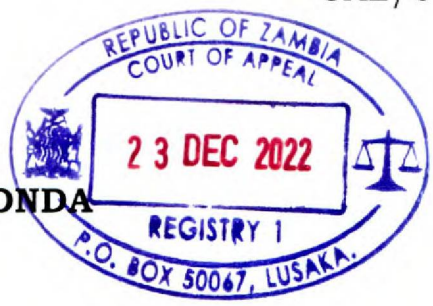
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 16 of 2021
CAZ/08/345/2020



BETWEEN:

DORIS KATWAMBA MUSONDA Appellant

AND

NATIONAL BIOSAFETY AUTHORITY Respondent

Coram: Kondolo, Sichinga and Sharpe-Phiri, JJA
16th November 2022 and 23rd December 2022

For the Appellant: Mr. M. Chitambala of Messrs Lukona Chambers
For the Respondent: Mr. G. D. Chibangula of Messrs GDC Chambers

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RULING

Sharpe-Phiri, JA, delivered the Ruling of the Court

Legislation referred to:

1. *The Court of Appeal Act, Number 7 of 2016 of the Laws of Zambia.*
2. *Section 85 of the Industrial and Labour Relations Act, Chapter 269 of the laws of Zambia.*

Cases referred to:

1. *Philip Mutantika and Sheal Mulyata v Kenneth Chipuma, Appeal No. 94 of 2012 (SC0*
2. *ZEGA Limited v Zambia Revenue Authority, Appeal No. 96/2018 (CA)*

1.0 INTRODUCTION

1.1 This is a ruling on an application by the appellant for determination of a point of law pursuant to order VII Rule 2(1), (3) and Order X Rule 9(4) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016, as read together with Order R59/1/140 of the Rules of the Supreme Court of England (1999 Edition) and further pursuant to the inherent jurisdiction of the Court.

1.2 The application was made by way of summons filed into Court on 18th November 2022 and supported by an affidavit of even date.

2 BACKGROUND

2.1 Before the application was brought, an appeal was pending before this Court against the judgment of Mwansa, J of the Industrial Relations Division of the High Court delivered on 11th August 2020.

2.2 By the aforesaid judgment, the Court below found that the proceedings in that Court, ought to have been referred to arbitration for determination.

2.3 The appellant (complainant in the Court below) was appointed as Registrar and Chief Executive Officer of the respondent for a three-year period by virtue of a contract of

employment dated 6th of May 2015. The contract of employment was terminated by a letter dated 25th of November 2016 and she commenced an action before the Industrial Relations Division of the High Court on 10th of April 2017, claiming wrongful and unfair termination and payment of damages, amongst other claims.

2.4 On the 4th of May 2017, the respondent reacted by applying before the learned Registrar for an order to stay proceedings and refer the parties to arbitration pursuant to **Section 10 and Section 6(1) of the Arbitration Act No. 19 of 2000.**

2.5 The respondent submitted that clause 11 of the contract of employment between the parties contains an arbitration clause to the effect that in the event of any dispute arising between the parties, that dispute would be resolved and settled through an informal and amicable manner, and where this fails, that the same be subjected to arbitration in accordance with the said provision.

2.6 The respondent argued that this was a fit and proper case to stay the litigation proceedings and refer the parties to arbitration in line with the arbitration agreement under clause 11 of the contract of employment.

2.7 The appellant opposed the application by way of affidavit of 19 May 2017 in which she contended that although the contract of employment provided for arbitration as the mode of settling disputes arising under the contract, the matter

could not be referred to arbitration as the respondent had not complied with the requirements under the contract.

2.8 The appellant further contended that the said arbitration clause was not enforceable on the grounds that:

(i) She was not made aware of the arbitration provision prior to her execution of the contract of employment.

(ii) She was not in gainful employment and would not be able to meet the cost of the arbitration.

(iii) The nature of the grievance was one that could only be determined by the Industrial Relations Division of the High Court as an arbitral tribunal is not vested with statutory power to resolve such matters.

2.9 In response to these contentions, the respondent argued that it had complied with the requirements of clause 11 as it had engaged the appellant in an informal manner of resolving the dispute, but the parties were unsuccessful in reaching amicable settlement.

