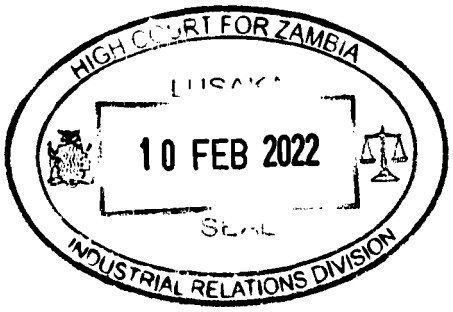
IN THE HIGH COURT FOR ZAMBIA **APP NO. IRCLK/04/2021**
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



ZION MUMBICHI **1ST APPLICANT**
FABIAN CHILALA **2ND APPLICANT**

AND

KANGWA MUSENGA **1ST RESPONDENT**
VINCENT KABIMBA MWITUMWA **2ND RESPONDENT**

Coram: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka the 10th day of February, 2022

For the Applicants: *Mr. G. C. Musonda of Dzekedzeke and Company*
For the Respondents: *Mrs. L. Mushota of Mushota and Associates*

RULING

Cases referred to:

1. *Zambia Consolidated Copper Mines and Jackson Munyika and 33 Others (2004) Z.R. 193 (S.C.).*
2. *Chongesha v. Securicor Zambia Limited, SCZ Appeal No. 102/2005.*
3. *Kapoko v. The People, 2016/CC/0023.*
4. *Augustine Tembo v. First Quantum Minerals Limited - Mining Division, SCZ/8/94/2015.*
5. *The People v. The Patents and Companies Registration Agency, 2017/CCZ/R003.*
6. *Barclays Bank Plc v. Jeremiah Njovu and 41 Others, SCZ/9/21/2019 [2020].*
7. *Saviour Chibiya v. Crystal Gardens Lodges and Restaurant Ltd, SCZ Appeal No. 97 of 2013.*

Legislation referred to:

1. *Sections 85 (3), 17 (Rule 4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*

2. *Section 37 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.*
3. *Practice Note 3/5/1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*
4. *Article 118 (2) (e) of the Constitution of Zambia.*

Publications referred to:

1. *Garner B.A. & Black H.C. Black's Law Dictionary, 8th Edition (Thomson/West, USA 2004).*

1. INTRODUCTION

1.1 This is the Respondents' application to dismiss this matter for being statute barred.

1.2 The application was made by way of Summons, pursuant to Section 85 (3) of the Industrial Relations Court Act, Chapter 269 of the Laws of Zambia; and was supported by an Affidavit (the "Affidavit in Support"), deposed to by the 2nd Respondent, herein. The application and accompanying documents were filed on 17th December, 2021.

1.3 The application was opposed, and to this end an affidavit (the "Affidavit in Opposition"), deposed to by the 1st Applicant, was filed by the Applicants, and accompanied by Skeleton Arguments. The documents in opposition were filed on 19th January, 2022.

2. RESPONDENTS' EVIDENCE AND ARGUMENTS IN SUPPORT

2.1 The 2nd Respondent deposed that in paragraph 5 of the Applicants' affidavit in support of their application, they stated that they were dismissed on 29th January, 2018. That, this means that from that date, the Applicants ceased to be members of the Professional Union of Teachers.

Further, that the Applicants refused to attend the disciplinary proceedings preceding their dismissal.

2.2 That, upon being dismissed, the Applicants and four others, commenced an action in the High Court on 5th February, 2019, under Cause No. 2019/HP/0913 and the action failed. Further, that the Applicants relaunched their suit in the High Court under Cause No. 2019/HP/0181 with similar reliefs as under Cause No. 2019/HP/0913, and the suit was unsuccessful as well.

2.3 The 2nd Respondent averred that, under Cause No. 2019/HP/0913, the court summarised the Applicants' case as forum shopping and that the court was *functus officio.* It was further asserted that in an Industrial Relations Court case under Cause. No. COMP/IRCLK/17/2018, where the Applicants were Respondents, the court ruled against the Respondents.

2.4 It was the 2nd Respondent's testimony that he had been advised by his Advocates that the Applicants are abusing court process as they have embarked on forum shopping. Further, that since the Applicants' dismissal to the date of commencement of these proceedings, a period of over one thousand and two hundred days had elapsed and thus, the Applicants' action is statute barred, as it was filed over one thousand and two hundred days after the lapse of the period within which the Complaint ought to have been filed.

2.5 At the hearing, Counsel for the Respondents stated that two orders had been exhibited in the Affidavit in Support,

namely "VKM2", being a Ruling in Cause No. 2018/HP/0913, in which the court reportedly dismissed the Applicants' matter on the ground that the court was *functus officio* because the Applicants had been before another court; and "VKM3", being a Ruling in Cause No. COMP/IRCLK/17/2018, in which the court dismissed the Applicants' case for lack of merit.

2.6 Counsel contended that the claims are the same and that the complaint arises from a dismissal of 2018 and was filed without leave of court. Counsel argued that the provisions regarding extension of time applies to interlocutory applications, not commencement of actions. Further, that both the Industrial and Labour Relations Court Act and the Limitation Act, put a cap as to when matters can be commenced, and where the period has elapsed, only the court can enable the commencement of an action out of time.

3. APPLICANTS' EVIDENCE AND ARGUMENTS IN OPPOSITION

3.1 The 1st Applicant deposed that the Applicants have challenged the capacity of the Respondents to dismiss them from the Professional Union of Teachers. That, the Applicants have been advised by their advocates that non-membership of the Union does not bar the former members from seeking reliefs from court, against the Union.

3.2 It was further deposed that the issue relating to forum shopping was ably handled by the court in Cause No. 2019/HP/0181 and does not exist.

3.3 It was deposed, in addition, that the Applicants were not given an opportunity to be heard by a properly and lawfully constituted Disciplinary Committee of the Association, and thus, the Applicants sought the same reliefs by commencing an action under Cause No. 2019/HP/0181, which was dismissed for want of jurisdiction, determined only on 18th November, 2020.

3.4 To augment the Affidavit in Opposition, Counsel for the Applicants, citing Section 37 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia and Practice Note 3/5/1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the "White Book"), submitted that the object of the provisions is to give the court discretion to extend time so as to avoid injustice to the parties.

3.5 Counsel further submitted that time within which to file a complaint could be extended where the delay was due to the Applicant seeking or pursuing administrative channels. Counsel, in this regard, referred the Court to Section 85 (3) of the Industrial and Labour Relations Act and the case of *Zambia Consolidated Copper Mines and Jackson Munyika and 33 Others*[1].

3.6 Counsel argued that the issues alluded to by the Respondents in Cause No. 2019/HP/0181 and Cause No. 2019/HP/0913, are not related to the application before this Court. That, exhibit "VKM2" dealt with an injunction, whereas in "VKM3", the reliefs sought were different from the ones in this matter, and so were the parties.

3.7 Counsel also cited the cases of *Chongesha v. Securicor Zambia Limited*[2] and *Kapoko v. The People*[3], and submitted that nothing in the rules shall be deemed to limit the powers of the court to make orders as may be necessary, and that justice should be administered without undue regard to procedural technicalities, as per Article 118 (2) (e) of the Constitution of Zambia.

3.8 Counsel, thus, submitted that this Court being a court of substantial justice, should exercise its discretionary powers to enable the Applicants be heard on merit.

4. RESPONDENTS' ARGUMENTS IN REPLY

4.1 Counsel for the Respondents stated that the Summons to Dismiss is very specific as to what is being sought and contains the provisions, pursuant to which it was drawn.

4.2 With regard to the issue of the Court's discretion, as submitted by Counsel for the Applicants, Counsel for the Respondents argued that the Court has jurisdiction to make any order on matters, as long as the matters are properly before the court.

4.3 As regards Article 118 of the Constitution, it was argued that the same has not done away with requirements to observe procedure and that a party that does not observe the rules does so at its own peril. Counsel, further, argued that before this Court there is no technicality that is in issue and the Court is *functus officio.*

4.4 Counsel, thus, prayed that the matter be dismissed with costs.

5. ANALYSIS AND FINDINGS

5.1 I have carefully considered the parties' arguments in support of and in opposition to the application herein.

5.2 It is not in dispute that the Applicants were dismissed on 29th January, 2018 and following their dismissal, they delayed in filing their complaint before this Court.

5.3 The dispute arises from the Respondents' contention that between the dismissal of the Applicants and commencement of the matter herein, a period much longer than the one prescribed by statute elapsed, rendering the matter statute barred. The Respondents have also argued that the Applicants commenced two actions in 2018 and 2019, under Causes No. 2018/HP/0913 and 2019/HP/0181, with similar reliefs, which did not go in the Applicants' favour. Further, that the Applicants also commenced a matter in this Division of the High Court, under Cause COMP/IRCLK/17/2018, in which the court reportedly dismissed the Applicants' case for lack of merit.

5.4 On the other hand, the Applicants have contended that the matter is not statute barred as the Court has discretionary power to extend time as it administers substantive justice.

5.5 The application herein was made pursuant to Section 85 (3) of the Industrial and Labour Relations Act, which for ease of reference, I will reproduce below:

> *"The Court shall not consider a complaint or an application unless the complainant or applicant presents the complaint or application to the Court-*

(a) within ninety days of exhausting the administrative channels available to the complainant or applicant; or

(b) where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application:

Provided that-

(i) upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it; and

(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."

5.6 Based on the provision above, the Respondents have maintained that the matter herein is statute barred, while the Applicants insist that they have advanced a good reason for their delay and thus, have been captured by the proviso, allowing for extension of time.

5.7 The issue for determination, in my view and simply put, is whether the action herein is or is not statute barred.

5.8 Before I proceed to deal with the issue, I wish to point out that I have observed that Counsel for the Applicants, in their Skeleton Arguments in Opposition, were labouring on repealed law, being Section 85 (3) of the Industrial and Labour Relations Act, before the 2008 amendment. In its previous form, an extension of time seemed to have been

tied to the exhaustion of administrative channels, as a prerequisite. The position has since changed and is of different significance, and Counsel for the Applicants is reminded to take care to ensure that they cite the correct law and avoid the danger of misleading the Court.

5.9 I now proceed to deal with the issue at hand.

5.10 The Supreme Court, in the case of *Augustine Tembo v. First Quantum Minerals Limited - Mining Division*[4], explained the effect of Section 85 (3), as amended, as follows:

> *"There is a significant change in the law in that the pursuance of redress through administrative channels is no longer the subject of the proviso. Now, even if it takes years to exhaust the administrative channels available, the mandatory period only begins to run when the last channel has been exhausted. The section, however, has still retained the proviso. This time, the grounds upon which an Applicant may apply for extension of time under the proviso are not stated. We think, though, that the section now acknowledges that an Applicant, be it one who has no administrative channels to exhaust or one who has exhausted such channels, may for some reason fail to file their complaint within the mandatory period. Hence, the proviso caters for such an Applicant; and allows them to apply for extension of time, giving the reasons that prevented them from filing their complaint within the mandatory period... So that, if the Applicant gives reasons that are satisfactory to the court and it is established that those reasons occurred before the mandatory period had expired, that will have the effect of*

suspending the mandatory period; and if the Applicant does not unduly delay to file his application from the time that those reasons ceased to prevent him from doing so then his application will be meritorious. But if it is established that the reasons given, good as they may sound, only arose after the mandatory period had expired, then again, the court cannot extend the mandatory period which expired."

5.11 From the above, two things stand out for me as regards what needs to be done before a court can exercise its discretion to extend time within which an Applicant may file his complaint beyond an expired mandatory period, and these are:

(i) the Applicant must have applied for leave to file the complaint out of time; and

(ii) the Applicant must advance cogent reasons explaining his delay, and such reasons must have been in existence before the mandatory period expires and not only after the mandatory period expires.

5.12 The procedure set out in the proviso to Section 85 (3) above, is clearly that an Applicant seeking an extension of time within which to file his complaint must make the appropriate application to the court. It is in that application that the Applicant will tabulate the reasons for his delay and accord the court the opportunity to determine whether or not to exercise its discretion in favour of the application.

5.13 The specific words used in the proviso to Section 85 (3) of the Industrial and Labour Relations Act, denoting how an

Applicant should seek to extend time, are *"upon application by the complainant or applicant"*. In my view, the simple interpretation of these words is that there is an expectation that the complainant or applicant seeking to extend time within which to file their complaint, must make deliberate effort to formally request the court for permission for the same.

5.14 The word 'application', which, in legal terms can also mean a 'motion', has been defined by the learned authors of Black's Law Dictionary as a request or petition; or a written or oral application requesting a court to make a specified ruling or order. This entails that an applicant actively takes a step to secure permission from a tribunal or court, by making an application, either in writing or orally. However, in *casu*, it is clear from the record that no such application was made before this Court, before the Applicants commenced the action herein. All that the Applicants did was to proceed to commence this matter, in total disregard of Section 85 (3) of the Industrial and Labour Relations Act. In fact, the Applicants have justified their conduct to proceed to file their complaint out of time without leave of court by arguing that this is a court of substantial justice and that on the strength of Article 118 (2) (e) of the Constitution of Zambia, their failure to obtain leave was a mere procedural technicality that ought to be overlooked and allow the matter to be heard on the merits.

5.15 However, the Constitutional Court guided very clearly in the case of *The People v. The Patents and Companies*

Registration Agency[5], regarding the import of Article 118 (2) (e) as follows:

> *"... it can be deduced that the phrase 'undue regard to procedural technicalities 'simply means placing excessive reliance on or giving heed to a minor detail or point of law which is part of a broader set of rules that govern the manner in which court proceedings are to be conducted which does not go to the core of the whole court process.*
>
> *Therefore, the question is, what is the import of the provisions of Article 118 (2) (e) of the Constitution... what mischief did the framers of the Constitution intend to forestall by enacting Article 118 (2) (e)?*
>
> *In the case of Henry Kapoko, we had occasion to interpret and give meaning to Article 118 (2) (e). We put it thus: -*
>
> *"Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality."*
>
> *In Raila Odinga and 5 others v. Independent Electoral and Boundaries Commission and 3 Others, which we referred to in the Henry Kapoko case, the Supreme Court of Kenya, in interpreting Article 159 (2) (d) of the Kenyan Constitution which is couched in the same manner as our Article 118 (2) (e), stated as follows: -*

"The essence of the provision is that the court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. The principles of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."

We also wish to borrow from the Kenyan Court decision in the case of James Mangeli Musoo v. Ezeetec Limited in which the High Court of Kenya considered and pronounced itself on how procedural technicalities should be treated. The court aptly put it thus: -

"A provision of the law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore, means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and/or procedural in nature. It does not in any way oust technicalities. It only emphasises a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute."

The Constitution and statute have no quarrel with due regard or even regard to technicalities. If this was a

technicality, the test would be whether this was duly or unduly applied or regarded.

Applying the above principles to the current case, we reiterate and echo our position in the Henry Kapoko case where we stated that: -

"Our decisions should generate incremental improvements in both substantive and procedural justice, but they must not jeopardise what has worked well in the past. The need for confidence in our legal system means that there must be good reason to depart from well settled procedure, be it civil or criminal. While Article 118 (2) (e) signifies a new era, it also signifies caution.

... we do not intend to depart from the above position as it is sound law. We reiterate that Article 118 (2) (e) was not meant to do away with laid down rules of procedure for conducting cases as these ensure predictability and uniformity of court procedures and processes. The Article is meant to avoid manifest injustice that would otherwise ensue from giving unjustifiable regard to procedural technicalities. This Article, in fact, enjoins all the courts in Zambia which are thus bound by that provision, not to give undue attention to procedural technicalities, but to give attention to all pertinent factors that have a bearing on the case and not to impede the administration of justice.

For the reasons we have stated above, we find that Article 118 (2) (e) does not proscribe adherence to procedural rules or technicalities as what it proscribes is

paying undue regard to procedural technicalities that result in a manifest injustice..."

5.16 The above is self-explanatory and needs no further elaboration, lest it be diluted.

5.17 It has already been alluded to that the Applicants herein proceeded to file their complaint several months after the mandatory statutory filing period had expired, and they did so without seeking the permission of the Court, prior to the filing. The effect of failure to obtain leave as a prior step to commencing an action or its equivalent has been pronounced in a number of superior court cases. One such case is *Barclays Bank Plc v. Jeremiah Njovu and 41 Others*[6], where the Supreme Court held thus:

"The absence of leave to appeal goes to the very core of the appellate court to deal with the appeal. Put nakedly, where leave has not been granted, the appellate court has no jurisdiction to entertain the appeal."

5.18 While the case cited above was dealing with leave to appeal, I am of the view that the principle of law expounded therein is applicable even in a situation such as the current. The important question to ask is 'what is the effect of a party ignoring the requirement to seek leave to file a complaint or application out of time and proceeding as though it was filing in the first instance and within the mandatory period?' The answer, in my considered view, is that the very jurisdiction of the court to hear such a matter will be wanting.

5.19 The requirement to seek leave of court before filing a complaint out of time is more than just a simple procedural technicality that can be cured. Skipping the process of obtaining leave renders the subsequent complaint incompetently before court. I am guided in this regard by the sentiments of the Constitutional Court in the case of *The People v. The Patents and Companies Registration Agency* (supra) in this regard.

5.20 The Court should be given the opportunity to examine for itself whether the delay in filing the complaint is genuine and justifiable. Such a technicality should be differentiated from procedural technicalities such as counsel neglecting to indorse their email address on a writ drawn on behalf of their client. The lack of leave under Section 85 (3) of the Industrial and Labour Relations Act, cannot just be regularised as one would in a case, for instance, where the writ or other originating process is missing counsel's email address. Lack of leave under Section 85 (3) of the Industrial and Labour Relations Act, goes to the very jurisdiction of the Court.

5.21 In view of the foregoing, I find merit in the Respondents' application to dismiss the Applicants' application filed into court on 20th August, 2021, for being statute barred.

5.22 Before I proceed to make my orders, I wish to address the issue to do with the party on whom the costs for commencement of this matter should fall. It appears to me that it should be common knowledge to Counsel for the Applicants that in circumstances such as in *casu*, where it

was obvious and has not been disputed, that the Applicants were out of time as regards the prescription of filing complaints under Section 85 (3) of the Industrial and Labour Relations Act, there was need to seek leave of court to file the Applicants' application out of time. I say so because I believe that Counsel for the Applicants must have been notified by their clients of the dates when the events allegedly took place. Thus, Counsel should have been in a position to do a simple computation of time and establish whether their clients were within the mandatory statutory period for filing the application. Instead, Counsel decided to ignore the obvious, only to now argue that their disregard for the proviso to Section 85 (3) was a mere procedural technicality that could be overlooked. By way of information to the Applicants herein, in the case of *Barclays Bank Plc v. Jeremiah Njovu and 41 others* (cited above) and an earlier case of *Saviour Chibiya v. Crystal Gardens Lodges and Restaurant Ltd*[7], the Supreme Court made some pertinent observations on the options available to litigants in such situations. The Court stated that a litigant who suffers any prejudice arising from the incompetence or negligence of his/her counsel in having an appeal dismissed, should have recourse to his/her legal counsel.

6. ORDERS

6.1 For the reasons aforementioned, the Applicant's Notice of Application under Section 17 (Rule 4) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, filed into court on 20th August, 2021, is hereby dismissed

with costs to the Respondents, to be agreed by the parties or taxed in default thereof.

6.2 Leave to appeal is granted.

Delivered at Lusaka this 10th day of February, 2022.

Dr. W. Sichode Mwenda
JUDGE