IN THE SUPREME COURT FOR ZAMBIA **APPEAL No. 61/2014**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

PETER ALLAN MBEWE	**APPELLANT**
AND	
THE WORKERS COMPENSATION FUND CONTROL BOARD	**1st RESPONDENT**
THE ATTORNEY GENERAL	**2nd RESPONDENT**

CORAM: Muyovwe, Kabuka, and Chinyama, JJS.

On the 6th September, 2016 and 12th September,2016.

FOR THE APPELLANT: **N/A**

FOR THE 1st RESPONDENT : Legal Counsel, Workers Compensation Fund Control Board.

FOR THE 2nd RESPONDENT : Ms. M. Kalimamukwento, Assistant Senior State Advocate.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Water Wells Limited v Wilson Samuel Jackson (1984) Z.R. 98 (S.C.)
2. Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 60
3. Stanley Mwambazi v Morester Farms Limited (1977) Z.R. 108 (S.C.)
4. Zambia Breweries Limited v Central and Provincial Agencies (1983) Z.R. 152 (H.C.)
5. Donovan v Gweloys (1990) 1 WLR 472
6. Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (1984) Z.R. 81 (S.C.).
7. National Milling Corporation Limited v Grasswell Gibson Zulu SCZ Appeal No. 107/2013.
8. Boart Longyear (Zambia) Limited v Austin Makanya SCZ Appeal No. 9 of 2016.

Legislation referred to:

The Industrial and Labour Relations Act Cap. 269 (as Amended) by Act No. 8 of 2008, S.85 (3)(a)(i); (5).

The appellant appeals against a ruling of the Industrial Relations Court dated 6th February, 2014, in which the court below

Secretary at his office over some of his demands for payment which were not accepted by the respondents.

Thereafter, when he did not hear from the Permanent Secretary on those issues, the appellant by letter dated 26th July, 2012, decided to appeal to the Minister. In his said letter of appeal, the appellant complained that, the three months' payment in lieu of notice which was made to him excluded a few entitlements which were incidental to his employment. He identified these entitlements as: three months' rent monies; access to entertainment; club membership; and swimming pool cleaning services. There was no reply to this letter.

On 12th September, 2012 the appellant decided to redirect his request to the 2nd respondent. The 2nd respondent channeled his reply through the 1st respondent but only accepted to settle the claim relating to payment of rent. This was done, notwithstanding that three months' rent had already been paid to the landlord for the house the appellant had been occupying at the time his services were terminated, but which he had decided to vacate. By letter dated 10th January, 2013, the 2nd respondent requested the

appellant to formally acknowledge the payment for rent, by appending his signature in the space provided on the same letter.

No further correspondence was exchanged between the parties in relation to the rest of the appellant's claims which were not accepted by the respondents.

On the 27th of November, 2013 however, the appellant decided to bring an application before the Industrial Relations Court for leave to file a complaint against the respondents out of time. The application was made pursuant to section 85 (3) of the Industrial and Labour Relations Act Cap. 269. He cited as reasons for the delay in making the application, that all his attempts to settle the matter administratively with the Permanent Secretary, through several letters, had been unsuccessful.

In considering the application, the court reviewed the five letters that were written by the appellant to the respondents. The court also referred to S. 85 (3) (a) which provides for the lodging of a complaint within 90 days from the date of exhausting the administrative channels of redress. Applying that provision to the facts of this case, the court below found that, the letter from the

Permanent Secretary to the appellant dated the 5th July, 2012 ended all attempts of having the matter resolved administratively. The court then noted that, by instituting proceedings on 27th November, 2013, which was thirteen (13) months later, the appellant had waited too long and that the delay was inordinate. Leave to lodge complaint out of time was accordingly denied.

Dissatisfied with that ruling, the appellant now appeals to this court on the following grounds:

1. **The trial court erred in law and fact when it held that the letter dated 5th July 2012 authored by Mr. Amos Malipenga who was Permanent Secretary in the Ministry of Information, Broadcasting and Labour addressed to the applicant closed all administrative channels available to settling disputes;**

2. **The court erred both in law and fact when it held that the delay on the part of the appellant to commence the action was inordinate;**

3. **The trial court erred in law and fact when it failed to do substantial justice and allowed itself to be fettered or constrained by procedural default or technicalities.**

To augment the grounds of appeal, counsel on both sides filed written heads of argument.

In ground 1 of his heads of argument, learned counsel for the appellant contended that, the Industrial Relations Court has power

to extend the period in which a complaint or application may be presented before it, as provided under section 85 (3) (a) and 85 (3) (b) (i). That the said sections grant a period of 90 days which may be extended by the court on application under section 85 (3) (b) (i).

Counsel argued, it was not in dispute, that the appellant sought to exhaust all administrative channels available to him through his correspondence to the Permanent Secretary at the Ministry of Information, Broadcasting and Labour; and finally, with the Minister of the same Ministry. Counsel's submission was that, the court below erred when it found that the letter dated 5th July, 2012 from the Permanent Secretary had closed the administrative channels available for settling disputes; in view of evidence on record showing the appellant had further appealed to the Minister of Labour, as the final authority.

In the circumstances, counsel's argument was that, the letter which closed all administrative channels was that of 10th January, 2013. In this letter, reference was made to the meeting between the appellant and the 1st respondent of 23rd December, 2012 which was held for purposes of settling the appellant's terminal benefits and

other issues he had raised. The submission on the point was that, in view of this evidence, time only started to run three months from 10th January 2013. That the appellant should therefore have commenced his action before the 10th of April 2013. Having applied to do so on 27th November, 2013, the delay was only seven (7) months and not thirteen (13) months. In the premises, that the decision by the learned judge to refuse to grant him leave to lodge the complaint out of time should not be sustained for reasons that, the seven (7) month delay was not inordinate.

This argument was stretched to ground 2, faulting the finding of the court below, that the delay was inordinate. Counsel re-iterated his submission, that the thirteen (13) months delay stated in the ruling of the IRC was erroneously arrived at, as the court did not take into account the appeal made by the appellant to the Minister by his letter dated 26th July, 2012 which culminated in the final letter of reply dated 10th January, 2013. It was counsel's argument that, if the time is taken to have started running from that date, the period of delay up to 27th November, 2013 when the

application to file complaint out of time was made is only 7 months, which counsel re-iterated, was not inordinate.

Counsel further argued, that the appellant had been subjected to investigations by the Task Force on Corruption on allegations of abuse of office prompted by a former employee who had reported the matter. The said investigations were underway and no certificate of clearance was ever issued by the Task Force to clear the appellant. Counsel's contentions in this regard were that, the seven (7) months delay was caused by reason of waiting for a certificate of clearance from the Task Force.

In relation to ground 3, the submissions were that, the appellant has a *bonafide* and meritorious complaint; and that cases should be decided on their merits and not fail on procedural technicalities. In support of this submission, learned counsel cited the cases of **Water Wells Limited v Wilson Jackson (1); Zambia Revenue Authority v Jayesh Shah (2); Mwambazi v Morrestor Farms Limited (3)** and **Zambia Breweries Limited v Central and Provincial Agencies (4)**. In conclusion, counsel's submission was that, the prospects of success were high and that unless leave to file

complaint out of time is granted, the appellant would suffer a grave injustice.

In his written heads of argument filed in response, learned counsel for the 1st respondent submitted that S.85 (3) (a) proscribes the IRC from accepting a complaint unless it is presented within 90 days from the occurrence of the event or where administrative channels are followed, from the date when the complainant exhausted such administrative channels. It was the 1st respondent's contention that, the complainant had exhausted all administrative channels in having his grievance regarding his entitlements heard. Counsel argued that, the complainant should have commenced his action 90 days from the date of receipt of the letter dated 5th July 2012 from the Permanent Secretary. That this letter highlighted which claims the respondents were willing to settle and which ones they were not.

Counsel submitted, it is this letter that closed all administrative channels available to the appellant. That even if it was argued that the complainant's last communication was 10th January 2013, the period of 7 months was still inordinate. It was

his submission in conclusion that the lower court cannot be faulted when it found that, the letter of 5th July 2012, had closed the administrative channels available to the complainant for redress.

The submissions of learned counsel for the 2nd respondent in response were that, the appellant's contract of employment was terminated on 23rd April 2012. His various letters show his last communication with the 2nd respondent in relation to settling his claim was on 5th July, 2012. This letter set out all the appellant's claims which the 2nd respondent was willing to settle. The appellant however wrote a further letter dated 12th September, 2012. Counsel submitted as the 2nd respondent did not react to this letter, it is clear that the letter of 5th July, 2012 is the one that closed the administrative channels available to the appellant.

On ground 2, the 2nd respondent's first argument was that, under section 85 (3) (a) (i) of the Industrial and Labour Relations Act, it is not mandatory for the court to extend time. Secondly, her further argument was that, in any event, the delay in filing the complaint by the appellant was inordinate as it was made over a

year after the close of administrative remedies that were available to him.

Finally, in relation to ground 3, the submissions by counsel were that, the Industrial Relations Court cannot ignore statutory time limits in the name of doing substantial justice. To fortify her submission, she cited the case of **Donovan v Gweloys (5)** in which it was held that, the primary purpose of a limitation period is to protect the defendant from the injustice of dealing with a stale claim he did not expect. In this regard, the submissions of learned counsel for the 2nd respondent in conclusion were that, the respondents would suffer an injustice if one year after the close of administrative channels, they were expected to deal with such a claim.

We have painstakingly considered the arguments and submissions from counsel, together with the cases referred to.

Starting with ground 1, the appellant here claims that the letter from the Permanent Secretary in the Ministry of Information, Broadcasting and Labour dated 5th July, 2012 did not close all administrative channels available to him for settling the dispute. We

have looked at **S. 16 of the Worker's Compensation Act No. 10 of 1999** which provides for the appointment of the Commissioner by the Minister, in consultation with the 1st respondent.

Against that backdrop, we find merit in the appellant's argument that when he received no further communication following upon his meeting with the Permanent Secretary of 6th July, 2012, the appellant was entitled to pursue the matter further by appealing to the Minister, which he did through his letter dated 26th July, 2012. In view of that letter, and that of 12th September 2012 in which the appellant sought further audience with the said Minister; the finding by the court below that the appellant had exhausted all administrative channels available to him by 5th July, 2012, is clearly not supported by this evidence that is on record.

We accordingly do not accept submissions of learned counsel for the 1st and 2nd respondents, that the letter of 5th July, 2012 marked the end of the administrative channels of redress. In view of the appellant's further letter of appeal to the Minister dated 26th July, 2012 and the response thereto of 10th January, 2013; the court below fell in error when it failed to take the said letter into

account for purposes of determining whether the period of delay was inordinate or not. Had it done so, it would have found this is the letter which marked the end of the appellant's administrative channels of redress and not that of 5th July, 2012.

To that extent, ground 1 of the appeal has some merit.

Coming to ground 2, in which the appellant faults the finding of the court below, that the delay on his part to file the complaint was inordinate. We note in this regard that, S. 85 (3) (a) which is in issue stipulates the period within which a complaint should be lodged in mandatory terms as follows:

> "85. (3) **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;**

In excusing the delay in lodging his complaint, the appellant in his submissions advanced two explanations. First he said that he was waiting for a response to his letter dated 26th July, 2012, (which

never came). His second excuse was that, there were on-going investigations by the Task Force on Corruption that were being conducted. These investigations related to allegations made against him for mismanagement of the 1st respondent and abuse of office. Consequently, he could not file his complaint as he was still awaiting a clearance certificate from the Task Force.

We find the first explanation of indefinitely waiting for a response from the Minister not one supported by the affidavit evidence which is on record. This is particularly in view of the fact that, the letter dated the 5th July, 2012 had a tone of finality, as regards the respondent's position on the claims made by the appellant which it was not willing to consider. As earlier noted, these were identified as claims for three months' rent monies; access to entertainment; club membership; and swimming pool cleaning services. The appellant's appeal letter of 26th July, 2012 only managed to have the respondents accept the claim relating to rent, as communicated to him by letter dated 10th January, 2013. The respondents were categorical on not being prepared to entertain the other three remaining claims.

Taking into account that the 1st respondent paid all the other claims of the appellant and even went ahead to process his request to purchase the motor vehicles that were availed to him on personal to holder basis, as his entitlement, during his tenure of office. These facts certainly confirm that, the 1st respondent as well as the appellant did not consider the alleged investigations a factor that could hinder them from resolving the issue of the appellant's dues. The appellant has therefore failed to advance any reasonable explanation to justify the delay in lodging his complaint based on allegedly waiting for a clearance certificate from the Task Force on Corruption.

Even if the appellant's own proposed date of when time should have started running was to be accepted, the delay of 7 months and not 13 months as found by the trial court, is still inordinate. It still remains unexplained. Section 85 (3) (a) of the Industrial Relations Act sets a 90 days statutory limit as the period within which the complainant can file his complaint or application to file a complaint after exhausting administrative channels available for redress.

In this regard, we can only draw attention of litigants, generally, to the importance of taking such procedural steps as may be necessary in pursuing their claims within the permitted statutory time limits. In the case of **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited (6)** we underscored this responsibility of the parties when we said as follows:

> *"We wish to remind appellants that it is their duty to lodge records of appeal within the period allowed, including any extended period. If difficulties are encountered which are beyond their means to control (such as the non-availability of the notes of proceedings which it is the responsibility of the High Court to furnish), appellants have a duty to make prompt application to the court for enlargement of time. 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....If the delay has been inordinate or if in the circumstances of an individual case, it appears that the delay to appeal has resulted in the respondent being unfairly prejudiced in the enjoyment of any judgment in his favour, or in any other manner, the dilatory appellant can expect the appeal to be dismissed for want of prosecution, notwithstanding that he has a valid and otherwise perfectly acceptable explanation."*

Even if we were in the present case to accept that the administrative means of redress ended by letter dated 10th January, 2013, the appellant should still have lodged his complaint at the very latest, by the 10th April, 2013. The appellant however only filed his complaint on 27th November

2013 with no plausible explanation, at all, as to what occasioned the delay. In the event, the court below cannot be faulted for finding that the delay in applying to lodge complaint out of time was inordinate.

Ground 2 of the appeal accordingly fails.

On ground 3, challenging the trial judge for failure to do substantial justice and allowing itself to be fettered or constrained by procedural default or technicalities, S.85 (5) which addresses the issue of substantial justice provides that:

> **"85. (5) The Court shall not be bound by the rules of evidence in civil or criminal proceedings, but the main object of the Court shall be to do substantial justice between the parties before it."**

It is clear from the above provision that what the court is not bound by are the procedural rules of evidence which apply in hearing civil and criminal matters. This provision can however not be stretched to cover procedural defaults relating to time limits within which specific steps are required to be taken, such as rules relating to enlargement or abridgement of time, as is the case in the High Court or Supreme Court, Rules.

We recently had occasion to give guidance on this issue in recent judgments of this court in the cases of **National Milling Corporation Limited v Grasswell Gibson Zulu (7)** and **Boart Longyear (Zambia) Limited v Austin Makanya (8).** We there stated that, in S.85 (5), the words "*shall not be bound'* must be construed purposefully so that, faced with a situation which demands the observance of the rules of evidence, the court has to interrogate the demands of justice of the case. This means that, the IRC is not bound by *rules of evidence* in criminal or civil proceedings where following such rules will prevent substantial justice from being done".

We have failed to see how the cases cited by the appellant of **Water Wells Limited v Wilson Jackson (1); Zambia Revenue Authority v Jayesh Shah (2); and Mwambazi v Morrester Farms Limited (3);** which all highlight the principle that matters should be dealt with on their merits and that triable issues should go to trial; can assist the appellant's case. The issue here is not that the matter was not heard on its merits, but rather that, the appellant did not adhere to the strict time limits for filing a complaint as

provided by the relevant legislation. He waited seven (7) months from the occurrence of the last event to institute proceedings. The limitation period is intended to ensure that litigation is not left open ended at the whim of the complaint and leaving the respondent at his mercy. A respondent is just as entitled to justice as a complainant and this includes the protection of the respondent from the injustice of having to deal with a stale claim.

Ground 3 of the appeal also fails.

The substance of the appellant's appeal was to have the finding of the court below reversed and allow him to proceed to lodge his complaint out of time. This has failed. His notional success on ground 1 of the appeal has not assisted the appellant's case. In sum, the outcome of this appeal is that it is devoid of any merit and it is hereby dismissed.

Costs of the appeal will be borne by the respective parties.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE