2016/HP/816

IN THE HIGH COURT OF ZAMBIA

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

LOVENESS JENDEENDA MIYOBA **PLAINTIFF**
(Suing as Administratrix of the estate Of the late GEOFFREY HANTUNDULU JENDEENDA)

AND

CHIBOTE LIMITED **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 14th DAY OF DECEMBER, 2016

For the Plaintiff : *Mr G. Pindani, Chonta, Musaila and Pindani Advocates*
For the Defendant : *Mr K. Musabandesu, M & M Advocates*

R U L I N G

CASES REFERRED TO:

1. ***R V Essex Justices and The Attorney General 1982 3 ALL ER 926***
2. ***DPP V Jack Lwenga 1983 ZR 37***
3. ***Miyanda V The High Court 1984 ZR 62***
4. ***P C Cheelo and Others V ZCCM SCZ No 27 of 1999***
5. ***Ituna Partners V Zambian Open University Appeal No 117 of 2008***
6. ***Access Bank V Group 5 and Zicon Business Park SCZ/ 8/ 52/ 2014***

LEGISLATION REFERRED TO:

1. ***The Constitution of Zambia Act No 2 of 2016***
2. ***The High Court Act, Chapter 27 of Laws of Zambia***
3. ***The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia***
4. ***The Limitation Act, 1939***

This is a Ruling on an application made by the Defendant pursuant to Order 11 Rule 1 (4) of the High Court Rules, Chapter 27 of the Laws of Zambia, to set aside the writ of summons and statement of claim issued on 20th April 2016. Counsel relied on the affidavit filed in support of the application, sworn by Hatchwell Sikaundi and filed into court on 17th October, 2016. Counsel further relied on the skeleton arguments and list of authorities.

He stated that the facts prompting the application were clearly laid out in paragraphs 5 to 20 of the affidavit, and were also summarized in paragraphs 1 to 9 on page 2 of the Defendant's skeleton arguments. It was stated that the matter was commenced on 25th April 2016 when it had already been pronounced upon, and therefore this court lacks jurisdiction.

He stated that the affidavit evidence reveals that this matter was initially sought to be commenced in the Industrial Relations Court on 4th December, 2015, when the Plaintiff as Complainant lodged a summons for leave to file the complaint out of time, pursuant to Section 85 (3) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.

Counsel argued that at the time, the Industrial Relations Court was not yet a division a High Court as established under Article 133 (1) and (2) of the Constitution of Zambia Act No 2 of 2016. He stated that the Ruling of the Court was exhibited as 'HCS1' on the affidavit in support of the application, dismissing the application on 10th March, 2016. That the Ruling directed that any person who was dissatisfied with the Ruling, could appeal to the Supreme Court within thirty days.

It was stated that it was now ten months later, and the Plaintiff had never appealed. That by coming to the High Court the Plaintiff remains dissatisfied with the Ruling of the Industrial Relations Court, but had never appealed that decision. Therefore the Plaintiff was attempting to forum shop in the High Court by seeking the same substantive relief that she had wanted to seek in the Industrial Relations Court.

Counsel further submitted that following the enactment of the Constitution of Zambia, Act No 2 of 2016 on 5th January 2016, the Industrial Relations Court which dismissed the Plaintiff's application is now a division of this Court, as stipulated in Article 133 (2). Therefore in light of this provision, the matter cannot proceed before this Court, as the Court has already pronounced itself on the matter, and accordingly lacks the jurisdiction, as it is functus officio.

It was argued that if the Plaintiff wants the matter to be heard on its merits, she should have appealed to the Supreme Court. Therefore the Plaintiff by instituting the matter before the High Court is abusing the court process. With regard to the definition of

the Court being functus officio, reference was made to page 5 of the skeleton arguments where reliance was placed on the case of ***DPP V JACK LWENGA 1983 ZR 37.*** It was stated that the case held that once a matter is dismissed, the Court is functus officio.

Further reliance was also placed on the case of ***R V ESSEX JUSTICES AND THE ATTORNEY GENERAL 1982 3 ALL ER 926*** which held that the moment a Court announces its decision, no matter how inconvenient, it becomes functus officio, and cannot re-open or re-hear the matter.

It was also Counsel's argument that the matter before court is a purely industrial relations matter, and the only window that it can be heard is through an appeal after the Industrial Relations Court delivered its Ruling. Counsel further stated that the Plaintiff had raised a preliminary argument that the Order relied on in support of the application is non- existent. This argument he stated was seriously flawed as Order 11 Rule 1 (4) as amended by Statutory Instrument No 68 of 1998, of the High Court Rules exists.

He submitted that the Plaintiff had also argued on the retrospective application of the Constitution of Zambia Act No 2 of 2016. Again Counsel's view was that the argument in relation to this was flawed, for whereas they conceded that the Plaintiff commenced the action before the Industrial Relations Court, before the enactment of Act No 2 of 2016, by the time this action was commenced in April 2016, Article 133 (2) of Act No 2 of 2016 was already in force. Therefore the issue was not about the law being applied retrospectively in the

Industrial Relations Court case, but the current action being caught up in Article 133 (2).

It was submitted that the Plaintiff in paragraph 3.1. 2 of the skeleton arguments argued that the matter has now been commenced at the general list which is separate from the Industrial Relations Division. Counsel stated that this argument was neither here nor there as the reliefs sought are purely industrial, and are the same as those sought before the Industrial Relations Court.

With regard to the arguments by the Plaintiff touching on Section 2 (1) (a) of the Limitation Act, it was stated that it was not Counsel's argument that the matter is statute barred, but that it was about the lack of the court's jurisdiction, in light of the arguments advanced above. Thus all the authorities that the Plaintiff seeks to rely on regarding the Court having jurisdiction to hear the matter had been misapprehended and misapplied, and did not aid the Plaintiff in any way.

It was conceded that this Court has unlimited jurisdiction to hear even industrial relations matters, but that by the Plaintiff so arguing, she was admitting that the matter was a purely industrial relations matter, and on which the court had adjudicated. He prayed that the application be dismissed with costs.

In response Counsel for the Plaintiff opposed the application, and relied on the affidavit in opposition filed on 24th November, 2016, as well as the skeleton arguments of even date. Counsel stated that it was not true as argued by Counsel for the Defendant that this Court has pronounced itself on this matter.

It was submitted that there is a clear distinction between leave to file a complaint out of time, and hearing the main matter, and making pronouncements on the issues raised. Counsel stated that there had been no pronouncements whatsoever by any Court regarding the main claims sought by the Plaintiff, and that the Ruling exhibited on the affidavit in support of the application is self -explanatory, that the Industrial Relations Court did not hear any evidence from the Plaintiff relating to the main matter.

With regard to time jurisdiction, reliance was placed on the case of ***MIYANDA V THE HIGH COURT 1984 ZR 62,*** and that the first question to consider is whether the High Court has authority to hear matters arising out of pure master servant relationships, which is what forms the basis of the Plaintiff's claim in this matter. This, Counsel argued is answered in the case of ***P C CHEELO AND OTHERS V ZCCM SCZ No 27 of 1999***, where the Supreme Court held that the High Court has jurisdiction to hear masters arising out of pure master servant relationships.
It was argued that the deceased died whilst in the employ of the Defendant, and that the cause of action accrued after his death. This is within the six year period during which any litigant is at liberty to enforce their rights. Counsel also submitted that the argument that the matter is one that is purely industrial in nature is not correct.

As regards the argument that the Plaintiff by commencing this action is forum shopping, Counsel stated that this action was commenced on 25th April, 2016, within the statutory period of

limitation for commencing matters in the High Court. He stated that the Industrial Relations Court has its own rules pertaining to when a complaint can be filed, being within three months of the cause of action arising. However this does not stop a party from exercising other options that are available within the law to commence the action.

Further in the submissions Counsel stated that the Constitution of Zambia Act No 2 of 2016 came into force on or about 5th January, 2016, but that the application to file the complaint out of time was filed prior to that date on 4th December, 2015. The argument was that there is no retrospective application of the law, and thus Article 133 (2) of the Constitution relied on by the Defendant does not come into play.

It was also argued that Article 118 (2) of the Constitution of Zambia Act No 2 of 2016 provides for the right to be heard without undue regard to procedural technicalities. Therefore it would be an infringement of the Plaintiff's rights to shut her out from having her case heard on the merits. Further that to insist that this Court has got no jurisdiction to hear this matter based on the refusal by the Industrial Relations Court to grant leave under a totally different regime, would in effect be permitting the procedural technicalities that the Constitution proscribes.

It was Counsel's view that the cases of ***DPP V JACK LWENGA***, and ***R V ESSEX JUSTICES*** are criminal cases and should not be relied upon in civil matters. Counsel retracted his earlier submission regarding the non - existence of Order 11 Rule 1 (4) of the High

Court Rules, stating that the submission was made as they had not had sight of Statutory Instrument No 68 of 1998.

Counsel for the Defendant in reply stated that they accepted the argument that the Industrial Relations Court did not hear the matter on its merits, but reiterated that the Ruling was explicit that any dissatisfied party could appeal against the Ruling within thirty days.

It was also stated that there was no master servant relationship between the Plaintiff and the Defendant, and that this relationship only existed between the deceased and the Defendant. That as the Plaintiff chose to commence the action in the Industrial Relations Court in the face of the six year period, which would have allowed have her to sue in the High Court, she was therefore forum shopping. He also stated that the Industrial Relations Court had noted that the Plaintiff had gone before that Court inordinately late, as she had made the application for leave to file the complaint out of time, almost three years after the cause of action arose.

He also stated that the reliance on the Limitation Act, 1939 does not help the Plaintiff in any way. With regard to the submission on Article 118 (2) of the Constitution, it was stated that the Supreme Court in the case of ***ACCESS BANK V GROUP 5 AND ZICON BUSINESS PARK SCZ/ 8/ 52/ 2014*** had pronounced that the said article is not meant to encourage parties not to comply with the rules of practice and procedure, and that those who do so sit on their rights, as the Plaintiff had done in this case.

Counsel noted that the argument on the non – applicability of the cases of ***DPP V JACK LWENGA*** and ***R V ESSEX JUSTICES AND THE ATTORNEY GENERAL*** lacked merit, as the case of ***ITUNA PARTNERS V ZAMBIAN OPEN UNVIVERSITY Appeal No 117 of 2008,*** a civil matter had relied on the same cases. The prayer that the application be granted with costs, was reiterated.

I have considered the application. The question that seeks to be answered in this application is whether in light of the fact that the Industrial Relations Court in its Ruling dated 10th March, 2016, refused to grant the Plaintiff leave to commence the action in the Industrial Relations Court out of time, is a bar to commencing the action in the High Court?

The gist of the Defendant's argument is that the Industrial Relations Court being a division of the High Court, before which this matter has been commenced refused to hear the matter, and therefore by virtue of that refusal this Court is functus officio, and has no jurisdiction to hear the matter.

According to the Ruling which is exhibited as 'HCS1' on the affidavit in support of summons to set aside the writ of summons and statement of claim dated 17th October, 2016, the Plaintiff on 4th December, 2015 filed an application to file the complaint out of time. The cause of action relates to the payment of terminal benefits to the estate of the Plaintiff's late husband Geoffrey Jendeenda who died on 12th August 2010. The Industrial Relations Court in its Ruling stated that the Plaintiff only went to that Court two years

and seven months after the expiration of ninety days, being the time within which she should have commenced the action before that Court.

It is trite that Section 85 (3) of the Industrial and Labour Relations Act No 8 of 2008 provides that a complaint shall be filed before that Court within ninety days of exhausting administrative channels available to a complainant, or where there are no administrative channels available, within ninety days of the occurrence of the event giving rise to the complaint or action.

In short if one is to successfully commence an action in the Industrial Relations Court, they have to do so in line with that provision. Counsel for the Defendant argued that by virtue of Act No 2 of 2016 being the Constitution of Zambia Act, by the Industrial Relations Court having ruled on 10th March 2016 that the Plaintiff could not file the complaint out of time, as she sought to do so after the expiration of ninety days of exhausting the administrative channels, she cannot commence this action in the High Court, as the Industrial relations Court that declined her leave to file the complaint, is now a division of the High Court. In short this court being the same as the Industrial Relations Court has pronounced itself on the matter.

It is not in dispute that by virtue of Article 133 (2) of the Constitution of Zambia Act No 2 of 2016, which came into force on 5th January 2016, the Industrial Relations Court is now a division of the High Court. Therefore literally speaking the High Court and the Industrial Relations Court are the same courts. However the

said courts are governed by different procedural rules, and therefore commencing an action before either of the courts, has different consequences.

To my knowledge following the enactment of the Constitution of Zambia Act No 2 of 2016 which made the Industrial Relations Court a division of the High Court, the procedural rules under the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia have not been repealed and replaced. Thus they are the rules that are still governing proceedings instituted in the Industrial Relations Division of the High Court.

Section 6 of the Constitution of Zambia Act No 1 of 2016 provides that;

(1)Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of This Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended.

(2)Parliament shall, within such period as it shall determine, make amendments to any existing law to bring that law into conformity with, or to give effect to, this Act and the Constitution as amended.

Further the High Court Amendment Act No 21 of 2016 provides that;

"2. The principal Act is amended by the repeal of section three and the substitution therefor of the following:

(1) The Court consists of the following divisions:

(a) the Industrial Relations Court;

(b) the Commercial Court;

(c) the Family Court;

(d) the Children's Court; and

(e) such other specialised court as the Chief Justice may prescribe by statutory instrument.

(3) Subject to this Act and any other written law, the Chief Justice may, by statutory instrument, specify the categories of matters over which a division of the Court has jurisdiction.

(4) The Chief Justice may give practice directions to a division of the Court".

The consequence of these enactments is that until the law is harmonized by way of enactments to give effect to Article 133 (2) of the Constitution of Zambia Act No 2 of 2016, which creates the Industrial Relations Court as a division of the High Court, the rules of procedure governing the conduct of proceedings under the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia will continue in force.

Therefore the issue of the retrospective effect of Act No 2 of 2016 does not arise, and neither does the commencement of this action being caught up in the provisions of Article 133 (2) of the Constitution of Zambia Act No 2 of 2016, arise in light of the provisions of Section 6 of the Constitution of Zambia Act No 1 of 2016.

This brings me to the argument advanced that as the High Court and Industrial Relations Court are now the same, the Plaintiff cannot commence this action in the High Court, as the Industrial Relations Court being the same court has already pronounced itself on the matter. This argument cannot stand as the rules of the Industrial Relations Court limit the time for commencement of actions to ninety days of either exhausting administrative channels or where such administrative channels do not exist, to ninety days within the cause of action giving rise to the complaint arising. The High Court on the other hand has jurisdiction to hear matters arising from simple contracts within a period of six years from the cause of action arising.

Therefore the cases of ***DPP V JACK LWENGA*** and ***R V ESSEX JUSTICES AND THE ATTORNEY GENERAL*** do not apply to this matter as the issue of the Court being functus officio does not arise.

Suffice to state that the argument that principles of criminal law do not apply in civil matters is without merit, as principles of law are universally applicable, except where the law specifically provides otherwise. Further the issue of justice being administered without

undue regard to procedural technicalities, equally does not apply in this matter, as the current law as it relates to proceedings in the Industrial Relations Court is still in force, and the choice of whether one commences an action in the Industrial Relations Court or the High Court is still available. I do however agree that Article 118 (2) of the Constitution of Zambia Act No 2 of 2016, was not enacted to permit litigants to disregard procedural rules. Litigants who choose to do so, do so at their own peril.

Having established that the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia still governs proceedings instituted in the Industrial Relations Court, then only matters that are within the exclusive jurisdiction of that Court as specified in Section 85 of the Act which provides that;

"85 (1) The Court shall have original and exclusive jurisdiction to hear and determine any industrial relation matters and any proceedings under this Act.

(9) For the purpose of this section "industrial relations matters" shall include issues relating to-

(a) inquiries, award and decisions in collective disputes;

(b) interpretation of the terms of awards, collective agreements and recognition agreements;

(c) general inquiries into, and adjudication on, any matter affecting the rights, obligations and privileges of employees, employers and their representative bodies", can be adjudicated upon only by that Court.

The Plaintiff's claim is for the payment of terminal benefits due to her husband's estate, which claim arises out of a pure master servant relationship. The argument that the Plaintiff was not in such a relationship with the Defendant is in my view absurd, as the Plaintiff has sued as a personal representative of her late husband's estate, and her late husband enjoyed that relationship with the Defendant.

Thus going by the decision in the case of ***P.C.CHEELO AND 9 OTHERS v ZAMBIA CONSOLIDATED COPPER MINES LIMITED SCZ No 27 of 1999,*** where the Plaintiffs had sued claiming their redundancy benefits, and the Supreme Court had held that "***the High Court has jurisdiction to hear matters arising out of a pure master and servant relations***", the Plaintiff can commence the action before the High Court, which is not bound by the ninety day period like the High Court.

To argue that the only way this matter can be heard on its' merits after the Industrial Relations Court refused to grant leave to file the complaint out of time, is by way of appeal, lacks merit, as the application for leave to file the complaint out of time relates to the limitation period for filing matters before the Industrial Relations Court. Once that Court found that the Plaintiff was out of time, while strictly speaking the right to appeal against such a ruling exists, it would not guarantee the matter being heard on the merits.

I say so because the Appellate Court was likely to agree that the leave was rightly refused, for being time barred. The Plaintiff would then have had no recourse.

As matters involving simple contracts, an employment being one of them, are subject to the limitation period provided in the Limitation Act, 1939, which has been extended to Zambia, by virtue of Section 2 of British Acts, Extension Act, Chapter 10 of the Laws of Zambia, the Plaintiff if within such time limit can commence the matter.

Section 2 of the said Limitation Act, 1939 provides that actions arising out of simple contracts shall be commenced within a period of six years from the cause of action arising. There is no argument that was made that the Plaintiff is outside that limitation period. In fact Counsel for the Defendant in his submissions stated that it was not their argument that the action is statute barred in terms the Limitation Act.

That being the position, and while it is not desirable that litigants commence actions concerning the same subject matter before different courts, the Industrial relations Court did not hear the Plaintiff's substantive claim, but found that the action could not be commenced before that Court, as the rules of that Court limit the commencement of actions to ninety days after exhausting administrative channels, or where no such administrative channels exist, to ninety days after the event giving rise to the action.

The High Court however hears and determines matters arising out of simple contracts pursuant to Section 2 (1) of the Limitation Act, 1939, being within six years from the cause of action arising, and the matter having been commenced within the said statutory period, is properly before the Court.

The Defendant's application to set aside the writ of summons and statement of claim fails on that basis, and it is accordingly dismissed, with costs to the Plaintiff, to be taxed in default of agreement. The Defendant shall proceed to file its defence if any, within fourteen days from today, failure to which the Plaintiff shall be at liberty to enter judgment in default. Leave to appeal is granted.

DATED THE 14TH DECEMBER, 2016

Kaunda

S. KAUNDA NEWA
JUDGE