LEGAL AND INSTITUTIONAL CHALLENGES ON MEDIATION OF LABOUR DISPUTES IN TANZANIA

*January J. Nkobogo**

Abstract

Mediation as a basic method of labour dispute resolution in Tanzania is mainly done by the Commission for Mediation and Arbitration (CMA). This article examines both legal and institutional challenges on mediation at the CMA. These include non-attendance of mediation hearing and its consequences, determination of application and objections, role of personal representatives and uncertainty on med-arb. Institutionally, there are inadequate offices and mediators, lack of skills and professionalism and heavy workload in some areas. It also notes some challenges from its stakeholders like the parties, advocates and trade unions. The article points out that these challenges inhibit the performance of the CMA and the process in general. It calls upon amendment of some rules and the need for CMA to solicit more resources and assistance from the government and other stakeholders.

Key Words: *Dispute Resolution, Labour Dispute, Challenges, Mediation, Tanzania*

* PhD candidate (UDSM), Lecturer in law at Mzumbe University. The author is also an advocate of the High Court of Tanzania and subordinate courts thereto. The author can be contacted through january.nkobogo@gmail.com. This article is based on the candidate's ongoing PhD Thesis titled, "Legal and Institutional Challenges of Labour Disputes Resolution in Mainland Tanzania", at the School of Law, University of Dar es Salaam.

1. INTRODUCTION AND BACKGROUND

About a quarter of a century ago, most Southern African Development Community (SADC) members witnessed the enactments of their new labour laws.[1] The International Labour Organisation (ILO) also provided technical support on this endeavour to enact new labour laws and institutions for dispute resolutions.[2] In this regard, emphasis was placed on informal and harmonious approach rather than the adversarial method which increases animosity. Thus the adversarial methods were replaced by the Alternative Dispute Resolution (ADR) which employs mediation, arbitration and adjudication processes. As such drafters of labour legislation "[were] influenced by the significant interest in and growth of alternative dispute resolution (ADR) movement."[3]

As for Tanzania, the legislative process began in 1986 by the Law Reform Commission of Tanzania (the Commission). The Commission accomplished the task in 2001 and thereafter the government appointed a Task Force on Labour Law Reform (The Task Force).[4] The Task Force enumerated some

---

[1] Masabo, J., "Irregular Migrant Worker's Access to Host Country's Labour Dispute Resolution Mechanisms: Experience from the SADC", 42 (1), *Eastern Africa Law Review*, 2015, p.27 at pp. 35-6.
These countries include South Africa, Eswatini (formerly Swaziland), Namibia, Botswana, Malawi, Zimbabwe and Zambia.

[2] Shivji, I.G., "Machinery for Settlement of Labour Disputes in Tanzania", (A Study Prepared for the International Labour Organisation, Strengthening Labour Relations in East Africa (ILO/SLAREA), Dar es Salaam, September, 2002) at p.4.

[3] Steadman, F., "Handbook on Alternative Labour Dispute Resolution", Turin: ITC/ILO, at p. 7, available at https://www.citeseerx.ist.psu.edu>viewdoc>download>10.1.1.516.3538.pdf (accessed on 27 May 2019).

[4] The Task Force was chaired by Hon. Justice J.A. Mrosso (Retired Justice of the Court of Appeal) and other distinguished members from trade unions, employers' associations, the Ministry, the Industrial Court of Tanzania and the legal profession. See, Ministry of Labour, Youth Development and Sports*, First Report*

reasons for the need to reform the labour laws as being, among others: the socio-economic and political changes taking place both at national and global levels; the policy changes from a planned to market economy in Tanzania with its consequent change of employment relations from the public to private sector; and the inaccessibility to the law due to its complexity and scattered nature; the need to align Tanzania with her regional partner states particularly the SADC and the East Africa Community (EAC) common market and the rigidity and out dated labour law which was in conflict with the ILO Conventions to which Tanzania is a member and party.[5]

The Task Force recommended, among others, the introduction of new mechanisms of resolving labour disputes, to wit, mediation, arbitration and adjudication[6] as well as the establishment of the present Commission for Mediation and Arbitration and the High Court Labour Division.[7] The reforms culminated in the overhaul of all pieces of labour legislation and other related legislation from the colonial and post-colonial period and their replacement in 2004.[8] This was done through the enactment of the Employment and Labour Relations Act (ELRA) [9] and the Labour Institutions Act (LIA).[10]

---

of the Task Force on Labour Law Reform, Dar es Salaam: Ministry of Labour, Youth Development and Sports, 2003, at p.i.

[5] Id, at p.1.

[6] Id, at p.151.

[7] Ibid.

[8] S.103 and the Second Schedule to the Employment and Labour Relations Act, Cap. 366 [R.E 2019].

[9] Act No.6 of 2004, The Act is now cited as Cap. 366 [R.E 2019], following the Laws Revision (Replacement of Repealed Laws and Assignment of New Chapter) Notice, 2007, G.N No 121 of 2007 read in tandem with the General Laws Revision Notice, 2020, G.N No.140 of 2020.

[10] Act No 7 of 2004, now cited as Cap. 300 [R.E 2019].

These two pieces of legislation together with a number of subsidiary legislation made there under[11] are conveniently referred to as the labour laws. Their clear objectives are, among others, provision of a framework for dispute resolution by mediation, arbitration and adjudication; incorporation into the labour laws the relevant constitutional provisions and giving effect to the core instruments of the ILO.[12] Institutions charged with labour disputes resolution are the CMA[13] and the High Court of Tanzania, Labour Division.[14]

With almost sixteen years of their operation, this article highlights some legal and institutional challenges on mediation of labour disputes in Tanzania. It is concluded by providing some recommendations to those challenges.

2. CONCEPTS AND TERMINOLOGIES

2.1 Dispute

In legal perspectives, a dispute is defined by Black's Law Dictionary as "a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other".[15] In the South African case of *Durban City Council v. Minister of Labour*,[16] it was held that a dispute, "must at a minimum postulate the notion of the expression of the parties, opposing each other in controversy, of

---

11 These include the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007; the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007; the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. No. 67 of 2007 and the Labour Court Rules, 2007, G.N No 106 of 2007.

12 S.3 of the *Employment and Labour Relations Act*, Cap. 366 [R.E 2019].

13 Sections 12 and 13 of the *Labour Institutions Act*, 2004, when read together, establish the CMA as an independent body charged with the function of mediating and arbitrating labour disputes in Tanzania.

14 Established under section 50 of the *Labour Institutions Act*, Cap. 300 [R.E 2019].

15 Garner, B.A., (ed), *Black's Law Dictionary* (8th Edn.), Texas: Thomson, 2004, at p.558.

16 1953 (3) SA 708

conflicting views, claims or contentions."[17] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp state that for a dispute to exist a demand must be communicated to another party who should also be given an opportunity to comply.[18] Thus, in law, a conflict develops into a dispute when contradictory claims are affirmed in public. That is to say, the claims and their incompatibility are communicated to a third person.

2.2 Labour Dispute

One of the relationships with inevitable conflicts is the industrial or employment relations. This is *ipso facto* the relationship characterised with rival interests between the parties. Jeffrey, Blitman, Maes and Shearer state that "many workplace conflicts, like other types of disputes, are the results of failing to communicate or understand others' interests or needs."[19] The rivalling interests are rooted in the production process. In this regard, O'Donovan and Oumarou state that since conflicts are inherent and inevitable in employment relationships, establishing effective dispute prevention and resolution processes is key to minimising the occurrence and consequence of the conflicts.[20]

In labour relations, a labour dispute has been defined as "a highly formalised manifestation of conflict in relation to workplace matters".[21] In Tanzania labour statutes, a dispute is "tautologically" defined as "any dispute

---

17 Id., at D.

18 du Toit, D., et al., *Labour Relations Law, A Comprehensive Guide*, (6th Edn), Durban: LexisNexis, 2014, p. 129.

19 Jeffrey, A., et al., "Using Collaborative Modelling to Mediate Workplace Conflicts", 22(5), *Equal Opportunities International*, 2003, p. 25, at p. 26.

20 O'Donovan, P and Oumarou, M., in International Training Centre/ ILO, *Labour Dispute Systems: Guidelines for Improved Performance*, Turin: International Training Centre/ ILO, 2013, at p. iv.

21 Rutinwa, B., "Dispute Resolution", in Rutinwa, B, Kalula, E and Ackson, T., (Eds), *The New Employment and Labour Relations Law in Tanzania: An Analysis of Labour Legislation in Tanzania*, Dar es Salaam: Faculty of Law, University of Dar es salaam and Institute of Development and Labour Law, 2012, p.151 at p.151.

concerning a labour matter between any employer or registered employer's association on the one hand, and any employee or registered trade union on the other hand."[22] Under the ELRA, a dispute also includes an alleged dispute.[23] The phrase "alleged dispute" is not statutorily defined but it generally refers to a dispute which has not been proven to exist and communicated or referred to a third party. Under the old labour regime it was also known as an apprehended dispute. An alleged dispute is normally related to disputes of interest. We can say that an "alleged dispute" is an exception to the common accepted definition of the word dispute.

In addition, under the ELRA a complaint is also a dispute if it arises out of the application, interpretation or implementation of: an agreement or contract with an employee; a collective agreement; the Employment and Labour Relations Act or any other written law administered by the Minister[24] or the engagement of seafarers[25] as provided under Part VII of the Merchant Shipping Act, 2003.[26]

A dispute is specifically defined for purposes of arbitration under the ELRA as including a dispute of interest for parties engaged in an essential service; a complaint over the fairness or lawfulness of a termination of employment; or any other contravention of the Act or any other labour law; or breach of contract or any dispute referred to arbitration by the Labour Court. It also includes any employment matter that falls under the common law tortuous and vicarious liabilities. [27] From the above definitions, one can say that a labour dispute is a conflict over labour or employment rights and interests between parties to an employment contract or their respective representatives like trade unions or employers' association.

---

22 S.4 of ELRA, Cap.366 [R.E 2019].
23 Ibid.
24 Minister is defined under s.4 of the Act as the Minister responsible for labour.
25 S.4 of the Act.
26 Act No. 21 of 2003.
27 S.88 (1) (a) (b) of the Act.

2.3 Types of Labour Disputes

The labour laws envisage two types of labour disputes which are disputes of rights and disputes of interests. Nevertheless, these two may either be individual disputes or collective disputes.

2.3.1 Dispute of Right or A Rights Dispute

This is a dispute between an employee or employees and their employer over a violation or negation of an existing right or benefit provided in the law, collective agreement or the individual's contract of service and even an employment policy. The right may be in form of wages or salaries, payment for overtime worked, holidays, alleged misconduct or unfair treatment and even where the contract is allegedly unfairly and illegally terminated.

It is a dispute whose essence is an employment right or obligation/ liability which forms part and parcel of the condition or term of the employment contract. The Task Force on Labour Law Reform defines a dispute of right as "a dispute over a breach of a right that may be located in legislation, the common law, a collective agreement, or an award, or a contract of employment. It could also be a dispute over an interpretation of a right".[28]

2.3.2 Dispute of Interest

A dispute of interest (also called an interest dispute) may arise out of a disagreement between employees and their employer over future rights and or obligations in their contracts of service. According to Zack, interest disputes are "those arising in collective bargaining over wages, working hours and working conditions."[29]

---

28 Ministry of Labour, Youth Development and Sports*, First Report of the Task Force*, above note 2, at pp.141 & 145.

29 Zack, A.M., "Can Alternative Dispute Resolution Help Resolve Employment Disputes?", 136 (1) (Spring), *International Labour Review*, 1997, p.95, at p. 98.

Under the ELRA, a dispute of interest is tautologically defined as "any dispute except a complaint."[30] The phrase "dispute of interest" is, however, defined by the Task Force on Labour Law Reform as:

> A dispute over what the next collective agreement should contain, in other words, a dispute over future rights. A dispute of interest arises from disagreements over what future rights should be. In these kinds of disputes, parties would have an interest in securing a particular outcome but no right to it. These disputes, if settled, invariably create rights and obligations, normally in the form of a collective agreement.[31]

In some jurisdictions interest disputes include special rights such as trade union recognition, determination of bargaining units and those over unfair dismissals.[32] It is a dispute for the creation of a future right in case it is successfully resolved in favour of the initiating party.

2.3.3 Individual Dispute

Individual dispute has been defined as "a disagreement between a single worker and his[33] or her employer, usually over existing rights."[34] However, individual disputes may also involve two or more workers against their employer over the same issue in as far as each employee acts in his individual capacity. In such a situation, the employees may join themselves together in referring to a dispute or the agency may join them as one. This type of dispute is common in cases of disputes of right.

---

30 S.4 of the ELRA.

31 Ministry of Labour, Youth Development and Sports*, First Report of the Task Force*, above note 2, at p. 145.

32 International Training Centre of the ILO, *Labour Dispute Systems*, above note 20, at p. 18.

33 Section 4 of the ELRA, Cap.366.

34 International Training Centre of the ILO, *Labour Dispute Systems*, above note 20, at p. 18.

2.3.4 Collective Dispute

A collective dispute is "a disagreement between a group of workers, usually, but not necessarily, represented by a trade union, and an employer or group of employers over existing rights or future interests."[35] Such rights or interests may be in the form of an unsatisfactory working environment, unpaid entitlements, poor packages etc. It may also arise in cases where an initial dispute between a single employee and the employer or management attracts full support of his fellow employees who decide to side with him or her. This happens in cases of discrimination, oppression, victimization and similar causes. In short, there must be "an individual or a group of individuals who ignites the complaints and convinces others to have a common support."[36]

The essence of collective nature of the dispute was expressed by the Court of Appeal of Tanzania in *Zambia Tanzania Road Services Ltd v Pallangyo*[37] as *a* dispute involving more than one employee; it is a dispute that connotes collectiveness.

The distinction between an individual and collective dispute was considered negligible by the Task Force[38] and perhaps that is why it is not expressly reflected in the ELRA. However, the distinction is significant as it is recognized by ILO instruments and as the ELRA itself recognizes protest actions, strikes and retrenchments which are, by and large, collective disputes in nature. Besides, an "alleged dispute" as used under the ELRA, connotes an upcoming collective dispute.

---

35 Ibid.

36 Sikalumba, A.J., *Legal Aspects of Employment Contracts and Dispute Settlement Schemes in* Tanzania, Mzumbe: Research and Publication Department, 2003, at p. 82.

37 [1982] TLR 24 at 26.

38 Ministry of Labour, Youth Development and Sports*, First Report of the Task Force*, above note 2, at p.145

Alternative Dispute Resolution (ADR)

The phrase "Alternative Dispute Resolution" is defined in Black's Law Dictionary as "a procedure for settling a dispute by means other than litigation, such as arbitration or mediation."[39] Steadman[40] states that the concept of ADR refers to a phrase that describes an attempt by litigants and their lawyers to resolve their disputes by means other than the adversarial litigation process.[41] These means include negotiation, conciliation, mediation and several types of arbitration. The common denominator of all ADR processes is that they are intended to be faster, cheaper, less adversarial and capable of achieving better outcomes for disputants than they could achieve through the process of litigation.[42]

Steadman writes that although the adjective "alternative" is commonly used; in some jurisdictions like Europe it has raised some concerns. The primary concern is that the adjective "alternative" disparages the traditional and statutory system. Consequently new phrases like "appropriate dispute resolution" (APR) and or "effective dispute resolution" (EDR) are preferred in lieu of the alternative dispute resolution.[43] Other terms cropping up include additional, amicable and accelerated dispute resolution.[44]
Tanzania's legal system retains the nomenclature "Alternative Dispute Resolution" (ADR) with the three main processes i.e. conciliation, mediation and arbitration. Other processes may also include negotiations, case evaluation and hybrid processes. ADR became a legally effective part of

---

39 Garner, (ed), 2004, p. 86

40 Steadman, F, "Handbook on Alternative Labour Dispute Resolution," ITC/ILO, Turin, at p. 7 available at https://www.citeseerx.ist.psu.edu>viewdoc>download>10.1.1.516.3538.pdf accessed on 27th May 2019.

41 Id, p. 9.

42 Ibid.

43 Id, p. 9.

44 Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation*, Dublin: Law Reform Commission, 2010, p.14.

dispute resolution in matters of civil nature in 1994.[45] It was enshrined in the Constitution in 2000, following the 13th amendment of the Constitution of the United Republic of Tanzania, 1977.[46] However, mediation or ADR process does not apply to some categories of cases like injunctive reliefs, judicial review, constitutional rights and cases for declaratory judgments. It is also inapplicable in the Court of Appeal of Tanzania.

The introduction of labour dispute resolution by ADR in 2004 was therefore recognition and a continuation of the already existing process. Under the labour law framework common forms of ADR are mediation and arbitration. Others are a hybrid process combining mediation and arbitration (Med-Arb) and the adjudication process at the Labour Court.

2.4.1 Mediation

The word "mediation" is etymologically from a Latin word, *mediare*, which means "to be in the middle."[47] Mediation is defined by Black's Law Dictionary as "a method of non binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[48] It is also defined by The Essential Law Dictionary as "a form of alternative dispute resolution in which a neutral third party, the mediator, hears the testimony of both parties to a dispute and tries to help them agree on a solution but cannot impose a decision on them."[49] This definition is more precise and reflective of the mediator's role which is facilitative.

---

45 First Schedule to the Civil Procedure Code Act, Cap.33 [R.E 2002], as amended by G.N No 422 of 1994.

46 Constitution of the United Republic of Tanzania, Cap.2 [R.E 2015], Art. 107A (1) (d).

47 Online Etymology Dictionary, available at www.etymonline.com (accessed 30 January, 2020).

48 Garner, (ed), 2004, p. 1003.

49 Blackwell, A.H., *The Essential Law Dictionary* (1st Edn), Illinois: Sphinx Publishing, 2008, p. 313.

The Task Force described mediation as a process by which there is an intervention of a third party (mediator), who assists in settlement of the dispute. The intervention may be in the form of facilitation, fact finding, advisory arbitration etc. The mediator assists the parties in discussing and resolving a dispute. A mediator encourages flexibility and compromise to the parties with a view to resolving the dispute themselves.[50]

The above description is very broad and treats mediation as synonymous with conciliation. This was perhaps influenced by legislation governing mediation in other SADC countries. For example South Africa, Namibia and Eswatini have similar provisions which describe conciliation as a process which may involve mediating the dispute, conducting a fact finding exercise and making recommendation in the form of advisory arbitration.[51] However, the description proposed by the Task Force was not defined under the Acts.[52] Nonetheless, it is described under the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (LIMAG Rules) as a process in which an independent person is appointed as a mediator and attempts to assist the parties to resolve their dispute. In so doing, the mediator may meet with the parties jointly or separately, and by discussion and facilitation, attempts to help the parties settle their dispute.[53] In *Marwa Chacha Kisyeri v. Board of Management for Lake Secondary School*[54] mediation was defined as "a process in which parties are assisted to resolve their dispute amicably through an independent mediator."[55] From the above, it is clear that unlike the other

---

50 Ministry of Labour, Youth Development and Sports, 2003, p.144.

51 See s. 135(3) of the Labour Relations Act, 1995 (South Africa); S.81 (3) of the Industrial Relations Act, 2000 (Act No.1 of 2000) (Eswatini) and S.1 (1) of the Labour Act 11 of 2007 (Namibia).

52 ELRA, Cap.366 [R.E 2019] and Labour Institutions Act, Cap. 300 [R.E 2019].

53 LIMAG Rules, 2007, (G.N No.67 of 2007), r.3 (1).

54 Labour Dispute No.15 of 2009, High Court of Tanzania, Labour Division at Dar es Salaam (unreported).

55 Id, p.3.

SADC countries which employ a conciliation process, Tanzania employs a mediation process.

2.4.2 Arbitration

Arbitration as a process of dispute settlement has always existed separately from the ADR system. The word is derived from a Latin word, *arbitrari*, "to be of an opinion, give a decision from an arbiter; a judge, umpire or mediator. Thus, it means settlement of a dispute by a third party."[56] Arbitration is defined by Osborn's Concise Law Dictionary as "the determination of disputes by the decision of one or more persons called arbitrators. [It] is a legally effective adjudication of dispute otherwise than by the ordinary procedure of the courts."[57] The term is also defined in Black's Law Dictionary as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding".[58] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp define arbitration as a process in which a neutral person makes a decision on disputed issues.[59]

Writing on the difference between mediation and arbitration, Sara Pose Vidal states that in conciliation and mediation the third party has no mandate to make a decision while in arbitration the arbitrator can issue some binding and compulsory orders. In this regard mediators are *interpartes* whereas arbitrators are *suprapartes*.[60]

---

56 Online Etymology Dictionary, available at www.etymonline.com accessed on 30 January 2020.

57 Rutherford, L and Bone S., (eds), *Osborn's Concise Law Dictionary*, (8th Edn), New Delhi: Universal Law Publishing Co. Pvt. Ltd, 2003, p. 30.

58 Garner, (ed), 2004, p. 112.

59 du Toit, D., et al., *Labour Relations Law, A Comprehensive Guide*, (6th Edn), Durban: LexisNexis, 2014, p. 146.

60 Vidal, S.P., "Mediation by Labour Courts in Spain", in Talvik, A., (ed), 2015, p.19.

The Task Force defined arbitration as "a process whereby a third party conducts a hearing in which the disputants have the opportunity to present their case."[61] Statutorily, arbitration is defined as "a process in which a person appointed as an arbitrator for resolving a dispute determines the dispute for the parties."[62] The arbitrator arbitrates through hearing the parties and their evidence followed by the arbitrator's reasoned and written award or decision which is binding on the parties and enforceable by a court of law. In *BIDCO Oil and Soap v. Abdu Said & 3 others*,[63] it was emphasised that the arbitration process is *quasi judicial*. As the labour laws recognize and permit arbitration of labour dispute other than by the CMA,[64] arbitration in such other forums is defined and applied according to the law establishing and governing the process, and not by the labour laws.

2.4.3 Combined Mediation and Arbitration (Med-Arb)

Combined Mediation- Arbitration (Med-Arb) is not envisaged under the ELRA as a method for resolving labour disputes. However, it is provided under the Labour Institutions (Mediation and Arbitration) Rules (LIMA Rules).[65] Med-Arb is a process whereby arbitration of a dispute follows immediately after mediation has failed. Thus the adjective, "combined", may be misleading to some extent. Under the LIMA Rules, the CMA may set a combined mediation arbitration process on the same date and by the same person.[66] In South Africa where conciliation is employed, the process is branded as Con-Arb.[67]

---

61 Ministry of Labour, Youth Development and Sports, 2003, p. 145.
62 LIMAG Rules, 2007, (GN No.67 of 2007), r.18.
63 High Court of Tanzania, Labour Division at Dar es Salaam, Revision No.149 of 2009.
64 ELRA, Cap.366 [R.E 2019], s. 92.
65 GN No. 64 of 2007, r.18.
66 Ibid.
67 S.191(5A)(c) of the Labour Relations Act,1995 and rule 17 of the CCMA Rules (South Africa).

Before a dispute is subject to med-arb, parties must be given a written notice to that effect.[68] Thus, Med- Arb should not be confused with situations where a mediator converts himself / herself into an arbitrator upon failure of mediation.[69] Nevertheless, in some cases, where parties to a failed mediation consent, mediators have converted themselves into arbitrators and proceed to treat the dispute as "a combined mediation arbitration". For example, in *Wimbi H Kassim v TANESCO,*[70] after the mediation had failed, the mediator proceeded with arbitration of the dispute without being appointed in terms of section 88 (2) (a) of ELRA. In reversing the award, the High Court stated that the mediator acted with material irregularity to convert himself as an arbitrator. The Court stated further that:

> Such irregularity is not only a conflict of roles which may lead to injustice and breach of the rule on confidentiality of mediation proceedings but would also deprive the mediation system the basis of its success namely; ability of the parties to participate in the process with the frankness necessary to reach an amicable settlement…[71]

Although in some cases the High Court has endorsed the practice,[72] it remains a jurisdictional flaw since it is the CMA which can appoint a person to conduct the process and not a self appointed person.[73]

---

68 Ibid.

69 *Aziz Ally Aidha* Adam *v. Chai Bora Ltd* [2011-12] LCCD 65; See also *BMZ UNHCRGTZ Kigoma v. Phares Ngeleja & TUICO*, Labour Revision No.180 of 2009, High Court of Tanzania, Labour Division at Dar Es Salaam.

70 [2015] LCCD 7.

71 Id, at p. 24.

72 See for instance: *Blue Financial Services v. Vestina Masaga* [2014] LCCD 3 at p.6; *Kagera Tea Co. Ltd v. Valerian C Mlay* [2013] LCCD 85 at p.148.

73 S. 88(2) (a) of ELRA.

2.4.4 Adjudication

Adjudication is a predominant mode of dispute settlement under the adversarial system. It is defined in Black's Law Dictionary as "the legal process of resolving a dispute; the process of judicially deciding a case."[74]Its etymology is a Latin word *adiudicatus*, whose verb is *adiudicare* which means "grant or award as a judge".[75] Rutinwa states that adjudication is "a formal procedure for dispute settlement involving a hearing by a judge in a court of competent jurisdiction who decides the dispute for the parties."[76] In this context and within the larger picture of labour dispute resolution in Tanzania, adjudication is the hearing of a labour dispute by the High Court in the exercise of its original jurisdiction. The disputes that are subject to adjudication are those which do not go through the CMA for mediation.

3. MEDIATION OF LABOUR DISPUTES IN TANZANIA

Mediation of labour disputes in Tanzania is regulated by labour laws. Besides, since mediation is a constitutional category and considering that one of the objects of the labour laws is to give effect to the Constitution, it is argued that the Constitution is the basic law on mediation in Tanzania.[77] The specific laws on mediation of labour disputes are the ELRA[78]; the LIMA Rules[79]; the LIMAG Rules[80]; the Labour Institutions (Code of Conduct for Mediators and Arbitrators) Rules, 2007[81] and the Employment and Labour Relations (General) Regulations, 2017.[82]

---

74 Garner, B.A.,(ed), 2004, p. 45.

75 Online Etymology Dictionary, available at www.etymonline.com accessed on 30th January, 2020.

76 Rutinwa, B., "Dispute Resolution" in Rutinwa, B., *(et al),* (eds), 2009, p. 175.

77 Cap.2 [R.E 2005]

78 Cap. 366 [R.E 2019]

79 GN No.64 of 2007.

80 GN No. 67 of 2007.

81 GN No. 66 of 2007.

82 GN No.47 of 2007.

Labour disputes are instituted by delivering at the CMA office a duly filled Referral Form which must have been served on the other party or parties. Once the Referral Form is properly before the CMA, the CMA appoints a mediator, time and venue at which the mediation hearing will take place.[83] Parties are informed of these particulars through a summons. The appointed mediator must conduct himself or herself in a professional manner and according to the standards. The mediator must demonstrate competency, decline to mediate the dispute if he/ she has any interests or seek assistance where the nature of the dispute is complicated for him alone. Besides, the mediator has to act with honesty, impartiality, diligence and independence from external pressures.[84]

In conducting mediation hearing, the mediator has to be guided, though not in a checklist form, by the mediation guidelines.[85] Significantly, the mediator's role is only that of helping by facilitating the parties to settle their dispute while observing the fundamental principles of mediation which are the parties ultimate role to decide whether to settle or not and the confidentiality of the process. As such a good mediator may not impose his will on the parties or either of them. Mediator should also ensure that the whole process is done in utmost good faith by assuring the parties that nothing done or said at mediation will be used against any party, should mediation fail.[86]

Before 2017, where mediation was successful, the mediator had to draft a settlement agreement as failure to draft the same could result in an ambiguous mediated agreement. For example, in *S & C Ginning Co Ltd v. Simon Mboje Balya,*[87] the Court held that the mediator's mediated agreement

---

83 LIMA Rules, 2007(GN No. 64 of 2007), r. 13.

84 Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators), 2007, (G.N No. 66 of 2007), r.5.

85 LIMAG Rules, 2007(GN No.67 of 2007), r. 2.

86 LIMAG Rules, 2007(GN No.67 of 2007), r. 10(6) (a) (b) (c) (d) and LIMA Rules, 2007 (GN N0 64 of 2007), r. 17(1) & (12).

87 [2013] LCCD 190.

was vague in that it lacked the precise outcome and could therefore not be executed.[88] However, in view of the statutory mediation agreement Form (CMA F 7) the mediator's task has been reduced to that of filling the Form only.

One of the important aspects under the LIMAG Rules is the keeping of records of mediation by the mediator.[89] Records to be kept include proposals, offers and counter offers which are made by the parties. However, as mediators may also hear applications and objections, the records to be kept include such proceedings and consequent rulings. This is demonstrated in *Method Shaban Nyanda v. Major Drilling Mwanza*,[90] in which the applicant applied for revision of the mediator's ruling. After perusing the records, the Labour Court observed that there was material alteration of the proceedings which indicated that the mediator had miserably failed to keep the record of the proceedings as per the Rules.[91]

Besides, as the law stipulates that nothing done or said during mediation should be used against any party in subsequent proceedings, then the keeping of the records does not augur well with mediation principles. In *Arnold Mganga v. KCB Bank Tanzania Ltd,*[92] it was noted by the Labour Court that the respondent's counter affidavit revealed or attempted to disclose what had transpired during the mediation at the CMA, as the respondent blamed the mediator for not taking into account some relevant considerations. To that end, the Court insisted that it is prohibited by the law to refer to or disclose anything that happened in the mediation process. Such an attempt amounts to misconduct and abuse of the mediation process and the law.[93]

---

88 Id, p. 345.
89 Id, rr.13 (1) (4) (a) and (5).
90 [2011-2012] LCCD 10.
91 Id., p. 20.
92 [2015] LCCD 102.
93 Id, p. 335.

4. CHALLENGES ON MEDIATION OF LABOUR DISPUTES IN TANZANIA

4.1 Legal Challenges

The application of mediation in resolving labour disputes in Tanzania is still faced with a number of challenges like non attendance of the parties at mediation, determination of objections and applications, mediators' professionalism and unclear role of representatives.

4.1.1 Non Attendance of Mediation and its Consequence

It is a common ground that in judicial proceedings when an informed party absents himself by not appearing when the matter is due for hearing the consequences thereof is clear. Depending on which party did not appear, the matter may either be dismissed or proceed *ex parte,* that is, hearing in the absence of the other party.

In mediation of labour disputes the same consequences have been adopted with regard to non-appearance of the parties for mediation hearing. The law permits the mediator to dismiss the complaint if the applicant does not appear for mediation hearing or to proceed with an ex *parte* hearing if the respondent fails to appear on the date set for mediation.[94]

A bizarre situation of this anomaly surfaced in *Mkurugenzi, St Marys School v Atupakisye E Kameta*.[95] In this application, the High Court found that at the CMA, the applicant did not attend mediation hearing though was duly served. Consequent upon the applicant's (respondent's) non-appearance, the mediation 'proceeded' ex parte. Strangely, at the conclusion of the ex parte mediation, the mediator issued a *Tuzo* (an award) while at the same time

---

[94] S.87(3) (a) (b) of the ELRA and Rule 14(2)(a) (i) &(ii) of the Guidelines.

[95] Labour Revision No.180 of 2009, High Court of Tanzania, Labour Division at Dar es Salaam.

issuing the settlement/Non Settlement Certificate (CMA Form No 5)[96] that the matter be heard ex parte. This indicated that the mediator was not certain as to how the matter ought to have been dealt with and at what stage the matter was concluded.

Both the dismissal and *ex parte* decisions are substantive decisions and enforceable as a decree. It is submitted that this does not augur well with the very essence of mediation, which is a mutually reached consensus settlement. It is in fact contrary to the fundamental principle of mediation as is stated in the LIMAG Rules.[97]

The position of the law above was akin to a former Rule in South Africa which was invalidated by the South African Labour Appeals Court (LAC). The LAC, in *Premier of Gauteng & Another v Ramabulana N.O & others,*[98] declared invalid the Commission for Conciliation, Mediation and Arbitration (CCMA) rule, which was *in pari materia* with rule 14 (2) (a) of the LIMAG Rules. The invalidated CCMA rule provided that where a party is represented at the conciliation but fails to attend in person the commissioner may: continue with the proceedings; adjourn the proceedings; or dismiss the matter by issuing a written ruling.[99]

It is hoped that had the above decision been made before the enactment of these provisions, most probably the legal position would be different as well considering that the labour law is modelled on South Africa's labour law.

---

96 This is now CMA Form No.6 (see schedule to Employment and Labour Relations (General) Regulations, 2017, GN 47 of 2017.

97 Rule 4(1) of the Guidelines provides that it is a fundamental principle of mediation that parties ultimately choose whether to settle the dispute or not and the mediator's recommendations are not binding on them.

98 [2008] 4 BLLR 299 (LAC); (2008) 29 ILJ 1099 (LAC) also cited in Benjamin, P., *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)*, Geneva: ILO, 2013, at p.18.

99 Rule 13(2) of the CCMA Rules (South Africa).

Besides, it is argued that if a mediator cannot impose his will in the presence of both parties, it is equally and probably more difficult for him to impose a decision in the absence of one of the parties.

Although admittedly labour laws are different from the *corpus juris* (the body of law) the sanctions for non-appearance in mediation hearing are also contrary to what the Court of Appeal has consistently held with respect to non-appearance for mediation in ordinary civil cases. The Court has laid down that where a party does not attend mediation, the court should not dismiss it or proceed *ex parte* but rather treat it as a failed mediation.[100] This position has been reinforced by the amendment to the Civil Procedure Code (the CPC)[101] which provides that where mediation has failed due to non-appearance at the mediation hearing, the mediator can only remit the file to the trial judge or magistrate for necessary orders according to law.[102] Thus, under the CPC it is only the trial judge or magistrate who can dismiss a suit for a failed mediation if the plaintiff did not appear or strike out the defence if it was due to the defendant's fault or make any order deemed fit.[103]

Paradoxically, the High Court, Labour Division, upheld the principles of mediation in what seems to have been an oversight of the statutory provisions governing non-appearance of a party to a mediation session. This

---

100 *Tanzania Harbours Authority v Mathew Mtalakule & 8 others* [2002] TLR 385; *Ignazio Messina & Another v Willow Investment Limited & Another*, Civil Appeal No.105 of 1998, Civil Appeal No.105 of 1998 Court of Appeal of Tanzania at Dar es Salaam, (unreported) and *Napkin Manufacturer's Limited v Charles Gadi & Another*, Civil revision No. 2 of 2008, Court of Appeal of Tanzania at Dar es Salaam (unreported).

101 [Cap.33 R.E 2019] as amended by the Civil Procedure Code (Amendment of the First Schedule) Rules, 2019, GN No.381 of 2019.

102 Rule 29, above note 100.

103 Rule 29(a) (b) (c), above note 100. See also, *Ruth Twisa v Israel Salath Mwakila & 6 others*, Land case No.65 of 2015, High Court of Tanzania at Dar es Salaam, (25/10/2019) (Unreported).

was in the case of *M/S Namera Group Industries v Juma Zimbwe & 58 others*[104] in which the dispute was scheduled for mediation but the employer defaulted appearance. Upon the default, the mediator proceeded *ex-parte* and gave an award. In setting aside the award, the Court held that the mediator did not resolve the dispute amicably by following the procedures set out under section 88(1) of ELRA. It was further held that by doing so, the mediator turned himself into an arbitrator by determining the dispute without being appointed by the CMA or with the consent of the parties.

4.1.2 Applications and Preliminary Objections

The other less or similar conundrum relates to determining jurisdictional issues, applications for condonations, joinder of parties and other preliminary objections on points of law that are raised at mediation stage. It is a fundamental principle that jurisdictional issues can be raised at any stage of the proceedings and in this regard, the mediator is supposed to be satisfied that the CMA has the requisite jurisdiction.

As jurisdiction is a statutory creature, parties cannot confer or agree to confer jurisdiction on the CMA. As such, any jurisdictional or preliminary legal objection cannot be a subject of mediation. Thus, the determination of jurisdictional issues by a mediator during the mediation process is a misnomer, to say the least. Where jurisdiction is contested the mediator must leave the parties to battle the war and at the end, he or she must give a ruling. It is clear that such a ruling is a solely mediator's decision which is imposed and binding on the parties.[105]

---

[104] Revision No. 5 of 2008, High Court of Tanzania, Labour Division at Dar es salaam (unreported).

[105] Under Rule 50 of the Labour Court Rules, 2007, GN No 106 of 2007. Such decisions are not revisable unless they have the effect of finally concluding the matter or it is plain clear that there is an occasion of grave injustice.

4.1.3 Role of Representatives

Representation during mediation is allowed by the law.[106] At its enactment in 2004, the ELRA permitted two categories of representatives, firstly; a member or an official of that party's trade union or employer's association and secondly; an advocate. The Act was amended in 2006 to include a third category of representation, namely, personal representative.[107]

The scope and role of representatives during the mediation process is not free from difficulty. In the first place the High Court has compounded the problem by giving contrary views on the role of representatives. In *Charles Joseph Maro v Director, Tanzania National Parks* [108] the Court held that in terms of Rule 23(1) of GN No.64 of 2007, "representative acts or assumes the duties which are normally done by advocates."[109] Conversely, in *Cami Apparel v Balozi Msuya & 231 others*[110] it was held that "representation of parties by their unions, employers' associations or party's own choice as per labour law, creates a different form of representation. It is an intrinsically different role from that of advocates."[111] The problem posed is that there is a clique of persons who identify themselves as personal representatives who represent parties the same way as advocates do. However, they are not regulated by anybody although they also charge a fee for representing the parties.[112]

Although it was revealed by the Director that the Commission was responding to these issues as it had prepared a Code of Conduct and Ethics

---

106 S.86 (6) of ELRA; Rule 23 (1) of GN No.64 of 2007 and Rule 7(1) of GN No.67 of 2007.

107 Act No 8 of 2006.

108 Labour Revision No.309 of 2009, High Court of Tanzania, Labour Division (unreported).

109 Id, at p.3.

110 [2011-2012] LCCD 106.

111 Id, at p.219.

112 Wambali, V., Interview by author, (19 August 2021, CMA HQ, Dodoma) and Kefa, P.E., Interview by author, (14 April 2021, CMA, Mwanza).

for Personal Representatives, 2021,[113] the propriety of the Code is questionable since personal representatives are not "professionals" as such who should be regulated by a code of conduct.

At mediation, personal representatives have two main impacts. First, some of them lack mediation skills and secondly, in considering the terms of mediation, the represented party has to be mindful of the costs or fees of his representative.[114] Moreover, the law is not clear whether a representative can proceed with mediation in the absence of his "client" and make a binding bargaining settlement on his behalf. Our humble understanding of the phrase "…may be represented…" simply means what it says. That is, a party who decides to act through another is bound by whatever that representative bargained in so far as it was within the ambit.[115] However, this interpretation does not seem to be consonant with labour relations law which strives to maintain harmonious relationships.

4.1.4 Legislation and Technology

An analysis of the Rules governing mediation and arbitration at the CMA clearly reveals that the setting does not embrace the fast growing technology. For example, parties and witnesses are issued with summonses requiring them to appear physically before the CMA office, documents are still delivered in hard copies and awards are also given at the CMA offices by physical delivery. All these indicate that the CMA has not yet embraced the use of modern technology like e – Forms and pleadings, e - service, hearing by video-conferencing, e- evidence etc.[116]

---

113 Ibid.

114 Mkobozi, Z., Interview by author, (19th August 2021, CMA HQ, Dodoma).

115 In *Ahmed Ausi & 297 others v Kilimanjaro Hotels Co Ltd & Consolidated Holding Corporation* [2011-2012] LCCD 79 at 163, it was held that having a representative means that the representative is legally entrusted or authorised to act on their behalf. The representative has all the mandate to act for them.

116 Mpula, U.N., (CMA officer in charge for Ilala/ Kinondoni Office), Interview by author, (14th July, CMA Ilala Office, Dar Es Salaam).

The impact of this challenge was manifested in 2020 during the Covid 19 pandemic where cases were adjourned through notices posted on notice boards or text messages to the parties. In *Chama cha Walimu Tanzania (CWT) v. Baraka Agalla Owawa,*[117] the applicant's counsel prayed for adjournment on the grounds that he was in 14 days self quarantine. The prayer was declined and the matter proceeded *ex parte.* On application to the Court, the Court held that if there was urgency in determining the matter then the CMA ought to have employed modern technology and hear the matter online.[118]

4.1.5 Conflicting Decisions of the Labour Court

Tanzania's legal system is predominantly common law, thus the doctrine of precedent forms the basic pillar of administration of justice. In this sense, the CMA is bound to follow decisions of the Labour Court in disputes with similar material facts. However, due to conflicting decisions in the Court, the CMA is left at a crossroads and mediators have only to choose their preferred position in determining some preliminary legal issues.

For example, as regards the question on public servants, two ex- employees from the same institution, the Bank of Tanzania, were treated differently by the same CMA office; one holding that the CMA had no jurisdiction thus striking out the dispute,[119] while in the other it was held that the CMA had jurisdiction and proceeded to determine the matter.[120] In another matter, and on the authority of decisions of the Labour Court, a mediator struck out a dispute for want of jurisdiction only to be overruled by the Labour Court

---

[117] High Court of Tanzania, Labour Division at Musoma, Labour Revision No.28 of 2020.

[118] Id, p.10.

[119] *Regina Ngusa v. Bank of Tanzania*, CMA at Ilala, CMA / DSM/ ILA/R. 44/18/29.

[120] *Esther F Wambura v. Bank of Tanzania*, CMA at Ilala, Labour Dispute CMA/ DSM/ ILA/1252/18.

that the CMA has jurisdiction.[121] In short there is no consistency, certainty and predictability on how some issues are to be resolved.

4.2 Institutional Challenges

4.2.1 Delays and Case Management

While mediation of labour disputes have to be completed within 30 days, this is hardly the case. This is particularly so in areas with high number of disputes like Dar es Salaam and Mwanza[122] or where there are no mediators to conduct mediation. At Dar es Salaam office, for example, as from October-December 2019, the Mediation unit at Ilala/Kinondoni CMA office with ten mediators only received and registered 499 new cases while it had 236 cases brought forward, thus making a total of 735 cases. Out of this number, 473 cases were mediated while 262 were still pending at mediation stage. And at the quarter ending on 30th June 2021 there were a total of 576 disputes at mediation stage.[123]

Nationwide, the number of disputes referred at the CMA for mediation (and arbitration) is summarised in tables 1.1 and 1.2 below.

Table 1.1: A Summary of Labour Disputes referred for mediation at the CMA from 2006 – March 2017

Year	Total disputes received	Mediated		unmediated		Med-Arb.
		total	%	Total	%	
2006/07	1977	685	35	1292	65	-
2007/08	6065	4171	69	1894	31	-
2008/09	6489	5218	80	1271	20	-

[121] *Jeremiah Mwandi v. Tanzania Posts Corporation*, High Court of Tanzania at Kigoma, Labour Revision No. 06 of 2019.

[122] According to the Register at Mwanza, these cases exclude those that were remitted for rehearing of arbitration.

[123] Data obtained from the Dar es Salaam officer in charge during an interview conducted on 14 July 2021.

2009/10	12573	4373	35	8200	65	-
2010/11	8177	4132	50.5	4045	49.5	-
2011/12	7722	3281	42	4441	58	-
2012/13	5722	2214	39	3508	61	-
2013/14	5963	2007	34	3956	66	-
2014/15	5811	1861	32	3950	68	-
2015/16	9292	3915	42	5377	58	-
2016/17*	8067	2965	37	5102	63	-
2017/18**						

*****Cases up to March, 2017

** No data availed to the author

Source: Research findings and compilation by the author

Table 1.2: A Summary of Labour Disputes referred for mediation at the CMA from 2018 – 2021

Year	Total Disputes (mediation & Arbitration)	Mediation					Med -Arb
2018/19	14,778	Disputes referred for Mediation			Pending		
		Total	Mediated	%	Total	%	
		9647	8367	86	1280	14	-
2019/2020	16,269	10031	8112	81	1919	19	-
2021/2021	18,222	8814	7208	86	1786	20	-

Source: Research findings and compilation by the author

From the above two tables, five main facts are clear. First, there is a higher number of disputes which were not mediated by the end of each year, the leading year being 2014/15 with 68 percent. Secondly, there was a sharp and sudden increase in the number of disputes from 2016/17 to 2018/19, an increase of about 6,721 disputes. Thirdly, for the past three years, there has been an almost consistent increase of about 2,000 disputes per year. Fourthly, no dispute has been resolved through med-arb. And lastly, there are

remarkable efforts to mediate more disputes in the last three years than before. Despite the increase in disputes, unmediated disputes have remained at 20 percent only for the past two years and 15 percent in the year 2018/19.

4.2.2 Lack of Adequate Offices

Lack of offices at district levels is a major institutional challenge faced by the CMA. The only regions with more than one operational office are Dar es Salaam, Iringa, Ruvuma and Dodoma regions which have two offices each and the Coast region which has three offices because of its geographical nature. However, there is neither a mediator or arbitrator at the Mkuranga District office. The only stationed officer is an administrative secretary who receives referral documents and other documents.[124]

According to the CMA Mediation Director, the CMA is also in the process of establishing its offices in the districts of Kaliua, Kinondoni, Kigamboni, Ubungo and Kibondo.[125] As for the districts in Dar es salaam, initiatives to establish CMA offices in each district in Dar es Salaam region await response on availability and allocation of offices from the respective district authorities.[126]

It was also revealed that as the CMA is "under" the Ministry of Labour, most of its offices are hosted at office buildings of the ministry. Thus, allocation of the offices depended with availability of offices in those buildings. For example, the CMA had offices in Ifakara and Kilosa Districts in Morogoro region, but when the labour department disestablished their offices in those districts, the CMA was also forced to close its offices for lack of offices.[127]

---

124 Mkombozi, Z., (Mediation Director), Interview by author (19 August 2021, CMA HQ, Dodoma).

125 Ibid.

126 Mpula, U.N., (CMA officer in charge for Ilala/ Kinondoni Office and former in charge for Dar es salaam Zone), Interview by author (14 July, CMA Ilala Office, Dar es Salaam).

127 Mkombozi, Z., Interview by author (19 August 2021, CMA HQ, Dodoma).

In most regions, CMA offices are located at the region's Headquarters.[128] Considering the geographical distances between some districts and their regional Headquarters, this makes the CMA to remain unknown and inaccessible. For instance, one respondent in Kibondo district informed the author of a labour dispute which was instituted in the primary court of Kibondo District at Kibondo Urban (Nabuhima).[129] A similar situation revealed itself in *Hamis Ntaziha & 17 others v. Oxfarm & Salu Security Services Ltd*[130] where the applicants who were employed as security guards in Kibondo District, had their contracts of service unceremoniously ended. However, instead of pursuing the matter at the CMA, they complained to Kibondo District Commissioner who referred them to the Police Officer Commanding District (OCD) where the matter remained for over three months. It was noted by the judge that where institutions clothe themselves with jurisdiction not granted by law, ignorance of law goes beyond the individual limit to "institutionalised ignorance".[131] Given this situation, employees with little or moderate claims against their employers may opt to surrender rather than engage in costly justice.

4.2.3 Mediator's Professionalism, Calibre and Skills

Mediators are supposed to conduct mediation in a professional and competent manner. However, it was aptly revealed by the Director of Mediation that some mediators lack mediation skills or unwillingness to conduct mediation due to their personal prejudice or other reasons.[132] It was stated that some mediators do not even attempt to mediate the parties, or they are swayed by the dictates and whims of the parties or use a threatening

---

128 Mkombozi, Z., Interview by author (19 August 2021, CMA HQ, Dodoma).

129 Ngendabanyikwa, V., Interview by author (6 July 2021, Kibondo). The respondent could not remember the number of the case and the author could not access the court file.

130 High Court of Tanzania, Labour Division at Kigoma, Revision Application No. 10 of 2020.

131 Id, p.5.

132 Mkombozi, Z., Interview by author (19 August 2021, CMA HQ, Dodoma).

approach.[133] In *Charles Petro v. St. Carol Institution,*[134] it was alleged that the mediator did not put into writing what was agreed upon, but rather an offer which was made by the employer and also that the employee was forced to sign the agreement by the mediator.[135]

Other examples of deviation from professionalism is where a mediator turns himself into arbitrator,[136] usurps the powers of arbitrator,[137]fails to keep records,[138] issues an ambiguous mediated agreement[139] and failure to attempt mediation.[140] In one case, the Labour Court admonished a mediator whose manner of dealing with mediation was described as bordering misconduct.[141] In another case it was alleged that the mediator was receiving instructions and guidance from the arbitrator, who, owing to lack of offices shared an office in which the mediation was being conducted and upon failure of the mediation, appointed himself an arbitrator of the same dispute despite protest by one of the parties.[142] The confidentiality and informality of the process may have an adverse impact if the mediator decides to employ other

---

133 Ibid.

134 [2014] LCCD 96.

135 Id, p.435.

136 *Aziz Ally Aidha Adam v Chai Bora Ltd* [2011-12]LCCD 65; See also *BMZ UNHCRGTZ Kigoma v Phares Ngeleja & TUICO*, Labour Revision No.180 of 2009, High Court of Tanzania, Labour Division at Dar es Salaam.

137 *Mkurugenzi, St Marys School v Atupakisye E Kameta*, Labour Revision No.180 of 2009, High Court of Tanzania, Labour Division at Dar es Salaam.

138 *Method Shaban Nyanda v Major Drilling Mwanza* [2011-2012] LCCD 10, at p.20.

139 *The Principal, Mbeya University College of Science and Technology v John A Mwatulo* [2015] LCCD 144, at 102.

140 *Thobias Ndege v Mwatex* [2011-2012] LCCD 10, at p.21.

141 In *Simon Shija v. St. Augustine University of Tanzania* [2013] LCCD 22 at 38-9, It was alleged among others that the mediator acted as a prosecutor, defence engine and a judge. The Court observed that the mediator's conduct amounted to a fundamental irregularity which, though not sufficient to find misconduct, clearly borders it.

142 *GTZ/UNHCR/BMZ v. Yuda Kisinga*, The Labour Court Zonal Centre of Kigoma at Kigoma, Revision No. 6 of 2011.

techniques or irrelevant considerations to effect a settlement. This is especially where the matter involves the uninformed, ill equipped and unrepresented parties.

4.2.4 Insufficient Staff

The CMA has an insufficient number of not only mediators and arbitrators but also the supporting staff. According to the Directors of Mediation and Arbitration, the CMA has a total of 42 mediators and 44 arbitrators only while the demand is for 130 mediators and 130 arbitrators.[143] In short, there is a deficiency of 75 percent for both mediators and arbitrators. At Kigoma, Musoma and Lindi (and for a considerable time Shinyanga and Geita) offices, there is only one arbitrator with no mediator.[144]

Nationwide, as by 2021, the CMA had only 47 administrative secretaries, most of them employed on contractual basis[145] and only three offices had office attendants.[146] Despite the huge demand for increased staff and CMA's application for permission to recruit more staff, in 2021 the government approved a permit for employing 36 new employees only. The permit was for 10 mediators, 10 arbitrators and 16 other staff.[147]

4.3 Other Challenges

4.3.1 Trade Unions' Interest

According to one company director, some trade unions tend to fuel labour disputes rather than preventing them.[148] This tendency is born out of the liberalisation of trade unions which has resulted into a fierce competition for

---

143 Mkombozi, Z., (Mediation Director) and Wambali, V., (Arbitration Director), Interview by author (19 August 2021, CMA HQ, Dodoma).

144 Ibid.

145 Director of Human Resources, Interview by author (19 August 2021, CMA HQ, Dodoma).

146 Ibid.

147 Ibid.

148 Anonymous, interview by author (20 July 2021, Temeke).

more members. More members mean more income but as non-members are represented at the CMA and Labour Court upon payment of fees or contingent fees, the trade unions have developed a tendency of impressing their members in pursuing disputes rather than in ameliorating them.[149] For example, in one dispute, a company was about to close its business. As a means to secure mutual agreement on terminal benefits, it invited the employees and their trade union for negotiations which resulted in a collective agreement and terminal benefits. However, hardly before a month, some of the employees, represented by the same trade union, filed a labour dispute claiming again the same terminal benefits.[150] The author notes that this tendency is also cropping in individuals who conclude contracts for employment termination but once they are paid, they again, refer the same claims to the CMA.[151]

The involvement of a trade union with personal interest in a dispute is also evident in *Iddy Omary Iddy & 1680 others and Tanzania Union for Industrial and Commercial Workers (TUICO) v. Mazava Fabrics and Production East Africa Limited*[152] where the trade union's priority interest was payment of salaries to the employees, so that in turn, a deduction be made to effect their contributions to the union.

4.3.2 Unrepresented Parties

According to an interviewee,[153] the relatively limited knowledge of the procedure by unrepresented parties has an impact on speedy resolution of

---

149 Ibid.

150 *Kassim Amir Kasanga & 33 others v. Premix Concrete Ltd*, CMA at Temeke, CMA/DSM/ 284/2015.

151 *Precision Air Tanzania Limited v. Gloria Thompson Mwamunyange*, High Court of Tanzania, Labour Division at Dar es Salaam, Revision No. 292 of 2017 and *Francis Kidanga v. Kilimanjaro Fast Ferries Ltd*, High Court, Labour Division at Dar es Salaam, Revision No. 668 of 2019,

152 CMA at Morogoro, Labour Dispute No. CMA/MOR/155/2020.

153 Wandiba, D.A., (CMA Mediator), Interview by author (14th April 2021, CMA, Mwanza).

labour disputes. The interviewee pointed out that in some disputes the parties, especially employees, do not even know their real employer or the nature of their employment relationship. In such cases, disputes are prolonged at the CMA whenever issues of correct parties arise. Similar to this, parties normally fail to serve the other parties on time thus compelling adjournments of mediation sessions.

4.3.3 Advocates

The role of advocates in legal proceedings cannot be over emphasised. However, concerns were expressed by some respondents on the role of advocates in the labour disputes resolution process.[154] Firstly, in mediation proceedings, it was stated that a good number of advocates have minimal skills on the process. Some are very passive and do not help their clients to fully understand the nature and advantages of mediation, while others persuade their clients to reject mediation so that the dispute proceeds to arbitration.[155]Besides, sometimes advocates have been the cause for adjournment of CMA proceedings due to their absence.[156]

5. CONCLUSION

This article has highlighted the challenges on the mediation process of labour disputes resolution in Tanzania. It has also shown that the mediation process in Tanzania is different from other SADC countries which employ conciliation, a process which includes mediation, fact finding exercise and

---

[154] Mkombozi, Z., (Mediation Director); Wambali. V., (Arbitration Director); Mpula, U.N., (Officer in Charge, Dar es salaam and Wandiba, D., (former officer in charge, Kigoma). Three advocates who preferred anonymity were also of the same view.

[155] This view was commonly shared by interviewed CMA officers: Kefa, E (Mwanza); Mpula, U.N., (Dar es Salaam); Andrew D, (Kigoma) and Mkombozi, Z (Dodoma).

[156] Wandiba, D., Interview by author, (14 April 2021, CMA Mwanza).

recommendation in form of an advisory award. Besides, it has noted that mediation at the CMA is cloaked with both legal and institutional challenges.

It is recommended that the law be amended to address several aspects. These include non-dismissal or *ex parte* hearing where one party fails to attend mediation, applications and other objections be determined in arbitration session. Further, it is recommended that a represented party should also attend the hearing as is in South Africa and Eswatini. Alternatively, the representative should inform the CMA on record that he has full mandate to make binding terms. Where the latter is not possible, some reliable and ready means of communication with the party must be in place to avoid belated response from the party. Despite its informal nature, mediation should be taken seriously by all the stakeholders. Further, the CMA should work and liaise with the government and other partners to ameliorate its institutional challenges like enhancing staff, offices and budget.