

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. SCZ/8/08/2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



CITIBANK ZAMBIA LIMITED

APPLICANT

AND

SUHAYL DUDHIA

RESPONDENT

Before Hon. Lady Justice Kabuka in Chambers on 13th April, 2022 and 20th May, 2022

For the Applicant : Mr. R. Petersen, Messrs. Chibesakunda & Company.

For the Respondent: Ms. S. Kalima- Banda, Messrs. J & M Advocates.

R U L I N G

Cases referred to:

1. Guardall Security Group Limited v Reinford Kabwe CAZ Appeal No. 44 of 2019
2. Finsbury Investments Limited v Antonio Ventriglia and Manuela Ventriglia SCZ No. 02/ 2019
3. ZEGA Limited v Zambia Revenue Authority Appeal No. 96 of 2018
4. Bidvest Food Zambia Limited, Chipkins Bakery Supplies (Pty) Ltd., Bidvest Group Limited v CAA Import and Export Ltd. Appeal No. 56 of 2017

Legislation referred to:

1. The Court of Appeal Act No. 7 of 2016, SS. 13, 24 (1) (c)

2. The Industrial and Labour Relations (Amendment) Act of 2008, S. 19 (3) (b) (ii)
3. Zambia Revenue Appeals Tribunal Regulations Statutory Instrument No.143 of 1988.

Introduction

1. By motion filed on 30th March, 2022 the applicant is seeking leave to appeal to this Court against part of a ruling that was delivered by the Court of Appeal on 16th December, 2021. The application comes by way of renewal, the Court of Appeal having declined the applicant's initial application that was made to that court.

Background

2. According to the parties' affidavits and Skeleton Arguments filed in support and in Opposition to the motion, the respondent was dismissed from his employment with the applicant. Unhappy with the dismissal, the respondent on 23rd July, 2013 went to file a complaint in the Industrial Relations Court Division of the High Court ("IRD"). Upon hearing the matter, the IRD on 29th December, 2019 delivered a judgment in favour of the respondent.
3. Aggrieved with the IRD judgment, the applicant appealed to the Court of Appeal. Before the appeal could be heard, however, the applicant raised preliminary issues against its own appeal contending that the IRD judgment, was disposed of after one year from the date on which

the complaint was presented, contrary to law and established jurisprudence. On that premise, the applicant implored the Court of Appeal to:

- (i) declare the IRD judgment null and void; and
- (ii) not to exercise the discretion to order remit of the matter to the IRD for re-hearing on the basis that it was statute barred.

4. Upon consideration of the preliminary issues, the Court of Appeal in its Ruling dated 16th December, 2021 and now subsection of this motion, referred to **section 19 (3) (b) (ii) of The Industrial and Labour Relations (Amendment) Act of 2008** (“section 19 (3) (b) (ii)”) which provides that:

“The Court shall dispose of the matter within a period of one year from the day on which the complaint or application was presented.”

5. On account of the trial court’s failure to comply with the above provision, the Court of Appeal affirmed its earlier decision in the case of **Guardall Security Group Limited v Reinford Kabwe¹** by finding on ground (i) of the preliminary issue, that the IRD judgment that was delivered after a period of six years from presentation of the complaint was null and void for want of jurisdiction and accordingly set it aside.

6. On ground (ii) of the preliminary issue the applicant argued that, the matter was time barred as seven years had since lapsed from the time the cause of action arose and that the Court of Appeal did not have discretion to waive the statute bar. In resolving that contention, the Court of Appeal relying on our decision in **Finsbury Investments Limited v Antonio Ventriglia, Manuela Ventriglia**² opined that *‘when it is found that a court acted without jurisdiction, the parties are restored to the state they were in before the jurisdiction lapsed and the right of a party to litigate is not necessarily put to an end.’*
7. The Court of Appeal further noted that on the facts of this particular case the complaint was in fact filed ‘correctly’ and the only infraction was the court’s failure to dispose of the matter within one year from the date of its filing. That since what was set aside is the judgment only, the complaint is still before the IRD and the issue of the matter being statute barred did not arise.
8. Accordingly, an order was made for a remit of the record to the IRD for re-hearing of the complaint by another judge of competent jurisdiction. Further, and in order to comply with the time limit, the complaint was also deemed to have been filed on the date of the ruling. It is against these pronouncements that the applicant has anchored its proposed grounds of appeal questioning the import of

section 19 (3) (b) (ii) as follows:

- (i) *whether on a proper interpretation non-compliance with **section 19 (3) (b) (ii)** affects only a judgment delivered, or the entirety of the proceedings.*
- (ii) *if the Court loses jurisdiction over the entirety of the proceedings that do not comply with **section 19 (3) (b) (ii)** whether the complaint must be filed anew.*
- (iii) *whether the Court of Appeal has jurisdiction to remit the matter to the IRD.*

9. The contention of applicant in sum, was that, its proposed grounds of appeal, address the consequences not only to the judgment, but to the entire proceedings, as a result of the IRD's failure to determine a matter within the one-year period provided by law. Counsel argued that, in coming to its decision in the **Guardall**¹ case, the Court of Appeal relied on this Court's decision in **ZEGA Limited v Zambia Revenue Authority**³ as held that:

“where a judgment was delivered after the court had lost jurisdiction, that judgment was null and void and the matter had to be re-heard.”

10. The submission on the point was that the underlying legislation subject of interpretation in those two cases was different. In the **ZEGA**³ case, the relevant law was the **Zambia Revenue Appeals Tribunal Regulations Statutory Instrument No.143 of 1988**

which set a time line for delivery of a written decision, but not for determination of the whole matter. That being the case, only the decision is affected by failure to deliver within the prescribed time-line. The said position was contrasted from the effect of **section 19 (3) (b) (ii)** which gives a timeline for determination of the matter as a whole.

11. Counsel submitted that it is conceivable under **section 19 (3) (b) (ii)** that the one-year period provided can lapse before the matter is even heard. It can also lapse following the hearing but before a decision is made. That this is the reason the questions in the proposed appeal seek interpretation of the impact of non-compliance with **section 19 (3) (b) (ii)** on the proceedings as a whole and not just on the judgment. It was contended that a point of law of public importance within the meaning of section 13 of the Court of Appeal Act No. 7 of 2016 has thus, been raised, ripe for determination by this Court.
12. In her response learned Counsel for the respondent contrasted the two positions taken by the applicant *vis as vis* the preliminary issues raised against its own appeal as reproduced at paragraph 3 (i)-(ii) above and in its proposed grounds of appeal set out at paragraph 8. She underscored the point that, the matter being statute barred does not arise as the applicant before the Court of Appeal, was not

challenging the finding that the complaint was filed correctly and the only infraction was the IRD's failure to dispose of the matter within the one-year time limit. Counsel noted that, while in the Court of Appeal the applicant was imploring that court not to exercise its discretion of remitting the matter to the IRD for re-hearing, the applicant before this Court, now wants to argue that the Court of Appeal does not have jurisdiction to remit the matter to the IRD.

13. The submission was that, from the clear distinction between the questions raised for determination in the Court of Appeal and those raised before this Court in the proposed grounds of appeal, it is evident that the applicant's intended appeal is frivolous and vexatious, has not met the criteria set out in **section 13 of the Court of Appeal Act** and is only aimed at depriving the respondent further.
14. The case of **Bidvest Food Zambia Limited, Chipkins Bakery Supplies (Pty) Ltd., Bidvest Group Limited v CAA Import and Export Ltd. Appeal No. 56 of 2017⁴** was cited as authority for the submission that, it is not the novelty *per se* that makes a point of law one of public importance. Hence, the mere fact that the Supreme Court has not pronounced itself on the import of **section 19 (3) (b) (ii)** does not make the issue one of public importance. It was further submitted, that the effect of the said section has, in any event,

already been addressed by the Court of Appeal making it unnecessary for an appeal to be tabled before this Court.

Submissions at the Hearing

15. When the application came up for hearing before me on 13th April, 2022 learned Counsel for the parties augmented their Skeleton Arguments and submissions, orally. Substantively, these were a rehash of their written Skeleton Arguments and submissions. For his part, Counsel for the applicant pointed out that the current understanding of the **Guardall**¹ case by the lower courts is that, where a High Court loses jurisdiction for reasons that it failed to comply with **section 19 (3) (b) (ii)**, the jurisdiction can be conferred by re-allocating the matter upon which time starts to run afresh.
16. Further, that the IRD itself can reallocate the matter after the one-year period thereby re-setting the time. In some instances, the matter is actually re-allocated to the same judge. The case of *Mwenya Joseph v DG Partners Comp No. IRC LK/89/2018* was cited to illustrate such an approach, where after noting that the one-year period had lapsed the dealing Judge, Mr. Justice E. Mwansa, was quoted to have renewed the one -year period by a ruling stating: *"I am thus directing that for purposes of computing time, today will be*

considered the date of filing or reallocation, whichever is appropriate.....”

17. It was contended that the determination by the Supreme Court of the proposed grounds of appeal will settle once and for all, the question whether the re-allocation of a matter can cure non-compliance with **section 19 (3) (b) (ii)**. Attention was also drawn to **section 24 (1) (c) of the Court of Appeal Act No. 7 of 2016** that gives the Court of Appeal power to set aside a judgment and to order the matter to go for re-trial, which that Court stated it invokes when sending a matter back to the High Court when that court had lost jurisdiction. Counsel for the applicant submitted that the overarching question, whether the court can confer jurisdiction merely by remitting a matter for re-allocation, is an important question that not only transcends the particular case but also transcends the IRD Act.
18. In her oral augmentation in response, learned Counsel for the respondent highlighted a number of consequences suffered by litigants, some of which I will return to later in this ruling.

Consideration of the Application for Leave to Appeal and Decision

19. I have considered the affidavit evidence, the parties Skeleton

Arguments and submissions, the applicable law and various decided cases referred to by Counsel.

20. I note that the applicant has no quarrel with the Court of Appeal ruling of 16th December, 2021 as declared the IRD judgment null and void for having been delivered after a period of one year from the date that the complaint was filed. It is the orders that followed, directing a remit of the record and re-hearing of the matter with which the applicant is aggrieved. They are the basis the applicant decided to launch an appeal to have the import of **section 19 (3) (b) (ii)** pronounced upon by this Court.
21. The applicant's argument constituting the crux of the intended appeal is that, *'on a proper interpretation, non-compliance with **section 19 (3) (b) (ii)** results in the court losing jurisdiction over the whole of the proceedings and not only a judgment delivered.'* The applicant argues that, this issue constitutes a point of law of public importance as it affects all litigants that have recourse to the IRD and who may be caught up by the one-year period.
22. For her part, I also note that learned Counsel for the respondent, outlined how the section in issue which according to her, in very clear terms requires matters taken before the IRD to be disposed of within a year, may result in inflicting a lot of injustice if the

interpretation sought by the applicant were to be allowed. It was contended that considering the huge volume of cases, of which I was prompted to take judicial notice, accepting the applicant's proposition of the IRD's total loss of jurisdiction to hear or determine a matter upon expiry of one year, would result in many litigants being caught up in the web of **section 19 (3) (b) (ii)**, through no fault of their own.

23. Counsel for the respondent contended that, it would not have been the intention of parliament in enacting **section 19 (3) (b) (ii)** to have the IRD dismiss all cases regardless of the circumstances nor treat the matter as statute barred when the litigant would have filed the complaint within time and the delay in determining the matter within the one -year prescribed period, is totally beyond his control. Hence, the judges in the courts below, were being confined to interpret the section in a manner that does the most justice. This, according to Counsel, is what the Court of Appeal did in **Guardall**¹ as well as in this case now before me and subject of this ruling. To this list of efforts to curtail the adverse consequences of the expiry of the one-year period, I take the liberty of adding the ingenuity of renewing the one-year period by a mere pronouncement of the IRD judges

themselves, as happened in the *Mwenya Joseph* case, referred to by learned Counsel for the applicant.

24. It is premised on considerations outlined at paragraphs 20-24 that I now turn to the real question calling for determination in this application. This is, whether the issues in the proposed grounds of appeal, set out earlier at paragraph 3, raise a point of law of public importance that meet the threshold envisaged in **section 13 of the Court of Appeal Act**, as to entitle the applicant to the grant of the permission it is seeking to come to this Court on appeal. This Court has in the recent past consistently and in a considerable number of cases, including the **Bidvest⁴** case cited by Counsel, held that, for a legal question to be regarded as a point of law of public importance:

“..... it must have a public or general character rather than one that affects the private rights or interests of the parties in a particular dispute.”

25. In that regard, I cannot agree more with learned Counsel for the respondent and take judicial notice of the fact that, at the time of writing this ruling, the number of cases before the IRD is well beyond the number of judges that should hear them. In the event, it is inevitable that for some of those cases, the one-year period may lapse

before hearing is concluded, or if the hearing would already have been concluded, before judgment is delivered. Time may also lapse even before allocation for hearing to respective judges is made. The number of litigants to be affected by those eventualities is most certainly, considerable and goes well beyond the parties to this matter.

26. There is therefore, need for this Court to clarify whether loss of jurisdiction on expiry of the one-year period provided in **section 19 (3) (b) (ii)** affects the entire proceedings, including cases not allocated. Further, if the interpretation of the Court of Appeal in the **Guardall**¹ case and in its' ruling in *casu*, is to be accepted as the settled legal position, does loss of jurisdiction upon expiry of the time limit only affect the judgment and the individual judge seized with the particular matter, such that another judge of the IRD, still retains jurisdiction to hear such matter and with time starting to run anew from the date that the matter is re-allocated?
27. Those are the issues affecting the IRD and on which guidance is

needed by pronouncements of this Court. In stating so, I am alive to the fact that, the issues may also be settled more holistically and expeditiously settled by legislative intervention. For purposes of determining this application for leave to appeal, however, I find the question as to whether on a proper interpretation non-compliance with **section 19 (3) (b) (ii)** affects only a judgment delivered, or the entirety of the proceedings, one that raises a point of law of public importance and meets the threshold in **section 13 (3) (a) of the Court of Appeal Act.**

Leave to appeal is accordingly granted and the applicant is to file its appeal within 14 days of the date hereof.

Costs of the application will be in the cause.



J. K. KABUKA
SUPREME COURT JUDGE