

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP/IRCLK/398/2021

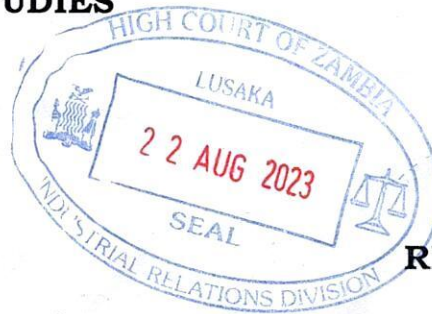
BETWEEN:

**ZAMBIA INSTITUTE FOR TOURISM
AND HOSPITALITY STUDIES**

APPELLANT

AND

DABILA C. KAPOTWE



RESPONDENT

Coram: Chigali Mikalile, J. this 22nd day of August, 2023

For the Appellant: Mr. N. Nsamba - Messrs L.M Chikuta Legal Practitioners

For the Respondent: Ms. S. Daka Mulozi – National Legal Aid Clinic for Women

JUDGMENT ON APPEAL

Legislation referred to

1. The Industrial and Labour Relations Act Chapter 269
2. The Constitution of Zambia, Act No.2 of 2016

Cases referred to:

1. Bank Mellat v. Her Majesty's Treasury (2013) UKSC 38
2. Hakainde Hichilema & 5 Others v. Government of the Republic of Zambia, SCZ Appeal No. 28/2017
3. Ndilila Associates v. Supply Connections Limited, CAZ Appeal No. 22/2016

4. Edward Chilufya Mwansa & 194 v. Konkola Copper Mines, Appeal No. 99/2015
5. Kalunga Chansa v. Evelyn Hone College, Appeal No. 134/2019.
6. Concrete Pipes and Products Limited v. Kingsley Kabimba & Another (2017) ZMSC 222
7. Access Bank Limited v. Group 5 ZCON Business Joint Ventures, SCZ/8/52/2014.
8. Twampane Mining Corporation v. E and M Sorti Mining Limited S.C.Z Judgment No. 20/2011
9. Gerald Chilumba v. Zesco Limited, Appeal No. 106/2014
10. Gaedonic Automotive Ltd & Another v. Citizens Economic Empowerment Commission, SCZ Judgment No. 39/2014
11. Augustine Tembo v. First Quantum Mineral Limited, SCZ/8/94/2015

Introduction

1. This is an appeal against the decision of the Learned Registrar in which he granted the complainant leave to file her complaint out of time. The general theme of the appeal by the respondent is that the complainant should not have been allowed to file her Notice of Complaint outside the confines of the 90 days prescribed by law.
2. For convenience, I shall refer to the appellant and respondent as the respondent and complainant respectively which was what they were as they appeared before the Honourable Registrar.

Background to the Appeal

3. The Learned Registrar granted the complainant leave to file her Notice of Complaint out of time by *ex-parte* order dated 23rd June, 2021. The reason advanced in the *ex-parte* application for the delay in filing the complaint was that the complainant had been attempting an out of court settlement which did not yield positive results.
4. Armed with the *ex-parte* order, the complainant filed her Notice of Complaint on 21st July, 2021, seeking to recover the following:-
 1. *An order that the demotion from Human Resource Manager to Senior Lecturer was unlawful and amounted to a dismissal*
 2. *Damages for unlawful dismissal*
 3. *Damages for breach of contract*
 4. *In the alternative to 1-3 above, that the complainant is entitled to a redundancy package for reasons that the respondent unilaterally varied the terms of the agreement by its letter of January, 2019*
 5. *Salary difference from January, 2019 to June 2020 plus allowances payable for the position of Human Resource Manager*
 6. *Interest as by law provided*
 7. *Any other relief that the Court may Deem fit*
 8. *Costs*
5. Disenchanted by the Registrar's decision, the respondent raised the following grounds of appeal:
 - (i) *The Honourable Registrar erred in law when he allowed the application for leave to file complaint out of time and subsequently granted the said application ex-parte without giving the respondent an opportunity to be heard on the said application.*

- (ii) *The Honourable Registrar erred in law and fact when he did not take into account the mandatory nature of section 85(3) of the Industrial and Labour Relations Act Cap 269 of the Laws of Zambia (as amended) by allowing the complainant to file her complaint out of time.*

Heads of arguments in support of the appeal

6. In buttressing the first ground of appeal, the respondent contended that the complainant argued that the right to be heard is paramount in administering of justice and yet no such consideration was taken into account when the Registrar decided to render his decision *ex-parte*. It was emphasized that the right to be heard is a pertinent principle of justice and is fundamental to the dispensation of justice in a modern democratic society.
7. It was argued that the fundamental right to be heard cannot be overridden by necessary discretion of the Court. In support of this argument, the case of **Bank Mellat v. Her Majesty's Treasury**⁽¹⁾ was relied on. The respondent also cited extensively from the case of **Hakainde Hichilema & 5 Others v. Government of the Republic of Zambia**⁽²⁾ wherein the Supreme Court emphasized that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard and that the Court should observe the rules of natural justice.
8. Predicated on the above authorities, it was submitted that the fact that the respondent was not given an opportunity to be heard was a miscarriage of justice.

9. It was contended that the complainant did not disclose to the Registrar that initially, the complainant filed a matter under Comp/IRC/LK/519/2020 on 1st September 2020 which was dismissed on account of the fact that leave was not sought to file the same and the case was brought out of the ninety day period. As such, the above cause is, in any event, an abuse of court process as the matter was effectively determined under the aforesaid cause.
10. It was further submitted that on an application such as the one on appeal, it was prudent for the learned Registrar to order an *inter-parte* hearing on account of the special procedure provided for under section 85 of the Industrial and Labour Relation Act which section is a gatekeeper to afford a party relief before this Court. The said provision is meant to sieve out frivolous and vexatious claims that do not have substance and ought not to see the light of day in Court. To this end, reliance was placed on the case of **Ndilila Associates v. Supply Connections Limited**⁽³⁾ in which the Court of Appeal approved the lower Court's decision to set aside an *ex-parte* order on grounds that it was improper.
11. As such, it was only proper in the instant case for the *ex-parte* order granted by the Registrar to be set aside for improper procedure adopted.
12. As regards the second ground of appeal, it was contended that it is trite law that an appeal to a judge in chambers from a decision of a Deputy Registrar is an entirely fresh hearing. The evidence on

record shows that the letter dated 27th February, 2020 was in fact the date the 90 days started running.

13. It was submitted that the complainant slept on her rights when she lamentably failed to make the requisite application within the said 90 days. The complainant only lodged her application sometime in May, 2021 which period was in excess of 1 year 2 months.

14. Court's attention was then drawn to the case of **Edward Chilufya Mwansa & 194 v. Konkola Copper Mines Plc⁽⁴⁾** in which the Supreme Court stated inter-alia:

Thus, the law and rules regarding time limits apply across the board, regardless of the social or economic circumstances of the person involved... we also stated that justice is not deaf. Its ears are wide open. It will listen to any person who comes to it with a view of persuading it. The appellants have had their day in Court and their story has been listened to. It regrettably has not changed the position of the law no matter how much, we as agents of justice, may sympathise with the appellants. Arising from what we have stated, we are afraid that the appellants must lose and the appeal must be dismissed. We dismiss the appeal accordingly.

15. It was thus submitted that the complainant failed to follow the provisions of section 85(3) when she filed the Notice of Complaint on 1st September, 2020 under cause COMP/IRCLK/519/2020 which was dismissed on account of failure to apply for leave. Court was asked to take judicial notice of the contents of the said record.

16. Court was also referred to the case of **Kalunga Chansa v. Evelyn Hone College**⁽⁵⁾ and it was argued that the Court's discretion to extend the time to file a complaint out of time should be exercised judiciously. The reasons advanced by the complainant were without merit. Further, the complainant failed to disclose to the Registrar that her case was dismissed due to failure to apply for leave. It was further argued that the complainant is estopped from applying for leave after the dismissal as this amounted to an abuse of Court process.
17. In summation, Court was urged to allow the grounds of appeal and order that the complaint, the affidavit in support and the order to file an answer be expunged from the record.

Heads of arguments in opposition

18. On the first ground, it was contended that the learned Registrar was on firm ground when he allowed the application for leave to file the complaint out of time and subsequently granted the application *ex-parte*
19. It was submitted that amongst the complainant's reasons was the fact that the respondent only communicated their final decision regarding the staff movement on 5th March, 2020. The complainant was only 90 days late when she filed her first complaint on 1st September, 2020. The said complaint was however filed without leave of Court and consequently was dismissed. It was against this background that the complainant made an application to file the said application out of time. She

relied on the provisions of Article 118(2) of the Constitution of Zambia (Amendment) 2016 which stipulates that in exercising judicial authority, the courts shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

20. It was acknowledged that the principle of natural justice is fundamental and that each party to the case has a right to know the full case against them as stated in the case of **Bank of Mellat v. Her Majesty's Treasury**⁽¹⁾. However, the application being challenged on appeal by the respondent is one that does not touch on the merits of the main matter but rather an application which gives the complainant an opportunity to bring her complaint before the Court.
21. The complainant's contention was that the respondent's right to be heard and challenge this case has not been overridden as the main matter under cause no COMP/IRCLK/398/2021 is pending hearing and will allow the respondent to have its case heard on the merits.
22. It was submitted that justice will not be served if the complainant is denied the opportunity to file the complaint based on procedural technicalities of not having filed her complaint within the time stipulated despite advancing proper reasons for not doing so.
23. It was argued that the assertion that the decision to grant the application *ex-parte* was a miscarriage of justice is misconceived.

The application made *ex-parte*, it was argued, is such that purely one party is privy to such application.

24. Further, the allegation that the complaint was an abuse of court process is also misconceived as the case under cause No. COMP/IRC/LK/519/2020 was dismissed based on a procedural issue and not on its merits. It was contended that the procedure taken by the complainant was correct and not improper as alleged by the respondent. The prayer, therefore, was that the first ground be dismissed for lacking merit.
25. As regards ground two, it was contended that the learned Registrar was on firm ground as he did take into consideration section 85(3) of the Industrial and Labour Relations Act CAP 269 as amended.
26. On the requirements of section 85(3), it was submitted that the complainant did explain that her failure to file the application within the time was due to the fact that she was attempting an out of court settlement which did not yield any positive outcome and exhibits were provided to that effect.
27. The Court's attention was drawn to the case of **Concrete Pipes and Products Limited v. Kingsley Kabimba & Another** ⁽⁶⁾ where the Supreme Court explained the importance of exhausting the available internal disciplinary channels before one proceeds to commence legal action.
28. Further, it was submitted that the argument that there was need to inform the Registrar about the cause that was dismissed is

flawed as the said facts do not touch on the basis of the *ex-parte* application bearing in mind that the merits of the case were to be argued after the complaint was filed. No issue in the main matter has been litigated upon to allege abuse of process. Thus, this ground too should be dismissed.

At the hearing

29. Mr. Nsamba on behalf of the respondent submitted that the respondent was alive to the fact that matters ought to be determined on their merit as this is what justice demands. Nevertheless, justice requires that this Court should not succumb to litigants who exhibit scant respect for the rules of procedure. To this end, reliance was placed on the Supreme Court decision in the case of **Access Bank Limited v. Group 5 ZCON Business Joint Ventures**⁽⁷⁾.
30. Mr. Nsamba posited that this Court being the gate keeper to the access to the door of this Court should not entertain the complainant's reasons for the delay as they were without merit. The complainant had not provided any evidence that the application to file complaint out of time was served on her advocates and hence the delay. The letter from the respondent was addressed to the complainant herself and not to her advocates. Therefore, in terms of time, the complaint was filed 1

year 2 months late in blatant disregard to the 90 day guiding the operations of this Court.

31. On behalf of the complainant, Ms. Mulozi submitted that a litigant's failure to bring an action within the stipulated time should not of itself be the reason why they should be denied access to justice through hearing the matter on its merits.
32. In reply, Mr. Nsamba again drew Court's attention to the **Edward Chilufya**⁽⁴⁾ case and submitted that the complainant had her day in Court at the hearing. Thus, Court ought to set aside the *ex-parte* order of leave.
33. On the aspect of costs, Mr. Nsamba took cognizance of the fact that by virtue of Rule 44 of the Industrial Relations Court Rules, costs are granted at the discretion of the Court.

Consideration and decision

34. I have carefully considered the grounds of appeal and the skeleton arguments filed for and against. As rightly submitted by the respondent, in dealing with this appeal, I am exercising my discretion anew and independently as though the matter came before me for the first time.
35. The issue at hand is whether or not the Registrar should have granted the complainant leave to file her complaint out of time.

36. The respondent's first ground of appeal assailed the Registrar's decision to grant the leave *ex-parte* without affording the respondent an opportunity to be heard.

37. I agree that rules of natural justice have to be adhered to. Each party to a case ought to be heard. The case of **Hakainde Hichilema**⁽²⁾ is instructive especially when the Court of apex jurisdiction stated that no man shall be condemned unheard.

38. However, I tend to agree with the complainant that at leave stage, it is not absolutely necessary for the respondent to be heard as no adverse decision is being made against the respondent. The applicant at that stage is simply asking the Court to extend the time in which the complaint may be presented. The application is made pursuant to section 85(3) which states:

(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; 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:

Provided that-

(i) upon application by the complainant or applicant, the Court may extend the period in which the complaint or application may be presented before it; and

39. A careful reading of the proviso above reveals no mandate to the Court to hear both parties.
40. The case of **Ndilila Associates**⁽³⁾ relied on by the respondent can be distinguished from this case. In that case, the Deputy Registrar granted an *ex-parte* order appointing an arbitrator. This order clearly was adverse to the respondent as the respondent's input was required in selecting an arbitrator. The Court of Appeal agreed with the High Court Judge who stated that arbitration is a party driven process which means both parties had an equal role in participating as to who was to take charge of the Arbitral proceedings.
41. I am, therefore, of the view that an order to file a complaint out of time may be granted *ex-parte*. This is in the interest of justice and there is nothing irregular about that action. The Court is after all vested with power and authority to grant the order. It is, however, open to the respondent, upon receipt of the notice of complaint to apply to set aside process where the respondent is of the view that leave to file out of time ought not to have been granted in the first place.
42. Thus, I find the first ground to be without merit.
43. As regards ground 2, the common theme in authorities dealing with applications granted outside the prescribed time frame is that there must be sufficient reasons. In the case of **Twampane Mining Corporation v. E and M Sorti Mining Limited**⁽⁸⁾, the Supreme Court emphasized that it is important to adhere to

rules of Court in order to ensure that matters are heard in an orderly and expeditious manner.

44. As per section 85(3), matters in the Industrial Relations Division are to be commenced within a specific time frame. The Court, however, is clothed with authority to extend the time but this ought to be done judiciously, that is, there must be good and convincing reasons. Leave must not be granted as of right.

45. In the case of **Chilumba Gerald v Zesco Limited**⁽⁹⁾ the Supreme Court guided that:

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 purser of such leave were merely pushing an open door.

46. In casu, the complainant filed her *ex-parte* application for leave to file complaint out of time on 13th May, 2021. The *ex-parte* Order was endorsed by the learned Registrar as he then was on 23rd June, 2021. There is no evidence on record that the Registrar satisfied himself that the reasons given by the complainant were sufficient to warrant the grant of such leave.

47. It was argued by the complainant that she was pursuing *excuria* settlement. Meanwhile, the respondent maintained that the last communication between the complainant and the respondent was on 27th February, 2020. The complainant, on the other hand, is adamant that this communication was only received through her advocates on 5th March, 2020.

48. Whether or not the letter communicating the respondent's decision regarding the complainant's position was received by the complainant on 27th February, 2020 or 5th March, 2020, the fact is that the complainant was out of time when she sought to move Court under the dismissed 2020 cause. Leave was not initially obtained hence the dismissal.
49. Contrary to the respondent's assertion, the complainant did not abuse court process by filing the application to seek leave of court to commence complaint out of time. As rightly submitted by the complainant, the matter was not adjudicated upon in the dismissed cause. I am fortified by the case of **Gaedonic Automotives Limited & Another v. Citizen Economic Empowerment Commission**⁽¹⁰⁾ where the Supreme Court stated that the plaintiff could commence a fresh action after dismissal of the earlier action for the simple reason that the matter was not adjudicated upon or determined on its merits as the parties were not heard.
50. Now what I ought to determine is whether or not the reason advanced by the complainant for the delay was sufficient.
51. The complainant did not rebut the evidence that there was no communication between the parties since March, 2020. In essence, she did not provide proof of the alleged attempt at out of court settlement after the final decision was rendered. This was cardinal in determining whether the notice of complaint stood a chance.

52. In the case of **Augustine Tembo v. First Quantum Mineral Limited**⁽¹¹⁾ the Supreme Court stated that:

If the complainant gives reasons that are satisfactory to the court and it is established that those reasons occurred before the mandatory period had expired, that will have the effect of suspending the mandatory period; and if the complainant does not unduly delay to file his application from the time those reasons ceased to prevent him from doing so then his application will be meritorious. But if it is established that the reasons given, good as they may sound only arose after the mandatory period had expired, then again as we said in the Elvis Katyamba case, the court cannot extend the mandatory period which had expired.

53. This case decides that reasons for the delay in filing the complaint must occur within the 90-day mandatory period. Thus, the complainant in casu needed to provide proof of the attempts at *excuria* settlement and that the same occurred before 3rd June, 2020 or thereabout, that is, within 90 days of receipt of the final decision. The complainant instead sat back and only moved after over a year to file her application. It is also important to emphasise here that the Court in the **Chilumba Gerald** case was faced with a delay of less than half a year. Quite clearly, the complainant sat on her rights.

54. I have not ignored the submissions on behalf of the complainant regarding Article 118(2)(e) of the Constitution which instructs Courts not to have undue regard to procedural technicalities. However, the Supreme Court has stated in a plethora of authorities that Article 118(2)(e) was not enacted to shield litigants

from complying with procedural rules which are intended to provide an orderly administration of justice.

55. In view of the forgoing, I am not persuaded to turn a blind eye to the complainant's invigilancy. She should have kept an eye on the time. It is after all settled that attempts at *excuria* settlement do not stop time from running.

Conclusion and Order

56. All in all, I find that the complainant has not furnished any valid reason or material as to why there was no action taken within the stipulated time frame. The delay is inordinate and inexcusable.

57. In the premises, I find merit in ground 2 and accordingly set aside the *ex-parte* order granted by the learned Registrar. Consequently, the notice of complaint filed on 21st July, 2021 is dismissed as it has no legs to stand on.

58. No order is made as costs.

Leave to appeal is granted.

Dated at Lusaka this 22nd day of August, 2023



HIGH COURT JUDGE