IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(*Civil Jurisdiction*)

Appeal No. 106/2014
SCZ/8/54/2014

BETWEEN:

CHILUMBA GERALD **APPELLANT**

AND

ZESCO LIMITED **RESPONDENT**

Coram: **Mambilima, CJ, Kaoma and Musonda, JJS**
on 7th March, 2017 and 10th March, 2017

For the Appellant: In person

For the Respondent: Mr. A. Sike, Chief Legal Officer, ZESCO Limited

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Nkhuwa v Lusaka Tyre Services Limited (1977) ZR 43**
2. **Jonathan Lwimba Mwila v World Vision Zambia: SCZ Appeal No. 193 of 2005 (unreported)**

Legislation referred to:

The Industrial and Labour Relations Act, CAP. 269

This is an appeal arising from the refusal, by the Industrial Relations Court, to grant the appellant leave to lodge his Complaint out of time.

The history and background facts surrounding this appeal are as plain and simple as can be.

On 1st November, 2010 the appellant was employed by ZESCO Limited, the respondent, as a Meter Reader. His employment contract was for a fixed term of 3 years. This meant that his employment contract was to expire on 31st October, 2013.

We wish to momentarily pause here to observe that, according to the affidavit which the appellant had sworn and filed in the court below in support of his application for leave to lodge his complaint out of time, his initial fixed term employment contract with the respondent had, in fact, run from 1st November, 2007 to 31st October, 2010. However, unlike his contract dated 1st November, 2010 which was evidenced in writing, there is no such evidence in respect of this first contract.

On 28th December, 2011, the respondent wrote to the appellant and advised him that his position had been re-designated to that of

cashier but that his other terms and conditions of employment were to remain the same as had been attached to his previous position.

Following the re-designation of his position, the appellant was also transferred to Mumbwa with effect from the 28th December, 2011. According to the evidence on record, the appellant did not immediately relocate to take up his position at Mumbwa.

On 7th February, 2012 the appellant was charged with the disciplinary offence of absenteeism from duty involving 5 consecutive days. On 9th February, 2012 the respondent wrote to the appellant advising him that he had been suspended from duty with effect from that date. The appellant was consequentially placed on half pay pending the determination of his case.

According to the record, from the time when the appellant was transferred and his job re-designated, that is, on 28th December, 2011 he neither reported at his new station (Mumbwa) nor his former station (Kabwata, Lusaka). The record further discloses that a disciplinary hearing arising from the appellant's first transgression took place and the committee which had sat to hear the matter found the appellant guilty and recommended his suspension for one month

and without pay. The committee also gave the appellant a final warning.

After serving his suspension, the respondent wrote to the appellant on 19th April, 2012 and directed him to report at his new station at Mumbwa. The appellant did not immediately report for duty at his new station but only did so on 17th May, 2012 and only after he had been telephoned and reminded to proceed to his new station.

A day after reporting at his new station, that is, on 18th May, 2012, the appellant sought permission from his Branch Manager at Mumbwa to return to Lusaka promising to return to Mumbwa on 23rd May, 2012 but did not do so. The appellant also ignored phone calls from some of the respondent's staff who were seeking to establish his whereabouts. This behavior prompted the respondent to charge the appellant with a disciplinary offence. The record reveals that when the respondent was served with fresh disciplinary charges he prepared an appeal against his transfer. This appeal was mischievously back-dated to 4th June, 2012.

A second disciplinary hearing subsequently took place and the appellant was found guilty as charged.

Consequently, he was dismissed from employment in accordance with the conditions under which he was serving.

Notwithstanding his dismissal, the appellant was given 14 days within which to appeal.

On 16th January, 2013, the appellant appealed to the respondent's Managing Director. In his letter of appeal, the appellant complained that his dismissal had been unfair pointing out that he had not been deliberately absconding from work but was forced to do so because he did not possess the skill and talent to undertake the new role of cashier which had been assigned to him. According to the appellant, he had made verbal and written requests to the respondent's Human Resources Department seeking to be excused from his new job because it was neither within his career path nor experience.

On 23rd July, 2013, the respondent's Managing Director wrote to the appellant advising him that his appeal, which had been heard on 19th June, 2013, had been unsuccessful. In the same letter, the Managing Director advised the appellant that he had exhausted the appellate procedure in ZESCO and that if the appellant wished to pursue the matter further, he had to go to court.

On 2nd January, 2014, the appellant lodged his application in the Industrial Relations Court for leave to lodge his complaint out of time.

In his affidavit in support of his application for leave to lodge his complaint out of time, the appellant deposed that he was dismissed by the respondent because he did not take up his new position at Mumbwa. He further deposed that he could not file his complaint within the required time because he had been **"....pursuing administrative channels.... to settle the matter outside court which did not yield positive results."**

For its part, the respondent opposed the appellant's application for leave to lodge his complaint out of time via an affidavit which was sworn by Arthur Sike.

The material depositions of Arthur Sike's affidavit were that the appellant had not demonstrated by letter or otherwise that he had objected or challenged his transfer to Mumbwa. Arthur Sike further deposed that the appellant had admitted that he failed to take up his position at Mumbwa adding that it was that failure which had prompted the respondent to discipline and to dismiss the appellant for absenteeism and desertion. Arthur Sike further deposed in his

affidavit that the dismissal of the appellant was effected in accordance with the terms and conditions under which he had been serving the respondent.

Following the hearing of the application, the court below found no merit in the same and dismissed it on the basis of inordinate delay and the absence of any plausible reason warranting the granting of the same.

The appellant has now appealed to this court against the refusal by the court below to grant him leave to lodge his complaint out of time. The appeal is anchored on two grounds which are set out in the memorandum of appeal in the following terms:-

> **"1. That the trial court erred in law and fact when it held that the letter dated 23rd July, 2014 signed by Mr. M. Mumba on behalf of the ZESCO Managing Director to the appellant closed all the administrative channels to settling disputes;**
>
> **2. The trial 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."**

The appellant filed written heads of argument to support his grounds of appeal while counsel for the respondent also filed heads of argument on behalf of the respondent.

We have noted from the appellant's heads of argument that there is a glaring variance or inconsistence between what was presented as the grounds of appeal in the Memorandum of Appeal and the grounds which are actually argued in the appellant's heads of argument. Notwithstanding the aforestated inconsistence or disparity, we have – doing the best that we can- related the grounds of appeal as they were presented in the memorandum of appeal to the grounds of appeal as they were presented and argued in the appellant's heads of argument and noted that what is argued as ground one in the appellant's heads of argument does encompass the second ground of appeal as it was captured in the memorandum of appeal as well as the substance or gist of the ruling of the court below which the appellant now seeks to assail. In effect, we have 'reconciled' and 'harmonized' ground one in the appellant's heads of argument with the second ground of appeal as it was captured in the memorandum of appeal and treated the 'two' as representing the sole ground or basis upon which this appeal is founded. However, we have found no basis for reconciling or harmonizing what purports to be the first ground in the memorandum of appeal with the second ground in the appellant's heads of argument.

We wish to stress, for the avoidance of doubt, that, in engaging in the exercise which we have just set out above, we do not mean nor intend to depart from the position which we have repeatedly articulated when faced with similar circumstances. Indeed, our position will remain the same even as our appellate intervention is sought by those who, for different reasons, appear in person.

We now turn to consider what we now deem to be the appellant's solitary ground of appeal and the reaction which the same elicited from the respondent.

The contention of the appellant around what we have deemed to be the sole ground of appeal, so far as we have endeavoured to decipher from his written arguments, is that the delay which was occasioned in having him apply for leave to lodge his Complaint out of time was not inordinate. It seems to us, however, that a closer examination of the appellant's arguments suggests that his real contention is that, whatever delay that had arisen in having him seek leave to lodge his Complaint out of time was attributable to what he appears to have considered to have been legitimate exercises on the way to seeking court intervention such as involving his union.

We were accordingly urged to allow the appellant's appeal on the basis that the lower court had failed to properly discharge its mandate as a court of substantial justice

For his part, Mr. Sike, the learned in-house counsel for the respondent filed written heads of argument in which he contended that the appellant had not demonstrated that he had placed good reasons before the lower court which could have warranted the exercise by that court of its discretion to grant the appellant leave to lodge his Complaint out of time. Counsel also proceeded to make reference to our decision in the case of **Nkhuwa v Lusaka Tyre Services Limited**[1] in which this court stated that a court's discretion to grant leave to appeal cannot be exercised in the absence of the party pursuing such leave showing good cause.

We have considered the arguments which were canvassed before us by or on behalf of the parties to this appeal in relation to the brief Ruling of the Court below refusing to grant leave to the appellant to lodge his Complaint in the Industrial Relations Court out of time. The lower court reasoned that not only had the appellant's delay of just over 5 months been inordinate, but that no plausible

reasons were advanced by the appellant to warrant the granting of the belated application in question.

We must immediately observe that there is now a plethora of cases in which we have said that leave of the nature that the appellant was seeking in the court below cannot be granted as a matter of course, as though the pursuer of such leave were merely pushing an open door. In the case of **Jonathan Lwimba Mwila v World Vision Zambia**[2], this court was faced with the same application which now confronts us. We said:

> **"The granting of leave to file delayed complaints requires that discretion is exercised judiciously....there has to be sufficient reasons for the delay to seek redress in court after the incident complained of; that the case was meritorious is no valid reason to counter the delay, on the contrary, that should have prompted the complainant to go to court early, within the prescribed time.... We find no valid reason for the delay..." (at p.J7).**

Adverting to the matter at hand, it can scarcely be doubted that the approach of the appellant in the court below represented a very lazy effort indeed.

In his affidavit in support of his application in the court below for leave to lodge his complaint out of time, the appellant deposed, at paragraph 10 thereof, that he had been ***"...pursuing administrative channels... to settle the matter***

outside court...". This affidavit was filed into court on 2nd January, 2014. And yet, on 23rd July, 2013, the appellant was advised, in a letter which he had exhibited to his Affidavit in question that:

> **"We wish to inform you that you have exhausted the appeals procedure in ZESCO and should ...consider this matter closed. However, you have an option of referring your case to a court of competent jurisdiction".**

The letter from which the above extract has been drawn originated from the Managing Director of the respondent and was of the nature of a dismissal of the appellant's appeal.

In spite of the very clear tone and message of the respondent's managing director's letter, the appellant still considered it sensible not only to ignore the gratuitous advice in that letter but to wait for another five months before launching his lukewarm and ill-fated application for leave to lodge his complaint out of time.

Clearly, this appeal has no merit. We dismiss it but make no order as to costs.

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I.C. MAMBILIMA
CHIEF JUSTICE

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R.M.C. KAOMA
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE