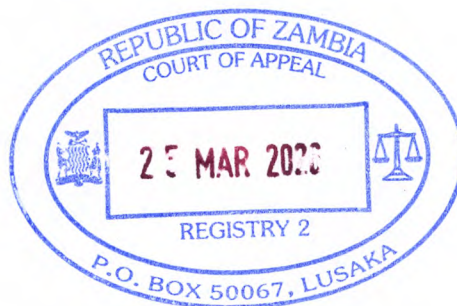


**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL No.75/2025**

**HOLDEN AT NDOLA**

(Civil Jurisdiction)



**BETWEEN:**

**CHRIS HAMUWELE**

**APPELLANT**

**AND**

**MULUNGUSHI UNIVERSITY  
RESPONDENT**

**CORAM: Chashi, Ngulube and Banda-Bobo, JJA.  
On 18<sup>th</sup> and 25<sup>th</sup> March, 2026.**

**For the Appellant: Mr. L. Njungu of Mutemwa Chambers**

**For the Respondent: N/A**

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**JUDGMENT**

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**Banda-Bobo, JA delivered the Judgment of the Court.**

**Cases referred to:**

1. Crossland Mutinta and Seedat v Donovan Chipanda SCZ Selected Judgment No. 53/2018
2. Milingo Lungu v Attorney General and 2 Others (2022/CCZ/006)
3. Samuel Kamau Macharia and Another v Kenya Commercial Bank and Others (2014) Eklr
4. Aristogerassimos Vangelatos and Another v Metro Investments Limited and 3 others SCZ Selected Judgment No. 35/2016
5. Zambia Revenue Authority v T and G Transport (SCZ Judgment No. 2/2007)

6. Access Bank (Zambia) Limited v Group Five ZCON Business Park Joint Ventures (SCZ 8/52/ 2014/2016)
7. Mususu Kalenga Building Limited and Winnie Kalenga v Richmans Money Lenders Enterprises SCZ Judgment No. 4/1999
8. Concrete Pipes and Products Limited v Kabimba and Another (SCZ Appeal No. 14/2015)

**Legislation and Other Works referred to:**

- The Court of Appeal Rules, Act No. 7 of 2016
- The Industrial Relations Court Rules, Cap. 269 of the Laws of Zambia)
- Section 85 of the Employment and Labour Relations Act (Cap. 269)

**1.0 INTRODUCTION**

- 1.1 This appeal is against the ruling of Honourable Lady Justice Mrs. Chigali Mikalile, delivered on 15<sup>th</sup> January, 2025 in the High Court (Industrial Relations Division) at Lusaka. The court below upheld the respondent's notice of motion to raise preliminary issues and held that the appellant's complaint filed on 1<sup>st</sup> March, 2023, was out of time.
- 1.2 The Notice and Grounds of Appeal were filed on 29<sup>th</sup> January, 2025.
- 1.3 The parties will be referred to as they appear in this Court.

## **2.0 BACKGROUND**

- 2.1 On 19<sup>th</sup> December, 2013, the Appellant who was the complainant in the Court below was summarily dismissed from employment by the Respondent, when its Disciplinary Committee found him guilty of the charge of "Being found in possession of Mulungushi University property without authority".
- 2.2 From 11<sup>th</sup> February, 2014 when the Appellant escalated the appeal to the Council Chairperson, up to the time he instituted his action in the Court below, his appeal remained unheard or unconsidered by the Council Chairperson.
- 2.3 On 10<sup>th</sup> March, 2023, by way of notice of complaint pursuant to section 85(4) of Cap 269, the complainant instituted the proceedings. The Respondent filed its answer on 29<sup>th</sup> May, 2023. The matter came up for trial on 17<sup>th</sup> October, 2023, on which date counsel for the Respondent made it known that the respondent intended to file a motion to raise preliminary issue.

2.4 An order for directions was issued, and by consent of the parties, the matter was adjourned for ruling on the preliminary issue.

2.5 The preliminary issue was raised on the following grounds;

- (i) The complaint was filed out of time without leave of court
- (ii) The Complainant never served on the respondent a pre-litigation demand letter
- (iii) The matter has not been disposed of within the legally prescribed one (1) year time frame.

2.6 The Appellant herein primarily opposed the above notice of motion stating that;

- (i) he fell within the exceptions allowed by law to file a complaint out of time.
- (ii) that the demand letter is only a pre-requisite to matters began by writ of summons as espoused by Statutory Instrument No 58, of 2020.
- (iii) that it is no longer law that the Industrial Relation Court Division of the High Court loses its

jurisdiction if it does not determine a complaint within one year.

### **3.0 DECISION OF THE COURT BELOW**

3.1 The Court below upheld the Respondent's notice of motion to raise preliminary issues and concluded that the Appellant (complainant in the court below) was out of time when he filed his complaint on 1<sup>st</sup> March, 2023. This is reflected on page 21 Paragraph 22 of the Record of Appeal.

3.2 The Court went on to reiterate that, "failure to comply with the procedural requirement under section 85 (3) divests a Court of jurisdiction, and on this basis alone, the court proceeded to dismiss the Appellant's case.

### **4.0 THE APPEAL TO THIS COURT**

4.1 Dissatisfied with the ruling of the court below, the Appellant launched an appeal fronting one ground as follows:

**That the Court below lacked jurisdiction to hear the Respondents interlocutory application as the Respondent had no leave to file its answer outside the stipulated period and therefore barred from making any interlocutory application in the absence of a validly filed answer.**

In the alternative, the Appellant filed the following grounds.

- 1. The Court below misdirected itself in law and in fact by holding that:  
"the Complainant ought to have realized after the lapse of at least one year that the respondent was unreasonably prolonging the administrative procedure and ought to have filed his complaint then" as such holding is not backed by any law, evidence or reasoning, serve for being a mere assumption or suggestion.**
- 2. That the Court below misdirected itself in law and fact by framing a wrong question for determination of the matter when the question in the circumstances should have been "whether the Complainant could commence court proceedings without exhausting the internal administrative procedure?"**
- 3. That the Court below misdirected itself in law and fact by misapprehending and therefore misapplying the principle enunciated in the Supreme Court case of Concrete Pipes and Products Limited V. Kabimba and another, Appeal No 14/2015 in as far it provides for exceptions to the 90 days limitation period within which to file a complaint.**
- 4. That the Court below misdirected itself in law and fact by concluding that the case of Concrete Pipes and Products Limited V. Kabimba and another,**

**Appeal No 14/2015 guided that the complainant cannot rely on the respondent's inertia in the matter for his protracted delay in commencing an action.**

**5. That the Court below misdirected itself in law and fact by concluding that the case of Concrete Pipes and Products Limited v Kabimba and another, Appeal No. 14/2015 guided that the complainant cannot rely on the respondents inertia in the matter for his protracted delay in commencing an action.**

4.2 We observed that the alternative grounds in the memorandum of appeal offend the mandatory provisions of Order X, Rule 9(2) of the Court of Appeal Rules, as they contain narratives and or arguments.

4.3 Order X, Rule 9 (2) of the Court of Appeal Rules, 2016, which provides that:

**"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."**

4.4 We accordingly expunge them from the ROA.

## **5.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 The Appellant filed heads of argument on 29<sup>th</sup> August, 2023.

5.2 In arguing the sole ground, the Appellant contended that the Court below lacked jurisdiction to entertain the Respondent's interlocutory application, as the Respondent filed its answer outside the stipulated period without leave and was thus barred from making any such application absent a validly filed answer.

5.3 Counsel for the Appellant submitted that a question of jurisdiction may be raised at any stage of proceedings, including on appeal, even if not raised below. Reliance was placed on, *inter alia*, the case of **Crossland Mutinta and Another v Donovan Chipanda**<sup>1</sup>, espousing the principle that jurisdictional issues may be raised at any time.

5.4 Counsel recounted the procedural history of the matter as analysed above, and further argued that, per Regulation 11(1) and (2) of the Industrial Relations Court Rules (Chapter 269 of the Laws of Zambia), the Respondent was required to

file its answer within the appointed time, and failure to obtain leave barred subsequent filings or applications.

5.5 The Appellant emphasised that jurisdiction derives from law, citing **Milingo Lungu v Attorney General and 2 Others**<sup>2</sup>, where the Constitutional Court, following **Samuel Kamau Macharia and Another v Kenya Commercial Bank and Others**<sup>3</sup> held that:

**"A Court's jurisdiction flows from a constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred by the law."**

5.6 It was argued that, in the absence leave, the court below lacked jurisdiction to entertain the interlocutory application.

5.7 Further, reference was made to *inter alia* the case of **Aristogerassimos Vangelatos and another v Metro Investments Limited and 3 others**<sup>4</sup>, where it was noted that proceedings by a court lacking jurisdiction amounts to nothing. Counsel further argued that ignoring a court order invites peril, as a Judge's order supersedes rules and demands compliance.

5.8 Further reference was made to the case of **Zambia Revenue Authority v T and G Transport**<sup>5</sup> where the Supreme Court reiterated that the requirement for leave goes to the jurisdiction of the Court and that the jurisdiction cannot be conferred by the express consent of the parties.

5.9 Finally, **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture**<sup>6</sup>, was cited for the principle that courts cannot circumvent rules under the guise of doing substantial justice.

5.10 On these submissions, the Appellant prayed that the ground be upheld, declaring the court below destitute of jurisdiction.

## 6.0 **ARGUMENTS IN OPPOSITION**

6.1 Counsel for the Respondent submitted that the Appellant's contention, that the Respondent filed its answer out of time, was neither raised before the court below nor pronounced upon by that court, rendering it incompetent to raise it for the first time on appeal. That this principle was described as elementary, and in support, referred the case of **Mususu Kalenga Building Limited and Others v Money Lenders Enterprises**<sup>7</sup>, where the Supreme Court held that:

**"We have said before and we wish to reiterate here that where an issue was not raised in the Court below it is not competent for any party to raise it in this court."**

6.2 It was further submitted that even assuming that the answer was filed out of time, which was denied, there is no evidence on record of when the Appellant served the complaint on the Respondent, such that time could commence running. That a perusal of the Record of Appeal reveals no affidavit of service, and that this Court cannot speculate on the filing date absent evidence, given the fact that time starts running from the date of service.

6.3 Counsel therefore submitted that ground one lacks merit and urged its dismissal.

## **7.0 HEARING**

7.1 At the hearing, Mr. Njungu relied on the heads of argument filed on 1<sup>st</sup> March, 2025. He referred to the case of **Concrete Pipes and Products Limited v Kabimba and Another**<sup>8</sup>, where the court held that an aggrieved employee need not exhaust internal processes. Counsel submitted that the appellant had been frustrated by his employer in pursuing

those processes, leading him to abandon his internal appeal and proceed directly to court.

7.2 Mr. Njungu further argued that, the 90-day limitation period did not apply. That the last communication occurred in 2020, after which the employer repeatedly promised, but failed to conduct a hearing. That the appellant commenced these proceedings in March, 2023. That leave was not sought, as the internal remedies had not been exhausted. He argued that the 90-day period was understood to run only after exhausting internal channels.

## **8.0 ANALYSIS AND DECISION**

8.1 In determining this appeal, we have carefully considered the sole surviving ground, which challenges the jurisdiction of the court below to entertain the Respondent's interlocutory application on the basis that the Respondent filed its answer outside the stipulated period without leave, rendering it barred from filing any further applications.

8.2 We have further considered the evidence, written submissions, and authorities cited by the parties. From the

evidence in this matter, and the ROA, the following are the questions for determination.

- 8.3 Whether an issue not raised in the court below can be raised on appeal?
- 8.4 Whether the court below was correct to consider the Respondent's notice of motion to raise a preliminary issue when its answer to the complaint was filed out of time?
- 8.5 Counsel for the Appellant submitted that Regulation 11(1) and (2) of the Industrial Relations Court Rules strictly required the Respondent to file its answer within 21 days of the court's order of 16<sup>th</sup> March 2023, and argued that its late filing on 29 May, 2023, 53 days later, without seeking leave, deprived the court below of jurisdiction to hear the preliminary objection.
- 8.6 Counsel for the Respondent countered that this issue was never raised before the Court below, making it incompetent on appeal. That even if considered, the Respondent denied the late filing, noting the absence of evidence on when the complaint was served on it, as time under the Rules runs from service.

8.7 While jurisdictional questions can indeed be raised at any stage, this does not extend to novel procedural objections not ventilated below, especially where the record shows no prejudice to the Appellant and the court below proceeded without objection.

8.8 In the case of **Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises<sup>7</sup>**, the Supreme Court held that:

**"We have said before and we wish to reiterate here that where an issue was not raised in the Court below it is not competent for any party to raise it in this court."**

8.9 Given the settled rule barring novel procedural challenges not advanced in the court below, particularly without demonstrated prejudice to the Appellant and where proceedings continued unchallenged, this limb of the ground fails on its merits and stands dismissed

8.10 We now turn to the second question, Whether the court below was correct to consider the Respondent's notice of motion to raise a preliminary issue when its answer to the complaint was filed out of time caused no evident injustice.

- 8.11 We are alive to the provision of section 85 (5) of the Industrial Relations Rules which is to the effect that 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.
- 8.12 In *casu*, no application was made to strike out the answer, and the Appellant consented to an adjournment for the preliminary issue.
- 8.13 We are of the view that invoking technical defaults now would undermine the Industrial Court's flexible jurisdiction, which eschews the strictures of ordinary civil procedure to protect workers' rights. We hold the view that authorities like **Zambia Revenue Authority v T and G Transport**<sup>5</sup>, cited by the Appellant, where the Supreme Court reiterated with force that the requirement for leave goes to the jurisdiction of the Court and that the jurisdiction cannot be conferred by express consent of the parties, pertain to general litigation and do not bind the specialised equity of industrial relations proceedings.

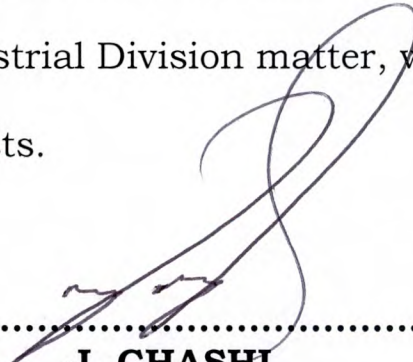
9.0 For the foregoing reasons, we find that the court below acted well within its equitable discretion under section 85(5) of the Industrial Relations Rules by entertaining the Respondent's notice of motion as a preliminary issue, notwithstanding the late filing of the answer, which occasioned no injustice. The Appellant's reliance on general litigation authorities is misplaced in this specialised context, and this limb of the ground of appeal accordingly fails.

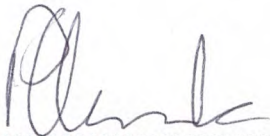
9.1 Furthermore, as argued by the Respondent, there is no evidence on record as to when the Appellant actually served the complaint on the respondent, such that time could start running. Absent any such evidence, this Court has nothing on record to which it can direct its mind in order to conclude that the respondent's answer was filed out of time. It is trite law that time starts to run from the date of service. A perusal of the ROA reveals no affidavit of service indicating when the respondent was served. Accordingly, this Court cannot speculate that the respondent's answer was filed out of time in the absence of evidence.


10.0 **CONCLUSION**

10.1 In sum, both limbs of this ground of appeal fail for want of merit. On the first limb, it is trite that an issue not raised in the court below cannot be raised on appeal for the first time. On the second limb, the court below was correct to consider the Respondent's notice of motion as a preliminary issue despite the late filing of the answer, which caused no evident injustice and aligned with the Industrial Court's flexible jurisdiction under section 85(5) of the Industrial Relations Rules. The authorities relied upon by the Appellant, drawn from general civil litigation, do not constrain this specialised equity. Accordingly, the entire ground of appeal is dismissed.

10.2 This being an Industrial Division matter, we order that each party bears own costs.

  
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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

  
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**P. C. M. NGULUBE**  
**COURT OF APPEAL JUDGE**

  
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**A. M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**