

The Legal Framework of the Commission of Mediation and Arbitration in the Settlement of Labour Disputes in Tanzania

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Abstract

This article examines the legal position of the Commission of Mediation and Arbitration (CMA) in resolving labour disputes in Tanzania. It examines labour disputes and the settlement of labour disputes under the CMA through mediation and arbitration, in accordance with the Employment and Labour Relations Act, Cap 366 RE 2019 (ELRA), and the Labour Institutions Act, Cap 300 RE 2019 (LIA). The analysis focuses on the legal and institutional framework of the CMA, the powers of mediators and arbitrators, and court decisions on the mandates of the CMA. The article examines procedures for referring disputes to the CMA for mediation and arbitration, including time limits for referring the dispute, condonation, conducting mediation and arbitration, determining jurisdictional issues in arbitration, maintaining records of arbitration proceedings, joinder and substitution of parties in arbitration, and arbitration awards, as well as how to challenge faulty awards. Combined mediation and arbitration (med–arb) and its legal framework also form part of the discussion. In settling labour disputes, the CMA faces challenges such as jurisdiction, the time it takes to resolve disputes, the appearance and non-appearance of parties at the CMA, the legal effects, and conflicting decisions and procedural inefficiencies that impede its performance. The article calls for amendments to the ELRA, the LIA, and the rules made thereunder and for the CMA to address challenges that inhibit the smooth settlement of labour disputes.

Keywords

labour disputes, settlement of labour disputes, Commission for Mediation and Arbitration, mediation, arbitration

1. Introduction

The rise of labour disputes between employers and employees is the result of inequalities that exist in the bargaining positions of the parties to the employment contract. Labour conflicts are inherent in the labour relationship or the workplace.¹ If labour conflicts remain

1 Clarence, T & Tsweledi, B 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa' (2014) 18(1) *Law, Democracy & Development* 340.

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unresolved, they escalate into disputes that can cause social, legal, and economic problems. Labour disputes require the development of a system of settlement through concerted processes, other than routine litigation, to achieve flexible, simple, relatively inexpensive, less hostile, and expeditious methods of settlement. The Employment and Labour Relations Act, Cap 366 RE 2019 (ELRA) and the Labour Institutions Act, Cap 300 RE 2019 (LIA) have introduced a system of settlement of labour disputes that is less technical, can be accessed by more people, costs less, and operates with greater speed than the ordinary courts. Mediation and arbitration are the preferred methods of settling labour disputes in modern times and are used by the Commission of Mediation and Arbitration (CMA).

This article analyses the legal framework of the CMA in settling labour disputes in Tanzania. It employs a doctrinal legal research methodology involving a descriptive and detailed analysis of legal rules found in statutes, regulations, and cases relevant to the subject. The discussion focuses on the legal provisions applied by the CMA to settle labour disputes and how the courts have interpreted them in relation to the mandates envisaged in the law. Therefore, the article explores, albeit in summary, labour disputes and the settlement of labour disputes under the CMA. At the CMA, labour disputes are settled by mediation and arbitration. The article describes mediation and arbitration, aligning them with labour dispute settlement under the ELRA and the LIA, as well as the rules made thereunder.² It assesses the CMA by focusing on its establishment, composition, functions and jurisdiction. In addressing the institutional framework of the CMA, the article examines mediators and arbitrators, concentrating on their appointments and the powers they have to resolve labour disputes.

The article also describes procedures for referring disputes to the CMA. It begins with a discussion of the mediation of labour disputes, including time limits for referring disputes to mediation, condonation, and the conduct of mediation. There is a special focus on mediating disputes of interest and complaints before the CMA. The article later addresses the conduct of arbitration under the CMA, including determining jurisdictional issues, postponing arbitration, the records of arbitration proceedings and their legal framework, and the joinder and substitution of parties in arbitration. The article also examines combined mediation and arbitration (med–arb), arbitration awards and how to challenge faulty awards. The article concludes with a discussion of the challenges facing the CMA in settling labour disputes and the solutions to these challenges.

2. Labour dispute settlement under the CMA

Labour disputes are disagreements between workers and employers in relation to the arrangement of working conditions. Labour disputes arise between individual workers and employers, as well as between workers' unions and employers' unions, depending on whether such disputes relate to individual workers and employers or their organisations.³ Disputes may concern the workers' association or employers' association in their exercise

2 Labour Institutions (Mediation and Arbitration) Rules 2007, GN No. 64 of 23 March 2007, and Labour Institutions (Mediation Arbitration Guidelines) Rules 2007, GN No. 67 of 23 March 2007.

3 Centel, *T Labour Dispute Resolution in Turkey* (Springer, 2019) 24.

of their collective labour rights such as representing their members in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment.

Additionally, dispute settlement in the CMA developed as a result of the heavy workloads of the ordinary courts in resolving labour disputes under the old labour laws. Long trials caused by technicalities and formalities in ordinary courts led to the establishment of the CMA to resolve labour disputes. The current regime of labour dispute settlement in Tanzania provides parties with the opportunity to apply to the CMA, an independent and impartial institution for resolving labour disputes through mediation and arbitration.

Mediation is one of the methods used by both courts and quasi-judicial bodies to resolve disputes. It can take different forms, such as court-annexed mediation, private mediation, and institutionalised mediation conducted by an independent institution, such as the CMA. Despite the fact that mediation has been practised from time immemorial, it has not been easy to define.⁴ Mediation has been defined as the decision-making process in which parties to the employment dispute are assisted by a third party, the mediator, who tries to improve the process of decision-making and to assist the parties in reaching an outcome that is acceptable to them.⁵ Mediation is also defined as a decision-making process in which the parties are assisted by a third party, the mediator, who attempts to facilitate the decision-making process and assist the parties in reaching an outcome to which each can agree.⁶ It is a decision-making process in which the approved mediator assists the parties by facilitating discussions between them, allowing them to communicate effectively regarding the matters in dispute.⁷

Tanzanian labour laws define mediation as a process in which a person independent of the parties is appointed as a mediator to assist them in resolving a dispute. The mediator may meet with the parties either jointly or separately and, through discussion and facilitation, help them settle their dispute.⁸ Mediation is also described as a formal stage, following negotiations or consultations, where the parties settle disputes amicably, thereby preserving their working relationship.⁹ As a method of dispute settlement, mediation is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties but rather solutions which are mutually commercially acceptable at the time of the mediation.¹⁰ The voluntary and amicable aspect of dispute settlement in the mediation process is maintained but is achieved with the aid of a neutral third party.¹¹ The neutral

4 Kurien, G 'Critique of Myth of Mediation' (1995) 43(6) *ADRJ* 3.

5 *Ibid.*

6 Boulle, L & Rycroft, A *Mediation Principles, Processes, Practice* (Butterworths, 1997) 3.

7 Lukumay, Z 'A Reflection of Court-Annexed Mediation in Tanzania' (2016) 1(1) *LST Law Review* 54.

8 Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, GN No. 67 of 2007, rule 3(1).

9 *Tanzania Breweries Ltd v Charles Malabona* Labour Revision No. 24 of 2007, High Court of Tanzania Labour Division at Mwanza, consolidated with *Tanzania Breweries Ltd v Henry Kilagula* Labour Revision No. 219 of 2008, High Court of Tanzania Labour Division at Mwanza (unreported) 9; *Buzwagi Project v Antony Lameck* Revision No. 297 of 2008, High Court of Tanzania Labour Division at Mwanza (unreported) 8.

10 *Cable & Wireless v IBM United Kingdom Ltd* [2003] EWHC 316.

11 *Tanzania Breweries Ltd* (note 9) 9.

party must be someone experienced in the relevant field and should offer alternative suggestions to stimulate discussion and facilitate movement towards a resolution.¹²

The mediation process is preferred for resolving labour disputes because it promotes access to justice and restorative justice, and is effective in preserving relationships between the parties, unlike an adversarial dispute settlement process.¹³ Additionally, mediation facilitates the expeditious and cost-effective settlement of disputes, dispenses with technicalities in the rules and procedures of evidence, and provides parties with solutions to disputes that are beyond the scope and powers of judicial officers.¹⁴ Mediation is made compulsory under the LIA to achieve the policy objective of promoting the spirit of amicable settlement of industrial conflicts, which is vital for economic efficiency and productivity.¹⁵ Thus, for a successful mediation process, certain key features must be present, including the mediator's qualifications, skills, and expertise, the mediator's neutrality, the degree of confidentiality maintained throughout the process, and the legal status of any settlement outcome.¹⁶

Arbitration can be defined as a system of settling disputes whereby the parties present their cases to a mutually agreed-upon neutral party and commit to abiding by that person's decision, recognising it as final and binding.¹⁷ Arbitration is also described as an adjudicative process which takes place pursuant to an agreement between the parties to a dispute, whereby that dispute is referred for final determination to an independent and impartial arbitral tribunal appointed by or on behalf of the parties.¹⁸ Arbitration is also defined as a process in which a person appointed as an arbitrator determines the dispute between the parties after hearing their evidence and arguments, and delivers a written decision with reasons in the form of an arbitration award, which is binding on the parties and enforceable in court.¹⁹ Arbitration under the CMA does not provide for the right to appeal against the arbitral award, but an aggrieved party has the right to apply to the Labour Court to set aside the award based on irregularities in the arbitration proceedings.²⁰

2.1 Establishment of the CMA

The CMA is established by the LIA as an independent department of the government, which is not subject to the direction or control of any person or authority, to resolve labour disputes through mediation and arbitration methods.²¹ It is also independent of

12 Zack, AM 'Can Alternative Dispute Resolution Help to Resolve Employment Disputes?' (1997) 136(1) *International Labour Review* 96.

13 Boulle & Rycroft (note 6) 6; Lukumay (note 7).

14 Ibid.

15 *Tanzania Breweries Ltd* (note 9) 9.

16 Mtavangu, V *Commission for Mediation and Arbitration as a Quasi-Judicial Body for the Resolution of Labour Disputes in Tanzania: An Examination of its Efficiency and Effectiveness* (unpublished LLM dissertation, Mzumbe University, 2011) 34.

17 Zack (note 12) 95.

18 Joubert, WA (ed) *the Law of Arbitration in South Africa* 2 ed (Butterworths, 2003) 399.

19 GN No. 67 of 2007, rule 18(1)–(4).

20 Ibid, rule 18(5) and (6).

21 LIA, s 13(1)(a) and (b).

any political party, trade union, employers' association and federation of trade unions or employers' associations.²² The government, public authorities, and other registered organisations and federations are nonetheless required by law to provide such assistance and cooperation as may be necessary to ensure that the CMA remains independent of them.²³

The CMA is a specialised institution presided over by judicial officers who are experts in labour disputes; as a tribunal, its processes are different from those of a court.²⁴ It is also referred to as a quasi-judicial statutory body.²⁵ From its inception, the CMA was established to settle labour disputes in an expeditious way and with minimum costs. As an alternative to a court of law, the CMA was also expected to avoid complexities, formalities, technicalities and legalism, which contributed to the delay in settling labour disputes.²⁶

2.2 Composition of the CMA

The CMA is composed of six members who represent the 'tripartite character' of the Tanzanian employment relationship, that is, representatives of the government, trade unions, and employers' associations.²⁷ Some commentators hold in regard to the independence of quasi-judicial bodies that, by having commissioners representing the interests of employers, employees and the government, 'a tripartite quasi-judicial organ' implies that the much-cherished functional independence of the CMA may be more of an ideal than a reality.²⁸ If the stakeholders in the employment relationship do not interfere with the CMA's independence, the ultimate independence contemplated by the law will be achieved, regardless of the members who constitute the CMA. The government is over-represented in the CMA. Since the government is one of the employers, there is no need for separate representation by the government, as the members of the CMA are appointed by the President (the government) after consultation with the Minister responsible for labour matters, who is, in fact, the President's appointee. Furthermore, the members of the CMA are appointed by the President.²⁹ Such appointments by the President are subject to the prior recommendation of the Minister responsible for labour matters after consultation with the Labour Economic and Social Council (LESCO).³⁰

22 Ibid, s 13(1)(c).

23 Ibid, s 13(2).

24 *Morogoro Canvas Mills (1998) Limited v Jacob Mwansumbi* Labour Revision No. 42 of 2009, High Court Labour Division at Dar es Salaam (unreported).

25 See also *China Railway Jiang Engineering Company Limited v Abdallah Ibad and Salum Mtengevu* Labour Revision No. 61 of 2008, High Court Labour Division at Dar es Salaam; *Antony Mulungu v Bora Industries Limited* Labour Dispute No. 51 of 2008, High Court Labour Division at Dar es Salaam; and *Edna Pendael Tenga v Parokia of Bugando* Labour Revision No. 19 of 2007, High Court Labour Division.

26 Mtavangu (note 16) 31.

27 LIA, s 16(3).

28 Mhina, MV 'The Labour Institutions Act: Identification of Labour Institutions, their Functions, Composition and Jurisdiction' Paper presented at the workshop on the new Income Tax Act, 2004, the new LIA 2004 and the new ELRA 2004, 6; Mtavangu (note 16) 44.

29 LIA, s 16(1)(a) and (b).

30 Ibid, s 16(4).

The law stipulates that the chairperson of the CMA must not be a member, official, or office-bearer of a trade union, employers' association, or federation, or an employee in the public service.³¹ The chairperson must possess knowledge, experience and a considerable degree of involvement in labour matters.³² This includes a minimum academic qualification of at least a Master's degree in the relevant field, a minimum of five years of working experience in labour or a related field, and general abilities and capacities in the relevant field, as well as in managing national consultative bodies.³³ The law requires commissioners to possess defined qualifications, including a minimum of three years of working experience in labour or a related field, integrity, and expertise in labour, economics, and social fields.³⁴

Furthermore, the CMA is coordinated by the Director and the Deputy Director, who the CMA appoints after consultation with the Minister.³⁵ A person is eligible to be appointed as a Director or Deputy Director if they possess knowledge, skills, and experience in labour relations, dispute prevention, and resolution.³⁶ Apart from being the chief executive of the CMA, subject to the general directions and control of the CMA, the CMA Director is responsible for implementing the CMA's policy decisions and overseeing the day-to-day administration and management of the CMA's affairs.³⁷ The Director may also perform the functions conferred on him by labour law or delegated to him by the CMA and may conduct mediations and arbitrations referred to the CMA under the ELRA.³⁸

2.3 Functions of the CMA

The CMA has several functions, as provided for in the LIA, which include mediating labour disputes in terms of labour law.³⁹ The CMA also decides labour disputes referred to it by arbitration if a labour law requires the dispute to be resolved by arbitration; the parties to the dispute agree that their dispute be resolved by arbitration; or the Labour Court (LC) referred the dispute to the CMA to be resolved by arbitration in terms of section 94(3)(a)(ii) of the ELRA.⁴⁰ In the exercise of its powers, section 94(3)(a)(ii) allows the LC, instead of deciding a dispute which is under its jurisdiction, to refer it to the CMA to be decided by arbitration.

In addition to the above functions, the CMA may also offer to mediate a dispute that has not been referred to it.⁴¹ Generally, the major functions of the CMA are to mediate and arbitrate labour disputes. Mediation and arbitration are judicial functions in nature; therefore, when performing these functions, the CMA must act judiciously.⁴²

31 Ibid, s 16(1)(a)(i) and (ii).

32 Ibid, s 16(2).

33 Labour Institutions (General) Regulations 2017 GN No. 65 of 24 February 2017, reg 4(1)(a)-(c).

34 Ibid, reg 4(2)(a)-(c).

35 LIA, s 18(1) and (2).

36 Ibid, s 18(2).

37 Ibid, s 18(3)(a).

38 Ibid, s 18(3)(b) and (c).

39 Ibid, s 14(1)(a).

40 Ibid, s 14(1)(b)(i)-(iii).

41 Ibid, s 14(2).

42 Maige, I 'A Critical Appraisal on the Efficacy of Dispute Resolution under the Commission for Mediation and Arbitration' (2013) 4(2) *Open University Law Journal* 76.

2.4 Jurisdiction of the CMA

Jurisdiction refers to the authority of a judicial or quasi-judicial body to hear and decide cases. It is the power or competence of a court to hear and determine an issue between parties.⁴³ Jurisdiction can further be described as

a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction.⁴⁴

The CMA is established to mediate and arbitrate employment disputes. The LIA, therefore, designates its powers or competence, i.e., jurisdiction, to determine disputes that arise in certain places with respect to specific individuals, relationships, and issues.

In the case of the CMA, its jurisdiction arises in disputes between parties to the employment relationship, where the law categorically provides that such disputes must be mediated or arbitrated at the CMA. Jurisdiction is the bedrock on which the courts' authority and competence to entertain and decide matters rests.⁴⁵ It can be raised at any stage of a case, even at the appellate level.⁴⁶ Sometimes, however, jurisdiction may be affected by the parties' prior conduct. This may occur, for instance, when the contract of employment contains a clause requiring disputes arising from that employment relationship to be arbitrated by a private arbitrator, or when a collective agreement supersedes the contract. The jurisdiction of the court or a quasi-judicial body, such as the CMA, must be determined objectively.⁴⁷ The law states that the CMA has jurisdiction to mediate disputes referred to it and arbitrate disputes of interest if the parties are engaged in essential services; complaints over the fairness or lawfulness of the employee's termination of employment; any other contravention of this Act or any other law or breach of contract or any employment or labour matter falling under common law; tortious liability and vicarious liability; as well as any dispute referred to arbitration by the LC under section 94(3)(a)(ii) of the ELRA.⁴⁸

On the other hand, the LC is empowered to adjudicate complaints that are not subject to arbitration.⁴⁹ The ELRA, the LIA and the regulations made thereunder have indicated a line of demarcation between complaints to be determined through arbitration and those that the LC must decide.⁵⁰ The law categorically provides that a statement of complaint

43 *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

44 *Wright v Stuttaford & Co* 1929 EDL 10 at 42; *Vromans De Foro Competenti; Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C-D.

45 *Mwananchi Communications Limited and others v Joshua K Kajula and 2 others* Civ. Appl. No. 126/01 of 2016, CA, Dar es Salaam.

46 *Tanzania International Container Terminal Services Limited v Ernest Kalage* Revision No. 634 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

47 *Pinetown Town Council v President, Industrial Court* 1984 (3) SA 173 (N) at 179B-D (Leon J).

48 LIA, s 14(1) read together with s 88(1) of the ELRA.

49 ELRA, s 94(1)(d).

50 *Ibid*, s 94(3)(a)(i) and (1)(d); GN No. 67 of 2007, rule 20(3)(b)(ii); Mwalongo, F 'Labour Disputes Handling Procedure in Tanzania', <file:///C:/Users/HP/Downloads/1668611016813_Labour%20Dispute%20Handling%20Procedures%20By.%20Frank%20Mwalongo%20(1).pdf> accessed 14 October 2024.

shall be presented directly to the LC for matters within the pecuniary jurisdiction of the High Court.⁵¹ Therefore, the CMA's pecuniary jurisdiction is different from that of the LC.

Another issue regarding the CMA's jurisdiction is its geographical scope. The legal position is that the dispute shall be mediated or arbitrated by the CMA at its office, having responsibility for the area in which the cause of action arose,⁵² unless the CMA directs otherwise.⁵³ In a case where the cause of action arose in Shinyanga, where the respondent was working and where he was terminated, and the matter was taken to the Dar es Salaam CMA office, it was held that the Dar es Salaam office could only have jurisdiction over the matter if the applicant had sought the CMA's permission to allow the referral to be made to Dar es Salaam, the preferred place, instead of Shinyanga, which was the CMA office having responsibility for the area where the cause of action arose.⁵⁴ Since the cause of action arose in Shinyanga, the Dar es Salaam CMA office had no jurisdiction to arbitrate the dispute.⁵⁵ Therefore, the place of hearing is where the cause of action arose unless the CMA directs otherwise, or a party applies to the CMA for the matter to be transferred.⁵⁶

The jurisdiction of the CMA is not excluded where a matter is within its jurisdiction, but a tribunal established by another law is conferred jurisdiction to determine such a matter. The jurisdiction of the CMA will only be excluded where there is an express provision to that effect.⁵⁷ Before the amendment of the labour and employment laws in 2015, the LC held the position that the CMA has jurisdiction to determine labour disputes unless they are specifically reserved for the LC.⁵⁸ The creation of the labour dispute machinery under the Public Service Act was not intended to exclude the jurisdiction of the CMA; if that had been the intention of Parliament, it would have been specifically stated.⁵⁹ Despite the LC's position, a conflict existed between the ELRA and the Public Service Act and it was recommended that Parliament and other responsible organs should re-examine the existing laws to reform and harmonise them.⁶⁰

As a result, the labour and employment laws were amended by enacting the following provision:

Where there are inconsistencies between Labour Laws and Public Service Act, the Public Service Act shall prevail.⁶¹

Before seeking remedies provided for in the labour laws, a public servant must exhaust all remedies provided for in the Public Service Act.⁶² Additionally, the prevailing legal position

51 Labour Court Rules 2007, rule 23(1).

52 GN No. 64 of 2007, rule 22(1).

53 *Francis Kuringe v Singita Grumeti Reserve* Revision No. 37 of 2013, LCCD 1.

54 *Bulyanhulu Gold Mine Ltd v Gasto Myovela* Revision No. 217 of 2011, High Court of Tanzania Labour Division at Dar es Salaam (unreported) 8 February 2013.

55 *Ibid.*

56 *Kwila Peter Nkwama v General Manager Marine Services Co. Ltd* Labour Revision No. 229 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

57 Maige (note 42) 78.

58 *Attorney General v Allan Mulla* Labour Revision No. 271 of 2008, High Court of Tanzania at Dar es Salaam (unreported).

59 *Ibid.*

60 *Ibid* at 14.

61 Employment and Labour Laws Miscellaneous Amendment Act 24 of 2015, s 22.

62 Public Service Act [Cap. 298], s 32A.

is that, where there is an inconsistency between the provisions of the Public Service Act and any other law governing executive agencies, public institutions, or public service offices, the provisions of the Public Service Act take precedence.⁶³ Moreover, in the case of a conflict between the ELRA and any other written law relating to employment standards, the standards stipulated under the ELRA prevail.⁶⁴ This amendment led to conflicting decisions from the High Court of Tanzania's Labour Division regarding whether a public employee may directly refer a matter to the CMA.⁶⁵ However, the Court of Appeal of Tanzania in *Tanzania Posts Corporation v Dominic A. Kalangi*⁶⁶ held that public servants must exhaust the remedies available in the Public Service Act. The court held:

It is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President. The CMA has no jurisdiction to adjudicate upon such matters.⁶⁷

Moreover, where the aggrieved employee uses the existing statutory dispute settlement machinery at the level of his employer or refers the matter to arbitration before referring it to the CMA, the cause of action, for time limits, is deemed to arise from the date of termination of the last proceedings at the level of the employer or arbitration.⁶⁸

2.5 Appointment of mediators and arbitrators

The CMA appoints mediators and arbitrators in terms of section 19(1) of the LIA. The appointment of mediators and arbitrators of the CMA is a two-stage process.⁶⁹ After being appointed in terms of section 19(1) of LIA as mediators and arbitrators, they are further appointed to deal with specific disputes referred to CMA, in terms of section 86(3)(a) of the ELRA (for mediators), and section 88(2)(a) of the ELRA (for arbitrators).⁷⁰ The law does not preclude a person from being appointed as both a mediator and an arbitrator or from being assigned to perform in both capacities in respect of a dispute.⁷¹

This provision is a source of the problem of partiality and is also said to contribute to the erosion of confidentiality.⁷² Nonetheless, if mediators and arbitrators adhere to the provisions of the law that provide for confidentiality, there will be no problem. The law prohibits any person from making reference to anything said at mediation proceedings during any subsequent proceedings; and a mediator or any person present during

63 Ibid.

64 See Public Service Act [Cap. 298], s 34A; ELRA, s 102A.

65 These cases include *Deogratus John Lyakwipa and Henry Maghubo v Tanzania Zambia Railway Authority* Revision Application No. 68 of 2019; *Mbozi District Council v Michael Simbeye* Revision No. 47 of 2015; *Salehe Komba & Revocatus Rukonge v Tanzania Posts Corporation* Revision No. 12 of 2018 and *The Board of Trustees of Public Services Pension Fund (PSPF) v Jalia Mayanja and Geoffrey Ngonyani* Revision No. 248 of 2017.

66 Civil Appeal No. 12 of 2022 (unreported).

67 Ibid at 10.

68 Maige (note 42) 79.

69 Ibid at 76.

70 Ibid.

71 LIA, s 19(7)(a) and (b).

72 Mtavangu (note 16) 45.

mediation may not be called to give evidence to the CMA or the LC on what transpired during mediation.⁷³ Mediation is a confidential process designed to settle disputes through mutual agreement.⁷⁴ Since all appointed mediators are also arbitrators, it becomes difficult for them to differentiate between the roles of mediators and arbitrators, especially when they perform both roles in the same dispute.⁷⁵ The fact that one person conducts both processes is said to have an adverse effect on the mediation proceedings, simply because the parties may be aware that any concessions made during mediation might prejudice their position in the subsequent arbitration hearing.⁷⁶ Due to potential problems that may arise from the mediator acting as the arbitrator in the same case, the practice in stations with limited personnel has been for the parties to the dispute to consent to the dispute being mediated and arbitrated by the same person.⁷⁷ Additionally, when the CMA station has two or more staff members, the practice has been that if one staff member has been involved in mediation, the same person may not arbitrate the same case.⁷⁸

2.6 Powers of mediators and arbitrators in resolving labour disputes

Mediators and arbitrators are vested with powers exercised by other judicial officers such as magistrates and judges.⁷⁹ Mediators and arbitrators may summon any person for questioning or to attend mediation or arbitration hearings if his presence will assist in resolving the dispute.⁸⁰ Additionally, they have powers to summon any person believed to be in possession or control of any book, document, or object either to appear himself to be questioned or to produce the said materials.⁸¹ Also, they can administer oaths or accept affirmations from any person before permitting him to adduce the evidence.⁸² Lastly, they have powers to question any person about any matter relevant to the dispute at hand.⁸³

Mediators have powers to require further mediation meetings between the parties, after the initial hearing scheduled by the CMA, provided that the mediator may do this after the period set aside for mediation has expired and in deciding whether to require further meeting mediator may consider the following: the prospects of progress towards settlement; the consequence of settlement or non-settlement being reached; the interests of the parties; and the general public interest.⁸⁴ In exercising their powers under section 20 of the LIA and rules 5 and 19 of GN No. 67 of 2007, mediators and arbitrators should not prosecute cases on behalf of the parties.⁸⁵ Furthermore, any person who does not abide by the legal orders

73 GN. No 64 of 2007, rule 17; GN No. 67 of 2007, rule 8(1), (2) and (3).

74 *Ibid.*

75 Mtavangu (note 16) 45.

76 *Ibid.*

77 Commentary by the Mbeya Mediator-Arbitrator at the Legal Aid Seminar, 23rd March 2024.

78 *Ibid.*

79 LIA, s 20; GN No. 67 of 2007, rules 5 and 19.

80 LIA, s 20(1)(a).

81 *Ibid.*, s 20(1)(b).

82 *Ibid.*, s 20(1)(c).

83 *Ibid.*, s 20(1)(d).

84 GN No. 67 of 2007, rule 5(2)(a)(i)-(iv).

85 *BIDCO Oil and Soap Ltd v Robert Matonya and Two Others* Revision No. 70 of 2009 High Court of Tanzania Labour Division at Dar es Salaam (unreported).

of the mediators and arbitrators commits an offence.⁸⁶ In exercising their dispute resolution authority, mediators and arbitrators must comply with the code of conduct established by the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules.⁸⁷ For instance, mediators and arbitrators are required to act with honesty, impartiality, integrity, and due diligence, and to remain independent of any outside pressure.⁸⁸

3. Referring disputes to the CMA for mediation

Disputes are referred to the CMA by way of a referral by completing and delivering the prescribed form ie the referral document.⁸⁹ The law requires that the party who refers a dispute to the CMA must ensure that a copy of the referral has been served on the other parties to the dispute.⁹⁰ Additionally, the referring party is required to sign the referral form, and attach the referral document, which is written proof that the referral document was duly served to the other parties to the dispute.⁹¹ Where the referral document is filed out of time, the applicant is required to attach a condonation.⁹² If these requirements are not complied with, the referral document will be rejected by the CMA.⁹³ Also, the complainant is required by the law to include in his referral all the relief sought, and failure by the party to plead all the relief in the first referral is a bar to claiming it during arbitration.⁹⁴ After the dispute is duly brought before the CMA, the process of mediation starts.

3.1 Time limit for referring disputes to the CMA and notice for mediation hearing

Disputes about the fairness of an employee's termination of employment must be referred within 30 days from the date of termination or the date on which the employer made a final decision to terminate or uphold the decision to terminate.⁹⁵ All other disputes must be referred to the CMA within 60 days from the date on which the dispute arose.⁹⁶ After the dispute has been referred to the CMA, the law provides that the CMA must give parties at least 14 days' notice in writing of the mediation hearing unless the parties agree to a shorter period of notice.⁹⁷ For subsequent meetings, parties must be given seven days' notice, although they may agree to a shorter period notice.⁹⁸ The notice must state the date, time and place of attendance, and the law allows the CMA to contact parties by telephone or other means prior to the commencement of mediation in order to seek to resolve the dispute.⁹⁹

86 LIA, s 20(3).

87 GN No. 66 of 2007.

88 Ibid, rule 4.

89 ELRA, s 86(1); GN No. 64 of 2007, rule 12(1).

90 ELRA, s 86(2).

91 GN No. 64 of 2007, rules 5 and 6.

92 Ibid, rules 11 and 12(2)(a)-(c).

93 Ibid, rule 12(3).

94 *Dr Abel Nkini v Rajabu Ally Kikwete* Revision No. 33 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

95 GN No. 64 of 2007, rule 10(1).

96 Ibid, rule 10(2).

97 Ibid, rule 13(1).

98 Ibid, rule 13(2).

99 Ibid, rules 13(3) and 14.

3.2 Condonation

The time limit for referring a dispute to the CMA is 30 days from the date the cause of action accrues for disputes regarding the fairness of contract termination, while for other disputes, it is 60 days from the date of accrual.¹⁰⁰ The CMA may, however, condone time upon application for good cause.¹⁰¹ The phrase ‘good cause’ has been discussed in several cases. In *Valerie McGivern v Salim Fakhruddin Dalal*,¹⁰² the CA held:

No particular reason or reasons have been set out as standard sufficient reasons. What constituted good cause cannot, therefore, be laid down by any hard and fast rule. The term good cause is a relative one and is dependent upon the circumstances of each individual case.

Additionally, the delay should not be inordinate, and the applicant must demonstrate diligence, rather than apathy, negligence, or sloppiness in pursuing the action they intend to take.¹⁰³ Those who refer their applications to courts of law ‘must not show unnecessary delay in doing so; rather, they must show great diligence.’¹⁰⁴ Thus, referring a dispute to the CMA for mediation must be done within a reasonable time, depending on the nature of the case and the circumstances surrounding it.

However, there is no common understanding of what amounts to ‘reasonable time’. Where the applicant delayed referring the labour case to the CMA for six years, the delay was held to be inordinate, and the applicant was found to have acted negligently.¹⁰⁵ Referring a dispute to the CMA for mediation must be done within the time specified. This is a fundamental issue involving jurisdiction; it goes to the very root of dealing with civil claims since it is a material point in the speedy administration of justice. Time limitations are essential to ensure that a party does not come to court as and when he chooses.¹⁰⁶

A party who refers a dispute to the CMA out of time must apply for condonation by setting out grounds for condonation. An application for condonation is made by way of a notice supported by an affidavit.¹⁰⁷ The affidavit should contain, among other particulars, factual statements in support of the application and a statement of legal issues.¹⁰⁸ The requirement that an affidavit in support of an application for condonation should include a statement as to legal issues that arise from the material facts departs substantially from

100 Ibid, rule 10(1) and (2).

101 Ibid, rule 11(2).

102 Civil Application No. 11 of 2015 Court of Appeal of Tanzania at Tanga (Unreported) at p.6.

103 *Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women’s Christian Association of Tanzania* Civil Application No. 02 of 2010, Court of Appeal of Tanzania at Arusha (unreported).

104 See *Edwards v Edwards* [1968] 1 WLR 149 at 151; *Dr. Ally Shabbay v Tanga Bohora Jamaat* [1997] TLR 305; *Vodacom Foundation v Commissioner General (TRA)* Civil Application No. 107/20 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).

105 See *Abdon Pantaleo Msafiri v Tanzania Postal Bank* Misc. Labour Application No. 48 of 2020, High Court of Tanzania at Shinyanga (unreported).

106 *Tanzania Fish Processors Ltd. v Christopher Luhangule* Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania at Mwanza (unreported).

107 GN No. 64 of 2007, rules 11 and 29(1) and (4).

108 Ibid, rule 29(4).

the generally accepted principles of an affidavit, which regard it as an evidential statement containing concrete facts and not law and arguments.¹⁰⁹

The condonation form must be served on all parties to the dispute.¹¹⁰ An application for condonation is required by the law to set out grounds for seeking condonation and must include the referring party's submission on the following factors: the degree of lateness; the reasons for the lateness; prospects of succeeding with the dispute and obtaining the relief sought against the other party; any prejudice to the other party; and any other factors of relevance.¹¹¹ The rules governing condonation nevertheless have some inadequacies; they do not provide clear procedures on what the mediator must do after receiving the condonation form, and they do not prescribe when the mediator must deal with the issue of time limits.¹¹² Also the rules are not clear as to who must decide the application for condonation.¹¹³ The practice, nonetheless, reveals that the mediator appointed to mediate the dispute under section 86(3) of the ELRA must decide the issue of condonation. This practice has raised legal concerns for a number of reasons. First, while the application for and determination of condonation is supposed to be done before referral, mediators are appointed after referral and their jurisdiction to deal with specific referrals arises after such appointment.¹¹⁴ If the jurisdiction of mediators to determine condonation arises before referral, the question that remains unanswered is whether an application for condonation can be decided by way of mediation, taking into account that a mediator is a mere facilitator of dispute resolution.¹¹⁵

Disputes that are referred late cannot be processed unless the CMA has condoned the delay.¹¹⁶ After receiving the application for condonation, the CMA must serve the application on the other party to the dispute according to rule 29(5) of GN No. 64 of 2007, and proceed to hear and determine the application in terms of rule 29(10) or (11) of GN No. 64 of 2007.¹¹⁷ If the CMA does not do so, it will not be properly be seized with jurisdiction to process the application filed out of time without condonation.¹¹⁸

3.3 Conducting mediation under the CMA

The ELRA provides for compulsory mediation to resolve labour disputes.¹¹⁹ Parties to the employment dispute are required to first try to resolve their dispute under the guidance of the mediator before going to arbitration or adjudication.¹²⁰ All labour disputes must

109 Maige (note 42) 82.

110 GN No. 64 of 2007, rule 11(2).

111 Ibid, rule 11(3)(a)-(e).

112 Mtavangu (note 16) 55.

113 Maige (note 42) 82.

114 Ibid.

115 Ibid.

116 *Ally Mzee Moto v TANESCO* Revision No. 255 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported) at 3; *J.W Ladwa v Peter Kimote* Revision No. 52 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported); *Peter Mrema v Michael Kusaga* Revision No. 138 of 2008, High Court of Tanzania Labour Division (unreported).

117 Ibid.

118 Ibid.

119 ELRA, s 86(1) requires the dispute referred to the CMA to be in the prescribed form.

120 Ibid, s 86(3).

first be referred for mediation regardless of the pecuniary jurisdiction of the CMA.¹²¹ If efforts to settle an employment dispute through mediation fail, parties can refer the matter to the CMA for arbitration or to the LC for adjudication, depending on the value of the dispute.¹²²

The LIA and the rules made thereunder provides the legal framework for conducting mediation.¹²³ There are four stages to the process of mediation: introduction, gathering information from the parties, exploring options and developing consensus, and conclusion.¹²⁴ Also, mediation under the CMA is a confidential process and, in that regard, no evidence obtained during the mediation process can be used in arbitration or the LC against either party if mediation fails, unless the parties state otherwise.¹²⁵ The mediator may not be called as a witness in a dispute in which he was a third party during the mediation proceedings.¹²⁶

The law requires a mediator to resolve the dispute within 30 days of the referral or within any longer period to which the parties agree in writing.¹²⁷ Notwithstanding the failure to resolve a dispute within the 30-day period, the mediator shall remain seized of the dispute until the dispute is settled, and may convene meetings between the parties to the dispute in order to settle the dispute at any time before or during any strike, lockout, arbitration or adjudication.¹²⁸ The mediator shall decide the manner in which the mediation shall be conducted and, if necessary, may require further meetings within the 30 days.¹²⁹ Where the mediator fails to resolve a dispute within 30 days, a party to the dispute may, if the dispute is a dispute of interest, give notice of its intention to commence a strike or lockout.¹³⁰ If the dispute is a complaint, a party may refer the complaint to arbitration or to the LC for adjudication.¹³¹

The law is silent about the time within which a party may refer a complaint to arbitration before the CMA or the LC after the certificate of non-settlement is issued by the mediator. Where the dispute was referred to the LC eight months after the mediation failed, it was found that the law does not allow a party to refer a dispute at any time they choose.¹³² Prescribing no time for referring a dispute to arbitration by the CMA or adjudication by

121 *Rita Akena v Tanzania Postal Bank* Labour Dispute No. 32 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported); *Dr. Noordin Jella v Mzumbe University* Revision No. 47 of 2008, High Court of Tanzania Labour Court at Dar es Salaam (unreported); and *Bakari S. Tifili v Security Group* Revision No. 282 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

122 *Rita Akena* (note 121); *Cable Television Network v Athuman Kuwinda and Three Others* Labour Revision No. 94 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

123 GN No. 64 of 2007 and GN No. 67 of 2007.

124 GN No. 67 of 2007, rule 9(1).

125 *Ibid*, rule 8(1) and (2).

126 *Ibid*, rule 8(3).

127 ELRA, s 86(4).

128 *Ibid*, s 86(8).

129 *Ibid*, s 86(5).

130 *Ibid*, s 86(7)(a).

131 *Ibid*, s 86(7)(b)(i) and (ii).

132 *Dr. Noordin Jella* (note 121).

the LC does not accord with the spirit of the ELRA, which is to provide a means of settling labour disputes expeditiously. Limitation is a material point in the speedy administration of justice to ensure that a party does not come to court as and when he chooses.¹³³

Although in Tanzania the law provides for the right to legal representation in mediation proceedings,¹³⁴ it gives the mediator powers to extend the period of mediating interest disputes,¹³⁵ and to dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing.¹³⁶ The law provides further that the mediator may decide the complaint if the other party to the complaint fails to attend a mediation hearing.¹³⁷

3.4 Mediation of a dispute of interest and a complaint

A dispute of interest is referred to the CMA by an employee or trade union. If the referring employee or trade union fails to appear for mediation, the mediator may extend the period for settlement in terms of section 86(4) of the ELRA for a further period of 30 days.¹³⁸ The rationale for extending the time is the fact that the person who brings an action to a tribunal is interested in its speedy settlement.¹³⁹ If the respondent fails to enter an appearance (in this case, the employer or employers' association), the mediator is not authorised to extend time; instead, he must shorten the period stipulated in the law.¹⁴⁰ Meanwhile, where an employer or an employers' association refers a dispute of interest to the CMA, the mediator may extend the period stipulated under section 86(4) by a further thirty days if the employer or employers' association fails to attend the hearing arranged by the CMA.¹⁴¹ Also the mediator may shorten the period stipulated in section 86(4) if the employee or trade union party to the dispute fails to attend the hearing.¹⁴²

While in disputes of interest the mediator is not entitled to dispose of the dispute *ex parte* for non-appearance, in disputes of right the mediator is empowered to dismiss the referral if the referring party does not appear without good cause and may enter an *ex parte* award if the person against whom the referral is made does not appear.¹⁴³ However, commentators on the labour law and those who support the introduction of the CMA for cost-effective, quick, and relatively formal dispute resolution process view the *ex parte* disposal of a dispute during mediation as defeating the whole object of mediation envisaged in the ELRA. Since the role of the mediator is to assist the parties to mutually resolve disputes and not to impose an award in the absence of the parties, allowing a mediator to assume the position of a judge or arbitrator creates confusion in dispute

133 *Tanzania Fish Processors Ltd. v Christopher Luhangule* Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania at Mwanza (unreported).

134 ELRA, s 86(6)(a) and (b) and rule 7(1) of GN No. 67 of 2007.

135 ELRA, s 87(1).

136 *Ibid*, s 87(3)(a).

137 *Ibid*, s 87(3)(b).

138 *Ibid*, s 87(1)(a).

139 Maige (note 42) 83.

140 ELRA, s 87(1)(b).

141 *Ibid*, s 87(2)(a).

142 *Ibid*, s 87(2)(b).

143 *Ibid*, s 87(3)(a) and (b).

resolution and entails unnecessary delay of litigation.¹⁴⁴ It is improper and contradictory, considering the purpose of mediation. The mediator does not decide the complaint; it is the parties themselves who agree to resolve their dispute under the guidance of the mediator. Therefore, even when all parties attend mediation, the mediator is not vested with powers to decide the complaint but to mediate until the parties voluntarily agree or otherwise.¹⁴⁵

3.5 Conducting arbitration under the CMA

The CMA uses arbitration to resolve labour disputes. Unlike in mediation, where there is some autonomy, a person appointed as an arbitrator decides a dispute for the parties.¹⁴⁶ The arbitration process involves a hearing, where the parties present evidence and arguments, and the arbitrator provides a decision with reasons in a written award.¹⁴⁷ An arbitration award is binding on the parties and is enforceable before the court.¹⁴⁸ The Act stipulates that arbitration in the CMA occurs after the mediation process has been unsuccessful.¹⁴⁹ The Commissioner can appoint an arbitrator before the dispute has been mediated.¹⁵⁰

Arbitration, as provided for under the rules, involves five stages. The arbitration process begins with an introduction, followed by an opening statement, a narrowing of the issues, a presentation of evidence, an argument, and a final award.¹⁵¹ Therefore, the parties to the dispute may present evidence, call witnesses, and present arguments, but are subject to the arbitrator's discretion regarding the appropriate form of the proceedings.¹⁵² The rationale behind the five-stage process in arbitration is to ensure that the issues to be arbitrated are clear to the parties; parties have an opportunity to present evidence, call witnesses and cross-examine them if they so choose; and parties are given an opportunity to present arguments for their case.¹⁵³ A five-stage process also intends to ensure that the arbitrator's award contains reasons for the decision.¹⁵⁴ Importantly, arbitration must be conducted swiftly, and must adhere to the principles of natural justice.

The process of arbitration under the CMA is simple and the substantial merits of the dispute are addressed with the minimum of legal formalities.¹⁵⁵ Section 88(4) of ELRA does not empower an arbitrator to disregard legal formalities, which are essential to confer the basic attributes of legal proceedings on these quasi-judicial proceedings.¹⁵⁶ The arbitrator must adhere to legal formalities by affording parties the right to a fair hearing, calling

144 Maige (note 42) 85.

145 Mwalongo (note 50).

146 GN No. 67 of 2007, rule 18(1).

147 *Ibid*, rule 18(2) and (3).

148 *Ibid*, rule 18(4).

149 ELRA, s 88(2)(a) and (b).

150 *Ibid*, s 88(3)(a).

151 GN No. 67 of 2007, rule 22(2).

152 ELRA, s 88(5).

153 *Salim Kitojo v Vodacom Tanzania* Complaint No. 4 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

154 *Ibid*.

155 ELRA, s 88(4)(a) and (b).

156 *China Railway Jiang Engineering Co. Ltd.* (note 25).

witnesses, and receiving evidence.¹⁵⁷ Thus, the objective here is that arbitration proceedings must be structured to deal with a dispute fairly, quickly, and without excessive adherence to formalities. Flexibility in legal formalities is crucial in facilitating swift dispute resolution, as it sometimes enables an arbitrator to employ both inquisitorial and adversarial procedures to narrow down the issues in dispute.¹⁵⁸ The arbitrator is also duty-bound to comply with the code of conduct stipulated in the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules 2007 while arbitrating a labour dispute.

3.6 Determination of jurisdictional issues and postponement of arbitration

During the arbitration proceedings, a jurisdictional issue may arise, and it may appear that jurisdiction has not been determined. In such a situation, the arbitrator shall require the referring party to prove that the CMA has jurisdiction to arbitrate the dispute.¹⁵⁹ Arbitration proceedings may be postponed by an agreement between the parties, on application by parties, or by an arbitrator himself for good reasons.¹⁶⁰ While arbitration may be postponed for good reasons, the arbitration rules do not clarify the phrase 'good reasons', and the arbitrator must decide what constitutes 'good reasons'. This discretionary power vested in the arbitrator may lead to a delay in the arbitration proceedings. The arbitrator may postpone arbitration proceedings for 'good reasons' and because there is no time limit in the labour laws for concluding the arbitration, the rationale for the introduction of cheap, speedy and informal methods of labour dispute settlement is defeated by postponements based on good reason. The law further provides that arbitration proceedings shall be postponed by the CMA, without the parties appearing, if all the parties to the dispute agree in writing to the postponement, and the written agreement for the postponement is received by the CMA more than seven days prior to the scheduled date of the arbitration.¹⁶¹

3.7 Record of arbitration proceedings

During arbitration proceedings, an arbitrator is required to keep records with legible handwritten notes or by means of electronic recording.¹⁶² A court record is a serious document which should not be lightly impeached.¹⁶³ There is a presumption that a court record accurately represents what happened during the proceedings.¹⁶⁴ Where the arbitrator records the proceedings using handwritten notes, he may not be required to record word for word.¹⁶⁵ In the record of arbitration proceedings, an arbitrator is required to summarise the evidence and arguments submitted by the parties and record all the key issues relating to the dispute.¹⁶⁶ An arbitrator's failure to keep a record of proceedings is

157 Ibid.

158 Maige (note 42) 88-89.

159 GN No. 64 of 2007, rule 20.

160 Ibid, rule 21(1)(a)-(c).

161 Ibid, rule 21(2)(a) and (b).

162 GN No. 64 of 2007, rule 32(1).

163 Court of Appeal in *Halfani Sudi v Abieza Chichili* [1998] TLR 527 at 529; *Shabir F.A. Jessa v Rajkumar Deogra* Civil Reference No. 12 of 1994, Court of Appeal of Tanzania (unreported).

164 *Paulo Osinya v R* [1959] EA 353.

165 GN No. 64 of 2007, rule 32(2).

166 Ibid, rule 32(3).

fundamental and vitiates the entire proceedings.¹⁶⁷ Where the arbitration award does not identify the person who presided over the proceedings as a mediator and arbitrator, such an award shall be quashed by the LC.¹⁶⁸

Generally, the law has set out guidelines seeking to ensure that arbitration proceedings are orderly, that they have a starting point, reflect the issues between the parties, and indicate facts, evidence and the arguments of the parties.¹⁶⁹ The content of the record of arbitration proceedings complying with the guidelines must clearly indicate the issues to be arbitrated; evidence led by each side to prove or disprove the said issues; arguments by way of written submissions (if the arbitrator has allowed them), which should be indicated in the proceedings, or made part of the record where they are received orally; and closing arguments, where the arbitrator allowed them.¹⁷⁰ Where there were preliminary issues, the evidence and arguments by each side should be indicated in the record. Finally, the record of the proceedings should contain the award indicating the decision and the reasons for the decision.¹⁷¹ Where there is an application before the LC and there is no proper and accurate record from the CMA, it is impossible to decide the issues that the applicant is complaining about.¹⁷² Therefore, it is mandatory for the arbitrator to keep a record of the arbitration proceedings, whether handwritten or recorded by electronic means.

3.8 Joinder or substitution of parties to arbitration proceedings

The joinder of parties in arbitration proceedings is the process of including additional parties in an ongoing arbitration. It is combination of two or more persons or entities as plaintiffs, applicants, claimants, petitioners, defendants or respondents in arbitration proceedings. The commissioner of the CMA may join any number of persons as parties in proceedings if the right to relief depends substantially on the same question of law or fact, or if the person to be joined in the proceedings has a substantial interest in the subject matter of the proceedings.¹⁷³ Joining a third party to arbitration proceedings must be done judicially because arbitration is founded on party autonomy. The arbitration of labour cases by the CMA recognises the need to facilitate a fair and efficient resolution of disputes by accommodating additional parties who may play a role in the broader context of the dispute settlement.¹⁷⁴ Joining a third party in arbitration proceedings must be done in accordance with the applicable laws and rules. It may be done by an arbitrator of his own accord (*suo motu*), on application by a party, or if a person entitled to be joined in

167 *Destofanos Hotel v Domina Marusu* Complaint No. 21 of 2007, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

168 *Ibid* at 1.

169 GN No. 64 of 2007, rule 32.

170 *Jonathan Tengule v Geita Gold Mining Ltd* Revision No. 29 of 2007, High Court of Tanzania Labour Division at Dar es Salaam (unreported) ruled on 28 November 2008 at 4.

171 *Ibid*.

172 *Jannere Beemster v Tarasila Petro Shamba* Revision Application No. 12 of 2020, High Court of Tanzania at Arusha (unreported).

173 GN No. 64 of 2007, rule 24(1) and (2).

174 Nwokeke, C 'Joinder of Parties in Arbitration Proceedings Under the Arbitration and Mediation Act 2023' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4592325> accessed 7 October 2024.

the proceedings applies at any time during the proceedings to be joined as a party.¹⁷⁵ These persons may be represented by one or more persons after obtaining leave from the CMA. The joinder of third parties may enhance procedural efficiency and encourage consistency in decision-making. The issue of permission to appear in a representative suit is not a mere formality, since a party who is represented without leave may rightly refuse to be bound by a decree that he was not properly part of.¹⁷⁶ Similarly, the CMA, on application by any party, may substitute a person with an existing party if this becomes necessary.¹⁷⁷

3.9 Combined mediation and arbitration (med–arb)

The CMA may set down a combined mediation and arbitration (med–arb) process on the same date to be conducted by the same person after giving parties notice on such a combined process.¹⁷⁸ Where the matter is set to be dealt with under this mechanism, the parties are entitled to at least 14 days' notice in writing from the CMA.¹⁷⁹ When the same person has to conduct both mediation and arbitration, that person shall conduct the mediation process in a manner that does not compromise that person's ability to arbitrate the dispute.¹⁸⁰ Unless the parties agree, nothing that transpired during the mediation proceedings can be used during arbitration.¹⁸¹ To ensure that the arbitrator does not act prejudicially, the law requires the mediator with arbitration power to conduct himself in a manner that does not compromise his ability to arbitrate the dispute.¹⁸² The LC has held on several occasions that med-arb should not be confused with situations where a mediator becomes an arbitrator upon the failure of mediation.¹⁸³

Although the law allows for combined mediation and arbitration proceedings, rule 18 does not override rule 16, which requires the issuing a certificate where mediation has failed.¹⁸⁴ The CMA's power to order combined mediation–arbitration is exercised after giving due notice.¹⁸⁵ The difficulty is that the ELRA prescribes the appointment of a mediator of a dispute first under section 86(3)(a) and, after the failure of mediation, the appointment of an arbitrator under section 88(2)(a).¹⁸⁶ The practice of appointing one person as both mediator and arbitrator at the same time depends on how efficient the mediator is in finalising the mediation, writing the certificate and receiving the

175 GN No. 64 of 2007, rule 24(3)(a)-(c).

176 *Evans Buninange and Another v ACE Tanzania Ltd* Revision No. 61 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported), ruled on 18 June 2010.

177 GN No. 64 of 2007, rule 24(4).

178 *Ibid*, rule 18(1).

179 *Ibid*, rule 18(2).

180 *Ibid*, rule 18(1), (2) and (6).

181 *Ibid*, rule 18(5).

182 *Ibid*, rule 18(6).

183 *Kigoma v Phares Ngeleja & TUIICO* Labour Revision No. 180 of 2009, High Court of Tanzania Labour Division at Dar Es Salaam (unreported); *Aziz Ally Aidha Adam v Chai Bora Ltd* [2011-12] LCCD 65.

184 *BIDCO Oil and Soap Limited v Abdu Said and Three Others* Revision No. 11 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

185 GN No. 64 of 2007, rule 18(1) and (2).

186 *BIDCO Oil and Soap Limited* (note 184).

appointment as arbitrator.¹⁸⁷ Since the mediation of disputes is mandatory, and arbitration follows after its failure, depending on the pecuniary jurisdiction of the case, it remains to be seen how two appointments can be made at the same time without flouting the law.¹⁸⁸

It is also uncertain on what grounds a party to the proceedings can challenge the arbitral award if he believes that the mediator-arbitrator was influenced by what transpired in mediation when arbitrating.¹⁸⁹ The situation can be addressed by enacting enabling provisions and equipping the CMA with powers to effectively and efficiently carry out its important functions by being able to assign two different persons to perform the two functions in each case. If the reality is as explained, then the CMA must adopt a compromise practice that is not directly contrary to the law and does not cause injustice to either party.¹⁹⁰ Arbitrators have adopted the practice of informing the parties and recording their responses that they have been appointed as arbitrators in order to avoid nullification. If parties feel that the person's previous role as mediator will adversely affect their interests, they have the right to say so, and then the dispute must be arbitrated by another arbitrator who was not part of the mediation proceedings, even if that person has to come from a different area office, involving additional costs and delays.¹⁹¹

The CMA is enjoined to adopt a practice of requiring the parties' consent for the mediator proceeding to arbitration, by signing a consent agreement in the manner already prescribed for procedures where med-arb is adopted.¹⁹² The signed consent agreement must be clearly noted in the record before arbitration begins. In the current situation, where a mediator proceeds with the arbitration of a dispute without appointment or without complying with the above procedure of giving parties a choice in the matter, the subsequent proceedings will be found to have been conducted with fundamental irregularity and will be the subject of a review.¹⁹³

3.10 Arbitration awards

An arbitrator may make any appropriate award, but may not make an order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner.¹⁹⁴ Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award with reasons and must sign the award.¹⁹⁵ An arbitration award is binding on the parties to the dispute and an arbitration award may be served and executed in the LC as if it were a decree of a court of law.¹⁹⁶ 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.¹⁹⁷

187 Ibid.

188 Ibid.

189 Maige (note 42) 89.

190 *Tanzania Breweries Ltd* (note 9) 11.

191 Ibid.

192 GN No. 67 of 2007, rule 30.

193 *Tanzania Breweries Ltd* (note 9) 11.

194 ELRA, s 88(8) and (9).

195 Ibid, s 88(8) and (9).

196 Ibid, s 89(1) and (2).

197 Ibid, s 90.

3.11 Remedies available to a party aggrieved by the arbitration award

A party aggrieved by the arbitration award, especially where the arbitrator awarded costs, and who alleges a defect in any arbitration proceedings under the auspices of the CMA may apply to the LC for a decision to set aside the arbitration award. This must be done within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the improper procurement of the award.¹⁹⁸ If the award was improperly procured, the applicant must apply to the LC within six weeks of discovering the said fact.¹⁹⁹ Other grounds that may require the LC to set aside the CMA's award include misconduct on the part of the arbitrator and if the award is unlawful, illogical or irrational.²⁰⁰ The application made in terms of section 91 of the ELRA is called a 'revision'. Such an application is also covered by section 94(1)(b) of the ELRA and rule 28(1) of the Labour Court Rules, 2007. These provisions provide for the revision of the decisions by a responsible person or body implementing the provisions of the Act.

The grounds for revision are more explicit, including that the responsible person failed to exercise jurisdiction, or illegally exercised jurisdiction, or has exercised it with material irregularities, or there is an error manifestly apparent on the face of the records.²⁰¹ For instance, an application under section 91(1)(a) of the ELRA and rule 28(1) of the Labour Court Rules, 2007 was successful, and the LC set aside the proceedings of the CMA and ordered the return of the matter to the CMA to be heard by a different arbitrator, because the award was not dated.²⁰²

In *Grumett Fund Limited v Martin Isaya Kajahe*,²⁰³ the record of the proceedings revealed that no issues were framed after opening statements were received as prescribed by the law or before arbitration commenced. The arbitrator missed one of the vital stages in the arbitration process prescribed under rule 22(2) and (4) of GN No. 67 of 2007. As a result, the award was not issued in conformity with the requirements of rule 27(3) of GN No. 67 of 2007, which prescribes that a proper award must indicate the issues in dispute, the arbitrator's decision on them, and the reasons therefore. The LC held that the arbitrator's failure to follow the process for arbitration proceedings amounted to a material irregularity leading to injustice as the parties could not properly present their case. The LC quashed the impugned CMA proceedings, the subsequent award and the order, and referred the dispute back to the CMA to be arbitrated afresh before a different arbitrator.

Moreover, where there is an application before the LC regarding the award issued by the arbitrator in the CMA, the LC may stay the enforcement of the award pending its decision on that award.²⁰⁴ Where the award is set aside, the LC may decide the dispute in a manner it considers appropriate, or make any order it considers appropriate about the process to be followed to decide the dispute.²⁰⁵

198 Ibid, s 91(1)(a).

199 Ibid, s 91(1)(b).

200 Ibid, s 91(2).

201 Rule 28 of the Labour Court Rules, 2007.

202 *Gold Star Paints (Ltd) v Victor C. Kapyia* Revision No. 148 of 2012, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

203 Revision No. 29 of 2012, High Court of Tanzania Labour Division at Musoma (unreported).

204 ELRA, s 91(3).

205 Ibid, s 91(4)(a) and (b).

4. Legal challenges faced by the CMA in settling labour disputes

The settlement of labour disputes by the CMA is not without legal challenges. Issues of jurisdiction, the time taken to settle disputes, the appearance and non-appearance of parties before the CMA and their legal effects, and conflicting decisions by a single judge of the High Court Labour Division caused by the application of the doctrine of precedent affect the settlement of labour disputes by the CMA. The CMA's jurisdiction is restricted to specific types of labour disputes, such as unfair termination or non-payment of benefits, leaving certain matters such as statutory offences outside its scope. While the jurisdiction of the CMA seems to have been settled by the amendment of the labour and employment laws in 2015 and 2016, and by *Tanzania Posts Corporation v. Dominic A. Kalangi*,²⁰⁶ the CMA still faces jurisdictional limitations caused by the scope of cases which can be decided by the CMA. There is overlapping jurisdiction with other institutions such as the Public Service Commission and the LC. Although *Tanzania Posts Corporation v. Dominic A. Kalangi*, decided by the final appellate court, addressed the challenge, the court strictly followed the dictates of the law without considering the need to settle the matter once and for all.²⁰⁷ The subsidiary legislation under the Public Service Act still maintains that ELRA shall be binding on public servants in operational service in every disciplinary authority having powers of dismissal, termination of appointment, or discipline.²⁰⁸

Another challenge is the absence of clear specific procedural rules for med-arb for resolving labour disputes; clearer guidelines and legal recognition are needed to enhance efficiency.²⁰⁹ The rules²¹⁰ governing the non-attendance of parties at the CMA are also unclear, which allows the CMA to decide the matter *ex parte*, contrary to the established rules by the Court of Appeal which hold 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.²¹¹ Also, where the ELRA prescribes timelines for resolving disputes, the CMA sometimes struggles to meet these, which leads to delays.

5. Conclusion

This article examined the legal framework of the CMA in settling labour disputes. It analysed the approaches employed in labour dispute settlement at the CMA, namely, mediation and arbitration. The legal framework is based on the provisions of the ELRA, the LIA, and the rules made thereunder. These laws provide for a mandatory mediation process

206 Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania at Mtwara (unreported).

207 Sabby, F 'An Assessment of the Commission for Mediation and Arbitration's Jurisdiction over Public Servants' (2022) 49(2) *EALR* 185.

208 Order F. 29(4) of the Public Service Standing Orders of 2009.

209 Rushagama, FM 'Exploring Med-Arb in Tanzanian Industrial Disputes Resolution: A Legal Perspective' (2023) 12 (12) *International Journal of Science and Research* 1878-1883.

210 ELRA, s 87(3)(a) and (b); Labour Institutions (Mediation and Arbitration Guidelines) Rules, rule 14(2)(a)(i) and (ii).

211 See Nkobogo, J 'Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania' (2021) 48(2) *EALR* 47; *Tanzania Harbours Authority v Mathew Mtalakule & 8 Others* [2002] TLR 385; 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).

under the CMA regardless of the disputes' pecuniary jurisdiction and/or value. The article discussed the appointment and powers of mediators and arbitrators and the functions and jurisdiction of the CMA in settling labour disputes. It submits that mediators' and arbitrators' powers are exercised to ensure the settlement of employment disputes cheaply, quickly, and with minimal technicalities. Also, the time limit for referring the matter to the CMA for mediation is prescribed by the law. However, CMA may condone late reference of the dispute for mediation where there is good cause as stated under rule 11 of the GN No 64 of 2007. The court's decisions on what amounts to good cause and reasonable time for condonation were also discussed.

Mediation is a four-stage process; it is confidential, and it aims to settle disputes amicably. If mediation fails, the parties can refer the matter for arbitration before the CMA. An arbitrator will hear and determine the dispute by giving a decision in an arbitration award, which is subject to revision before the LC. Records of arbitration proceedings must be kept; a failure to keep records will lead to the proceedings being vitiated, and the matter will have to be heard *de novo*. The med–arb process is also discussed in the article, with a special focus on its legal implications and how it is not the same as arbitration after the failure of mediation.

The article recommends that the law be amended to address issues of jurisdiction, dismissal or *ex parte* hearings resulting from the non-appearance of parties at CMA mediation proceedings, and adherence to time limits in resolving labour disputes. The CMA must also adopt detailed rules for conducting med–arb so that the parties understand this procedure for settling disputes.

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