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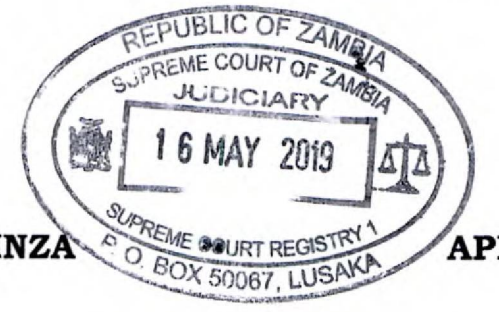
IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 131/2016

HOLDENAT LUSAKA SCZ/8/120/2013

(Civil Jurisdiction)



BETWEEN:

GOODFELLOW HAMAINZA **APPELLANT**

AND

INDO ZAMBIA BANK LIMITED **RESPONDENT**

Coram: Muyovwe, Kaoma and Chinyama, JJS.
On 7th May, 2010 and 16th May, 2019

For the Appellant: Mr. R. Mainza of Mainza and Company.

For the Respondent: Mr. C. Sianondo of Malambo and Company

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Zambia Consolidated Copper Mines v Jackson Munyika Siame and 33 others - Appeal No. 106 of 2003**
2. **Zambia National Commercial Bank Plc v Geoffrey Muyamwa and 9 others - Appeal No. 175 of 2008**
3. **Zambia National Commercial Bank Plc v Masautso E. Nyathando and 88 others - Appeal No. 62 of 2016**
4. **Chilumba Gerald v ZESCO Limited - Appeal No. 106 of 2014**
5. **Zambia Bata Shoe Company Limited v Damiano Mtabilika (2010) 2 Z.R. 244**
6. **Zambia Consolidated Copper Mines Ltd v Elvis Katyamba and Others (2006) Z.R. 1**
7. **GdC Logistics Zambia Ltd v Joseph Kanyama and 13 others - Selected Judgment No. 17 of 2017**
8. **Nkhata and others v Attorney General (1966) Z.R. 124**
9. **Jonathan Lwimba Mwila v World Vision Zambia - SCZ Appeal No 193 of 2005**

Legislation referred to:

1. **Industrial and Labour Relations Act, Cap 269, sections 85(3) and 97 and Rule 47**
2. **Limitation Act 1939, sections 2 (1) (a) and 32**
3. **British Acts Extension Act, Cap 10, section 2**
4. **English Law (Extent of Application) Act, Cap 11, section 2 (d)(e)**
5. **White Book, 1999 edition, Orders 14A Rule 1 and 33 Rule 3**

This appeal arises from a refusal by the Industrial Relations Court (IRC) to grant the appellant leave to file a notice of complaint out of time. The application was made under **Rule 47** of the **Industrial and Labour Relations Court Rules, Cap 269**.

The history of the matter as disclosed in the affidavit in support is that the appellant was employed by the respondent in April, 1989 as Branch Manager. During the course of his employment he served as Chief Inspector/Auditor, Chief Manager and General Manager on renewable contracts. From April, 2005 to April, 2009 his contract was renewed three times for periods of two years up to 2nd April, 2011 when the last contract expired.

At the expiry of each of the contracts, the appellant was entitled to gratuity calculated at the rate of 25% of basic salary and other emoluments such as medical, housing, social tour and fuel allowances and leave pay. He asserted that he was underpaid on these other emoluments.

The appellant also asserted in paragraphs 25 and 26 respectively of his affidavit that he was desirous to commence proceedings to recover the monies owed to him; and that the delay in filing the complaint was not deliberate. On diverse occasions, he reminded the respondent who until 2nd April, 2011 when his last contract came to an end was his employer to make good of the short fall but to no avail.

The record shows that the application first came up for hearing on 9th May, 2013 but it was adjourned to 27th May, 2013 since counsel for the respondent was retained only the previous day. On 13th May, 2013 the respondent's counsel filed a notice to raise preliminary issue pursuant to **section 2(1)(a)** of the **Limitation Act 1939** as extended by **section 2** of the **British Acts Extension Act**, **Cap 10** and **section 2(d)(e)** of the **English Law (Extent of Application) Act**, **Cap 11** as read together with **Orders 14A Rule 1** and **33 Rule 3** of the **White Book, 1999**.

