IN THE HIGH COURT FOR ZAMBIA **COMP/IRCLK/554/2020**
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BRIAN MBOZI **COMPLAINANT**

AND

ARMAGUARD SECURITY LIMITED **RESPONDENT**

Coram: Hon. Lady Justice Dr. W. Sithole Mwenda in Chambers at Lusaka this 13th day of January, 2022.

For the Complainant: Mr. Y. Daka of Lusitu Chambers

For the Respondent: Mr. V. Kayawe, Respondent's In-house Counsel

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RULING

Cases referred to:

1. *Guardall Security Group Limited v. Reinford Kabwe, CAZ Appeal No. 44/2019.*
2. *Hakainde Hichilema and Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, Electoral Commission and Attorney General 2016/CC/0031.*
3. *Henry Kapoko v. The People, 2016/CC/0023.*
4. *Kafula Rashid Mulenga v. ZSIC General Insurance Limited, Comp/IRCLK/130/2019.*
5. *Nosiku Likolo v. Magnum Security Services Limited, Comp. No. IRCLK/154/2021.*

Legislation cited:

1. *Order 14A, rule 2 of the Rules of the Supreme Court of England and Wales, 1999 Edition (The White Book).*
2. *Section 19 (3) (b) (ii) of The Industrial and Labour Relations (Amendment) Act No. 8 of 2008.*

3. *Section 85 (5) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*

1. Introduction

1.1 On 19th October, 2021, the Respondent filed into Court a Notice of Intention to Raise Preliminary Issue pursuant to Order 14A of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).

1.2 The issue *in limine* which the Respondent wants this Court to determine is as follows:

> *"That by Section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act of 2008, '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'.*
>
> *The complaint herein was filed/presented to this honourable Court on 10th September, 2020 and thus the matter was mandated by law to be disposed of (Judgment rendered) by not later than 11th September, 2021 as provided by Section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act of 2008. It is the Respondent's contention that the complaint herein therefore stands dismissed for want of prosecution as the time set/limited for its hearing and disposal has lapsed and therefore failed by reason of that technicality.*

1.3 Furthermore, that by provision of the above section the Court *cannot proceed to determine this matter after 11th September, 2021 as the Court is already "functus officio" with regard to this matter and thus has no jurisdiction to hear this matter."*

2. Respondent's supporting arguments

2.1 In support of the motion, Counsel for the Respondent filed skeleton arguments on 19th October, 2021 wherein he stated that the Complainant filed a Notice of Complaint and Affidavit in Support on 10th September, 2020 in the Industrial Relations Division under cause number COMP/IRCLK/554/2020 wherein he sought for damages for unfair and/or unlawful termination of contract; compensation for loss of work; monies owed for unpaid salaries from April, 2020 until completion of contract; the payment of statutory gratuity which should have been paid at the end of the contract in November, 2020, the return of the engine or alternatively the refund of K6,500.00 paid for the purchase of a new engine; interest; costs and any other relief the Court may deem fit. Thus, by provision of the above section, the Court cannot proceed to determine this matter after 10th September, 2021 as the Court is already *functus officio* with regard to this matter and thus lacks jurisdiction to hear this matter.

2.2 Counsel submitted that the Court of Appeal's case of *Guardall Security Group Limited v. Reinford Kabwe*[1] is instructive on this mandatory provision of the law. That, in that case the Court guided as follows:

> *"Failure to act within the set time limit robs the Court of jurisdiction to take any further action in the matter. Whether or not the non-compliance has been caused*

by the Court or other players is immaterial as the cesser of jurisdiction is by act of law."

2.3 According to Counsel, his submission on lack of jurisdiction is fortified by the case of *Hakainde Hichilema and Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, Electoral Commission and Attorney General*[2], where the Constitutional Court held that the petition stood dismissed for want of prosecution when the time limited for its hearing (14 days) lapsed and therefore, failed by reason of that technicality. That, the petitioners failed to prosecute their case within 14 days of it being filed and as such, there was no petition to be heard before the Court.

2.4 Counsel for the Respondent submitted further, that in the case of *Henry Kapoko v. The People*[3], the Constitutional Court rightly pointed out that the rules of court are a good and efficient administration of justice and that Article 118 (2) (e) of the Constitution is not observed to do away with existing laws and procedures even when they constitute technicalities, but is intended to take care of situations where a manifest injustice would be done by paying unjustifiable regard to technicality.

2.5 Counsel for the Defendant brought to the attention of this Court the case of *People v. O'Rourke*[4], where the court reportedly held as follows:

"In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a

compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials, or where a public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears, but the context ought to be very strongly persuasive before it is softened into mere permission."

2.6 It was finally, submitted that in view of the above, therefore, in the interest of justice, this case stands dismissed for want of prosecution as this Court is barred by law from any deliberation of the matter after the lapse on one year after its filing into Court.

3. <u>Complainant's Arguments in opposition</u>

3.1 In opposing the preliminary issue, Counsel for the Complainant started by submitting that the application is irregular as it does not comply with Order 14A, rule 2 of the Rules of the Supreme Court of England and Wales (the White Book), which sets out the manner in which an application under the order must be made. That, accordingly, summons or a notice issued under this order must clearly state the question of law or construction that the Court is required to determine, as well as the order being claimed upon which the Court is invited to make a determination on a question of law.

3.2 Counsel for the Complainant argued that the application does not raise any question of law or construction for this Court to determine. Further, that it does not state any order that this Court should make upon the determination of the question of law and that for these reasons, the application is irregular and must be dismissed for failure to comply with the Rules. That, non-compliance with mandatory provisions renders the proceedings totally incurable and irregular.

3.3 With regard to the substantive application before court, it was submitted that the Court of Appeal in *Guardall Security Group Limited v. Reinford Kabwe* (Supra), has settled the effects of section 9 (3) (b) (ii) of the Industrial and Labour Relations Act as amended by Act No. 8 of 2008 and the Complainant agrees with the Respondent on the consequences of loss of jurisdiction and non-compliance with mandatory provisions as this is well established law. Counsel for the Complainant admitted that it has been slightly over a year from the date the complaint was represented before the Industrial Relations Division of the High Court. Nevertheless, the Respondent neglected to consider the consequences of reallocation of a matter, given that this matter was reallocated in June, 2021 from Hon. Judge Chisunka to Hon. Justice Dr. W. S. Mwenda who now presides over the matter. That, in the case of *Kafula Rashid Mulenga v. ZSIC General Insurance*

Limited[4] Justice Nkonde SC, commenting on the Guardall Security Group Limited v. Reinford Kabwe case, observed that the Court of Appeal did not address the vital issue of what happens when a matter is reallocated from one Judge to another. Counsel submitted further, that similarly, in the case of *Nosiku Likolo and Others v. Magnum Security Services Limited*[5], this very Court noted with regret, that the Court of Appeal did not take occasion to clarify what happens when a matter is reallocated from one Judge to another.

3.4 It was contended that when this matter was reallocated to Justice Mwenda, it took on a new life and as a result, the issue of jurisdiction does not arise since the matter was deemed to have commenced on the date the Judge took over the file. Counsel for the Complainant noted that Zambia, like the rest of the world has been grappling with the Covid-19 pandemic for the past two years, thus negatively impacting the proper and efficient administration of justice. That, there is not a single court in Zambia whose operations have not been affected by Covid-19. That, when drafting section 19 (3) (b)(ii) of Act No. 8 of 2008, it was not envisaged that the country would experience a global pandemic like the current one; thus, it cannot be argued that Parliament intended that matters would continue being heard in a normal fashion without due regard for measures aimed at preserving life.

3.5 Counsel for the Complainant argued that the Respondent's application is made in bad faith and is a dishonest attempt to have the matter dismissed on technicalities rather than determined on the merits. Further, that the Respondent has been responsible for a number of the delays that have worked against the efficient and timely prosecution of this matter. As a result, the Respondent's attempt to have this case dismissed is reprehensible.

3.6 Finally, Counsel submitted that this Court is mandated to administer substantial justice under section 85 (5) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia and therefore, allowing this application would be an infringement of the very principles upon which this Court is founded and an act of gross injustice. That, section 19 (3) (b) (ii) of the Industrial and Labour Relations Act as amended by Act No. 8 of 2008, was not intended to allow parties to impede the timely and efficient prosecution of cases, only to later hide behind it as the Respondent now intends to do. With that, Counsel prayed that the application be dismissed with costs.

4. The hearing

4.1 The application came up for hearing on17th December, 2021. Both Counsel for the Respondent and the Complainant made submissions which more or less replicated their written submissions, therefore, I do not

see the need to restate them here save to say that in his reply to the submissions by Counsel for the Complainant in opposition to the application, Counsel for the Respondent stated that in as far as the law is concerned, the matter is before the Industrial Relations Division of the High Court, therefore, whether or not the matter is reallocated is immaterial.

4.2 Counsel for the Respondent further, submitted with regard to the second issue brought up by Counsel for the Complainant in opposition, that there is a clear point of law which this Court has been invited to determine, namely, whether this Court has the jurisdiction to continue to hear this matter in light of the provisions of section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008.

5. <u>Analysis and determination</u>

5.1 The preliminary issue before this Court challenges the Court's jurisdiction to determine this matter in view of the provisions of section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008, because this matter was commenced on 10th September, 2020 and therefore, it should have been disposed of as provided by the aforementioned provision, not later than 10th September, 2021. The Complainant has opposed the application arguing that this Court has the necessary jurisdiction to dispose of this case notwithstanding that the period of one year within which the matter should have been disposed of

has elapsed because the matter was reallocated to me and by so doing, time for disposal of the matter starts running from the date of reallocation. The Complainant has also claimed that the application before this Court is irregular for non-compliance with Order 14A, rule 2 of the Rules of the White Book. That, the Notice of Intention to Raise Preliminary Issue has contravened Order 14A, rule 2 because the Respondent has not invited this Court to determine any question of law or construction and further, it has not stated the judgment or order which this Court is invited to make. That, on this ground alone, the application should be dismissed.

5.2 In view of the issue raised by the Complainant alleging that the application before this Court is irregular for non-compliance with the provisions of Order 14A, rule 2 of the White Book, I will determine this issue first for the simple reason that the Respondent's application stands to be nipped in the bud in the event that this Court is of the view that the application by the Respondent is indeed irregular.

5.3 Editorial Note 14A/2/7 of Order 14A, rule 2 of the White Book, which has been cited by the Complainant as having been contravened by the Respondent states as follows:

> *"...The summons should state in clear and precise terms what is the question of law or construction which the Court is required to determine. If there is more than one such question, each should be stated in*

the same terms, and it should be made clear whether the several questions are cumulative or in the alternative

The summons should also specify, with particularity if necessary, what judgment or order is being claimed upon the determination of the question of law or construction."

5.4 As earlier alluded to, Counsel for the Respondent submitted in relation to the issue raised by the Complainant, that there is a clear point of law which this Court has been invited to determine, namely, whether this Court has the jurisdiction to continue to hear this matter in light of the provisions of section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008.

5.5 I have perused the Notice of Intention to Raise Preliminary Issue in contention and I am of the view that contrary to the submission by Counsel for the Complainant that the summons has not clearly stated the question of law or construction which this Court has been asked to determine as well as the order being claimed upon which the Court is invited to make a determination on a question of law, the summons has clearly stated the question of law which this Court is asked to determine, namely, whether this Court has the jurisdiction to determine this matter in light of the provisions of section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008. Further, the order being sought by the Respondent is that the matter be dismissed for want of prosecution

due to lapse of the time set for its hearing and disposal.

5.6 Admittedly, Counsel for the Respondent could have done a better job in drafting the question of law and order being sought. However, the question of law and order sought are discernible. For that reason, the application has complied with the requirements of Order 14A, rule 2 of the White Book and is not irregular.

5.7 Having ruled that the application herein is not irregularly before court, I will now move on to the substantive application before this Court.

5.8 It is not in dispute that the complaint in this matter was filed on 10th September, 2020 and therefore, should have been disposed of by 10th September, 2021, in accordance with section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008 which stipulates as follows:

> *"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."*

5.9 There is no question that section 19 (3) (b) (ii) is mandatory in view of the use of the word "shall" and authorities abound to the effect that a mandatory provision must be obeyed. Further, as Counsel for the Respondent correctly argued, the Court of Appeal in the Guardall case ruled that failure by the Court to act within the set time limit robs the Court of jurisdiction to take any further action in that matter. In that case

the Court of Appeal declared the judgment delivered by the lower court null and void for want of jurisdiction and set it aside due to the fact that the matter had not been completed within one year from the date of filing. However, the Court did not end at that. It went further and remitted the record to the Industrial Relations Division for re-hearing before another Judge of competent jurisdiction. The Court further ordered that the matter be deemed to have been filed on the date of the judgment in order to comply with the time limit which had commenced upon presentation of the complaint.

5.10 As I observed in the case of *Nosiku Likolo and 3 Others v. Magnum Security Services Limited*[5], in the absence of guidance from the Court of Appeal as to what happens when a matter which has exceeded the one year period is reallocated to another Judge, I am of the view that in such a case, the matter should be deemed to have been filed on the date the matter is reallocated to the new Judge and time should start running from the date of reallocation.

5.11 I am of the considered view that in the Guardall case, after the Court of Appeal declared the judgment of the lower court as null and void and setting it aside, could have ended there, but it remitted the record to the Industrial Relations Division, from whence it originated, for re-hearing before another Judge of competent jurisdiction. In my opinion, this goes to

show that a Judge, who is reallocated a matter which has already exceeded the one year limit for hearing and determination, is vested with jurisdiction to hear and determine that matter within one year from the date of reallocation. Therefore, the matter should be deemed to have been filed on the date of reallocation in order to comply with the time limit.

5.12 With regard to the argument by Counsel for the Respondent that section 19 (3) (b) (ii) uses the word "Court" and not "Judge", and that as far as the law is concerned, the matter is before the Industrial Relations Division of the High Court, therefore, whether or not the matter is re-allocated is immaterial, I am of the view that if that was the case, then the Court of Appeal in the Guardall case would not have remitted the record to the Industrial Relations Division to be reheard by a another Judge of the same division, since the Court itself would have been stripped of jurisdiction to rehear the matter.

5.13 In the Notice of Intention to Raise Preliminary Issue, the Respondent states in the last paragraph that:

> *"Furthermore, that by provision of the above section (section 19 (3) (b) (ii)) the Court cannot proceed to determine this matter after 11th September, 2021 as the Court is already "functus officio" with regard to this matter and thus has no jurisdiction to hear this matter."*

Contrary to what the Respondent has stated in the above-quoted paragraph, the Court of Appeal in the Guardall case stated that it is not correct to say that

after the expiry of the one-year period the Court becomes *functus officio* because that is not the correct position at law as the term refers to the status of an official or a document that has completed its task or performed his duty and served its purpose. Thus, according to the Court of Appeal, the Court lacks jurisdiction to hear the matter after a period of one year has elapsed not because it has become *functus officio,* but because it has failed to act within the set time, which robs the Court of jurisdiction to take any further action in the matter.

6. <u>Conclusion and ruling</u>

6.1 In view of the aforementioned, my determination of the question of law raised in the preliminary issue is to the effect that the matter herein does not stand dismissed for want of prosecution as this Court has the jurisdiction to hear and determine the matter which was reallocated to the Court on 20th May, 2021.

6.2 Therefore, the preliminary issue fails and is dismissed with costs to the Complainant, to be taxed in default of agreement.

6.3 Leave to appeal is granted.

Delivered at Lusaka this 13th day of January, 2022.

Dr. W. Sithole Mwenda
HIGH COURT JUDGE