

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

APPEAL NO. 99/2009

BETWEEN:

PAUL MWANZA

APPELLANT

AND

ZESCO LIMITED

RESPONDENT

**CORAM: MAMBILIMA CJ, KAOMA AND MUTUNA JJS;
On 1st October, 2019 and 19th November, 2019**

**For the Appellant : In Person
For the Respondent : Ms N.C. Sikazwe, In house Counsel,
ZESCO Limited**

JUDGMENT

MAMBILIMA CJ delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. ZAMBIA CONSOLIDATED COPPER MINES LIMITED V JOSEPH DAVID CHILESHE, SCZ JUDGEMENT NO. 21 OF 2002**
- 2. ZAMBIA CONSOLIDATED COPPER MINES V ELVIS KATYAMBA AND 46 OTHERS, SCZ JUDGMENT NO. 1 OF 2006**
- 3. RONDEL V WORSLEY (1969) 1 AC 191 at page 227**
- 4. D. E. NKUWA V LUSAKA TYRE SERVICES LIMITED (1977) ZR 43**
- 5. RATNAM V CUMARASAMY AND ANOTHER (1964) 3 ALL ER 933**
- 6. BOART LONGYEAR (ZAMBIA) LIMITED V AUSTIN MAKANYA, SCZ JUDGMENT NO. 9 OF 2016**
- 7. NAHAR INVESTMENT LIMITED V GRINDLAYS BANK INTERNATIONAL (ZAMBIA) LIMITED (1984) Z.R. 81**

LEGISLATION REFERRED TO:

- 1) THE INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA**

- 2) **THE SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA**
- 3) **THE LEGAL PRACTITIONERS' PRACTICE RULES, 2002**

1. INTRODUCTION

- 1.1 This is an appeal from an Order of the Industrial Relations Court (IRC) given on 29th April, 2009 refusing to grant the Appellant leave to file a notice of appeal out of time.

2 BACKGROUND

- 2.1 The events leading to this appeal are common cause. The Appellant was dismissed from employment by the Respondent as a Trainee Trades Linesman on 13th November, 2003. This was after the Respondent alleged that the Appellant had been absent from duty for a month without a satisfactory explanation. He was given fourteen (14) days within which to appeal to the Divisional Manager if he was dissatisfied with the decision to dismiss him. He accordingly appealed to the Divisional Manager but his appeal was unsuccessful, and he was given 14 days within which to appeal to the Director – Distribution and Supply. The Appellant went all the way and escalated his appeal to the Managing Director, who finally

upheld the dismissal on 12th August, 2005. He was informed that he had the right to seek legal redress from a court of competent jurisdiction.

- 2.2 The Appellant did not seek legal redress until the 14th of October, 2008, when he filed an application before the IRC for leave to lodge a complaint out of time. The major reason given by the Appellant for the delay in commencing the action was that he was so mentally "*tortured*" by his dismissal from employment that he went to the village to take a break.
- 2.3 The Court dismissed his application on 16th February, 2009, on the ground that the Appellant had slept on his rights and had no legitimate justification for bringing his complaint late. According to the record of appeal, the Court gave him 14 days to appeal against its decision.
- 2.4 The record of appeal shows that the Appellant did not comply with the 14 day period given by the Court. On 13th March, 2009, he applied for leave to file a notice of appeal out of time. According to his affidavit in support of the application, he had delayed in filing an appeal because the Court, in delivering its verdict on 16th February, 2009, did not give him the actual

period within which to appeal. He further explained that he submitted a notice of appeal to the Director at the IRC for signing, who signed it late in the afternoon on 5th March, 2009.

2.5 The Appellant further deposed that he attempted to file the notice of appeal in the Supreme Court on 26th February, 2009, but could not do so due to lack of money, and that one of the officers at the Registry had allowed him to pay the following week. That he went back to the Supreme Court on 3rd March, 2009, where a Registry Officer requested him to indicate whether he was appealing against a ruling or judgment and sent him back to the IRC. That it was only when he went back to the IRC that he came to know about the period within which he was required to appeal because that was when he was given the Court Order which indicated the fourteen-day period. According to him, being given the Order late was one of the major drawbacks to his appeal.

2.6 The Appellant further explained that when he went back to the Supreme Court, he was advised to change his notice of appeal to indicate that it was against an Order and not a ruling or

judgment. This entailed that he had to begin the whole appeal process afresh. He took a fresh notice of appeal to the IRC for signing on 4th March, 2009, but it was only signed on 5th March, 2009, in the afternoon. By the time the Appellant went back to the Supreme Court to file the fresh notice of appeal on 6th March, 2009, he was told that he had come too late in the day. The Appellant thereafter sought leave to appeal out of time, saying he relied on the fact that the IRC is a court of substantial justice.

- 2.7 The Respondent opposed the application for leave to appeal out of time, contending that it was wrongly before the Court because the Appellant was granted leave to appeal on 16th February, 2009, which leave he had acknowledged in his affidavit of 13th March, 2009. Counsel for the Respondent also argued that the application was wrongly before Court because such applications lie to the Supreme Court. Further that lack of money was not a justifiable reason for the delay. Counsel urged the Court to dismiss the application for lack of merit.

3. **DECISION OF THE LOWER COURT**

3.1 After hearing the application, the Court below found the Appellant to have been untruthful when he claimed that the Court did not give him a time frame within which to appeal. The Court referred the Appellant to its record of proceedings, where it indicated that he was at liberty to appeal within 14 days. It further noted that on the same day it delivered its verdict, which was 16th February, 2009, a Court Order was drawn up stating the period within which the Appellant could appeal. The Court consequently dismissed the Appellant's claims that he was not informed of the period within which to appeal and that the Court Order was belatedly given to him. The Court was also of the view that lack of money was not a justifiable reason for the delay. It consequently refused to grant the application.

4. **GROUNDS OF APPEAL AND SUBMISSIONS
BY THE PARTIES**

4.1 Dissatisfied with the Order of the Court below, the Appellant appealed to this Court, advancing three grounds of appeal, namely that: –

1. **the minutes of 16th February, 2009 are not a true reflection of what transpired. Refer to pages one and two. The Court**

did not ask the Appellant the reasons for going to the village (contradictions in the minutes);

2. the second set of minutes (typed unsigned) were also not a true reflection of what transpired (29th April, 2009); and

3. the Respondent's Legal Counsel had no jurisdiction to oppose (the action) in the Industrial Relations Court. The Appellant believed that it is the mandate of the IRC to determine the period of appeal to both the IRC and any Court over it.

4.2 In support of the grounds of appeal, the Appellant filed written heads of argument in which he argued all the three grounds of appeal together. In his submissions, the Appellant maintained the reasons he had given in the Court below for delaying to file his appeal within the time given. He submitted that as a lay person, he reasonably expected the Court to ask him why he had gone to the village, but it did not. Lamenting about his applications having been refused, the Appellant stated that the Court should have come to his defence as a layman who does not know the law. It was his submission that it was unfair for the Court below to refuse his application.

4.3 At the hearing of the appeal, it became evident that the Appellant did not comprehend the issues involved in his appeal. As opposed to submitting on the aspect of the lower Court's refusal to grant him leave to file his Notice of Appeal

out of time, he sought to argue the merits of his case. This prompted the Court to ask Senior Counsel Inutu Suba to assist the Appellant pro bono. Mesdames Suba, Tafeni & Associates have belatedly placed themselves on record and filed heads of argument on 14th October 2019.

- 4.4 In the filed heads of argument, Counsel has substituted the third ground of appeal with the following:-

“The Honourable Court below erred in law and fact when it rejected the Appellant’s application to appeal outside the stipulated 14 days.

Counsel has invoked Article 118 (2) (e) of the Constitution, the Rules of the IRC and a plethora of decided cases to submit that matters should not be decided on technicalities but on merits.

- 4.5 The submission of this new ground of appeal in essence offends Rule 58 (3) of the **SUPREME COURT RULES²** which states that:-

“The Appellant shall not... without leave of the Court put forward any grounds of objections other than those set out in the memorandum of appeal....”

We will, therefore, not allow the substituted ground of appeal. This means that the appeal will be decided on the grounds of

appeal appearing on page 4 of the record of appeal and the filed heads of argument.

- 4.6 Counsel for the Respondent, Mrs. Sikazwe, filed written heads of argument opposing the appeal on the filed grounds of appeal. On the first and second grounds of appeal, she submitted that although the two grounds were raising substantive claims, the Court Order appealed against was on a technical point. She stated that since the issues raised were not the subject matter of the Order appealed against, the Respondent had elected not to respond to the two grounds of appeal.
- 4.7 On the third ground of appeal, Counsel submitted that the Court below was on firm ground in refusing to grant the application. That the Order of the Court cannot be faulted. She went on to argue that Section 85 (3) of the **INDUSTRIAL AND LABOUR RELATIONS ACT⁽¹⁾**, provides that the Court shall not consider a complaint or application unless it is presented within thirty (30) days of the occurrence of the event which gave rise to it. She further noted, that the proviso to section 85(3) provides that the Court may extend the thirty-

day period for three months after the date on which the complainant or applicant has exhausted the administrative channels available to that person. She submitted that the Appellant in this case, commenced an action in 2008, more than three (3) years from the time when he exhausted the administrative channels which were available to him.

- 4.8 To buttress her submissions, Counsel referred us to the case of **ZAMBIA CONSOLIDATED COPPER MINES LIMITED V JOSEPH DAVID CHILESHE⁽¹⁾**, in which we quoted from **CHITTY ON CONTRACTS** where it states that:

“The general principle is that once time has started to run it continues to do so until proceedings are commenced or the claim is barred. The principle (if any is possible in so technical a matter) is that a Plaintiff who is in a position to commence proceedings, and neglects to do so, accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period. The principle is illustrated by a famous group of seventeenth-century cases deciding that the closing of the courts during the Civil War did not suspend the running of time...”

- 4.9 Counsel also cited the case of **ZAMBIA CONSOLIDATED COPPER MINES V ELVIS KATYAMBA AND 46 OTHERS⁽²⁾**, where we held that the provisions of Section 85(3) of the **INDUSTRIAL AND LABOUR RELATIONS ACT⁽¹⁾** are mandatory and that the IRC cannot entertain a complaint

unless it is brought within thirty (30) days of exhausting administrative channels.

4.10 Counsel stated that there is a purpose for limiting the time within which cases should be filed, and claimants must not be given freedom to belatedly commence actions unless there are compelling circumstances to warrant an extension of time. She argued that it is oppressive to defendants to allow actions to be brought long after the circumstances that gave rise to the action have passed. That limiting the time in which to sue also provides certainty, in that one does not have to spend the rest of their life looking over their shoulder and fearing that someone might sue them. He further stated that if too much time is allowed to pass, it becomes difficult to get all the facts before the court because evidence could be lost; memories fade; documents get lost; or witnesses die. It was Counsel's submission that this appeal should be dismissed.

5. DECISION BY THIS COURT

5.1 We have considered the grounds of appeal, the decision appealed against and the submissions by the parties. According to the Notice of Appeal, this appeal is against the

Order of the IRC made on 29th April 2009. It appears on page 6 of the record of appeal. This is the Order refusing to grant 'leave to file Notice of Appeal out of time.'

- 5.2 After the Appellant was refused leave to file his complaint out of time, he was given 14 days in which to appeal against that refusal. He defaulted and went back to Court to seek leave to appeal out of time. Leave was refused and hence this appeal to this Court to contest that refusal.

The submissions by the learned Counsel for the Respondent are predicated on the lower Court's refusal to allow the Appellant to file his complaint out of time. There is no appeal against that decision but the decision refusing to grant leave to appeal out of time. The submissions by Counsel, therefore, are otiose and irrelevant to the issue that confronts us in this appeal.

It is evident that the grounds of appeal do not conform to the provisions of Rule 58(2) of the **SUPREME COURT RULES**² which provides that:-

"(2) The memorandum of appeal shall be substantially in Form CIV/3 of the Third Schedule and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and

shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively. (emphasis ours)

- 5.3 Contrary to Rule 58(2), all the grounds of appeal on page 4 of the record do not raise any objections against the Order of the Court below, nor do they specify the points of law or fact which are alleged to have been wrongly decided. The first and second grounds of appeal do nothing other than impugn the accuracy of the proceedings in the Court below, which the Appellant has referred to as “minutes”.
- 5.4 Further, this appeal emanated from the IRC. Section 97 of the **INDUSTRIAL AND LABOUR RELATIONS ACT⁽¹⁾** provides that parties can only appeal to the Supreme Court on a point of law or any point of mixed law and fact. The first and second grounds of appeal do not raise any point of law or point of mixed law and fact. In the way they have been formulated, the two grounds fly in the teeth of this law and are, therefore incompetent.
- 5.5 As regards the third ground of appeal, it equally does not challenge the Order of the Court below. Rather, it questions the authority of Counsel for the Respondent to oppose the

Appellant's applications in the Court below. The Appellant has argued that Counsel had "*no jurisdiction*" to oppose the applications. According to him, "*it is the mandate of the IRC to determine the period of appeal to both (IRC) or any Court over it*".

- 5.6 Clearly, the third ground of appeal seems to be anchored on a misapprehension that merely because the IRC had jurisdiction to determine the applications before it, then Counsel for the Respondent was not entitled to oppose them. Rule 22 of the **LEGAL PRACTITIONERS' PRACTICE RULES, 2002**³ places a duty on a legal practitioner to retain professional independence and ability to advise clients fearlessly and objectively; and also to act in the best interest of the client. It goes without saying, therefore, that an advocate, appearing in court on behalf of a client, has a duty not only to the Court, but also to secure the interest of his client. Lord Reid aptly elaborated on this duty in the case of **RONDEL V WORSLEY**⁽³⁾, when he said-

"There is no doubt about the position of a barrister or advocate appearing in court on behalf of a client. It has long been recognized that no counsel is entitled to refuse to act in a sphere in which he practices and on being tendered a proper

fee, for any reason however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue....

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question however distasteful which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests." (emphasis ours)

Against this backdrop, we find nothing improper about Counsel for the Respondent opposing the Appellant's applications on behalf of her client.

- 5.7 Ultimately, the decision to either refuse or grant the application was entirely up to the Court. We explained in the case of **D.E. NKUWA V LUSAKA TYRE SERVICES LIMITED**⁽⁴⁾, that the granting of an extension of time within which to appeal is entirely in the discretion of the Court, but such discretion will not be exercised without good cause. The material factors in the grant or refusal of leave to appeal out of time include the circumstances of the delay, the reasons which provide the material on which the Court may exercise the discretion and the length of the delay. Whether there is a good reason will depend on the particular circumstances of a

case, but the court looks at the affidavit evidence before it to determine whether there is good cause to grant the application.

- 5.8 In this case, there was a history of delay. The Appellant had taken more than 3 years to file an application for leave to lodge a complaint out of time. After the Court refused to grant his application, he yet again did not file an appeal against the refusal within the 14 days which he was given. This prompted him to make an application to file a notice of appeal out of time, which the Court refused to grant.
- 5.9 The reasons given by the Appellant for the delay were found not to be satisfactory. He cast blame on the Court below, stating that the Court passed its verdict without informing him of the time within which to lodge the appeal. He alleged that the Court belatedly granted him the Order giving him fourteen (14) days to lodge his appeal. He went so far as to impugn the accuracy of the proceedings as recorded by the lower Court. The Court below took the trouble to read out the proceedings to him to demonstrate that he was duly informed of the period

within which to appeal if he so wished. The presiding Judge stated:-

“...we will read back our record of the proceedings of 16h February 2009 to you and the record is very clear on the aspect of time frame. You were given fourteen days...so you are not telling the truth when you say you were not given the time frame in which to appeal.”

The Court also noted that the Order refusing the Appellant's application was drawn up on the same date and it stated the period of fourteen days in which the Appellant could launch his appeal. The events in this case show that the Appellant has been walking on a path of delays right from the beginning.

5.10 Much as the Appellant is a lay person, we must state that he must abide by the rules and Orders of the Court. These rules ensure orderly conduct of litigation. In the case of **D.E. NKUWA**, we quoted Lord Guest in **RATNAM V CUMARASAMY AND ANOTHER**⁽⁵⁾, who aptly stated that:

“the rules of Court must prima facie be obeyed and in order to justify a court in extending the time during which some steps in procedure require to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.”

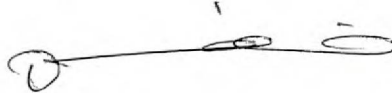
5.11 We are alive to the fact that the IRC is a court of substantial justice as stipulated in Section 85(5) of the **INDUSTRIAL AND LABOUR RELATIONS ACT**⁽¹⁾, which provides that the Court shall not be bound by the rules of evidence in civil or criminal proceedings, but that the main object of the Court shall be to do substantial justice between the parties before it. We explained the rationale behind this provision in the case of **BOART LONGYEAR (ZAMBIA) LIMITED V AUSTIN MAKANYA**⁽⁶⁾, where we stated that:

“Section 85(5) stipulates that the main object of the IRC is to do substantial justice between the parties and in order to achieve this objective, it is not bound by rules of evidence. The words ‘shall not be bound’ must be construed purposefully. They do not bar the Court from observing rules of evidence. It is only when faced with a situation where observing rules of evidence will compromise the justice of the situation between the parties that the rules of evidence will give way to justice. Faced with a situation which demands the observance of the rules of evidence, the Court has to interrogate the demands of justice in the case. It goes without saying that a rule which promotes justice between the parties must carry the day.”

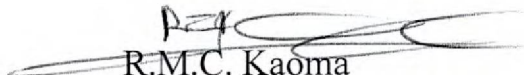
5.12 In the circumstances of this case, it is our view that the lower Court properly exercised its discretion. The Appellant was found not to have been truthful with regard to the reason he advanced for failure to appeal within the time given. Having been afforded an opportunity to file his appeal, he failed to do

so. We did state in the case of **NAHAR INVESTMENT LIMITED V GRINDLAYS BANK INTERNATIONAL (ZAMBIA) LIMITED⁽⁷⁾** that litigation must come to an end and it is highly undesirable that respondents should be kept in suspense because of dilatory conduct on the part of appellants.

5.13 We do not find any merit in this appeal. It is hereby dismissed. We make no order as to costs.



I.C. Mambilima
CHIEF JUSTICE



R.M.C. Kaoma
SUPREME COURT JUDGE



N.K. Mutuna
SUPREME COURT JUDGE