The sole issue that was raised for the court's determination was that the claims under the contracts of employment between the appellant and respondent entered into from 1989 and ending 2nd April, 2007 were statute barred and were not competent to be litigated upon.

On 27th May, 2013 the date appointed for hearing of the application for extension of time, counsel for the respondent informed the court that they had a preliminary issue and they would rely on their skeleton arguments. Counsel for the appellant suggested that they file their opposition, the respondent replies, and thereafter the court could render its ruling. It was agreed that the appellant files his submissions on or before 31st May, 2013; and the respondent its reply on or before 5th June, 2013. The judge indicated that he would be on leave but the ruling would be ready for uplifting on 10th June, 2013.

The appellant filed his opposition on 3rd June, 2013 arguing that labour related matters, commenced under the provisions of the Industrial and Labour Relations Act, are not subject to the Limitation Act, 1939 and that **Rule 47** of the **Industrial Relations Court Rules** confers discretionary power on the court to extend the time within which to file a complaint despite that the time for doing so has already expired. The cases of **Zambia Consolidated Copper Mines v Jackson Munyika Siame and others**[1] and **Zambia National Commercial Bank Plc v Geoffrey Muyamwa and others**[2] were cited to support this argument.

The respondent did not file a reply as agreed on 27th May, 2013.

The record of appeal does not contain the promised ruling on the preliminary issue and learned counsel for both parties agreed at the hearing of the appeal that the court did not render a ruling on the preliminary issue. What they received on 14th June, 2013 was a ruling relating to the main application for extension of time within which to file complaint which had not been heard by the court. Shockingly, they were not even aware, until this Court raised the issue that the awaited ruling was never delivered. What this reveals, is that counsel, were not vigilant concerning their respective client's case. Otherwise, they would have gone back to the court to ask for the promised ruling.

Suffice to say that as agreed by counsel for the respondent at the hearing of the appeal, the preliminary issue lacked merit and could not possibly have succeeded. As we said in the case of **Zambia National Commercial Bank Plc v Masautso E. Nyathando and others**[3], in terms of **section 32** of the **Limitation Act, 1939** the Act does not apply to an action where the limitation period is prescribed by another statute, in this case, **section 85(3)** of the **Industrial and Labour Relations Act**.

Now, counsel for the appellant argued that we should proceed to hear the appeal because refusing to do so would result in a lot of injustice. The difficulty we have is that the application for extension of time was never heard. We have considered whether we should send the matter back to the court below. However, our common view is that if we do so, we would be sending back an application that is devoid of merit.

Should we be compelled to hear the appeal, the rehearing would be based on the appellant's affidavit evidence only since the respondent did not file any affidavit in opposition. We would rarely take this latter option but in the particular circumstances of this case, this is the lesser of the two evils.

We have perused the ruling appealed against. In dismissing the application for extension of time, the court gave two reasons. Firstly, that the application was commenced more than two years from the date of the expiry of the contract; and secondly, that the appellant did not demonstrate what caused the delay to take the matter to court from the time he left employment.

The court was alive to the fact that under the provisions of the law, an action must be commenced within 90 days from the occurrence of the event giving rise to the complaint. The provision

which prescribes this period of limitation is **section 85(3)** of the **Industrial and Labour Relations Act**.

The court observed that from the appellant's affidavit, there were several events giving rise to the complaint all which happened when he was in employment. That he used to remind the respondent on the claims but to no avail until he left but there was no evidence of what steps he took after 2nd April, 2011 up to 17th April, 2013 when he filed the application. As a result, the court found the delay to have been inordinate.

The appellant was aggrieved by this decision and appealed on four grounds as follows:

1. **The court below misdirected itself in law when it dismissed the appellant's application for extension of time within which to file complaint because the application was commenced more than two years from the date of the expiry of the contract in the face of a statutory provision mandating the Industrial Relations Court to extend the time for filing a complaint notwithstanding that the period for filing such complaint had already expired.**
2. **The court below misdirected itself in law when it dismissed the appellant's application for extension of time within which to file complaint since the application was commenced more than two years from the date of expiry of the contract in the face of Supreme Court decisions cited by the appellant upholding previous Industrial Relations Court decisions granting the applicants leave to file complaints out of time despite delay of more than two years.**
3. **The court below misdirected itself in law when it dismissed the appellant's application for extension of time within which to file complaint since the application was commenced more than two years from the date of the expiry of the contract in the face of the established principle of law that the Industrial Relations**

Court has the mandate to administer substantial justice unencumbered by rules of procedure.

4. **The court below misdirected itself in fact when it held that the applicant did not demonstrate in its affidavit what caused the delay to bring the matter to court from the time he left employment.**

Both parties filed heads of argument in support of their respective positions. Counsel for the appellant argued grounds 1, 2 and 3 together. His arguments were still centred on **Rule 47** of the **Industrial Relations Court Rules** and the **Jackson Munyika Siame**[1] and **Geoffrey Muyamwa**[2] cases where we upheld the decisions of the IRC to allow the applicants to file their complaints out of time despite them having been late for periods of seven and twelve years respectively. He argued that the court below misdirected itself when it failed to follow our decisions in the above authorities.

In ground 4, the gist of counsel's argument is that contrary to the finding by the court that there was no evidence of the steps the appellant had taken after 2nd April, 2011 to the time he filed the application, he explained in paragraph 26 of his affidavit why he could not file the complaint within the statutory period. This was because he was pursuing an *ex curia* settlement which sadly did not bear any positive result.

In response to grounds 1 to 3, counsel for the respondent first dealt with the exercise of the court's discretion in an application to extend time within which to file complaint. He cited the case of **Chilumba Gerald v ZESCO Limited**[4] where we dealt with a similar appeal, declining an application where the applicant was only five months late.

It was submitted that from paragraphs 23 and 24 of his affidavit in support, the appellant was aware from 2006, of what he was claiming. However, he waited for more than two years before he could make the application. He simply took a very casual approach to the matter like we said in the above case.

Regarding the use of **Rule 47**, counsel contended that this rule is found under **Part VII** of the **Industrial Relations Court Rules** and in terms of **Rule 30**, this Part applies to all proceedings before the Court, meaning that **Rule 47** can only be utilised for a matter where a complaint is already before court and not for purposes of facilitating the admission of a complaint.

As authority, counsel cited the case of **Zambia Bata Shoe Company Limited v Damiano Mtabilika**[5] where we said **Rule 47** deals with extension or abridgment of time for doing any act prescribed under the rules or ordered by the court, for example, if

a complainant is ordered by the IRC to file certain documents within a prescribed time and he thinks the time is about to run out before he files the document, he may apply to the court to extend the time within which to lodge the documents.

Counsel further contended that institution of a complaint in the IRC is not made under **Rule 47** but **section 85** of the Act as amended by Act No. 30 of 1997 and Act No. 8 of 2008. Hence, the use of the rule instead of the section was erroneous. He also cited the case of **Zambia Consolidated Copper Mines Limited v Elvis Katyamba and others**[6] where we interpreted section 85(3).

It was argued that there is no thread of evidence to the effect that after leaving employment on 2nd April, 2011, the appellant pursued administrative channels. Counsel sought to distinguish the **Jackson Munyika Siame**[1] and **Geoffrey Muyamwa**[2] cases relied on by the appellant on ground that in those cases, other groups had already been successful. He also argued that the distinction could be made on the basis of the provisions of the law under which the applications were made.

On the appellant's argument that the time should have been extended in light of the established principle of law that the IRC has a mandate to administer substantial justice unencumbered

by rules of procedure, the case of **GdC Logistics Zambia Limited v Joseph Kanyama and 13 others**[7] was quoted where we made it very clear that substantial justice is for both parties.

The gist of the response to ground 4 is that the interpretation of the law by the court is in conformity with our guidance in the **Elvis Katyamba**[6] case. It was argued that the appellant wanted to seek refuge in paragraph 26 of his affidavit but the said paragraph does not indicate that he approached the respondent after he left employment and if he did, it does not disclose whether he did so within the mandatory 90 days. It was counsel's contention that there is also no document to show that effort was made within the mandatory period. Counsel restated and adopted our guidance in the **Chilumba Gerald**[4] case.

It was further argued that in any case, the finding by the court was a finding of fact which can only be overturned in very clearly demonstrated cases as we held in **Nkhata and others v Attorney General**[8]; and that **section 97** of the **Industrial and Labour Relations Act** does not permit appeals founded on fact.

We have considered the arguments by the parties. The appellant's position in grounds 1 to 3 is that **Rule 47** of the **Industrial Relations Court Rules** confers discretionary power on

the court to extend the time within which to file a complaint notwithstanding that the time had already expired and in ground 4 it is argued that the appellant gave the reason for the delay.

Indeed, **Rule 47** provides that:

> **"The time prescribed by these Rules or by order of the Court for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Court."**

The immediate question is whether the court below was properly moved under **Rule 47**. The answer is in the negative. In terms of **section 85(3)** of the **Industrial and Labour Relations Act** the IRC shall not consider a complaint or 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, within ninety days of the occurrence of the event which gave rise to the complaint or application. Of particular interest is paragraph (i) of the proviso which states that upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it.

Clearly, it is the proviso to section 85(3) which gives the court the power to extend the time within which to file the

complaint and not **Rule 47** which is subsidiary to the substantive provision. In addition, in the case of **Zambia Bata Shoe Company Limited v Damiano Mtabilika**[5], cited by the respondent, we said **Rule 47** deals with extension and abridgment of time for doing any act prescribed under the Rules or as ordered by the court. Therefore, an application for extension of time within which to file a complaint ought to be made under **section 85(3)** and this has always been the practice.

However, counsel for the appellant was quick to concede that he should not have proceeded under **Rule 47** and urged us to consider the application as having been made under **section 85(3)**. Sadly, even if we were to consider the application as having been properly made under **section 85(3)**, this appeal would still fail because what we said recently in the **Chilumba Gerald**[4] case would apply with equal force to this case.

In the above mentioned case, the appellant was employed as a metre-reader in 2010. In 2011 he was re-designated as a cashier and transferred to Mumbwa. He did not immediately take up the position and was charged with absenteeism from duty. He was later suspended. After the suspension, he was asked to report for duty but only did so after a month and continued to

absent himself. He was served with fresh disciplinary charges. He was found guilty and dismissed. His appeal was unsuccessful. On 23 July, 2013 he was advised in writing by the respondent's managing director that he had exhausted the appellate procedure and if he wished to pursue the matter further, he had to go to court. He applied for leave to lodge his complaint out of time on 2nd January, 2014 claiming that he had been pursuing other administrative channels which were not fruitful. The IRC dismissed the application on the basis of inordinate delay and the absence of a plausible reason.

On appeal, we reiterated what we had said in **Jonathan Lwimba Mwila v World Vision Zambia**[9] that leave to file a complaint out of time is not granted as a matter of course as though the pursuer is merely pushing an open door. The granting of leave to file delayed complaints requires that discretion is exercised judiciously, there have to be sufficient reasons for the delay to seek redress in court after the incident complained of. We found that the approach of the appellant in the court below represented a very lazy effort indeed and he had no plausible reasons for the delay of over five months.

In this case, the court did not dismiss the application purely on the basis that it was made more than two years from the date of the expiry of the contract. The court found that the appellant did not demonstrate what caused the delay to take the matter to court from the time he left employment up to the time he filed the application. This is also the argument by the respondent.

Quite clearly, paragraph 26 of the affidavit in support is vague. It does not show that the reminders to the respondent to pay him the shortfall (if this qualifies as administrative channels or attempts to settle the matter out of court) were made after he left employment. The court's finding which cannot be faulted is that this was done before he left employment and it dismissed the application because of lack of conceivable explanation and inordinate delay just like in the **Chilumba Gerald**[4] case.

We are taken aback by the argument by counsel for the appellant that our decision in the above case does not apply here because it was not law at the time the application for extension of time was made in the court below.

It was also argued on behalf of the appellant that the court below misdirected itself when it failed to extend the time in light of the established principle of law that the IRC has a mandate to

administer substantial justice and when it failed to follow our decisions in the **Jackson Munyika Siame**[1] and **Geoffrey Muyamwa**[2] cases where the applicants were allowed to file their complaints after seven and twelve years respectively.

We repeat that the court below was not obliged to extend the time simply because an application was filed and some feeble reason for the delay given. We have said that the granting of leave to file delayed complaints requires that discretion is exercised judiciously and there must be sufficient reasons for the delay to seek redress which was not the case here. We shall not labour the point.

In conclusion, we find no merit in all the grounds of appeal. We dismiss the appeal but make no order as to costs.

E.C. MUYOVWE
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE