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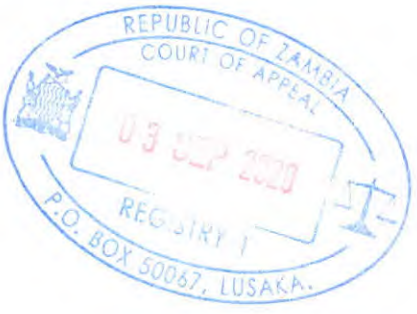
IN THE COURT OF APPEAL FOR ZAMBIA Appeal No. 134/2019
HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

KALUNGA CHANSA **APPELLANT**

AND

EVELYN HONE COLLEGE **RESPONDENT**

Mchenga DJP, Majula and Siavwapa, JJA
On 25th August, 2020 and 3rd September, 2020

For the Appellant: *No Appearance*

For the Respondent: *Mr. J.M. Chimembe of JMC & Associates*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Puma Energy Zambia Plc v Competition and Consumer Protection Commission, Appeal No.172/2015.*
2. *Twampane Mining Society Ltd v E & M Storti Mining Limited, SCZ Judgment No. 20 of 2011.*
3. *Gerald Chilumba v Zesco Limited Appeal No.106/2014.*
4. *Zambia Consolidated Copper Mines v Elvis Katyamba, Appeal No.1 of 2006.*
5. *Jonathan Lwimba Mwila v World Vision Zambia SCZ Appeal No. 193 of 2005 (unreported)*
6. *Henry Kapoko v The People 2016/CC/23*
7. *NFC Mining Plc v Techpro (Z) Limited (2009) ZR. 236,*

Legislation referred to:

1. *The Technical Education, Vocational and Entrepreneurship Training Act No.13 of 1998.*

2. *The Technical, Education Vocational and Entrepreneurship Training (Establishment of Institutions and Constitution of Management Boards) (Amendment) Regulations, SI No. 7 of 2003.*

Introduction

This is an appeal by the appellant Kalunga Chansa, against the decision of High Court Judge M.K. Chisunka of the Industrial and Labour Relations Division on 28th June 2017.

In the court below the Judge dismissed the appellant's application for leave to file a complaint out of time on account of the reasons advanced and the length of the delay. He did not find the explanation given for the delay plausible.

Displeased with this outcome the appellant has come before us advancing three grounds of appeal.

Background

The brief background is that the appellant had been employed by the respondent on a contract for a duration of seven years which terminated on 23rd January 2007. The appellant was aggrieved with the manner in which his dues had been calculated.

As far as he was concerned his dues were to be calculated in line with the Government Circular No.13 of 2001. He engaged in

discussions with the respondent. He went on to write a multitude of correspondence to the respondent and he received some responses. Upon the realization that these efforts were not yielding any fruit, he decided to launch a complaint before court. The reason advanced for the delay to file the complaint was that he was following administrative procedures and it is the prolonged negotiations that made him suffer the fate of being outside the 90-day prescribed window for lodging a complaint.

The respondent contended that notwithstanding *ex-curia* settlement negotiations, the time did not stop running and the appellant ought to have taken the necessary prudent steps as provided in the rules of the court to prepare for any eventuality. The respondent disfavoured the excuse tendered by the appellant of *ex-curia* settlement discussions for failure to follow rules of the court.

The decision below

After an analysis of the evidence, arguments by the parties and the law, the court below did not see the basis upon which discretion to extend time to lodge the complaint out of time could be exercised in his favour. That the complaint should have been lodged within ninety (90) days as per the requirements in section 85(3) of the **Industrial and Labour Relations Act**. According to the Judge's view, the time started running on 8th January 2015 which is the date when the respondent categorically stated their position. This being that they were unable to deal with the appellant any

differently from the way they had dealt with other members of staff who had retired in the same period with the appellant.

Consideration was given to the circumstances of the delay. The reasons as well as the length of time. The reasons given for the delay were dismissed.

This Appeal

In the appeal before us the appellant is unhappy with the discretion exercised by the Judge in the court below. He is contending in the first ground of appeal that the Judge failed to exercise his discretion in the appellant's favour contrary to the provision under section 85(3) of the **Industrial and Labour Relations Act**.

In the second ground he faults the Judge for holding that correspondence from the Secretary to the Cabinet could not be regarded as part of the administrative procedure between the appellant and the respondent when the respondent is a Government Institution.

In the third ground the appellant is resentful that the court below relied on authorities decided before the current Republican Constitution in declining to grant him leave to file notice of complaint out of time.

Appellant's arguments

The first two grounds of appeal have been argued together. It has been submitted that the court below erred in law. The Judge failed to exercise his discretion in favour of the appellant which was contrary to the proviso under section 85(3) of the Industrial and Labour Relations Act. The second bone of contention is that the Judge fell in error when he held that correspondence from the Secretary to the Cabinet could not be regarded as part of administrative procedure when the respondent is a government institution.

According to the appellant regarding the discretionary powers under section 85(3) of the Industrial and Labour Relations Act, the use of the word 'may' implies a discretion on the court which the Judge ought to have exercised judiciously.

The case of ***Puma Energy Zambia Plc v Competition and Consumer Protection Commission***[1] was adverted to where the Supreme Court explained the use of the word 'may'. That under the rules of statutory interpretation the word 'may' connotes discretion or choice between two alternatives.

The definition of the word 'may' in **Black's Law Dictionary, 6th Edition** was highlighted.

In furtherance of the argument on judicial discretion, refuge was sought in case of ***Sharp v Wakefield***[2] where Lord Halsbury observed that:

"where judicial discretion is exercised, the action should be according to the rules of reason and justice, not according to law and not humour. In other words, discretion ought not to be arbitrary but regular and legal"

The appellant has insisted that the court below failed to exercise the discretion in his favour despite the fact that circumstances existed to merit the discretion in his favour.

He has sought to distinguish the instant case from that of ***Gerald Chilumba v Zesco Limited***[3] where the Supreme Court expressed itself as follows:

"Leave to file complaint out of time is not granted as a matter of course as though the pursuer is merely pushing an open door. The granting of leave to file delayed complaints requires that discretion is exercised judiciously, there have to be sufficient reasons for the delay to seek redress in court after the incident complained of. The appellant had presented a lazy effort and had no plausible reasons for the delay of almost six months."

It has been contended that in this case the appellant went further to engage stakeholders whom he believed had powered to intervene. It is against this backdrop that it is submitted that therefore the last letter for purposes of computing the 90 days should be the one written on 10th August 2016, by the Secretary to the Cabinet.

We are being persuaded into construing this letter as the final position on the matter of the appellant's terminal benefits.

The contention here is that the Government of the Republic of Zambia was available for purposes of appeal by the appellant and fell within administrative channels defined in ***Zambia Consolidated Copper Mines vs Elvis Katyamba.***[4]

It has been forcefully argued that the Government is the shareholder and therefore part of the respondent and it was therefore erroneous for the court below to hold that it was an outsider and should not be considered as part of the administrative channels.

Moving to ground three, it has been contended that the court fell into error when it failed to consider the provisions of the constitution of Zambia when dealing with the application before it.

Long story short, the appellant is relying on Article 118(2)(e) of the Constitution which explains that the court's pre-occupation should be to dispense justice without undue regard to procedural technicalities.

In furtherance of the argument, the appellant contends that the lower court erred by solely relying on the authority of Zambia ***Consolidated Copper Mines v Elvis Katyamba***[4] without taking the constitutional provisions into account which is the Supreme law of the land.

It has been urged upon us to allow the appeal and order the lower court to hear and determine the matter on its merit.

Respondent's arguments

Mr. Chimembe, Counsel for the respondent has argued in relation to the first ground of appeal that the lower court cannot be faulted for not exercising its discretion to allow that the complaint be lodged out of time. That discretionary powers by nature are optional and must be exercised judiciously. The case of ***Jonathan Lwimba Mwila v World Vision Zambia***[5] has been relied upon in this regard where it was held as follows:

> *"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 as 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..."*

It has been submitted that the appellant had been forum shopping seeking audience with any person that would listen and when pleas fell on deaf ears he sought to lodge his complaint which was after the mandatory period had expired. It has been asserted that the appellant failed to show good cause why the lower court should have exercised its discretionary powers in his favour.

Turning to ground two it has been submitted that the respondent is a body corporate with its own legal personality at law. This is pursuant to the provisions of **The Technical Education, Vocational and Entrepreneurship Training Act,** section 9 reads:

> *"9. (1) The Ministry may, in consultation with the Authority, by statutory instrument, establish an institution for the provisions of technical education, vocational and entrepreneurship training and defined its functions.*
>
> *(2) An institution established under subsection (1) shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform."*

In addition it has argued that the above provisions as read with **The Technical, Education Vocational and Entrepreneurship Training (Establishment of Institutions and Constitution of Management Boards) (Amendment) Regulations SI No 7 of 2003** create the respondent institution. The argument is anchored on these two pieces of legislation. The argument being that as a person at law, all administrative channels begin and end with the respondent's institution itself.

Counsel has strongly contended that, that being the case, the lower court was in order when it held that correspondence between the appellant and the Secretary to the Cabinet cannot constitute administrative channels as the respondent is a body corporate.

To further strengthen this submission he adverted to the celebrated case of ***Zambia Consolidated Copper Mines v Elvis Katyamba.***[4]

> *"From our reasoning, 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 or her in the organization."* (Emphasis ours).

It has been contended that the Secretary to the Cabinet does not form part of the appellate structure of the respondent organization and thus the lower court was on firm ground.

Mr. Chimembe has spiritedly argued that even if Government is a shareholder of the respondent institution, there is a corporate veil that separates a company from its owners. That the administrative procedures begin and end with the institution itself.

Pertaining to the third ground of appeal, the short argument advanced is that rules of court are not mere technicalities. That the appellant failed to prosecute his claim within the prescribed time, he cannot then seek the aid of Article 118(2(e) of the Constitution. Reliance has been placed on the case of ***Henry Kapoko v The People***[6] where it was held that:

> *"Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same may constitute technicalities."*

Another insightful case called in support is that ***NFC Mining Plc vs Techpro***[7], where it was held that:

> *"Rules of court are intended to assist in the proper and orderly administration of justice. As such, they must be strictly followed by all the litigants and those who choose not to comply do so at their own peril."*

In concluding the argument regarding Article 118(2)(e) Counsel averred that the appellant, by ignoring the mandatory period within which to lodge his complaint, did so at his own peril and cannot call in aid the provisions of Article 118(2)(e). We have been urged to dismiss the appeal with costs to the respondent on account of the arguments advanced.

Our decision

We have scrutinized all the evidence and arguments before us. We have noted that the grounds of appeal are intertwined. We shall therefore deal with them globally. The central issue for determination, in our well-considered view, is whether the Judge exercised his discretion judiciously.

Judicial discretion

A Judge is vested with inherent discretionary power to make legal decisions according to their discretion. This discretionary power for a Judge as a decision maker is to make a judgment taking into account all relevant information. This entails making a choice of approving or not approving. The benefits of judicial

discretion are that a Judge can determine a case fairly based on the consideration of individual circumstances.

The only time this exercise of judicial discretion can be impeached is if the Judge did not exercise it judiciously. What this means is that a failure to take proper consideration of the facts and law relating to a particular matter will be considered to be an abuse of discretion. One must establish that the discretion exercised is an arbitrary one or is unreasonable thereby flying in the teeth of precedent and judicial custom.

Turning to the case before us, the learned trial Judge adverted to section 85(3) of the Act, which for ease of reference reads as follows:

> *"The court shall not consider a complaint or application unless the complainant or applicant presents the complaint or application to the court:*
>
> *(a) within ninety (90) days of exhausting the administrative channels available to the complainant or applicant; or*
> *(b) where there are no administrative channels, within ninety days of the occurrence of the event which gave rise to the complaint or application.*
>
> *Provided that:*
>
> *Upon application by the complainant or applicant, the court may extend the period in which the complaint or application may be brought."* (emphasis ours).

It is clear that the law makes provisions for a Judge to exercise his discretionary powers to extend the time period. The case of ***Puma Energy Zambia Plc v Competition and Consumer Protection Commission,***[1] the Supreme Court has guided that under the rules of statutory interpretation the word 'may' denotes discretion or choice between two alternatives.

We do agree that the Judge had the discretion whether or not to extend the period for filing of the complaint. We have examined the law pertaining to the issue as well as the circumstances with a fine tooth comb. It is clear to us that the appellant went on an expedition in a bid to have his grievance resolved. A number of letters have been exhibited. He did go from pillar to post but this did not yield any results. The question to be answered is what is the law regarding parties engaged in ex-curia negotiations and its effect on the time for filing a complaint?

The principle which has been articulated in a plethora of cases is that the fact that one is engaged in ex-curia negotiations does not stop the time from running. In ***Twampane Mining Corporative Society Ltd vs E & M Storti Mining Limited***[2] it was observed as follows:

> *"The position of the law is that ex-curia settlement discussions do not and cannot stop the time from running. This principle was ably espoused by the learned authors of* ***Chitty on Contract*** *paragraph 1949 at page 1267 where they stated inter-alia, that once time has started running, it continues until*

proceedings are commenced or the claim ***IS BARRED. PARTIES*** *Must bear in mind that ex-curia settlement discussion may fail or succeed hence the reason to be prudent enough to prepare for any eventuality. Watch the time and take the necessary steps as provided in the rules of* ***COURT.*** *To use ex-curia settlement discussions as an excuse for failure to comply with the rules is to do so at ones' peril."*

The court has put litigants on notice that even if they are engaging in ex-curia settlement discussions it is only prudent for them to prepare for any eventuality. This is bearing in mind the fact that the results of the negotiations are not guaranteed and may either fail or succeed. Thus, the need to be shrewd and watch the time and take the necessary steps as provided by the rules of the court. The ***Twampane***[2] case therefore sets the bar high and sends a warning that by failing to abide by rules of the court, one does so at their own peril.

The appellant wants to ride on the coat tails of the case of ***Zambia Consolidated Copper Mines vs Elvis Katyamba***[3] where the apex court made the following observation:

"It is mandatory for the Industrial Relations Court not to entertain a complaint or application unless such complaint or application is brought before it within thirty days from the date of the event that gave rise to the complaint or application."

They further stated that:

> *"In view of the mandatory nature of the law in sub-section 3 of section 85 of the Act, the proviso is, from our point of view, seen as a means of facilitating settlement outside court. This means that if the complainant or applicant can show to the court that during the mandatory period of thirty days, he or she had engaged in the process of appeal or negotiations for a better retirement or retrenchment package, the application for an extension of time within which to lodge the complaint or application can be said to be meritorious."* (emphasis ours)

The argument being that the appellant fulfilled the threshold set in the interpretation of section 85 in the aforcited case.

The trial Judge addressed the issue of what constitutes 'administrative channels' in the ***Elvis Katyamba***[3] case and after considering all the correspondence before him, formed the view that the time started running on 8th January 2015.

We could not agree more with him because there is an end to the pursuit of administrative channels. These cannot be pursued in perpetuity. The respondent had categorically stated its position on the matter. The argument mounted by the appellant is that he was awaiting the final say from the stakeholders and should be considered as part of the administrative channels. This argument does not hold water because as rightly pointed out by the respondent's counsel, Mr. Chimembe, the respondent is a body corporate with its own legal personality. Section 9 of **The**

Technical Education, Vocational and Entrepreneurship Training Act is authority for this position. In addition regard must be had to the provisions of **The Technical Education, Vocational and Entrepreneurship Training (Establishment of Institutions and Constitution of Management Boards) (Amendment) Regulations** which birthed the respondent institution. That being the case it only behoves us to state that the respondent has its own administrative channels to which the appellant has recourse. He cannot seek to pursue other administrative channels outside of the respondent, it being a body corporate. Proceeding to the Secretary to the Cabinet is quite a stretch.

In light of the foregoing it means that time started to run after the appellant's appeal to the respondent's management was unsuccessful. This is so because the Secretary to the Cabinet does not form part of the appellate structure in the respondent's organization. We see nothing untoward by the exercise of the Judge's discretion. It was exercised judiciously taking into account all the relevant circumstances of this case. The reasons for the delay are insufficient. The length of delay was inordinate.

We therefore find no merit in grounds one and two. We dismiss them accordingly.

Article 118(2)(e) Argument

We now turn to ground three which is anchored on the provisions of Article 118(2)(e) of the Constitution. This provision

was considered by the Constitutional Court in ***Kapoko vs The People***[6] where it was held that:

> *"Article 118(2)(e) cannot be treated as a "one size fits all answer" to all manner of legal situations. Article 118 (2)(e) is a guiding principle of adjudication framed in mandatory terms. It is a basic truth applicable to different situations. The Article's beneficial value is an eclectic fashion depending on the nature of the rule before it. Each court will need to determine whether in the circumstances of the particular case, what is in issue is a technicality and if so whether compliance with it will hinder the determination of a case in a just manner."*

They further stated at page J33 that:

> *"Article 118(2) is not intended to do away with existing principles laws and procedures, even where the same may constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality."*

The Constitutional Court has guided on the approach to be taken when dealing with legal questions and problems that may arise. They have made it clear that **Article 118** is not intended to oust procedural requirements. They have expressed themselves clearly in the foregoing paragraphs. The reason for having rules of procedure is to ensure there is a level playing field for all parties. In addition it promotes integrity of the process. One cannot therefore

disregard them willy-nilly and plead the provisions of **Article 118**. It is not a panacea for resolving violations of procedure.

We are also mindful of what was stated by the Supreme Court in ***NFC Africa Mining Plc vs Techpro Zambia Limited***[7] that:

> *"Rules of procedure are intended to assist in the proper and orderly administration of justice."*

The appellant was duty bound to abide by the rules of procedure and can now not seek refuge in the provisions of the Constitution, specifically, **Article 118** for reasons articulated in the preceding paragraphs.

In the final analysis, we have seen no basis upon which the trial Judge's decision can be assailed in all the three grounds.

We therefore dismiss them for want of merit.

Each party to bear their own costs.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
B.M. Majula
COURT OF APPEAL JUDGE

.....
M.J. Siavwapa
COURT OF APPEAL JUDGE