IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 204/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JUDY M. MUBANGA **APPELLANT**

AND

BANK OF ZAMBIA **RESPONDENT**

CORAM: ***SICHINGA, NGULUBE AND SIAVWAPA, JJA.***

ON 23RD, 29TH MARCH AND 29th APRIL 2021

FOR THE APPELLANT: *MRS. M. ZIELA OF MESSRS LUSITU CHAMBERS WITH MISS DINA LUNDWE OF MESSRS RANCHOLD CHUNGU*

FOR THE RESPONDENT: *MRS. J. C. KAMANGA WITH MISS. G MUKULWAMUTIYO BOTH IN-HOUSE COUNSEL*

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Zambia Consolidated Copper Mines Limited v Elvis Katyamba and Others (2006) ZR1.*
2. *Peter Mutale v Agro Fuel Investments and 2 others (2011) 3 ZR 419*
3. *United Engineering Group Limited v Mungalu and Others, (2007) ZR 86*
4. *BP Zambia PLC v Zambia Competition Commission and two Others, SCZ Judgment No. 21 of 2011*

Legislation referred to

1. *The Constitution of Zambia Act No. 2 of 2016 as amended*
2. *Section 85 (3)(b) of the Industrial and Labour Relations Act as amended by Act No.8 of 2008*

Other Authorities referred to

1. *Legal dictionary at legal-dictionary.thefreedictionary.com*

1.0 INTRODUCTION

1.1 The Appellant has come to us seeking to have the Ruling of the Honourable Mr. Justice E. Mwansa, sitting in the Industrial Relations Division, dated 5th June 2019, set aside.

1.2 In that Ruling, the learned Judge found that the complaint filed into Court by the Appellant was time barred and dismissed it accordingly.

2.0 BACKGROUND FACTS

2.1 The Appellant was employed by the Respondent in October 1982 as a Clerical Officer and served for seven years after which she applied for study leave.

2.2 The Respondent refused to grant her study leave but instead advised her to resign and undertook to re-employ her upon completion of her studies.

2.3 She travelled to the United Kingdom to pursue her studies and returned in 1992 upon completion of her studies.

2.4 The Respondent kept its promise and re-employed her. She served the Respondent until 12th January 2013 when she went on Voluntary Early Separation Scheme.

2.5 When the Appellant received the computed terminal benefits, she noticed that the benefits for the period leading to her resignation had not been included in the computation.

2.6 On 29th May 2013 the Appellant signed a document from Kwacha Pension Trust Fund acknowledging receipt of benefits (see page 31 of the Record of Appeal).

2.7 The Certificate of Service issued by the Respondent dated 18th June 2015 occurring at page 32 of the Record of Appeal states that the Appellant worked for the Respondent from 10th February 1992 to 25th January 2013.

2.8 By letter dated 28th December 2018, the Respondent claimed that the Appellant had been paid terminal benefits for her first tenure following her resignation.

3.0 **THE COMPLAINT**

3.1 Disenchanted by the Respondent's position; the Appellant filed a Notice of Complaint in the Court below on 9th April 2019 seeking the following remedies;

(a) Payment of terminal benefits for the period 10th October

1982 to 1989

(b) Interest

(c) Costs and any other relief the Court may order.

3.2 On 6th May 2019, the Respondent filed Notice to raise Preliminary issue pursuant to Rule 33 (1) of the Industrial Relations Court Rules.

3.3 The issues for determination were;

(a) That the action was statute barred and

(b) That the matter had been brought more than 90 days after the accrual of the cause of action.

3.4 The argument for the first issue is that the complaint was brought after six years contrary to the Limitation Act 1939, while the second one was anchored on Section 85 (3) of the Industrial and Labour Relations Act.

4.0 **ARGUMENTS BY THE RESPONDENT**

4.1 The Respondent argued that Section 32 of the Limitation Act prohibits commencement of actions in which the cause of action accrued more than six years prior to the commencement of the action in the first limb.

4.2 In the second limb the argument was that the Court had no jurisdiction to entertain a complaint ninety days after the

cause of action arose or after administrative procedures or negotiations were exhausted.

5.0 **ARGUMENTS BY THE APPELLANT**

5.1 The thrust of the Appellant's argument in opposition was that she was engaged in negotiations which only terminated when the Respondent wrote to the Appellant's advocates to the effect that it had paid for the first tenure and owed the Appellant nothing. The said letter is the one occurring at page 33 of the Record of Appeal dated 28th December, 2018.

5.2 To that end, it was argued that the said letter, having been received by the Appellant's Counsel on 2nd April, 2019, meant that time only started running on that date.

5.3 On that account it was submitted that the complaint filed on 9th April 2019 was filed promptly within the ninety days prescribed by the Act.

6.0 **DECISION OF THE COURT BELOW**

6.1 The learned Judge considered the opposing arguments and came to the conclusion that the Limitation Act of 1939 was not the Applicable law since the Industrial and Labour Relations Act had a limitation provision under Section 85(3).

6.2 Having so found the learned Judge found no evidence of negotiations between the parties and adjudged that time started to run in 1989 when the Appellant resigned.

7.0 **THIS APPEAL**

7.1 The Memorandum of Appeal filed on 17th July 2019 has one ground of appeal as herein under reproduced.

> ***"That the learned Judge misdirected himself in fact and in law in entering ruling against the complainant on the grounds that the complaint was brought outside the mandatory 90 days period and without seeking leave of Court to file out of time period in the face of evidence to the effect that the Complainant and Respondent were in correspondence which last correspondence was delivered to the Complainant on the 2nd day of April 2019 with the action consequently being commenced on the 9th day of April 2019."***

7.2 We have noted that in the Heads of Argument, the Appellant has set up two grounds of appeal but without leave of Court. That notwithstanding, it is clear that the two grounds in the heads of argument are derived from the sole ground in the Memorandum of Appeal. We will therefore ignore the grounds in the Heads of Argument and consider the one in the Memorandum of Appeal.

8.0 **APPELLANT'S ARGUMENTS**

8.1 The Appellant's key argument is that the cause of action arose on 2nd April 2019 in which case the complaint was filed within the ninety days prescribed by the statute on 9th April, 2019.

8.2 In support of the argument, the Appellant has relied on the Supreme Court decision in *Zambia Consolidated Copper Mines Limited v Elvis Katyamba and Others*[1]. In that case the Court stated as follows;

> ***"It can be deduced that even though administrative channels are not defined by Law, there are instances where a complainant or applicant finds it necessary to engage and exhaust the process of appeal available to him. There are instances also where a complainant may engage in further negotiations where he or she is entirely dissatisfied with the package offered to him or her by the employer either by way of redundancy, retirement or mere termination".***

8.3 Other persuasive authorities were cited which, in our view do not speak to the issues raised in the ground of appeal as we shall demonstrate later in this Judgment.

9.0 **RESPONDENT'S ARGUMENTS**

9.1 It is the Respondent's position that the cause of action arose in 1989 when the Appellant resigned from employment and not 2nd April 2019 as argued by the Appellant.

9.2 The case of *Peter Mutale v Agro Fuel Investments and 2 Others*[2] was relied upon in which it was held, inter-alia that ***"the cause of action accrued on the date the accident occurred and not on the date when the claim was rejected".*** (We note that this is a decision of the High Court which is only of persuasive value).

9.3 With regard to the argument that the parties were in negotiation constantly; from the time the Appellant resigned, it is submitted that the Appellant only raised the issue of payments for her first tenure of service upon her voluntary separation in 2013. It is therefore, denied that negotiations were held between 1989 and 2013.

9.4 The Respondent further argued that considerations of the need to hear cases on their merits as opposed to dismissing them on procedural flaws or technicalities do not apply when dealing with a statutory limitation period.

9.5 In that regard the cases of *United Engineering Group Limited v Mungalu and Others*[3], *and BP Zambia PLC v Zambia*

Competition Commission and two Others[4] respectively were relied upon.

10.0 **OUR ANALYSIS AND DECISION**

10.1 We have carefully considered the opposing views and arguments in this appeal and it is clear that there is only one point of contention between the parties.

10.2 The argument sounds elementary because it seeks to enlist our support of the view that the cause of action accrued on the date the Respondent denied owing the Appellant money for the period between her initial employment and her resignation.

10.3 The underlying question therefore, is when does a cause of action accrue for the purposes of limitation of time? This question triggers, as of necessity, the corollary question as when time begins to run.

10.4 Without redefining "cause of action", it is sufficient to state it as given by the legal dictionary at *legal-dictionary.thefreedictionary.com* as; *"the facts that give a person a right to judicial relief."* In relation to accrual it goes on to say; *"usually accrues on the date that the injury to the Plaintiff is sustained."*

10.5 From the above definitions, it becomes succinctly clear that time begins to run on the date the cause of actions accrues

which is the date when the fact entitling a person to seek judicial redress arises.

10.6 In the case of the Appellant, it is common cause that her claim emanates from her resignation from employment in 1989. Her resignation made her eligible for payment of certain monies that had accrued to her from the time she got employed.

10.7 It follows that the facts that gave rise to the right to judicial redress, namely; resignation and entitlement to payment arose in 1989 and the said facts constitute the cause of action.

11.0 **DEFERRED ACCRUAL**

11.1 The Appellant's chief argument is that the accrual of the cause of action was deferred by the negotiations that were ongoing between the parties until 2nd April 2019 when the Appellant's advocates received the letter by which the Respondent denied owing.

11.2 First and foremost it is settled that time does not start to run where the injury resulting from a set of facts is not readily discoverable and does not start to run until the person in fact discovers the injury.

11.3 The clearest deferment is however, to be found in Section 85(3) of the Industrial and Labour Relations Act which the learned Judge below applied to dismiss the Appellant's complaint.

11.4 For ease of reference we reproduce the Section hereunder:

"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; or

(b) Where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application".

11.5 The import of paragraph (a) of sub-section (3) is that time will not begin to run when the set of facts entitling a person to seek judicial recourse arise where administrative channels of resolving the injury are available.

11.6 It is however, not sufficient that such administrative channels should be available. It is a requirement that the person should invoke and pursue the said administrative channels to derive the benefit of a freeze on time.

11.7 Further, there ought to be demonstrated by evidence that the person commenced the engagement before the expiry of the ninety days set by the statute and that the same had been exhausted without a resolution of the dispute.

11.8 Upon exhaustion of the unfruitful administrative channels, time begins to run as though the cause of action had accrued at the close of the negotiations.

11.9 The Supreme Court in the case of *Zambia Consolidated Copper Mines v Katyamba* (Supra) merely amplified the import of the *"Administrative Channels"* by construing it to include internal appeal processes and negotiations.

11.10 Ultimately, the duty to prove that all or any of the said processes were engaged in within the prescribed time lies with the complainant.

12.0 **DID THE APPELLANT PROVE HER CASE?**

12.1 There is no dispute that upon her resignation in 1989, the Appellant went to the United Kingdom to pursue her studies. She returned in 1992 upon which the Respondent re-employed her.

12.2 There is however, no evidence of any correspondence passing between her and the Respondent relating to her terminal benefits during the period she was pursuing her studies.

12.3 In paragraph 3 line 3 of the heads of argument at page 6, the Appellant avers that she took issue when she noticed that her terminal benefits following her Voluntary Early Separation on 12th January 2013 did not include her first tenure.

12.4 In paragraph 4 at the same page, she talks about a letter dated 23rd March 2018 written to her by the Respondent to the effect that her entitlements for her first tenure had been paid to a named person.

12.5 What we glean from the aforestated averment of the Appellant is that there were no administrative procedures or negotiations being carried out between the parties prior to 12th January 2013.

12.6 This position is confirmed by the fact that the Record of Appeal shows that the first correspondence over terminal benefits between the parties is the letter dated 14th January 2013 exhibited at page 28 of the Record of Appeal.

12.7 This letter was triggered by the Appellant's application for Voluntary Early Separation on 1st October 2012. In the letter there is no reference to the benefits for the first tenure but as submitted by the Appellant, the first letter dealing with the benefits for the first tenure is the one dated 23rd March 2018 occurring at page 66 of the Record of Appeal.

12.8 We however, hasten to state that any administrative channels or negotiations to resolve the payment of benefits for the period covering the Appellant's first tenure with the

Respondent commenced after the expiry of the limitation period cannot defer the time count.

12.9 This is so because as we have stated earlier, the counting of time is only deferred by the prompt engagement in administrative channels or negotiations.

12.10 In the absence of evidence of such engagement between the parties soon after the accrual of the cause of action, time starts and continues to run and if no notice of complaint is filed before the expiry of the limitation period; in this case, the ninety days, then the complaint or application is out of time pursuant to Section 85 (3)(b) of the Industrial and Labour Relations Act as amended by Act No.8 of 2008.

12.11 The aggrieved party would, in the circumstances, only have recourse to the proviso which allows for an application to the Court for an extension of the limitation period.

13.0 **CONCLUSION**

13.1 Having failed to show that she engaged the Respondent for payment of her dues for the period 1989 when she resigned to 1992 within the statutory limitation period, the Appellant lost the right to file a complaint out of time without permission of the Court.

13.2 The letter dated 28th December 2018 which stated the Respondent's firm denial of liability occurring at page 56 of the Record of Appeal does not help the Appellant. This is because the letter does not show that negotiations had been ongoing since 1989 when the Appellant resigned.

13.3 We affirm the Respondent's position that a statutory provision cannot be defeated by considerations of hearing a case on its merits or default of procedure or indeed the provisions of Article 118(2) (e) of the Constitution.

13.4 We therefore find no basis upon which to overturn the Court below for the reason that the learned Judge was on firm ground when he dismissed the complaint for being statute barred.

13.5 We accordingly dismissed the appeal for want of merit with each party to bear their own costs.

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D. L .Y. SICHINGA
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE