom are appointed by the commission. While a mediator is appointed to mediate a dispute, an arbitrator is appointed to decide a dispute. Each of the functions depends on appointment in that a mediators cannot convey himself into an arbitrator contrary to section 88 (2) of the Employment and Labour Relations Act.

⁴¹ Rev. No. 180 2013 Dar es salaam (Unreported)

⁴² Application No. 212 of 2013, High Court Labour Division DSML Unreported

⁴³ [2000] T.L.R. 236.

⁴⁴ Rev. No. 58 2013 High Court Labour Division at Mwanza (Unreported).

⁴⁵ Rev. No. 5 of 2008, High Court of Tanzania at Dar es salaam (Unreported)

The above remark was quoted with approval in *Bidco Oil and Soap v. Abdu Said and 3 Others*:⁴⁶

Other cases

1. Tanga Cement Co. Ltd. v. Leah Mchome;⁴⁷
2. Dominic M. Mushi v. Monica Denis;⁴⁸
3. Project Manager: Barrick Gold Mine v. Adriano Odhiambo;⁴⁹
4. Buzwagi Project Manager v. Anthony Lameck;⁵⁰
5. K.C.B. (T) Limited v Dickson Mwinuka;⁵¹ (It is a gross procedural omission if CMA omits to mediate).

Law applicable

Section 88(2) of the Employment and Labour Relations Act provides:

"If the parties fail to resolve a dispute referred to mediation under section 86 the Commission shall;

(a) appoint an arbitrator to decide the dispute;

(b) determine the time, date and place of the arbitration hearing; and

(c) advice the parties to the dispute of the details stipulated in paragraph (a) or (b).

14. FAILURE TO FRAME ISSUES

The court in *Metal Products Limited v. Richard Kasese*⁵² held that. failure to clearly identify the issues by the arbitrators was a material irregularity in the conduct of proceedings. In this case. (at CMA) unfair termination was found to be a reason for granting

⁴⁶ Rev. No. 11 of 2008. High Court Labour Division at Dar es Salaam (Unreported). See also Yona Sanya & 13 Others Rev. No. 49 of 2009 (High Court Labour Division-Mwanza (Unreported) (p.6 of typed script)

⁴⁷ Rev. No. 15 2009 High Court Labour Division, Dar es salaam (Unreported)

⁴⁸ Rev. No. 13 of 2011 High Court Labour Division at Moshi (Unreported)

⁴⁹ Rev. No. 290 of 2008(Unreported)

⁵⁰ Rev. No 297 of 2008 (Unreported)

⁵¹ Rev. No.45 of 2013: High Court Labour Division at Mwanza (Unreported).

⁵² Rev. No. 126 2008 High Court Labour Division at DSM. (Unreported)

reliefs although the issue (unfair termination) was not pleaded and that reliefs granted had nothing to do with unfair termination. Similarly, in *Mateseko Gwabuko & 5 Others v. Nyanza Road Works Ltd*⁵³ it was held that failure to frame and thereby properly decide the issue on the type of employment contract between the parties was a material irregularity.⁵⁴

15. CONDONATION

The High Court of Tanzania, Labour Division at Mwanza, in the case of *Said Musa Mege v. Tandril Ltd*,⁵⁵ held, *inter alia*, that ignorance and negligence on the part of the applicant or his representative are not good reasons for the purpose of granting extension of time.

The Court has also held in *Ally Mzee Moto v. Tanesco*,⁵⁶ that the CMA was not properly seized of the matter when it arbitrated the dispute filed out of time without condonation.

NB-Condonation is not automatically granted but it is within Jurisdiction of the court. The term condonation means the delay in referring the dispute is excused or forgiven and the dispute is processed as if it were receiver in time.

In deciding whether or not to grant condonation, the adjudicator will take into account such things as degree of lateness, the prospects of success and any likely prejudice to the parties in the dispute.

See also:

- a) Peter Mwasandure v. Habibu African Bank Ltd;⁵⁷
(proceedings were quashed and award was set aside)

⁵³ Rev. No. 45 of 2011, High Court (Labour Division (Mwanza) (Unreported)

⁵⁴ See also *Grace Warioba v. Twitanga Secondary School*; Rev. No. 216 of 2008, High Court Labour Division at Mwanza (Unreported)

⁵⁵ Application No. 188/2008, (Unreported)

⁵⁶ Rev. No. 255/2008 High Court Labour Division at DSM (Unreported)

⁵⁷ Rev. No. 172 of 2009, High Court (Labour Division DSM (Unreported)

- b) Moshi University College of Co-operative and Business Studies (MUCCoBS) v. Christian M. Mahundu;⁵⁸
- c) Morogoro Canvas Mill (1998) Ltd. v. Flora Isdori
- d) Kikoti Chesco v. Kilolo Star Training Centre;⁵⁹ (Condonation is not a mere technicality but a substantive requirement of the law).

16. MISCONDUCT

In the Case of *Levina Kasene & Another v. Chodawu Makao Makuu* Rev. No. 302 of 2010, it was held that admission of misconduct justify the holding that termination of the application was for a valid reason and that it was not necessary to follow the procedures prescribed in the law for termination.

No severance allowance is payable where the employee is terminated of misconduct.

See also:

- a) *Vedastus s. Ntulanyenka & 6 others v. Mohamed Trans Ltd.*⁶⁰
- b) *Dickson Marco Komezi v. VSD Transanii*;⁶¹
- c) *Peter D. Nene v. Chine New Era International Engineering Corporation*⁶² The term misconduct was defined as an act done willfully with a wrong intention and conveys the idea of wrongful intention.

Law applicable

Section 42 (3) (a) of the Employment and Labour Relations Act.

⁵⁸ Rev. 21 of 2013; High Court Labour Division at Mtwara (Unreported)

⁵⁹ Rev. No. 11 of 2012; High Court Labour Division at Iringa (Unreported).

⁶⁰ High Court Labour Division at Shinyanga (Unreported)

⁶¹ Rev. No. 9 of 2011 (Mwanza) (Unreported) (See Section 42 (3) (a) of the Employment and Labour Relations Act.

⁶² Rev. No. 29 of 2013; High Court Labour Division at Mbeya (Unreported).

The provision of subsection (2) shall not apply-
(a) To a fair termination on ground of misconduct.

17. SIGNING OF PLEADINGS

The list of persons who are authorised to sign pleadings in Labour Court Registries (Sub-Registries) is clearly provided for in the Labour Court Rules, GN 106/2007 and the High Court of the United Republic of Tanzania (Labour Division) Zonal Centre (Establishment Rules) 2010 GN 209/2010. Such persons are Court Registrars and Resident Magistrates in Regions with no High Court Zonal Offices. According to *Onesmo Aminiel v. Daniel Mollel*:⁶³ Registry Clerks are not authorized to sign pleadings.

18. FILING OF PLEADINGS

In the case of *Onesmo Aminiel v. Daniel Mollel*: (supra), it was held that pleadings filed in the court are supposed to be stamped and that the date on the stamp is supposed to reflect the date they were filed and signed by the District Registrars or Resident Magistrates (as the case may be). The court held further that failure to comply with prescribed procedure is a material irregularity as failure to observe the same means that the date of filing, which is important in deciding matters of limitation, cannot be established with certainty.

19. REFERRAL TO ARBITRATION

A referral to arbitration or court must be made within reasonable time and that such reasonable time must be 30 days. See: *Dr. Noordin Jella v. Mzumbe University*:⁶⁴ and that by section 86(7) (b) of the Employment and Labour Relations Act, 2004, the mediator has no power to refer a dispute to court after failure of

⁶³ Rev. No. 15 of 2010: High Court Labour Division at Moshu (Unreported)
⁶⁴ Complaint No. 47 of 2008. High Court Labour Division at DSM (Unreported)

mediation and that such referral may only be made by a party to the dispute.⁶⁵

Law applicable

Section 86(7) provides that;

“Where the mediator fails to resolve a dispute within the period prescribed in subsection (4), a party to a dispute may

- (a) If the dispute is a dispute of interest, give notice of its intention to commence a strike or a lockout in accordance with section 80 or 82;*
- (b) if the dispute is a complaint-*
 - (i) refer the complaint to arbitration; or*
 - (ii) refer the complaint to the Labour Court.’*

20. COMMENCEMENT OF ACTIONS

The High Court Labour Division has restated the position in *Dr. Noordin Jella v. Mzumbe University* (supra) that the Labour Institutions Act mandates rigorous time schedules for initiating various actions, including;

- (a) dispute of unfair termination must be referred to the CMA within 30 days from the date of termination;
- (b) other labour disputes must be referred to CMA within 60 days ;
- (c) mediator must mediate the dispute within 30 days (unless the parties agree to extend the period in writing) otherwise if not mediated, parties may refer it to arbitration or to the court;

⁶⁵ See also *Nicomedes Kajungu and 1374 others v. Bulyankulu Goldmine (T) Ltd* Civil Appeal No. 110 2008 (C.A.T)

- (d) arbitrator is enjoined to arbitrate the dispute fairly and quickly;
- (e) revision of arbitrators awards must be within 45 days;
- (f) all disputes regarding unfair termination of employment must be commenced at the C.M.A. regardless of the amount claimed.

21. JURISDICTION OF THE COURT

In *MS Tanzania Limited v. Hassan Hamis Wendo*, it was held to be a long observed principle of law that the court has no jurisdiction to process a time barred dispute. The time permitted under Section 91 of the Employment and Labour Relations Act to apply for revision of CMA award is six weeks (45 days).

Where general damages are erroneously quantified, the same does not affect pecuniary jurisdiction of the court.

In *Tanzania-China Friendship Textile Co. Ltd. v. Our Lady of Usambara Sisters*⁶⁶; it was observed that; it is substantive claim which determines jurisdiction e.g. salaries, overtime, transport etc. and not otherwise.

Law applicable

Section 91 of the Employment and Labour Relations Act. provides that;

(1) Any party to an arbitration award made under section 88(8) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labor Court for a decision to set aside the arbitration award-

a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves improper procurement;

b) if the alleged defect involves improper procurement, within six weeks of the date that the applicant discovers that fact.

(2) The Labour Court may set aside an arbitration award made under this Act on grounds that-

- a) there was a misconduct on the part of the arbitrator;
- b) the award was improperly procured.

22. A CONTRACT OF EMPLOYMENT

The case of *Arnolac Co.Ltd v. Issa Lambert Mugeni*,⁶⁷ gave an account of the main characteristics of a contract of employment namely, right of supervision and control; that the terms of service are at the disposal of the employer; that the object of the contract of work is the performance of a certain specified work or of production of a certain specific result; that the contract is terminated upon death of the employee and that the contract terminates at the expiration of a period of service.

The court in reaching the above characteristics made reference to the South African Labour Appeal Court in *SABC v. McKenzie*.⁶⁸ See also *Temothy Mgumba v. Ritha Kabati*.⁶⁹ There must be proof that one is an employee. Section 61 of the Labour Institutions Act provides:

For the purposes of a labour law, a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

- a) the manner in which the person works is subject to the control or direction of another person;

⁶⁷ Rev. No. 14 2003 High Court Labour Division at Kigoma (Unreported)

⁶⁸ [1999] 1 B.L.L.R.1 (LAC)

⁶⁹ Rev. 17 of 2012: High Court Labour Division at Iringa (Unreported)

- b) the person's hours of work are subject to the control or direction of another person;
- c) in the case of a person who works for an organization, the person is a part of that organization;
- d) the person has worked for that other person for an average of at least 45 hours per month over the last three months;
- e) the person is economically dependent on the other person for whom that person works or renders services;
- f) the person is provided with tools of trade or work equipment by the other person; or
- g) the person only works for or renders services to one person.

23. SETTING ASIDE EXPARTE AWARD

The procedure to be followed by any person who would wish to set aside an exparte awards was reiterated in the case of *MS Nufaika Distributors v. Tumaini Kunguru & Others*.⁷⁰

At page 2 of the typescript, the court held, *inter alia*, that under section 87(5) (a) & (b) of the Employment and Labour Relation Act, a part seeking to challenge the basis of exparte award must file an application in the prescribed manner to the CMA and satisfy it that there were good grounds for failing to attend the hearing. The reasons advanced by the applicant in the application for failing to appear must be made to the CMA and that it is only when such application is dismissed by the CMA that one can apply for revision of the same in the Labour Court. Section 87(5) (a) and (b) reads;

The commissioner may reverse a decision made under this section if-

- a) application is made in the prescribed manner, and

⁷⁰ Misc. Application No 24 2009: High Court Labour Division at DSNJ (Unreported).

b) the Commission is satisfied that there are good grounds for failing to attend the hearing.

24. NEW CLAIMS

The High Court in the case of *Francael N. Raphael v. Moromboso Baptist English Medium School*⁷¹ held that no new claims can be raised in an affidavit to the High Court where such claims were not part of the claims referred to the CMA.

Other related cases:

- i) In *Dickson Marco Mkombozi v. SDV Transami*,⁷² compensation was not granted as that claim was not part of the issues raised in arbitration.
- ii) In *Kibena Tea Ltd. v. Ditram Ngilagwa & others*,⁷³ it was observed that new facts are not allowed.
- iii) In *Mateseko Gwabukoba & 5 Others v. Nyanza Road Works Ltd.*⁷⁴ it was held that it is improper to make a decision on unframed issues(s). Awards based on unframed issues become improperly procured.

25. LACK OF PROSECUTION

In the case of *TANESCO v. Ayoub Hussein*,⁷⁵ The applicant sought adjournment of the application several times over a year. It was held that the conduct of the applicant created a distinct impression that they were using delaying tactics to the detriment of the respondent/ employee. The court held further that it would be contrary to the Act to permit an application for revision to remain pending over a year awaiting convenience of the applicant, what would amount to allowing abuse of the Court.

⁷¹ Rev. No. 14 of 2010 High Court Labour Division at Arusha (Unreported)

⁷² Rev. No. 9 of 2011: High Court Labour Division at Mwanza (Unreported)

⁷³ Rev. No. 4 of 2011 High Court Labour Division at Iringa (Unreported)

⁷⁴ Rev. No. 45 of 2011 High Court Labour Division at Mwanza (Unreported)

⁷⁵ Rev. No. 134 of 2008. High Court Labour Division at Mwanza (Unreported).

26. PRELIMINARY OBJECTION

The High Court Labour Division has made reference to the holding in the old East African case of *Mukisa Biscuits Manufacturing Company Ltd. v. West and Distributors Ltd.*,⁷⁶ that, a preliminary objection was in the nature of what used to be a demenor. That it raises a point of law which is argued on the assumption that all the factors pleaded by the other side are correct. It was also said in the case that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as preliminary objection may dispose of the suit. It further said that the good example of preliminary objection was one on jurisdiction, plea of time or that parties are bound to refer the suit to arbitration. See *National Oil v. Aloyce Hobokela*.⁷⁷ The Court of Appeal in *Shahida Abdul Hasanali Kasam v. Mahed Mohamed Gulamali Kanji*,⁷⁸ stated that the aim of preliminary objection is to save time of the court and of the applicant because there is a point of law that will dispose of the matter summarily.

In *Timothy Mgumba v. Ritha Kabati*,⁷⁹ it was observed that a preliminary objection cannot be based on unascertained matters.

27. REPRESENTATION AT DISCIPLINARY COMMITTEE

In the case of *Moshi University College of Co-operative and Business Studies v. Patrick John Ngwila*, it was held, *inter alia*, that an act of the applicant to deny a representative of the employee at the hearing in the disciplinary committee was a gross violation of the Guidelines and Rules of the Code of Good

⁷⁶ (1969) E.A 696

⁷⁷ Application No. 212 of 2013; High Court Labour Division at DSM (Unreported).

⁷⁸ Civil Appl No 42 of 1999 (unreported)

⁷⁹ Rev No. 17 of 2012; High Court Labour Division at Iringa (Unreported)

Practice.⁸⁰ The purpose of assistance of the employee at hearing by a representative was twofold that is:

- a) the trade union representative or fellow employee must assist the employee with the presentation of the response to the charge;
- b) the trade union representative or fellow employee must ensure that the procedure which is followed during the enquiry is fair. The representative must not merely accompany the employee to the enquiry but must play an active role during the enquiry.

The law does not prohibit a party who has a representative of his own to testify (see Rule 23 (1) of G.N. 64 of 2007).⁸¹ A member or an official of a party's trade union, employers' association or an advocate, may represent a party in mediation or arbitration proceedings.

28. SUBSTANTIVE AND PROCEDURAL UNFAIRNESS

In the case of *Moshi University College of Co-operative and Business Studies v. Patrick John Mgwila*,⁸² it was held among others matters, that although there was procedural unfairness committed in terminating the employees, the employee was substantively terminated and could not therefore be re-engaged or reinstated.

In the case of *Sodetra (SPRL) Ltd v. Njellu Mezza & Another*,⁸³ it was held that the law abhors substantive unfairness more than procedural unfairness and if compensation is for redressing a wrong done to the employee, the remedy for the former attracts a heavier penalty than the latter. The court said further that under the law substantive unfairness may attract a reinstatement order

⁸⁰ G.N. No. 42 of 2007

⁸¹ See also *Charles Joseph Maro v. The Director Tanzania National Park* Rev. No. 309 of 2009: High Court Labour Division (Unreported).

⁸² Rev. No. 31 of 2014

⁸³ Rev. No. 207 of 2008. High Court Labour Division at DSM (Unreported)

and that failure to obey such an order attracted a mandatory payment of compensation of twelve months wages (section 40(3)). Under guideline No. 32(2) (d) the arbitrator is mandated not to order reinstatement where termination is unfair because the employer did ~~not~~ follow a fair procedure.

Other related cases

- ❖ *The University of Dodoma v. David Andrew Hellar and Another*,⁸⁴ there was both substantive and procedural fairness in termination.
- ❖ *Vedastus S. Ntulanyemka & 6 others v. Mohamed Trans Ltd*,⁸⁵ where no substantive fairness the court should not order for reinstatement.
- ❖ *Bidco Oil and Soap Ltd. v. Robert Matonya & 2 Others*,⁸⁶

Section 40(3) Employment and Labour Relations Act

"Where an order of reinstatement or re-engagement is made by an arbitrator or court and employer decides not to reinstate or re-engage the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

29. COURT ORDERS

Court orders are made with the purpose of regulating proceedings. In the case of *Farida Mashaka v. Seven Up Bottling Company (T)Ltd SBC*⁸⁷; it was stated that where the applicant decided to ignore the court order and filed submission after deadline and without leave of the court, he was considered to have defaulted and

⁸⁴ Rev. No. 2 of 2014. High Court Labour Division at Dodoma. (Unreported)
⁸⁵ Rev. No. 4 of 2014. High Court Labour Division at Shinyanga (Unreported)
⁸⁶ Rev. No. 70 of 2009 High Court Labour Division at DSNJ (Unreported)
⁸⁷ Rev. No. 180 of 2013. High Court Labour Division at DSNJ (Unreported)

therefore was regarded to have conceded with the preliminary objection.

The High Court Labour Division in the above case made reference to the Case of *Ivan Mankobrad v. Microslav Katik and Another*⁸⁸; which decided on a similar issue that court orders are meant to command parties to act within a time frame fixed by the court. If the parties are to act in total disregard to those orders then court business will be rendered uncertain and that will not be good for the efficient administration of justice. What is more, the respondent did not see need to apply for extension of time and if successful to have the time within which to file such submission.

30. DEFAMATION

The case of *Dar-Es-Salaam City Council v. Raphael Ruvakumbusa*⁸⁹ was comprised of two causes of action i.e. contract of employment (unfair termination and underpayment of salary) and the other was founded on the tort of defamation. It was held *inter alia* that:

- a) Under Section 50 of the Labour Institutions Act, 2004, the Labour Court is constituted when it sits with at least 2 assessors although the same is not mandated where parties consent.
- b) Where an employment dispute contains a defamation claim and it fails at mediation, the matter should be referred to the Labour Court where the matter can proceed with the assessors:
- c) The procedure necessarily means that disputes found on the tort of defamation based on anything published in a newspaper cannot be joined with other strictly labour claims.

⁸⁸ Civil Case No 321 of 1997, High Court at DSM (Unreported).

⁸⁹ Rev No 149 of 2008 at DSM (Unreported).

Law applicable

Section 50 (2) of the Labour Institutions Act provides;

- (2) *The Labour Division of the High Court shall consist of;*
- a) such number of Judges as the Chief Justice may consider necessary;*
 - b) Two panels of assessors appointed in terms of section 53.*
- (3) *The Labour Division of the High Court shall be constituted by a judge sitting with at least two assessors nominated by the presiding judge from each of the panels appointed in terms of subsection (2) (b) of this section, provided that, it shall not be necessary for the judge to sit with assessors:-*
- a) in application proceedings;*
 - b) if the parties to the dispute agree; and*
 - c) if it is necessary for the expeditious resolution or proceedings.*
- (4) *The decision of the Labour Court shall be made by the judge after taking into account the opinions of the assessors, if any. If the judge does not agree with such opinions, the judge shall give reasons.*
- (5) *Where the Registrar refuses to approve a change, he shall give written notice of that decision and the reasons for the refusal.*

31. NOTICE OF APPLICATION FOR REVISION

It is a mandatory requirement that an application for revision ought to be made on notice. Notice for revision has to conform with Rule 24 (2) of Labour Court Rules.⁹⁰ Where a person files a Notice of Appeal instead of Notice of Revision, then the application for revision is not properly before the court. This was the position

⁹⁰ G.N. 106 of 2007.

taken in *Catholic Diocese of Moshi-Olaleni Secondary School v. Valence Mushi*;⁹¹

Law Applicable

Rule 24 (2) Labour Court Rules

The Notice of Application shall substantially comply with Form No. 4 in the Schedule to these Rules, signed by the party bringing the application and filed and shall contain the following information;

- a) the title of the matter;*
- b) the case number assigned to the matter by the registrar;*
- c) the relief sought;*
- d) an address at which that party will accept notices and service of all documents in the proceedings;*
- e) a notice advising the other party that if he intends to oppose the matter, that party shall deliver a counter affidavit within fifteen days after the application has been served, failure of which the matter may proceed ex parte and*
- f) a list and attachment of the documents that are material and relevant to the application.*

32. AGENCY

A disclosed agent has mandate to sign. In the case of *Miombo Safaris Ltd. v. Jumanne Hamisi*;⁹² the court held that if the agent exceeds his mandate, this does not vitiate the proceedings before the Commission and the principal is bound by actions of the agent so long as there was no evidence of fraud in the making of the agency agreement.

⁹¹ Revision No. 265 of 2009, High Court (Labour Division) at Dar es Salaam (Unreported).

⁹² Revision No. 8 of 2008, High Court (Labour Division) Dar es salaam (Unreported).

33. EXTENSION OF TIME

In the Case of *Moshi University College of Co-operative and Business Studies (MUCCoBS) v. Christian M. Mahundu*,⁹³ it was stated among other things, that issues of limitation of time, jurisdiction and illegality were enough and sufficient grounds to grant application of extension of time.

Other cases

- i) *Kunduchi Beach Hotel v. Lewis Reuben Ngalunga*⁹⁴ See also Rule 56 of the Labour Court Rules, 2007 (G.N. No. 106 of 2007);
- ii) *Etiene Hotels v. National Housing Corporation*; ⁹⁵-(illegality)
- iii) *Zayumba Abeid Husein A. Akida V. Tanzania Ports Authority*⁹⁶

Law Applicable

Rule 56 of the Labour Court Rules provides that:

- (1) *The Court may extend or abridge any period prescribed by these Rules on application and on good cause shown, unless the court is precluded from doing so by any written law.*"
- (2) *Where a party fails to comply with any notice or direction given subject to the provisions of these Rules, any interested party may apply on notice for an order that the notice or directive be complied with within a period that may be specified, and that failure to comply with the order, the party in default will not be entitled to any relief in the proceedings.*
- (3) *The Court may, on good cause shown, condone non-compliance with the period prescribed by the Court.*

⁹³ Application No. 8 of 2013 High Court Labour Division at Mtwara (Unreported)

⁹⁴ Misc Application No. 48 of 2011 (Unreported)

⁹⁵ Civil Reference No. 20 of 2005 (CAT) (Unreported)

⁹⁶ Civil Appeal No. 18 of 2009: C.A.T. at DSM (Unreported)

34. MIXTURE OF ACTIONS

The court cannot quash a portion of proceedings and grant an award and safely leave the other portion intact particularly when the issues concerned are mixture of both discrimination and unfair termination. The case of *Zainul Kashuma v. Wazalendo Secondary School*⁹⁷; was the case in point. The mixture of such issues was also held to constitute material irregularity.

35. REVIEW OF CMA AWARDS

A ruling of CMA which is interlocutory in nature cannot be received by the Labour Court. In the case of *Cami Apparel v. Balazi Msiya & 23 Others*,⁹⁸ the Labour Court held that the applicant in that case had no right to seek revision of impugned C.M.A ruling which was interlocutory and as such it did not finally dispose of the dispute between the parties. The Court held further that the aggrieved party had another chance to raise the issues challenging the final decision of the Court.

Note: Rule 50 of the Labour Court Rules GN. 106/2007 provides;
"No appeal, review or revision shall lie on interlocutory or incidental decisions or orders, unless such decision has the effect of finally determining the dispute."

See also the case of *Ultimate Security Ltd. v. Kapunga Ndimila Dotto*-revision was made by Labour Court *suo motto* under Rule 28(1) of the Rules⁹⁹ which provides that:

"The Court may, on its own motion or on application by any party or interested person, call for the record of any proceedings which have been decided by any responsible person or body implementing the provisions of the Acts and in which no appeal lies or has been taken thereto, and if such responsible person or body appears;

a) to have exercised jurisdiction not vested in it by law; or

⁹⁷ Rev. No. 89 of 2009

⁹⁸ Rev. No. 213 of 2010 High Court Labour Division. at D S M (Unreported)

⁹⁹ G.N 106 of 2007.

- b) to have failed to exercise jurisdiction so vested or
- c) to have acted in the exercise of its jurisdiction illegally or with material irregularity or
- d) that there has been an error material to the merits of the subject matter before such responsible person or body involving injustice;
- e) the court may revise the proceedings and make such orders as it deems fit.

Provided that, any party to the proceedings or otherwise likely to be adversely affected by such revision shall be given an opportunity to be heard.

36. INCOMPETENT SUIT/APPLICATION

A non-existing party cannot be allowed to make an application. In the case of *George Chambo v. Tanzania Railways Corporation*,¹⁰⁰ the former employee of TRC was held to have sued a wrong party which by the time the suit was filed was not in existence. The court held further that in law, the remedy available when the suit is incompetent was to order it to be struck out.

See also

- ❖ *Juma Kadala v. Laurent Makande*;¹⁰¹
- ❖ *NBC 1997 Ltd. v. Thomas Chacha t/a Ibora Timber Supply*¹⁰²-(Such suits/applications are struck out).

37. COSTS IN LABOUR CASE

Under the law, costs are not payable at the Labour Institutions eg CMA and the Labour Court. In the case of *Coastal High School v. Mwanavita Kaniki*,¹⁰³ the Court held that it is stipulated under Rule 51 (1) of the Labour Court Rules that no costs are payable in

¹⁰⁰ Misc Appl. No. 30 of 2012

¹⁰¹ [1983] T.L.R. 103

¹⁰² Civil Appl. No. 2 of 2000, Mwanza (CAT) (Unreported)

¹⁰³ Rev. No. 106 of 2009 High Court Labour Division at Dar es salaam (Unreported)

respect of any matter under the Acts unless the proceedings appear to be frivolous and vexatious.¹⁰⁴

Law applicable

Rule 51(1) and (2)

(1) *No costs, fees or interests whether commercial or court fees or interests whatsoever shall be payable before the court in respect of any proceedings under the provisions of the Acts*

(2) *Notwithstanding subrule (1), where any proceedings appear to the Court to be frivolous or vexatious, the court may, in its discretion, order the party initiating such proceedings to pay general or specific costs incurred, or to pay fees or interest, as the Court deems fit and in case of default of payment in a specific time set by the Court, the said party shall be liable to distress on his assets and properties, failure in satisfaction of which, he shall be liable to imprisonment for a period exceeding six months;*

Provided that, such general and specific costs, fees or interest may be imposed upon the occasion of the trial without any action or proceedings for recovery.

38. DEFECTIVE AFFIDAVIT

In the case of *Filbert Raphael v. Joy in the Harvest*,¹⁰⁵ it was held that nothing can cure an argument or a conclusion that happens to be contained in any defective affidavit. The court could not therefore act on an incurably defective affidavit.

¹⁰⁴ Rule 51(2) of the Labour Court Rules, 2007.

¹⁰⁵ Rev. No. 2 of 2010; High Court Labour Division at Kigoma (Unreported)

Other cases include

- i) *Rebeca Daniel Wiliam v. Sandivik Mining Construction Ltd.*¹⁰⁶
(where an irregularity in affidavit was held to be fatal.
- ii) In *Wilbard Kilenzi & 3 others v. Permanent Secretary Ministry of Transport and Attorney General*¹⁰⁷ (The court observed that it was a fundamental irregularity where Commissioner for Oaths did not specify whether he knew the deponent in person or was introduced to him by another person.)
- iii) In *Athuman Koiseng & 9 others v. Rangers Safaris Ltd.*¹⁰⁸
• (The court was of the opinion that the application was supported by a defective affidavit and it was thus struck out.

39. LOOKING FOR LEGAL ASSISTANCE

Searching for legal assistance for preparation, filling and perusing of the application are not good reasons to warrant an application for extension of time to issue notice to file revision.¹⁰⁹

40. BIAS

The High Court Labour Division has held that it is not proper for the arbitrator to continue to conduct arbitration proceedings after the applicant's request for appointment of a different arbitrator. The court observed that in law, where the dispute has to be resolved through arbitration, the parties to it have the right to choose an arbitrator.¹¹⁰ Thus, a party to the dispute reserves a right to refuse an arbitrator not to conduct arbitration proceedings concerning a dispute in which such a party is involved.

¹⁰⁶ Rev. No. 10 of 2011; High Court Labour Division at Shinyanga. (Unreported)

¹⁰⁷ Misc Appl No. 6 of 2012 High Court (Labour Division) at Mwanza (Unreported)

¹⁰⁸ Revision No. 3 of 2011 High Court Labour Division at Arusha (Unreported)

¹⁰⁹ See *Musa Nyangali and Another v. Silafrika (Simba) Tanzania Ltd.*

¹¹⁰ *GTZ/UNHCR/BMZ v. Yuda Kisinga* High Court Labour Division at Kigoma. (Unreported)

See also;

- James Leonidas Ngonge v. DAWASCO¹¹¹ (that bias was in violation of one of the principles of natural justice (*Nemo Judex in Causa Sua*) and the Court quoted the decision of Queens Bench by Lord Denning, M.R; in *Metropolitan Properties Company (FGC) v. Lannon and others* [1969]1 QB 577 that;

"In considering whether there was a likelihood of bias, the court does not look at the mind of chairman of tribunal or whoever it may be who sits in a judicial capacity, the court looks at the impression which would be given to the people...there must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would or did favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking the Judge was biased."

41. PROBATIONARY EMPLOYEE

Whether Section 35 (5) of the Employment and Labour Relations Act apply. In the case of *Jane Chabruma v. National Microfinance Bank*,¹¹² it was held that;-

- a. section 35 of the Employment and Labour Relations Act unambiguously exempts employers from observing mandatory provisions of sub part E of the Act when dealing with probationary employees;

¹¹¹ Rev. No. 382 of 2013, High Court Labour Division at Dar es salaam (unreported)

¹¹² Rev. No. 159 of 2010, High Court Labour Division at Dar es salaam (Unreported)

- b. probationary employees are excluded from coverage of the rule against double jeopardy i.e, they are not protected by the rule that prohibits taking disciplinary action including termination against an employee also facing a criminal charge; and
- c. a probationary employee is entitled to terminal benefits under Section 41 of the Employment and Labour Relations Act.

Law applicable

Section 35

The provisions of this sub part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts.

42. APPLICABILITY OF CIVIL PROCEDURE CODE

In law, the Civil Procedure Code Cap. 33 R.E 2002 does not apply to the Labour Court. In *MUCCoBS v. RAAWU Kny J.R. Sisya*,¹¹³ the court held that the Labour Court is guided by its own laws and rules, unless it is specifically provided otherwise. Section 57 of the Labour Institutions Act and Rules 54 and 24 (1) of the Labour Court Rules are the provisions relevant to move the court to entertain application for leave to appeal to the Court of Appeal of Tanzania and not the Civil Procedure Code.

A person may apply the Civil Procedure Code only if there is a lacuna in Labour Court Rules.¹¹⁴

¹¹³ Misc Labour Application No. 92 of 2012; High Court Labour Division at Dar es salaam (Unreported).
¹¹⁴ Reli Assets Holding Co. Ltd. Japhet Casmiri and 1,500 others, Revision No. 10 of 2014 High Court Labour Division (Tabora) Unreported

Law applicable

Section 57 of the Labour Institutions Act, No. 7 of 2004:-

"Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal on a point of law only".

Rule 24(1) of the Labour Court Rules;

"Any application shall be made on notice to all persons who have an interest in the application".

Rule 54

Subject to the provisions of section 57 of the Act, any appeal to the Court of Appeal of Tanzania shall be in conformity or as nearly as possible with the provisions of the Court of Appeal of Tanzania Rules.

43. SIGNING OF VERIFICATION AND JURAT

Application which is supported by an affidavit whose date of verification and the date of the jurat differ has been held to be defective.

In the case of *MUCCoBS V. RAAWU Kny J.R. Sisya* (supra); the applicant signed and verified the affidavit on different dates of attestation before the Commissioner for Oaths. The Court was of opinion that the two parts of the affidavit have to be signed and dated on the same date and each part has to be effectively signed and dated before the Commissioner for Oaths.

Other cases

1. *Mwanachi Marine Products (T) Ltd. v. Owners of Motor Vessels.* (Verifications cannot be signed and dated in absence of Commissioner for Oaths.)
2. *Mohamed I.A. Abdul Hussein v. Pitake MPAP* [2005] T.L.R 383 (Defective affidavit is incompetent).

44. REVIEW ON LABOUR CASES

Notice of review is one of notices provided for under the Labour Laws. In the case of *Tanzania Union of Industrial and Commercial Workers v. Attorney General & Others*,¹¹⁵ the High Court had opportunity to explain the nature of the notice under Rule 27 of the Labour Court Rules G.N. 106 of 2007 which provides that any review shall be instituted by filling a written notice of review to the registrar within fifteen (15) days from the date of decision to be reviewed was delivered. Such notice of review should be made in a prescribed form and must be distinguished from the notice provided for under Rule 24 (1).

A party seeking to review a decision or proceedings of a responsible person or body performing a reviewable function justifiable by the court should file a chamber application of review to the body or person and serve it to all other affected parties.¹¹⁶ According to this case, the responsible person or body performing a reviewable function must be an inferior body and the Court should be a "Superior" body which sits in review.

Other cases

- *Joyness Denis Kiluwa v. Maxons Paper Convertors Ltd*¹¹⁷

Law Applicable

Rules 24(1), 26(1) and 27 of the Labour Court Rules, G.N 106 of 2007.

Rule 26(1)

"A party seeking to review a decision or proceedings of responsible person or body performing a reviewable function justifiable by the court, shall file a chamber application of review to the body or person and to all other affected parties."

¹¹⁵ Misc Application No. 1 of 2008, High Court Labour Division at Dar es salaam. (Unreported)

¹¹⁶ Rule 26(1) of the Labour Court Rules, G N 106 of 2007

¹¹⁷ Rev. Appl. No. 109 of 2010, High Court Labour Division at DSM: (Unreported)

Rule 27(1)

"Any review shall be instituted by filing a written notice of review to the Registrar within fifteen days from the date the decision to be reviewed was delivered."

45. JURISDICTION IN C.M.A DISPUTES

In *Bulyankulu Gold Mine Ltd. v. Gasto Myovela*;¹¹⁸ the respondent was allegedly terminated from employment at the applicant's work place which was in Shinyanga Region. Aggrieved by the act of the employer, the respondent filed a dispute in Dar es salaam.

It was decided that under the current law, the only C.M.A. office with jurisdiction in that Labour Dispute was the office responsible for the area where the dispute arose, unless permitted otherwise by the C.M.A. Where the above position is not followed then the Court has no jurisdiction.

46. POWERS OF THE REGISTRAR

The powers provided for under Rule 55 (1) and (2) of the Labour Court Rule are not extended to the Registrar of the Labour Court but to the Judge of the court only. The powers of the registrar are limited to his duties.¹¹⁹ In the case of *Notbrugha Maskini v. Local Authorities Pension Fund*,¹²⁰ the attempt of the Registrar to grant an extension of time to the applicant to re-file his application was by and large null and void for lack of Jurisdiction.

Law Applicable

Rule 55(1-2) of the Labour Court Rules

(1) Where a situation arises in proceedings or contemplated proceedings which these rules do not provide, the court may adopt any procedure that it deems appropriate in the circumstances.

¹¹⁸ Rev. No. 217 of 2011 High Court Labour Division at Dar es salaam (Unreported)

¹¹⁹ Rule 7 of G.N. No. 106 of 2007.

¹²⁰ Revision No. 19 of 2013; High Court Labour Division at Dodoma: Unreported.

- (2) the exercise and performance of its powers and functions, or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances, to achieve the objects of the Act and, or the good ends of justice.

47. EXCLUSIVE BARGAINING UNIT

The High Court of Tanzania made interpretation of the terms "bargaining unit" and "majority of all the employees" when resolving a dispute under Section 67 of the Employment and Labour Relations Act, 2004. In the case of *Tanzania Union of Industrial and Commercial Workers (TUICO) v. Tanzania Tobacco Processors Ltd. (TTPL)*,¹²¹ it was decided that the term bargaining unit refer to employees in the permanent employment category and that majority of the employees refer to the number held by each union in the premises among the permanent employees.

The term bargaining unit means any unit of employees in respect of which a registered trade unit is recognized or is entitled to be recognized as the bargaining agent in terms of the Act. The court held that TUICO had the majority of the employees at TTPL and held that it was the exclusive bargaining agent and therefore it had to be recognized as such.

Law applicable

Section 67 of the Employment and Labour Relations Act, 2004

(1) A registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognized as the exclusive bargaining agent of the employees in that unit.

2) An employer or employer's association may not recognize a trade union as an exclusive bargaining agent unless the trade

¹²¹ Labour Dispute No, 49 OF 2009, High Court Labour Division at DSM; Unreported.

union is registered and represents the majority of the employees in the bargaining unit.

- 3) A registered trade union may notify the employer or employer's association in the prescribed form that it shall seek recognition as the exclusive bargaining agent within an appropriate bargaining unit.
- 4) Within thirty days of the notice prescribed in subsection (3) an employer shall meet to conclude a collective agreement recognizing the trade union.
- 5) Where there is no agreement or the employer fails to meet with the trade union within the thirty days, the union may refer the dispute to the commission for mediation. The period of thirty days may be extended by agreement.
- 6) If the mediation fails to resolve the dispute, the trade union or the employer may refer the dispute to the Labour Court for decision.
- 7) The Labour Court may decide any dispute over the representativeness of the trade union by arranging any appropriate person to conduct a ballot of the affected employees.
- 8) In determining the appropriateness of a bargaining unit the Labour Court shall;
 - a) Consider the following;
 - i. the wishes of the parties;
 - ii. the bargaining history of the parties;
 - iii. the extent of union organization among the employees of the employer or employers;
 - iv. the employee similarity of interest;
 - v. the organizational structure of the employer or employers;

- vi. the different functions and processes of the employer or employers;
- vii. the geographic location of the employer or the employers;

b) Promote orderly and effective collective bargaining with a minimum of fragmentation of an employer's organizational structure.

9) Any dispute over the interpretation or application of an order made under this section shall;

- a. be referred to the commission for mediation; and
- b. if the mediation fails to resolve the dispute, be referred to the Labour Court for a decision.

10. Nothing in this section precludes registered trade unions employer's associations, and registered employers association from establishing their own collective bargaining arrangements by collective agreements.

48. LIMITATION OF TIME

In law, limitation is a material point in the speedy administration of justice. Limitation is, as such, meant to ensure that a party does not go to court as and when one chooses.¹²²

Other cases

i) *Jirey's Nestory Mutalemwa v. Ngorongoro Conversation Authority*;¹²³ (Limitation on actions knows no sympathy or equity)

ii) *Tanzania Fish Processors Ltd. v. Christopher Luhangula*,¹²⁴

¹²² See *Ombeni Pauli Msuya v. National Insurance Corporation of (T) Ltd and Consolidated Holding Corporation Rev. No.367 of 2013*; High Court Labour Division at Dar es salaam (Unreported)

¹²³ Misc Labour Application No. 270 of 2013 High Court Labour Division at Dar es salaam Unreported

¹²⁴ Civil Appeal No. 101/1994 (CAT).

49. CONSTRUCTIVE TERMINATION

Constructive termination is important in the context of impairment to one's dignity because it happens that an employer's act or omission renders employee's work situation intolerable and also impairs that person's right to dignity.

In the case of *TUCTA v. Nestory Kilala Ngula*¹²⁵ - six acts of the employer which were held to have led to "Forced Resignation" by the employee were;

- a) inquiry on accusation, mismanagement and embezzlement of applicant's money;
- b) kicking him out of office under cover of giving him leave of one month;
- c) refusal by employer to allow respondent back to office after leave;
- d) act of employer insisting and stressing that the respondent had resigned by uttering oral resignation contrary to the TUCTA constitution;
- e) act of the employer tabling oral resignation before the TUCTA General Assembly instead of tabling written letter of resignation;
- f) act of the employer deciding on an alleged oral resignation (an obvious breach of the constitution).

Therefore, the above acts/ conduct made continued employment intolerable.

Law Applicable

Rule 7(1) of GN 42 of 2007

- (1) "*Where an employer makes an employment intolerable which may result to the resignation of the employee, that*

¹²⁵ Rev. No. 172 of 2013 High Court Labour Division at Dar es salaam (Unreported)

resignation amount to forced resignation or constructive termination

- (2) Subject to sub rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-
- (a) sexual harassment or the failure to protect an employee from sexual harassment; and
 - (b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.
- (3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer.

50.DAMAGES

When employer terminates a fixed term contract of employee, the loss of salary by the employee of the remaining period of the unexpired term of the contract is a direct, foreseeable and reasonable consequence of the employer's wrongful action.¹²⁶ In the case of *Good Samaritan v. Joseph Robert Savari Munthu*,¹²⁷ the employment of the employee was terminated and the court found that the direct foreseeable and probable consequence of the action of the employer was loss of salary for the period of 21 months which was the remaining period of the employment contract.

In *Abubakari Haji Yakubu v. Air Tanzania Co. Ltd.*,¹²⁸ it was held that in order for damages to be granted, they must be certain. For

¹²⁶ Section 73 of the Law of Contract Act, Cap 345 RE 2002

¹²⁷ Rev. No. 165 of 2011, High Court Labour Division at DSM, (Unreported)

¹²⁸ Rev No. 162 of 2011

example, where damages are sought for personal injury like mental torture or anguish, there must be clear evidence of such distress/mental torture, anguish or any other alleged personal injury.

Law applicable

Section 73 of the Law of Contract Act, Cap. 345 R.E 2002 provides;

- (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
- (2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
- (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.*
- (4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

51. RENEWAL OF A FIXED TERM CONTRACT

In the case of *Dar-es salaam Baptist Secondary School v. Enock Ogala*;¹²⁹ the employee referred a suit of unfair termination of a two years fixed contract to CMA. The issue before the CMA and later to the High Court (Labour Division) was whether there was reasonable expectation of renewal of the contract in terms of Section 36 (iii) of the Employment and Labour Relations Act, 2004 and Rule 4 G.N 42 of 2004. It was held that the employee had reasonable expectation of renewal for two reasons;

- (i) that the employer wrote a termination letter to the employee while the contract would have expired automatically with no need of a letter of termination; and
- (ii) that the employer included the employee in the duty roster beyond the contract period.

Other cases

- (i) *Feza Primary School v. Wahida Kabarahara*¹³⁰ - Where notice is given in compliance with law.
- (ii) *Erasto Edward & 10 others v. M/S Game Stores*¹³¹ - Employee terminate services if not willing to accept change)

Law applicable

Section 36 (a) (iii) of the Employment and Labour Relations Act

"Termination of employment includes, failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;"

Rule 4(5)

"Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee

¹²⁹ Rev No. 53 of 2008; High Court of Tanzania (Labour Division) at DSM (Unreported)

¹³⁰ Revision No. 117 of 2013 High Court Labour Division at DSM; (Unreported)

¹³¹ Revision No. 231 of 2009 High Court Labour Division at DSM; (Unreported)

shall demonstrate that there is an objective basis for the expectation such as previous renewal or employer's undertaking to renew."

52. WHO IS AN EMPLOYEE?

Under the employer-employee relationship or in Industrial relations, the question whether a person is an employee or not is very crucial. Rights and obligations of the parties are derived from such relationship. The Employment and Labour Relations Act, 2004 provides in section 14 (1) (a-c) three categories of contracts of employment and Section 61 (a-f) of the Labour Institution Act, 2004 defines who is an employee.

In the case of *Director Usafirishaji Africa v. Hamisi Mwakabala and 25 Others*,¹³² the court made reference to the two provisions of the two laws named above and found that the respondent was an employee. For ease of reference, the two sections are quoted below;

Section 14 (1) of the Employment and Labour Relations Act states;

A contract with an employee shall be of the following types:-

- a) a contract for an unspecified period of time;*
- b) a contract for a specified period of time for professionals and managerial cadre; and*
- c) a contract for a specific task.*

Section 61 of the Labour Institutions Act, provide for presumptions as to who is an employee. One or more of the following factors are relevant;

- a) the manner in which the person works is subjected to control or direction of another person;*
- b) the person's hours of work are subject to the control or direction of another person;*
- c) the person is part of that organization;*

¹³² Revision No 29 of 2009 High Court Labour Division at DSM; (Unreported)

- d) the person has worked for that other person for an average of at least 45 hours per month over the last 3 months;
- e) the person economically depends on the other person for whom that person works or renders service;
- f) the person is provided with tools of trade or work equipment by the other person;
- g) the person only works for or renders services to one person.

53. CONTRACT OF EMPLOYMENT

According to the case of *ARNOLAC Co. Ltd v. Issa Lambert Mugeni*,¹³³ the court had opportunity to explain what factors show whether there existed a contract of employment or not. The factors are;

- (a) an agreement inter parties and that it must comply with the requirements of section 14 (1) of the Employment and Labour Relations Act;
- (b) the concept of work must appear. That is, by work means to place one's labour potential at the disposal and under the control of another (a person may offer service to an individual or juristic person (company) and follow the instructions of that person.
- (c) remuneration concept-either monthly payments or weekly or daily or irregular cash payment.
- (d) reciprocal contract-that is, one promise is made in exchange for another and one obligation is incurred in exchange for another.

¹³³ Rev. No. 14 of 2013; High Court Labour Division at Kigoma (Unreported)

Other cases

- (i) *Iringa Urban Water Supply and Sewerage Authority v. Mario Lusoko & Others*¹³⁴ (Content of features of a contract of employment)
- (ii) *Principal Labour Officer on Behalf of Ladzabiho Mwamlwilo v. Zonal Director, South West Zone Tanesco Ltd. Mbeya*.¹³⁵ (A letter of employment is not a contract of employment as it simply communicates the offer of employment to the employee.)

54. CONTRACT OF EMPLOYMENT AND CONTRACT OF WORK

The High Court of Tanzania Labour Division has subscribed to crucial differences between a contract of employment and that of work as were laid down by the Labour Appeal Court of South Africa in *S.A.B.C v. Mackenzie*.¹³⁶ This was in the case of *ARNOLAC Co. Ltd. v. Issa Lambert Mugeni* (supra). The four differences are;-

- (a) that the object of the contract of employment is the rendering of personal service by the employee to the employer, while the object of the contract of the work is the performance of a certain specified work or production of the certain specified result.
- (b) service to be rendered in terms of the contract of employment/service are at the disposal of the employer who may in his own discretion, subject to question of reputation decide whether or not he wants to have them rendered while in a contract of work one is bound to perform a certain specified work or produce specified

¹³⁴ Rev. No. 1 of 2012, High Court (Labour Division) at Iringa (unreported)

¹³⁵ [2001] TLR 305

¹³⁶ [1999] 1 BLLR 1 [LAC].

results, within time fixed by the contract or work or within a reasonable time where no time has been fixed.

(c) that a contract of service is terminated by the death of the employee, whereas the death of either of the parties to a contract of work does not necessarily terminate it.

(d) a contract of service terminates on the expiration of the period of service entered into while a contract of work terminates on the completion of a specified work or production of the specified result.

55. REASONABLE OR SUFFICIENT CAUSE

The High Court Labour Division in the case of *Josephat M. Mbiso & 32 Others v. D. T. Dobie Company Ltd*,¹³⁷ made interpretation of the words "reasonable or sufficient cause" which may warrant extension of time of limitation. The court stated that reasonable cause could include sickness, ignorance of the award or any reason that hinder the applicant from filling the application in time. The court further held that, the fact that the advocate travelled abroad was not a sufficient cause as the applicant had other options including getting assistance from another advocate, approaching the firm of the advocate (other advocates) or for the applicants to pursue the matter on their own as litigants.

56. TERMINATION ON NOTICE

Section 14(1) of the Employment and Labour Relations Act, 2004 provides three (3) types of employment. Section 41 (1) provides for three types of notice periods namely;

- (a) seven (7) days- if the notice is given in the first month of employment;
- (b) four (4) days- if the employee is employed on a daily or weekly basis; and

¹³⁷ Misc. Appl. No 27 of 2008; High Court Labour Division at DSM (Unreported)

(c) twenty eight (28)-days if the employees are employed on the monthly basis.

Notice may be given for a longer period than that required above but not shorter than that period. In the case of *Alliance one Tobacco Tanzania Ltd. v. Mustapha Mshata*,¹³⁸ it was held that a four (4) days' notice given to employees was illegal as it ought to have been one of twenty eight (28) days.

57. GROSS INSUBORDINATION

The term insubordination means disobedience to a constituted authority e.g., refusal to obey some lawful order which a superior officer has given.

Where in the employer-employee relationship the employee uses abusive/violent language and commanding his superior to withdraw the performance appraisal letter which had been written to him was held to amount to gross insubordination of which any other person could see as such. This was the position taken by the court in *Uswage Andrew v. Mkwawa University College*.¹³⁹

58. CONTENTS OF AFFIDAVIT

According to Rule 24 (3) of the Labour Court Rules,¹⁴⁰ an affidavit shall contain the names, description and addressees of the parties, a statement of material facts in a chronological order in which the application based, a statement of the legal issues that arise from the material facts and the reliefs sought. This is, apart from the requirement of Order XIX Rule 3(1)¹⁴¹ which requires that affidavits be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted, provided that the grounds thereof are stated. On the basis of the above requirements, an affidavit in the case of *Rebeca Daniel William v.*

¹³⁸ Rev. No 3 of 2012 High Court Labour Division at Morogoro (unreported)

¹³⁹ Revision Nos. 3 & 4 of 2012: High Court Labour Division at Iringa (Unreported).

¹⁴⁰ GN No 106/2007

¹⁴¹ The Civil Procedure Code, Cap. 33 R E 2002

*Sandvik Mining Construction Ltd.*¹⁴² was held to contain legal arguments and quotations of legal provisions, what should have been expected in final submission of the parties to proceedings.

Other Cases

- i) *Juma S. Busiyah v. The Zonal (South) Tanzania Post Corporation*¹⁴³
- ii) *Phantom Modern Transport (1985) Limited v. D.T. Dobie (T) Limited*,¹⁴⁴
- iii) *K.J Motors and 3 others v. Richard Kishamba and Others*,¹⁴⁵ (on Procedure)
- iv) *Zuberi Mussa v. Shinyanga Town Council*¹⁴⁶ (on Rules of Procedure)

59. SEXUAL HARASSMENT

The High Court of Tanzania, Labour Division, had opportunity to discuss the effect of sexual harassment. In the Case of *The Parastatal Pension Fund v. Saniel Mchembe*,¹⁴⁷ it was observed that (at 55 of typescript);

"the defamatory statements had exposed the respondent employee to the world and her society at large. The respondent who was a hard working employee to the extent of being awarded excellent work performance certificates by the applicant employer was sexually harassed when and after the awards were connected to her alleged behavior of sexuality and adultery by defamatory statements. She was even accused of attempting to "spoil" the marriage of the applicant's Director because of her behavior. That was sexual harassment which was being done or practised by the

¹⁴² Rev. No. 10 of 2011; High Court Labour Division. (Unreported)

¹⁴³ Civil Appl. No. 8 of 2014 (CAT-Mbeya)

¹⁴⁴ Civil Ref. No. 15 of 2001 and 3 of 2002 (CAT) (Unreported)

¹⁴⁵ Civil Appeal No. 74 of 1999 (CAT) DSM

¹⁴⁶ Civil Application No. 100 of 2004 (Mwanza)

¹⁴⁷ Rev. No. 389 of 2013; at DSM (Unreported)

applicant/employer to the effect that the employee/respondent lost her employment."

The court cited the report of the United Nations Rapporteur on violence against women which stated that;-

"sexual harassment strikes at the heart of women's economic self sufficiency, disrupting women's earning capacity by forcing them out of the work and school."

It also explained that the defamatory statements that the respondent /employee was being involved in sexual activities and adultery at place of work and getting favours from the employer on sexuality was a *quid pro quo* sexual harassment against the respondent employee by the employer.

Quid pro quo sexual harassment is held to occur where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant in exchange for sexual favour.

60. DISCRIMINATION ON ACCOUNT OF PREGNANCY

According to law, where the employee makes a *prima facie* case of discrimination by the employer on any of the grounds prescribed in section 7(4), it shall be the duty of the employer to prove that discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of those grounds. So the duty that has been imposed on the employer is mandatory.¹⁴⁸ In the case of *Feza Primary School v. Wahida Kibarabara*,¹⁴⁹ it was held that the respondent was subjected to mental torture and shame by the headmaster who discriminated and harassed her on ground of pregnancy.

Section 7(4) of the Employment and Labour Relations Act

¹⁴⁸ Section 7(8) (a) (i) of the Employment and Labour Relations Act
¹⁴⁹ Rev. 117 of 2013 at Dar es salaam (Unreported)

"No employer shall discriminate directly or indirectly, against an employee, in any employment policy or practice, on any of the following grounds:

(j) Pregnancy.

Section 7(8) of the Employment and Labour Relations Act

"In any proceedings-

(a) Where an employee makes out a prima facie case of discrimination by the employer on any of the grounds prescribed in subsection (4), it shall be the duty of the employer to prove;

(i) that the discrimination did not take place as alleged; or

(ii) that the discriminatory act or omission is not based on any of those grounds; or

(b) employer shall prove a defence in terms of subsection (6) if the discrimination did take place on a ground stipulated in subsection (5).

61. COMPENSATION IN LABOUR CASES

The law does not fix or talk about how much compensation should be set up by the court. However, by section 40(3) of the Employment and Labour Relations Act, an order for compensation should be in addition and not in substitute for any amount to which the employee may be entitled in terms of any law or agreements.¹⁵⁰

As to how damages should be granted, the court made reference to the case of *International Medical and Technological University v. Eliwanga Ngowi*,¹⁵¹ that damages should not be anticipatory ie, award for future events which may or may not happen.

¹⁵⁰ *Alliance One Tobacco Ltd. v. George Msingi* Rev. 285 of 2009, High Court Labour Division at Morogoro (Unreported)

¹⁵¹ Rev. No 54 of 2008 (High Court Labour Division [Unreported])

In *Sodetra (S.P.R.L.) Ltd. v. Njelu Mezza & Another*,¹⁵² the court observed that where there is substantive unfairness the amount of compensation is likely to be higher.

Law applicable

Section 40(3) of the Employment and Labour Relations Act

"Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment".

62. WHETHER ARBITRATOR CAN COLLECT EVIDENCE

It is not the duty of the mediator or arbitrator to collect evidence and disprove facts given particularly so where the respondent in a case was content to accept the applicant's version and proceed to have the dispute determined on merit. The mediator's conduct amounted to fundamental irregularity.

In the case of *Simon Shija v. St. Augustine University of Tanzania*,¹⁵³ the mediator, having doubted the genuineness of a discharge sheet produced, ordered a visit to the *locus in quo* i.e. visit to the hospital that issued the discharge sheet and after checking the record, he concluded that the sick sheet was not genuine. The procedure was improper.

63. DISOBEYING LAWFUL INSTITUTIONS OF EMPLOYER

In *Magnus Assenga v. Director, Automobile Ltd.*,¹⁵⁴ it was held that termination was fair where the employee was given a job of keeping records by his employer but refused on the ground that the new job of keeping records by his employer was not part of his job

¹⁵² Rev. No 207/2008, High Court Labour Division[Unreported]

¹⁵³ Rev. No 11 of 2012 High Court Labour Division at Mwanza (Unreported)

¹⁵⁴ Application No 112 of 2008, High Court Labour Division at Dar es Salaam (Unreported).

as a storekeeper. The Court observed that one wonders how a storekeeping function could be effective without keeping records. Despite of the above, it was observed that the applicant used foul language against his immediate superior at work, the allegation which was not contradicted.

64. RELEVANCE OF PERFORMANCE BY EMPLOYEE

The High Court has considered good performance/work performance of an employee as a good ground for finding termination of the employee as unfair. In the case of *Branch Director C.R.D.B. Bank Limited v. Titoh Kwareh*,¹⁵⁵ the employee performed over average in assessment (he got 4.18 over 5 according to C.R.D.B rates). Together with the failure by employer to follow procedures, it was found that the employee was not fairly terminated which act was described to be harsh and inhuman.

In the case of *The Parastatal Pension Fund v. Siriel Mchembe* (supra), the respondent who was awarded excellent work performance certificates but who was terminated abruptly on allegation of incompatibility was said to have been injured and sexually harassed.

65. PRELIMINARY OBJECTION ON POINT OF LAW AT MEDIATION

In the case of *Emirates Shipping v. COTWU*,¹⁵⁶ it was observed that it was procedurally wrong to raise a preliminary point of objection on point of law when the case was set for mediation. A party can raise a preliminary point of objection on a point of law when a matter is for arbitration.¹⁵⁷ It was further held that raising the preliminary objection at mediation could end up defeating the purpose of amicable settlement of a dispute on the one hand and it would on the other be contrary to the requirements of the law which require disputes to start with mediation.

¹⁵⁵ Rev. 14 of 2011; High Court Labour Division at Moshi (Unreported).

¹⁵⁶ Rev. No. 193 of 2009. High Court Labour Division at DSM (unreported)

¹⁵⁷ Rule 20 of the Labour Institutions (Mediation and Arbitration) Rules G.N 64 of 2007.

Law Applicable

Rule 20 of G.N 64 of 2007

"Where during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the arbitrator shall require the referring party to prove that the Commission has jurisdiction to arbitrate the dispute."

66. REINSTATEMENT AND RE-ENGAGEMENT

Where the arbitrator finds that termination by employer is unfair, he has discretion to order the employer to reinstate or re-engage the employee. This is so although the arbitrator may order the employer to pay compensation to the employee.¹⁵⁸

In *K.C.B. (T) Ltd v. Dickson Mwinuka*,¹⁵⁹ the court quoted Section 40 (3) of the Employment and Labour Relations Act, which states;

"where an order for reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve (12) months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

67. WHETHER ARBITRATOR CAN REVISE HIS DECISION

In law, the Arbitrator can only review but not revise his own decision. Once CMA has reached a final decision in respect of any matter before it in accordance with the law, it cannot be revisited because CMA has changed its mind that it made an error within jurisdiction; or because their counsel had failed to address an important issue. This is because the arbitrator, after making his decision becomes *functus officio*. This position was taken in the case of *Emmanuel Ouma Marcellus v. North Mara Gold Mine Limited*.¹⁶⁰ In this case, the arbitrator at CMA found

¹⁵⁸ See section 40(1-3) of the Employment and Labour Relations Act
¹⁵⁹ High Court Labour Division at Mwanza Rev. No. 45 of 2013 (Unreported).
¹⁶⁰ Rev. No. 13 of 2013; High Court Labour Division at Mwanza (Unreported)

that he had powers to revise its own decision and therefore quashed its earlier decision on the ground that it was fraudulently obtained.

Note that *functus officio* is a Latin term/phrase which refers to one who has exercised his authority and brought to an end in a particular case.

68. A CLAIM FOR SUBSISTENCE ALLOWANCE

The Court of Appeal of Tanzania in *Attorney General and 2 others v. Eligi Edward Masawe and 104 others*,¹⁶¹ observed that a claim of subsistence allowance has to be proved on the balance of probabilities and in compliance with the provisions of sections 110 and 111 of the Evidence Act.¹⁶² The Court of Appeal also held that the employees who failed to prove their claim for subsistence allowance could be paid subsistence expenses during the period they had to wait for the payment of their terminal benefits. This was said to be an equitable approach.

On the other hand, it was held that the employees whose employment has been terminated have to mitigate the loss by proceeding home and claim what they incurred above what had been paid as terminal benefits. In *Christian Council of Tanzania v. A.T. Mwakipesile and 6 Others*,¹⁶³ the Court quoted the decision in *Southern Highlands Tobacco Union Ltd. v. David McQueen*,¹⁶⁴ where it was held, *inter alia*, that an employee should not "sit and twiddle his thumbs" and expect to be paid daily allowance for months and without trying to make genuine and diligent efforts to proceed home and claim the losses later.

Law applicable

Section 110 and section 111 of the Evidence Act.¹⁶⁵

¹⁶¹ Court of Appeal of Tanzania, Civil Appeal No 86 of 2002 at DSM (Unreported)

¹⁶² Cap 6 R.E 2002.

¹⁶³ DC Civil Appeal No. 26 of 1993 (HC) Dodoma.

¹⁶⁴ [1960] E.A. 490

¹⁶⁵ Cap 6 R.E 2002

Section 110 provides:

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) *when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 111

The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

69. JURISDICTION OF C.M.A OVER A NON-CITIZEN

According to Section 26(1) of the National Employment Promotion Services Act,¹⁶⁶ it is both prohibited and criminalized to employ a non-citizen who has not obtained Class B permit. The Immigration Act,¹⁶⁷ also specifically prohibits a non citizen from being engaged in paid employment without permit.¹⁶⁸ Thus, C.M.A. has no jurisdiction in a dispute which did not concern a Labour Matter.¹⁶⁹ The position was taken in the case of *Rock City Tours Ltd. v. And Nurray*.¹⁷⁰

Law applicable

Section 16 of the Immigration Act Cap 54 R.E 2002 is on prohibition on employment, study, etc., without permit. It provides;

"(1) No person shall engage in paid employment under an employer resident in Tanzania except under a permit issued in accordance with the provisions of this Act.

(2) No person shall for gain or reward engage in any prescribed trade, business, profession or other occupation

¹⁶⁶ Cap 243 R.E 2002.

¹⁶⁷ Cap. 54 R.E 2002.

¹⁶⁸ Section 16 (1) of the Immigration Act, Cap. 54 R E 2002

¹⁶⁹ Relationship could not be that of employer and employee as it was based on unlawful contract of employment

¹⁷⁰ Rev No 69 of 2013, High Court Labour Division at Mwanza (Unreported)

except in accordance with the terms of an appropriate permit issued in accordance with this Act.

(3) No person shall commence any course of study at an educational institution in Tanzania unless he is the holder of a valid appropriate permit issued in accordance with this Act."

Section 26 (1) of the National Employment Promotion Services Act Cap. 243 R.E 2002 is on work permit. It provides;

"(1) No person shall employ any foreigner, and no foreigner shall take up any employment with any employer, except under and in accordance with a work permit issued to such foreigner.

(2) Any person who contravenes the provisions of this section commits an offence and is liable on conviction, to a fine not less than one million shillings or to imprisonment for a term not less than six months or to both such fine and imprisonment."

IMPORTANT NOTE

The above case was decided before the enactment of a specific law on the employment of non citizens namely the Non Citizens (Employment Regulations) Act, 2015 (Act No. 1 of 2015). Section 9 to 17 deals with Regulation of employment of non-citizens specifically dealing with employment and engagement of non citizens; application for work permit; consideration of application, work permit, categories of work permit cancellations of work permit; lost and stolen work permit; certificate of exemption returns and surrender of work permit. These sections are very important as prospective employers of non citizens are supposed to be conversant with the provisions. Section 18 of the Act is on appeals; section 19 is on incentives to certified investors and section 20 is on offences and penalties. The acts which may constitute offences under this law are;

- Where a person;
- (a) furnishes false information for the purpose of procuring a work permit or certificate of exemption knowing that the information is false;
 - (b) obtains or attempts to obtain any document by means of fraud, false pretence or by presenting or submitting a false or forged documents;
 - (c) obstructs or hinders a labour officer or any other authorized officer in the execution of his duty; and
 - (d) contravenes any condition attached to the work permit.
- Where any person commits an offence, on conviction, he shall be liable to a fine of not less than ten million (10,000,000/=) or imprisonment for a term not less than twelve months or to both

Note that,

A fine should not be less than Tshs. 10,000,000/= and imprisonment should not be less than twelve months. This means the law has set minimum fine and term of imprisonment.

70. ARBITRATOR ACTING AS A WITNESS

In the case of *Rissallah Mgonja v. Regional Manager Post office Iringa*,¹⁷¹ the CMA was said to have stepped into the shoes of the witness when the arbitrator compared signature himself contrary to section 49(1) and (2) of the of the Evidence Act,¹⁷² The procedure was held to be incorrect as arbitrator was supposed to be impartial. In this case he ordered the witness to write the signatures and observe them and said that they were different, thereby making proceedings irregular. The proceedings were nullified.

¹⁷¹ Revision No. 13 of 2011; High Court Labour Division at Iringa (Unreported)
¹⁷² Cap 6 R E 2002.

Law applicable

Section 49(1) and (2) of the Evidence Act

- (1) *When a court has to form an opinion regarding the person by whom, any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.*
- (2) *For the purposes of subsection (1) a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him "*

71. DISQUALIFICATION OF ARBITRATOR/ MEDIATOR

Rule 6 of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007 is on conflict of Interest and Mediator or Arbitrator may withdraw or disqualify oneself from the conduct of the dispute. Indeed, disqualification is not automatic once a party has complained. According to the case of *Azania College of Management v. Alfred Mtupwa*,¹⁷³ the arbitrator has to make a judicious decision to justify his withdrawal from the conduct of the matter. Accordingly, the arbitrator has to consider factors such as conflict of interest, possibility of being unfair and impartial and whether a withdrawal may not cause unfair delay or defeat the ends of justice.

¹⁷³ Rev. No. 57 of 2009 High Court Labour Division at DSM (Unreported)

Law applicable

Rule 6 of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) G.N 66 of 2007

- (1) All Mediators and Arbitrators shall disclose any interest or relationship, likely to affect their impartiality or business.*
- (2) Subject to the provisions of sub rule (1), Mediators and Arbitrators appointed to intervene in disputes shall, before accepting an appointment, disclose to the Commission any;
(iii) direct or indirect commercial or social interest in the matter in dispute; and
(iv) existing or past commercial, social, professional relationship likely to affect impartiality or lead to biasness;*
- (3) Where circumstances requiring disclosure are not known to a Mediator or Arbitrator prior to accepting an appointment, disclosure shall be made immediately as circumstances become known and shall include the relationship between witnesses and Arbitrator in arbitration proceedings.*
- (4) After the disclosure, the Mediators and Arbitrators may be required to serve if desired by both parties but may withdraw, where conflict of interest exists, notwithstanding the views expressed by the parties.*
- (5) Where an agreement has not been reached between the parties on whether a mediator or arbitrator should withdraw or not, the following shall apply-*
 - (a) The applicable procedure to determine the challenges on the jurisdiction of the mediator or arbitrator;*
 - (b) Where the mediator or arbitrator after carefully considering the matter determines that-*
 - (i) The reason for the challenge is not substantial;*

(ii) *It is possible to be impartial and fair; and a withdrawal may cause unfair delay or may be contrary to the ends of justice, then that mediator or arbitrator shall not withdraw."*

72. WHETHER C.M.A. CAN BE MOVED BY CORRESPONDENCE

Under the provisions of section 90 of the Employment and Labour Relations Act,¹⁷⁴ Arbitrator who has made an award may on application or on his own motion correct in the award any clerical mistake or error arising from any accidental slip or omission. Where application is made to the Commission for Mediation and Arbitration, it has to be in conformity with the provisions of Rule 29(2) of the Labour Institutions (Mediation and Arbitration) Rules.¹⁷⁵ The Rule requires in mandatory terms, that an application shall be brought by notice to all persons who have interest in the application. In the Case of *Moshi University College of Co-operative and Business Studies (MUCCoBS) v. Gilbert Kallagho*¹⁷⁶ CMA was moved by correspondence, what was held to be a material irregularity leading to injustice.

Law applicable

Section 90 of the Employment and Labour Relations Act

An arbitrator who has made an award under section 88 (8) may, on application or on his own motion, correct in the award any clerical mistake or error arising from any accidental slip or omission.

Rule 29 (2) GN. 64/2007

(1) Subject to Rule 10, this Rule shall apply, to any of the following;

¹⁷⁴ Act No. 6 R.E 2002

¹⁷⁵ GN. No. 64 of 2007

¹⁷⁶ Misc Appl. No. 45 of 2009; High Court Labour Division at Moshi (Unreported)

(a) condonation, joinder, substitution, variation or setting aside an award;

(b) jurisdictional dispute;

(c) other applications in terms of these Rules.

(2) An application shall be brought by notice to all persons who have an interest in the application

73. REMEDY ON THE TIME BARRED MATTERS

The High Court Labour Division was once faced with a question, whether there is a lacuna on the remedy of dismissed application or matters in the Labour Court Rules.

In the Case of *Tanzania Breweries Ltd. v. Edson Muganyizi Barongo and 7 others*,¹⁷⁷ it was stated that, the Labour Court Rules do not provide the remedy for matters filed out of time (i.e. time barred) and that it was right for the court to revert to the Law of Limitation Act which provides for remedy on matters which are time barred and that the award was dismissal as per section 3 of the Act. It was stated further that the Law of Limitation Act, was the law of general application and that it was applicable in the Labour Court.

It was held earlier that the Law of Limitation on actions barred by limitation knows no sympathy or equity, it is a merciless sword that cuts across and deep into all those who get caught in the web. (the above was a remark of the High Court in *John Cornel v. A. Grevo (T) Ltd.*¹⁷⁸ and *Makamba Kigoma v. U.F.I and P.R.S.C.*¹⁷⁹)

Law applicable

Section 3 of the Law of Limitation Act¹⁸⁰ is on dismissal of proceedings instituted after period of limitation.

¹⁷⁷ Misc Labour Application No 79 of 2014,

¹⁷⁸ Civil Case No 70 of 1998

¹⁷⁹ Civil Case No 109 of 2005 (Unreported)

¹⁸⁰ Cap 89 R.E 2002

- (1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.
- (2) For the purposes of this section a proceeding is instituted—
- (a) in the case of a suit, when the plaint is presented to the court having jurisdiction to entertain the suit, or in the case of a suit before a primary court, when the complaint is made or such other action is taken as is prescribed by any written law for the commencement of a suit in a primary court;
 - (b) in the case of an appeal, when the appeal is preferred either by filing a memorandum of appeal or in such other manner as may be prescribed by any written law;
 - (c) in the case of an application, when the application is made.
- (3) Where, after the institution of a proceeding, a person is made a party thereto, either as a plaintiff, defendant, appellant, applicant or respondent, the proceeding, shall, as regards him, be deemed to have been instituted on the date on which he is made a party.
- (4) Nothing in subsection (3) shall apply to a case where a party is added or substituted by reason of an assignment or devolution of any interest during the pendency of a suit, or where a plaintiff is made a defendant or a defendant is made a plaintiff, or an appellant is made a respondent or a

respondent is made an appellant, or an applicant is made a respondent or a respondent is made an applicant."

74. CONTENTS OF AN AWARD

It is in law a misconduct on the part of the Arbitrator not to record part of proceedings and for ignoring some contents of the award which in law are mandatory.

In *Charles Joseph Maro v. The Director Tanzania National Parks*,¹⁸¹ the court found that an award should contain six important points, namely:-

- (a) details of the parties;
- (b) the issue or issues in dispute;
- (c) background information and admitted between the parties;
- (d) Summary of the parties' evidence and arguments;
- (e) Reasons for the decision;
- (f) The order (the precise outcome of the arbitration).

The above points are mandatory according to Rule 27 (3) of the Labor Institution (Mediation and Arbitration Guidelines).¹⁸²

Law applicable

Rule 27(3) of the Labour Institutions (Mediation and Arbitration Guidelines) 2007.

An award shall contain the following;

- (a) details of the parties;
- (b) the issue or issues in dispute;
- (c) background information and admitted between the parties;
- (d) summary of the parties evidence and arguments;
- (e) reasons for the decision;
- (f) the order (the precise outcome of the arbitration).

¹⁸¹ Rev. No 309 of 2009; High Court Labour Division at Mbeya (Unreported)

¹⁸² G.N No. 67 of 2007.

75. DISCRIMINATION

In *James Leonidas Ngonge v. DAWASCO*,¹⁸³ the respondent accused the applicant of misconduct, namely, illegal connection of water to a client and pocketed the money accrued from that service. The applicant was sent to a Disciplinary Committee where a hearing was conducted and his employment was terminated. The dispute was filed to CMA on account of unfair termination. The CMA found that the applicant was substantively terminated. It was found by the High Court that the employer failed to establish on the balance of probabilities that there was a rule regulating conduct of employee at the place of work which was contravened by the applicant. It was held further that the employer had practiced discrimination at work place contrary to the Employment and Labour Relations Act, which prohibits discrimination at work place and which provides that every employer shall ensure that he promotes an equal opportunity in employment policy and practice.¹⁸⁴ In this case one employee was subjected to disciplinary action and the other was left although both of them had contravened the similar Rule.¹⁸⁵

76. JURAT OF ATTESTATION

Lack of Jurat of attestation makes the whole affidavit defective and application based on it incompetent. In the case of *Humphrey Samwel and 107 others v. Bonite Bottlers Limited*,¹⁸⁶ the High Court observed that the jurat of attestation had no date showing when the 46 applicants were sworn in or affirmed and the jurat was poorly drafted. The court held further that the date in the jurat of attestation is of great legal requirement as per Section 8 of the Notaries Public and Commissioners for Oaths Act.¹⁸⁷

¹⁸³ Rev 382 of 2013; High Court Labour Division at DSM (Unreported)

¹⁸⁴ Section 7 (1) of the Employment and Labour Relations Act, No. 6 of 2004

¹⁸⁵ (Rule 12 (1) (b) of the Employment and Labour Relation (Code of Good Practice Rules, G.N. 42 of 2007)

¹⁸⁶ Misc. Labour Application No. 10 of 2014; High Court Labour Division at Moshi (Unreported).

¹⁸⁷ Cap 12 R.E. 2002.

Law applicable

Section 8 of the Notaries Public and Commissioners for Oaths Act
"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

77. RENEWAL OF CONTRACT BY DEFAULT

A fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrant it.¹⁸⁸ In the case of *Peter D. Nene v. China New Era International Engineering Corporation*,¹⁸⁹ the applicant continued to work after expiration of his fixed terms contract of three months. This was found to be one of the situation in which the contract was renewed by default.

Law applicable

Rule 4(3) of GN 42 /2007

"subject to sub-rules (2) a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it."

78. CIRCUMSTANCES UNDER WHICH REINSTATEMENT OR RE-ENGAGEMENT MAY NOT BE ORDERED

There are four (4) main instances where the court/arbitrator may not be required to reinstate or re-employ an employee. These instances are;-

- (a) If the employee does not wish to be reinstated or re-employed e.g. if he has found another job and he is interested for compensation only.

¹⁸⁸ Rule 4 (3) of the Employment and Labour Relations (Code of Good Practice) Rules G N 42 OF 2007).
¹⁸⁹ Rev. No. 29 of 2013; High Court Labour Division at Mbeya (Unreported)

- (b) An order for reinstatement or re-engagement will not be made if the circumstances surrounding the dismissal are such that a continued relationship of employment would be intolerable.
- (c) If such an order will not be reasonably practical for the employer the reinstate or re-employ e.g. where employee has been retrenched due to, for example, mechanization or atomization of the system of the employer.
- (d) Reinstatement or re-employment will not be ordered if the dismissal is unfair only because the employer did not follow a fair procedure.

These four instances were pointed out in the case of *Michael Kirobe Mwita v. A.A.A Drilling Manager*, Rev. No. 194 of 2013; High Court Labour Division at DSM (Unreported).

79. THE USE OF THE WORD SHALL AND ITS IMPLICATIONS

The court in the case of *Michael Kirobe Mwita v. AAA Drilling Manager* (supra) had occasion to discuss the use of the word "shall" and its implication in law. It observed that even if the word shall connotes a mandatory meaning, it could have been used in the section in lieu of the word "may" and still the Labour Court or the arbitrator could not be precluded from making an order of compensation of less than twelve (12) months depending on the circumstances of each case and because not every where the word "shall" is used means that it places a mandatory requirement. This means that "shall" does not necessarily all the time mean compulsory or mandatory and that each case has to be decided on its own merits. The High Court made reference to a Court of Appeal Decision that the use of the word shall does not always mean that there is mandatory requirement. It all depends on the circumstances of each particular case.

80. WHETHER LEAVE SHOULD BE APPLIED FOR AND GRANTED IN MATTERS FROM CMA

A matter which commences from CMA and Revision preferred to the High Court Labour Division requires leave¹⁹⁰ in the event of an appeal to the Court of Appeal of Tanzania.

In the case of *Zayumba Abeid Hussein A. Akida & others v. Tanzania Ports Authority*,¹⁹¹ it was due to the absence of leave applied for and granted that the appeal was found incompetent and was struck out.

Previously, before the High Court Labour Division, the application for extension of time within which to file application for leave to appeal to the Court of Appeal and to file a Notice of Appeal to the same court out of time was held to be incompetent. The court stated that the right to appeal to the Court of Appeal of Tanzania is provided for under section 57 of the Labour Institutions Act and that Rule 54 of the Labour Court Rules G.N 106 of 2007, is required to be in conformity with the Court of Appeal Rules 1979 (now 2009) which create requirement for leave. A party seeking such leave in the Court of Appeal has to do so by filling an application under Rule 24 (11) of the Labour Court Rules, and where the application is for enlargement of time to seek such leave and that Rule 24(11) has to be read together with Rule 56 (1) of the Rules.

The High Court Labour Division observed that the Law of Limitation Act, Cap, 89 R.E 2002 and Civil Procedure Code, Cap. 33 RE. 2002 were not relevant to the case.

81. APPLICATION TO BE BY NOTICE

The High Court Labour Division had occasion to decide on the applicability of Rule 24(1) of the Labour Court Rules.¹⁹² The Rule states that;

¹⁹⁰ Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R E 2002

¹⁹¹ Civil Appeal No b18 of 2009, Court of Appeal of Tanzania, at DSM (Unreported)

¹⁹² G N 106 of 2007.

"Any application shall be made on notice to all persons who have an interest in the application"

In the case of *Tini Mungusa Goroba v. Bulyankulu Gold Mine*,¹⁹³ it was observed that the Rule quoted above make it mandatory for anyone who seeks any relief in Labour Court to move the court by initiating the application by way of notice of application and not otherwise.

In the case of *Barclays Bank Tanzania Limited v. Kombo Ally Singoma*,¹⁹⁴ (quoted in the above case), it was held that;

"Failure to initiate an application with notice of application as required under Rule 24 of GN.106 cannot be cured...the application is rendered incompetent"

82. A CAUSE OF ACTION

In the case of *Andrew O.R Dominic v. Tanzania Revenue Authority*,¹⁹⁵ the applicant was terminated from employment on 29th December, 2004 but which was to take effect on 1st January 2005. Disciplinary meeting was held on the 30th May 2007. Thus, the issue was whether the cause of action arose on 1st January, 2005 or on 30th May, 2007 when termination was confirmed by the decision of the Board of Directors.

It was held that the cause of action arose on the 1st day of January, 2005, when the complainant was terminated from his employment by his employer.

83. COMBINATION OF APPLICATIONS

In the case of *Tanzania Electric Supply Company Limited v. Mariam Mtoro Khalfan*,¹⁹⁶ it was held that combination of two applications was not bad in law as law abhors multiplicity of proceedings.¹⁹⁷ It was said that to refuse to consolidate would be to

¹⁹³ Rev. No. 13 of 2014 High Court Labour Division Shinyanga (Unreported)

¹⁹⁴ Misc Application No. 14 of 2011

¹⁹⁵ Application No. 6 of 2006 at DSM (Unreported)

¹⁹⁶ Rev. No. 51 of 2010 High Court Labour Division at DSM (Unreported)

¹⁹⁷ *Tanzania Knitwear Ltd. v. Shamsu Ismail* [1989] TRL 48

fragment the process and delay the outcome. The situation in the application in the present case was however different as the two applications were different. The first one related to revision and the other one was for execution and each has a different procedure.¹⁹⁸

84. ALTERNATIVE EMPLOYMENT

In the case of *Moshi Mrisho and 15 others v. Africamer Limited*¹⁹⁹ the employer, Africarrier Ltd. wound up business and wrote a letter to each of the applicants notifying them that his business was being taken over by Universal Auto Workshop. The employer offered a chance to the employees to work with the new employer on new contracts of employment. The old employer paid the employees all their terminal dues. The employees worked with the new employer for twelve days but thereafter resigned. They were paid for the days they worked with the new employer. Later they filed a dispute based on unfair termination against the first employer.

It was held that the evidence on record showed that there was consultation which was followed by the new employer taking over the employees under new contracts. The employees appreciated the efforts by the old employer. The old employer could not, after the closure of business, offer employment to the employees. Their application was therefore dismissed.

85. MISAPPREHENSION OF FACTS

A misapprehension of facts is not an error of law on the face of record. According to the case of *National Oil (T) Ltd. v. Bruno Joseph*,²⁰⁰ a misapprehension of facts is not an error apparent on the face of the record because to discern the misapprehended facts one would have to re-appraise the facts and evidence on record. The court found further that misapprehension of facts falls within the domain of appeal not review court and therefore

¹⁹⁸ Section 91 of the Employment and Labour Relations Act, and Rules 28 and 48 of Labour Court Rules, GN 106/2007.

¹⁹⁹ Rev. No 75 of 2008, High Court Labour Division at (DSM) (Unreported)

²⁰⁰ Rev. No 115 of 2008, High Court Labour Division at (DSM) (Unreported).

misapprehension of facts is not a manifest error unless both parties agree that the facts were misapprehended.

86. FAILURE TO SIGN AWARD

The law requires that an award of the arbitrator should be signed.²⁰¹ The Arbitrator should write and sign a concise award containing the decision within the prescribed time and with reasons.²⁰²

In the case of *International School of Moshi v. Alfred Joseph Salimi and Another*,²⁰³ the court held that both provisions make it mandatory that the award shall contain the arbitrator's signature and that should be within the prescribed time. The court found that breach of the two provisions of the law was a material irregularity.

87. TAKING EVIDENCE WITHOUT OATH

In the case of *International School of Moshi v. Alfred Joseph Salimi and Another*,²⁰⁴ the High Court (Labour Division) held that it was true that Arbitrator failed to observe closely the provisions of Rule 25 (1) of the Labour Institutions Mediation and Arbitration Guidelines; GN.67/2007 for his failure to take sworn evidence of DW₂. The court held that to be a gross misconduct on the part of the arbitrator and that it constituted material irregularity.

Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N 67 of 2007 states;

Rule 25(1)

"The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process;

a) Examination in chief

²⁰¹ Section 88(9) of the Employment and Labour Relations Act, 2004

²⁰² Regulation 27(1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67/2007

²⁰³ Rev. No. 90 of 2007 (Sic) Arusha (Unreported).

²⁰⁴ Ibid.

- (i) the party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;
 - (ii) parties are predicted to ask leading questions during an examination in chief.
- b) Cross examination
- (i) the other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute;
 - (ii) obtain additional information from the witness or challenge any aspect of the evidence given by the witness;
 - (iii) leading questions are allowed at this stage of proceedings.
- c) Re examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross examination and the purpose for re examination is to correct or clarify evidence adduced during cross examination.

88. WHETHER ELECTRONIC RECORD ALLOWED

Rule 32 of the Labour Institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007 is about record of arbitration proceedings. It provides, *inter alia*, that an Arbitrator should keep a record of his proceedings with legible hand written notes or by means of electronic recording. By the provisions of Rule 32 (1) therefore, the law allows the keeping of electronic record. Rules 32(4), 32(5) and 32(6), all make reference to electronic record.

In the case of *General Manager Mufindi Paper Mills v. Masoya Magoti and Cosmas Fimbo Msigwa* (Arbitrator), the court found that essential features of proceedings did not exist and there was only a scanty record and handwritten unsigned notes and that what was on record did not measure to the definition of proceedings. Lack of proper record has the effect to vitiate the proceedings.²⁰⁵

Law applicable

Rule 32(4-6) of the Labour Institutions (Mediation and Arbitration) G.N No. 64 of 2007

- 4) *A party may request for a copy of the handwritten notes or the transcript of an electronic record or a portion of a record kept in terms of sub rule 1, upon payment of the costs of the transcription.*
- 5) *After the transcript maker of the electronic record has certified that it is correct, the record shall be returned to the commission.*
- 6) *The transcript of an electronic record certified as correct in terms of sub rule (4) shall be presumed to be correct, unless the Labour Court decides otherwise.*

89. NOTICE OF OPPOSITION AND PRELIMINARY OBJECTION

According to the case of *Kalimwambo s/o Sabibi & Others v. Mkurugenzi, Manispaaa Kigoma Ujiji & Chama cha Waalimu Tanzania (CWT)*,²⁰⁶

“the two notices of preliminary objection are neither creatures of the said Rules in the sense that they do not form part of notice of opposition or counter affidavit. However..... preliminary objections are based on practice”.

²⁰⁵ *Thobias Ndege v. Mwatex (2001) Ltd*, Rev. No. 110 of 2009, High Court Labour Division at Mwanza (Unreported).

²⁰⁶ Rev. Application No. 4 of 2012, High Court Labour Division at Kigoma (Unreported)

It was stated further that a preliminary objection, according to the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd*,²⁰⁷ a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or submission that the parties are bound by the contract giving rise the suits to refer the dispute to arbitration. Thus, a notice of opposition has no effect of disposing of the case as it forms part of procedure. A preliminary objection is not a notice or procedure but on determination of the case-as where properly argued may dispose of the case.

90. WHETHER *EXPARTE* HEARING MAY BE CONDUCTED BY WAY OF WRITTEN SUBMISSIONS

The provisions of Rule 28(2) and (3) of the Labour Institutions [Mediation and Arbitration] Rules 2007,²⁰⁸ are to the effect that where an arbitrator proceeds in the absence of a party, the party present has to prove its case. The case of *Principal Moshi University College of Co-operative and Business Studies v. Aloyce Assenga*,²⁰⁹ held that *exparte* hearing was conducted by way of written submissions. It was found that, that amounted to material irregularity making the award revisable under Rule 28(1)(c) of the Labour Court Rules.

Law applicable;-

Rule 28(2) and (3) of GN. No. 67 of 2007 provides as hereunder -;

(2) *Where an arbitrator proceeds in the absence of a party the party, present has to prove its case and to present an opening statement, evidence, and any arguments in support of its case.*

²⁰⁷ (1969) E.A. 696 at p. 700.

²⁰⁸ GN, No 67 of 2007

²⁰⁹ Misc Application No. 115 of 2010, High Court Labour Division at DSM (Unreported)

(3) In the absence of the opposing party there shall be no cross examination of witness called and the arbitrator may question witnesses to enable the arbitrator to decide whether the party has proved its case.

The C.M.A award was consequently quashed, an order for execution was vacated and the applicant was declared to be free to take appropriate action to recover any monies paid following the order issued under the nullified decree. The court further ordered that the dispute be processed afresh commencing with hearing of application for condonation.

91. REINSTATEMENT AND RE-ENGAGEMENT

Section 40(1) (a – c) of the Employment and Labour Relations Act is on remedies for unfair termination. Three types of reliefs are named under the section i.e. reinstatement, re-engagement and compensation. Thus if an arbitrator or Labour Court finds termination to be unfair, may order for reinstatement, reengagement or compensation.

In the case of *Moshi University College of Co-operative and Business Studies v. Patrick John Ngwila*,²¹⁰ the arbitrator in that case awarded (wrongly) re-engagement to the respondent to the post of Assistant lecturer. In fact, the Respondent was Assistant Lecturer at the time of termination and therefore re-engagement was inappropriate relief. The court held that in law, to take an employee back to his employment is re-instatement and not re-engagement.

Section 40(3) requires the employer who decides not to reinstate or re-engage the employee to pay compensation of twelve (12) months' wage in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

²¹⁰ Rev. No. 31 of 2014; High Court Labour Division (Moshi) (Unreported)

92. TEMPORARY INJUNCTION

In the case of *Tanzania Union of Industrial and Commercial Workers (TUICO) v. Shoprite Checkers Tanzania Ltd.*²¹¹ the applicant, a recognized bargaining agent of employees in the employer premises, applied for, *inter alia*, an order of temporary injunction restraining the respondent from terminating employee's contracts of employment pending hearing and determination of a labour dispute in the C.M.A and payment of entitlements.

It was held, *inter alia*, that in order to avoid rendering the labour dispute at C.M.A. nugatory, the employer was restrained from selling, transferring, handling over assets, stock, goodwill and properties to Nakumatt (T) Ltd. and from terminating employment contracts of employment pending arbitration and finalisation of the dispute at CMA.

93. RES JUDICATA

In the case of *Elinamic Ndesamburo v. Tanzania Forestry Research Institute*,²¹² the applicant sought revision of the ruling of CMA on a preliminary objection on a point of law on the ground that the matter was res judicata as it had been heard and decided by District Court in Employment Cause No. 13 of 2007 and that the cause of action arose before CMA was established.

It was decided that C.M.A. lacked jurisdiction because it was not a proper forum to handle the dispute.

94. EFFECT OF FIRST OFFENCE

In law, the offence of an employee shall not justify termination unless it is proved that the misconduct by the employee is so serious that it makes a continued relationship intolerable (Rule 12 (2) of Employment and Labour Relations (Code of Good Practice), Rules 2007). The Rule was cited in the case of *Epidor French Bakery Ltd. v. Nicholas Tabarini*²¹³

²¹¹ Misc Appl No 43 of 2014; High Court Labour Division; DSM (Unreported),

²¹² Rev. No 176 of 2010, (Unreported)

²¹³ Rev. No 72 of 2011; High Court Labour Division at Dar es salaam (Unreported).

The court made reference to Rule 12 (3) which provides for acts which may justify termination; including

- a) Gross dishonesty;
- b) Willful damage of property;
- c) Willful endangering the safety of others;
- d) Gross negligence;
- e) Assault on a co-employee, supplier, customer or a member of the family of, and any person associated with the employer.
- f) Gross insubordination.

Termination was therefore found to be unfair.

95. PROBATION PERIOD

In the case of *Mwaitenda Ahobokile Michael v. Interchick Co. Ltd.*²¹⁴ the High Court observed that the purpose of a probationary period is to provide the parties with an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment relationship.

It was observed further that the company during the probation period has the right to lay down standards it expects a probationary employee to meet if he is to be retained, and such standards are not necessarily related to quality and quantity but also may include consideration of an employee's character, ability to work in harmony with others, potential for advancement and general suitability of the company concerned.

The court also found that the applicant (complainant) could not get the benefit of section 35 of the Employment and Labour Relation Act on unfair termination as his employment was less than six months. The subsection states:-

²¹⁴ Labour Dispute No. 30 of 2010, High Court Labour Division at Dar es salaam (Unreported).

The provisions of this sub-section shall not apply to an employee with less than six (6) months employment with the same employer whether under one or more contract.

96. SICKNESS

In the case of *Eddie Hamza v. African Barrick Goldmine Ltd*,²¹⁵ the issue was whether sickness was a good reason for extension of time. It was observed that the applicant was attending medication and was on sick leave. An annexure given to court showed that the applicant was among employees who were sick. It was further held that suffering from health problems, which is not of human choice, was a good cause for extension of time. (See also: *Emmanuel R. Maira v. D.E.D; Bunda District Council*²¹⁶; Civil Appl. No. 56 of 2010 (C.A.T) (Unreported).

97. PROFESSING CHRISTIANITY AND ISLAMIC FAITH AT THE SAME TIME

A person cannot swear and affirm in an affidavit at the same time. This has been held to be a great defectiveness in the affidavit.

In the case of *Salimu Ramadhani Simkoko v. Managing Director – DUWASA*,²¹⁷ the applicant affirmed and sworn, that is to say, as a Moslem and a Christian at the same time in an affidavit. The court found that to be a grave defectiveness in the affidavit because a person cannot profess the Holy Bible and the Holy Quran at the same time. It was further stated that the error (defect) could not be amended as a defective affidavit could not be amended as it was incompetent – that incompetent affidavit could not be withdrawn, amended or adjourned except that it could be struck out.

²¹⁵ Revision No. 240 of 2012, High Court Labour Division at Dar es salaam (Unreported).

²¹⁶ [2012]1 EA 149

²¹⁷ Miscellaneous Application No. 2 of 2014 High Court Labour Division at Dodoma (Unreported).

98. WHAT IS MEDIATION?

Mediation in essence is an important tool in maintaining sound labour relations. It is a stage, albeit a formal one, above negotiations/consultations where the parties settle disputes between each other amicably which leaves their working relationship unscarred.²¹⁸ Under mediation, the voluntary/amicable aspect of dispute resolution is maintained, only it is achieved with aid of a neutral party. It was observed further in the above cited case that Mediation is made compulsory under the Employment and Labour Relations Act, 2004 and its object is to achieve a policy objective of promoting the spirit of amicable settlement of industrial conflicts vital for economic efficiency and productivity. It was also observed that mediation enable quick settlements of disputes, and plays a vital role in maintaining good labour relations.

99. PREROGATIVE ORDERS

In the matter of Application No. 4 of 2008 between *Tanzania Railways Ltd. v. The Minister for Labour, Employment and Youths Development, The Attorney General and Tanzania Railways Workers Union (TRAWU)*,²¹⁹ the applicants prayed for leave to apply for prerogative orders of Certiorari and Mandamus. No chamber summons was filed. It was held that proceedings for prerogative orders are initiated first by making an application for leave and that such application should be initiated in the High Court and it requires the taking out of a chamber summons supported by an affidavit (as per order 43 Rule 2 of the Civil Procedure Code). Thus, the statement and affidavit which accompany the chamber summons are merely to indicate the existence of a prima facie case upon which leave can be granted.

²¹⁸ *Tanzania Breweries Ltd. v. Charles Malabona*; Labour Revision No 24 of 2007, High Court Labour Division at Mwanza (Unreported).

²¹⁹ High Court Labour Division at DSM (Unreported).

100. OPTIONS AGAINST REGISTRAR'S DECISION IN EXECUTION OF C.M.A.'S AWARD

There are three options that may be taken by a party who is aggrieved by the Registrar's decision in execution of the CMA's decree. These were underlined in the case of *Clobeleg, Tanzania Services Ltd. v. Evarist Sessa*;²²⁰

These are:-

- a) any aggrieved party could apply for revision of the award on account of being ambiguous. It could be brought under Section 94(1) (b) (i) of the Employment and Labour Relations Act and Rules 24 and 28 of the Labour Court Rules.
- b) to apply for Review of the disputed award under Section 94 of the Act, read together with Rule 26 of Labour Court Rules. or
- c) to put a machinery of reference under order XL1 of the Civil Procedure Code in motion. An aggrieved party may make an application to the Registrar requesting a reference be made to the High Court on the matter on which doubt is entertained.

Law applicable

Section 94 (1) of the Employment and Labour Relations Act

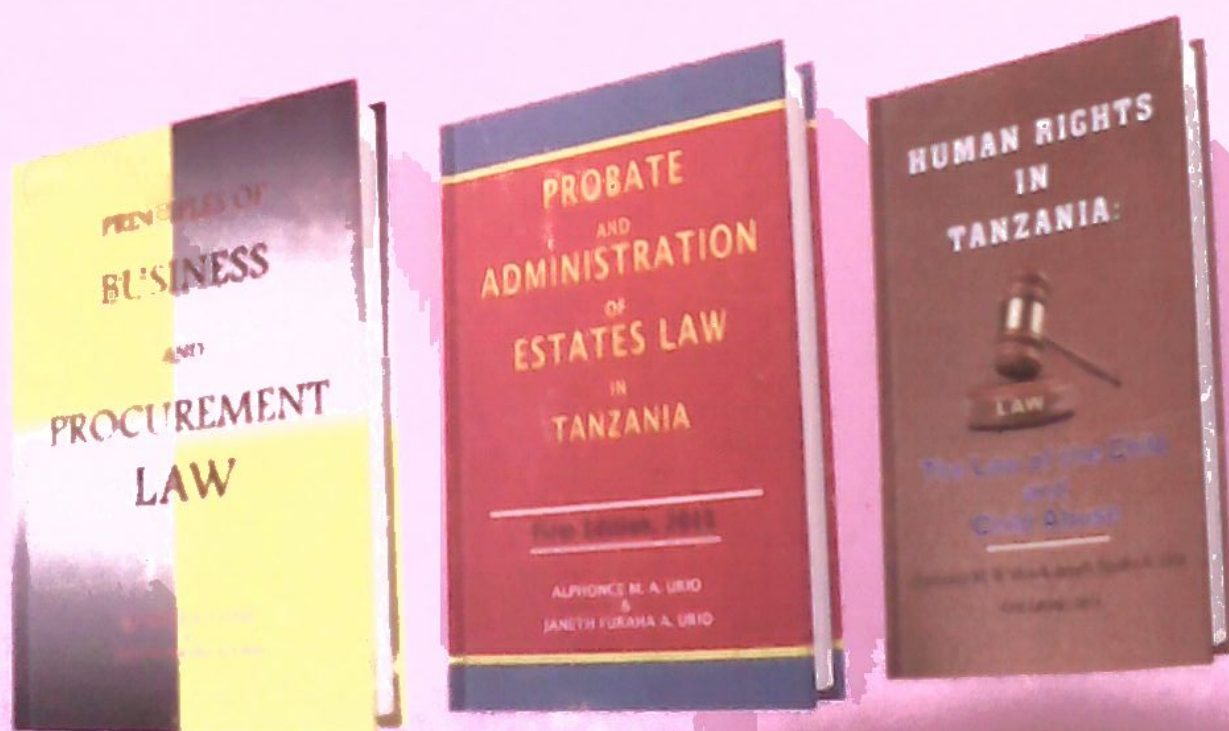
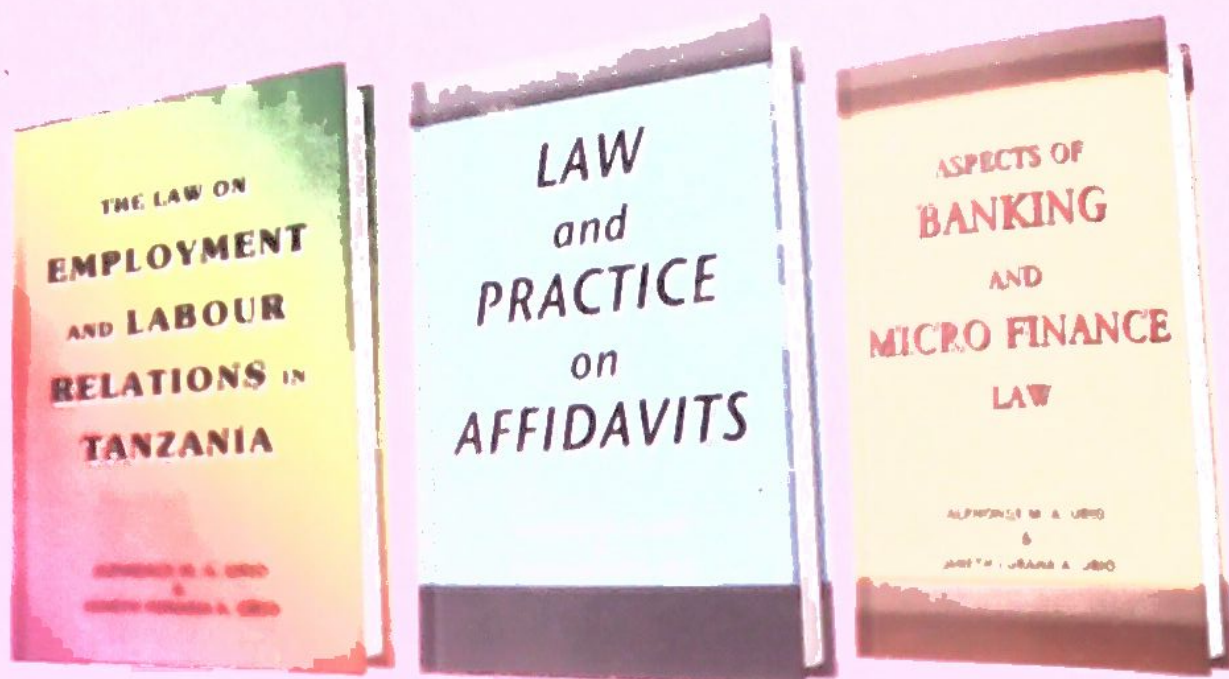
"Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and to decide;

(c) reviews and revisions of

(i) arbitrator's awards made under this part; "

²²⁰ Misc. Application No. 47 of 2010, High Court Labour Division at DSM; (Unreported).

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