2.10 The respondent further argued that the appellant had notified them by letter dated 13th of January 2017 of her intention to invoke the provisions of the arbitration clause as enshrined in the contract of employment as a clear indication that the arbitration clause was enforceable at law by the Courts.

2.11 Further, that the appellant was fully aware of the terms and conditions of the employment contract prior to her execution of the contract as evidenced by the correspondence between the parties, showing the bargaining that occurred before the appellant accepted the offer of employment. The respondent added that in any event, ignorance of the existence of the arbitration clause is not a defence at law.

2.12 The respondent further argued that the appellant's alleged inability to pay arbitral costs was also not a defence at law.

2.13 Lastly, the respondent argued that the provisions of the Industrial and Labour Relations Act of Zambia do not oust the jurisdiction of an arbitrator on matters involving damages. They cited a matter in which Dr Patrick Matibini had arbitrated a case with similar reliefs.

2.14 After determining the application, by ruling of 16th of October 2017, the Registrar found that there was indeed an arbitration agreement in the contract of employment between the parties, which agreement was valid, capable of being performed and not inoperative. That notwithstanding, the learned Registrar refused to stay the proceedings and refer the parties to arbitration as he found that the arbitration agreement was unenforceable for the fact that the 30-day notice requirement was not fulfilled.

2.15 In declining to refer the parties to arbitration, the Registrar's further justification was that the appellant did not have

sufficient funds to pay for the cost of arbitration and that the respondent would not suffer any irreparable damage if the parties were not referred to arbitration.

2.16 Being dissatisfied with this decision, the respondent filed a notice of appeal before a Judge of the High Court on 23rd October 2017 against the said decision, citing 4 grounds of appeal namely:

(i) The Honourable Deputy Registrar misdirected himself in both law and fact when he ruled that the complainant has not complied with the terms of the arbitral contract as strictly required by law and established practice and procedure of the Court.

(ii) The Honourable Deputy Registrar misdirected himself in both law and fact when he ruled that the complainant does not have sufficient funds to pay for the cost of arbitration and as such the matter should not be referred to arbitration contrary to the well-established principles of law and procedure.

(iii) The Honourable Deputy Registrar misdirected himself in both law and fact when he ruled that there are no special circumstances to show that the respondent will suffer irreparable damage or stands to be ruined if he declined to refer the matter to arbitration contrary to the binding contract between the parties herein and the well-established principles of law and procedure.

(iv) The Honourable Deputy Registrar misdirected himself in both law and fact when he ruled that the arbitration contract duly entered by the parties herein is unenforceable.

2.17 The respondent argued before the learned Judge that by commencing legal proceedings in the Industrial Relations Division of the High Court instead of invoking arbitral proceedings, the appellant contravened the arbitration clause contained in clause 11 of the employment contract.

2.18 The respondent also argued that the effect of the provisions of the Arbitration Act in relation to this matter is that it should be referred to arbitration as the Court's jurisdiction is ousted if the arbitration agreement is not null and void, not inoperative or incapable of being performed.

2.19 Further, that the appellant had notified the respondent by letter dated 13th of February 2017 of her intention to invoke the arbitration clause after their effort to informally resolve the dispute had failed.

2.20 That the appellant had entered into the arbitration agreement freely and voluntarily and that prior to signing of the agreement, she had had sufficient time to acquaint herself with the contract of employment. Therefore, the arbitration clause could not be said to be unconscionable or void at law because the appellant signed the agreement and drew benefits therefrom.

2.21 The respondent also argued that the arbitration clause was not void on the grounds that it is contrary to public policy

and that the jurisdiction of the Court does not oust the power to arbitrate.

2.22 Further, that the respondent's financial position should not be a consideration when deciding whether to refer the parties to arbitration or not.

2.23 The appellant essentially repeated her earlier arguments that the arbitration clause was not enforceable against her as the conditions precedent to referring the dispute to arbitration, namely the giving of 30 days' notice, were not fulfilled.

2.24 She also argued that the arbitration clause was contrary to public policy as it sought to oust the jurisdiction of the Industrial Relations Division of the High Court as conferred by section 85 of the Industrial and Labour Relations Act of the Laws of Zambia. Further, that an arbitral tribunal lacked statutory authority to deal with the matter.

2.25 Lastly, the appellant contended that the arbitration clause was unconscionable and oppressive as it required that both parties share the cost of arbitration, which she was unable to do. She also argued that she was coerced to agree to the contract of employment terms as the failure would have meant she would not have been employed.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the appeal, the learned Judge in his Ruling of 11th August 2020 held that there was no doubt that an arbitration agreement existed between the parties as the provision embodied in the contract of employment was clear, precise, and unambiguous.

3.2 Addressing the appellant's contention that the respondent had not provided the requisite 30-day notice to arbitrate, the Judge found that since it was the appellant with a grievance, it ought to have been her to comply with the arbitration agreement and provide the requisite notice. Further, that the argument of the appellant that she was not aware of the agreement had no merit as ignorance of the law cannot be raised as a defence by a party to an action.

3.3 On the question of the arbitration agreement being contrary to public policy, the learned Judge found that the appellant had failed to demonstrate how the arbitration was contrary to public policy. The Judge also observed that the requirements under **Section 6(3) of the Arbitration Act** provided that, irrespective of what any written law provided, if the agreement between the parties is not null and void, inoperative or incapable of being performed, there is an obligation on the court to refer the matter to arbitration.

3.4 Regarding the contention that the arbitration agreement is unconscionable and oppressive as it places an obligation on the appellant to bear half of the cost of arbitration, the Judge found no legal basis in this argument as the agreement was entered into voluntarily. Further, that the appellant had not made any attempt to terminate it during the pendency of the contract where she had derived pecuniary benefits and therefore could not attempt to avoid obligations under the contract.

3.5 The Judge proceeded to find that the arbitration agreement between the parties was valid and capable of being performed and accordingly set aside the ruling of the learned Registrar and ordered that the parties be referred to arbitration.

4.0 THE APPEAL BEFORE THIS COURT

4.1 Dissatisfied with the Ruling of the lower Court, the appellant has appealed to this Court, advancing two main grounds of appeal as follows, that:

(i) The Honourable trial Court erred in law and fact when it completely failed to adjudicate on the respondent's application for stay of proceedings and instead proceeded to hold that the complaint was not properly before it.

(ii) The Honourable trial Court erred in law and fact when it held to the effect that the arbitration clause in the contract between the appellant and respondent was not contrary to public policy and therefore not null and void or invalid

notwithstanding the fact that it sought to oust the jurisdiction of the Industrial Relations Division of the High Court under Section 85 (4) and (5) of the Industrial and Labour Relations Act.

(iii) Any further grounds of appeal that may be raised.

4.2 Before the appeal could be heard, the appellant filed an application asking this Court to determine a point of law.

5.0 THE AFFIDAVIT IN SUPPORT OF SUMMONS FOR AN ORDER TO DETERMINE A POINT OF LAW

5.1 The appellant in the affidavit in support contended that the Ruling being appealed against was not delivered within 12 months of the date when the application before the trial Judge was filed, meaning that, the learned trial Judge had no jurisdiction to determine the application before him and deliver the said Ruling.

6.0 THE AFFIDAVIT IN OPPOSITION OF SUMMONS FOR AN ORDER TO DETERMINE A POINT OF LAW

6.1 The respondent, on 30th November 2022, opposed the application with an affidavit contending that the points of law raised by the appellant are neither stated in the memorandum of appeal nor the heads of Arguments filed by the appellant at the time of lodging the appeal which is pending determination before Court.

6.2 It was on that basis argued that, the appellant's application is improperly before Court and further that the respondent has had no opportunity to contest the appeal on the points of law raised in the appellant's application.

7.0 THE AFFIDAVIT IN REPLY

7.1 The appellant replied by an affidavit dated 6th December 2022 repeating that a period of over one (1) year had elapsed between the date of hearing of the appeal before the Court below being the 12th April 2018 and date of delivery of Ruling being 11th August 2020, thus rendering the trial Judge to be out of jurisdiction to determine the matter.

7.2 The appellant also contended that a point of law on jurisdiction could be raised at any stage in the course of hearing the appeal notwithstanding that a ground of appeal to that effect has not been raised in the memorandum of appeal and Heads of Argument provided that the respondent has had sufficient opportunity to respond to the issue as was the with respondent. She contended that contrary to the respondent's assertion, the point of law has been properly raised before Court.

8.0 OUR DECISION ON THE POINT OF LAW

8.1 In considering the application before us, we have had recourse to the resourceful arguments and authorities submitted by both parties.

8.2 The question for determination hinges on the jurisdiction of the lower Court to have delivered its Ruling after a period of 1 year had elapsed from the date on which the matter was commenced. **Section 85 of the Industrial and Labour Relations Act**, Chapter 269 of the Laws of Zambia provides that:

> ***"The Court shall not consider a Complaint or an application unless the Complainant or Applicant present the complaint or application to the Court:***
> ***(a) Within ninety days of exhausting the administrative channels availed to the Complainant or Applicant; or***
> ***(b) ... provided that:-***
> ***(i) ...***
> ***(ii) The Court shall dispose of the matter within a period of one year from the day on which the Complaint or application is presented to it."***

8.3 We have had the opportunity of appreciating the direction set by the decisions in this jurisdiction on the question of jurisdiction, and we do agree with the appellant when she refers us to the case of **Philip Mutantika and Sheal Mulyata v Kenneth Chipuma**[1] in which the Supreme interpreted that a provision that invokes the use of the word *'shall'* is not regulatory but mandatory and therefore ousts discretionary power on the part of the Court. In the same vein, it would be right to argue that the provisions of **Section 85 of the Industrial and Labour Relations Act** are couched in mandatory terms as regards the period within which a decision should be delivered by the Industrial Relations Court from the date a

complaint is lodged or an application is made, which is within 1 year.

8.4 Further to the above, we had occasion to pronounce on the effect of lapse of time within which a decision must be made in the case of **ZEGA Limited v Zambia Revenue Authority**[2] where we held that:

> ***"In our considered view, a decision delivered outside the time specified by a statutory provision is null and void. Our understanding of the intention of such provision in a piece of legislation is to attach jurisdiction to time so that beyond the set time, jurisdiction to perform that stated act is lost."***

8.5 In **the Mulyata** case cited above, the Supreme Court further cemented this solid position of the law regarding the tying of jurisdiction to time and when such a point can be raised in Court in the following holding:

> ***"Having found that the issue of jurisdiction is a substantive issue, ground 2 attacking the appellant for raising it for the very first time in this Court cannot be sustained. The legal position that an issue not raised before a trial Court cannot be raised for the first time on appeal does not apply where the issue is one questioning the very authority or jurisdiction of the Court to have heard the matter, in the first place. For in the absence of jurisdiction to hear a matter, the ensuing decision is a complete nullity and no appeal can lie against it on the merits."***

8.6 Given the foregoing, we hold the firm view that the appellant was on firm ground when she raised the point of law in the manner she did and we agree that we have no discretion to entertain an appeal against a decision that was rendered outside the prescribed time by the Court below. **Section 85 of the Industrial and Labour Relations Act** clearly provides for a decision to be rendered within 1 year of the complaint being lodged. In *casu*, the Ruling was rendered way out of time as the complaint was lodged on 10th April 2017 and decision was only rendered on the 11th August 2020, well beyond the prescribed limit of 12 months.

9.0 **CONCLUSION**

9.1 In the premises, we find that the Ruling of the Industrial Relations Court delivered on 11th August 2020 is of no effect as the trial Court had no jurisdiction to make determinations on the action which was commenced on 10th April 2017 after the lapse of 1 year from the said date of commencement. Consequently, we set aside the Ruling of the Court below for being time-barred and it also follows that the appeal in this Court is improperly before us. It also follows therefore that the appeal before us is incompetent and is dismissed accordingly.

9.2 We make no order for costs.

M.M. Kondolo, SC
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE