IN THE COURT OF APPEAL OF ZAMBIA: **APPEAL NO. 44/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

GUARDALL SECURITY GROUP LIMITED **APPELLANT**

AND

REINFORD KABWE **RESPONDENT**

CORAM: KONDOLO, MAKUNGU AND SIAVWAPA, JJA

On 22nd January and 30th June 2020

FOR THE APPELLANT: MR. VICTOR KAYAWE, IN HOUSE COUNSEL

FOR THE RESPONDENT: IN PERSON

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Anderson Kambela Mazoka, LT General Christon Sifapi Tembo Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, the ECZ and the Attorney-General (2005) ZR 138.*
2. *Hakainde Hichilema and Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, Electoral Commission and Attorney General 2016/CC/0031: Ruling No 33 of 2016.*
3. *ZEGA Limited v The Zambia Revenue Authority Appeal No 96/2018.*

4. *Zambia Revenue Authority v Fillimart Investments Limited SCJ No. 24 of 2017.*
5. *Wahl v Round Valley Bank 38 ARIZ 411 300 P955 (1931)*
6. *State v Richie 20 S.W. 3D 624(Tenn.200).*
7. *Elliot v Piersol 1. Pet. 328-340 (1828).*
8. *Independent School Dist v Independent School District, 170 N.W.2d 433, 440 (minri. 1969).*
9. *People v O' Rourke, 124 Cal. App 752, 759 (Cal App.1932).*
10. *ANPP v GONI (2012) FWLF (PT 623) 1821.*
11. *Chief Dominic Onuorah Ifezue v Livinus Mbadugha and another S.C 68/1982.*
12. *St. John Shipping CRPPN v J. Rank LTD (1975) 1 QB 267 at 282*
13. *Bhagwandas Fatechani Daswani v HPA International and Others, 2000 (2) SCC 13.*

Legislation referred to:

1. Constitution of Zambia (Amendment) Act No 2 of 2016
2. Industrial and Labour Relations (Amendment) Act No 8 of 2008
3. Industrial and Labour Relations (Amendment) Act No 15 of 2015

Other Reference Materials

1. Black's Law Dictionary
2. Parliamentary Debates of 15th August 2008
3. Report of the Parliamentary Select Committee

INTRODUCTION

This is an appeal against the Judgment of the Hon. Mr. Justice E. L. Musona sitting in the Industrial Relations Division of the High Court. The Court gave Judgment in favour of the Respondent to the displeasure of the Appellant.

The Appellant filed a Notice and Memorandum of Appeal on 17th January, 2019 containing three grounds of appeal as follows;

1. The Court below erred in law when it proceeded to hear this matter on 5th December, 2018 and passed Judgment on 14th December, 2018 as at the time the matter was heard on 5th December, 2018 and Judgment passed on 14th December, 2018 it was already over one year contrary to the provisions of Section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008 which provides that; *"matters before the Industrial and Labour Division of the High Court ought to be commenced and disposed of within a period of one calendar year from the day on which the complaint or Application is submitted to it".* Thus by provision of the above section the Court erred in law when it proceeded to hear and determine this matter after 6th September, 2018 as the Court was already *"functus officio"* with regard to this matter and thus had no jurisdiction to hear this matter outside the law.

2. The Court below erred in law and in fact when it held that the Respondent was on Permanent and Pensionable Employment terms and thus ordered that he be paid terminal benefits at the rate payable to the Appellants' employees serving on permanent establishment for the period from February, 2002 to 1st August, 2012, when in fact the Respondent had been at

all material times employed on contract terms of 12 months renewable annually.

3. The Court below erred in law when it held that the giving of Notice of termination of employment contract by referring/reference to the termination clause in the contract did not amount to giving of proper reason as required by Act No. 15 of 2015.

BACKGROUND

The Respondent herein was employed by the Appellant in 2002. The record shows that on 1st March, 2016, the Respondent's contract of employment was renewed for a further twelve (12) months with effect from 1st March, 2016. This is according to the letter exhibited at page 41 of the Record of Appeal. The letter also states that the Respondent's previous contract had expired on 29th February, 2016.

The renewed contract was due to expire on 28th February, 2017 but by letter dated 4th November, 2016, exhibited at page 42 of the Record of Appeal, the Appellant gave a month's Notice terminating the Respondent's contract in accordance with the conditions of employment applicable to him.

According to a letter dated 6th March, 2014, an offer of employment to the Respondent exhibited at page 52 of the Record of Appeal, either party could terminate by Notice under Clause 8.

After exhausting administrative channels of dispute resolution, the Respondent filed a complaint in the Industrial Relations Division of the High Court on 6th September, 2017. The complainant alleged unlawful termination of employment and none-payment of terminal benefits and sought the following reliefs;

1. Compensation for damages for loss of employment.
2. Payment of terminal benefits and leave days.
3. Costs and interest.
4. Any other dues the Court may deem fit.

THE JUDGMENT IN THE COURT BELOW

On the date of hearing counsel for the Appellant was not present but the learned Judge proceeded to hear the case for the Respondent after refusing to adjourn the matter for reasons well stated in the Judgment. The Human Resource Officer, who represented the Appellant, cross-examined the Respondent but opted not to call evidence for the Appellant.

In his Judgment, the learned Judge found that the termination of the contract of employment by notice, without giving reasons, was a contravention of the Industrial and Labour Relations (Amendment)

Act No. 15 of 2015. He accordingly awarded the Respondent six months basic salary for unlawful termination of contract of employment.

On the claim for terminal benefits, the learned Judge found that the Appellant did not dispute the Respondent's evidence that he was employed on permanent and pensionable conditions for 11 years up to 2013 when he was converted to contractual terms. The learned Judge also found that the argument by the Appellant that the Respondent was not entitled to terminal benefits was not proved as it did not produce evidence to prove the assertion.

The learned Judge made an order that the Respondent be paid terminal benefits as applicable to its employees on permanent and pensionable conditions of service.

On leave days, the learned Judge found that the Respondent had been offered K1, 150.55 as leave terminal benefits which he had rejected. He ordered that the same amount be paid to the Respondent and awarded him interest on the amounts and costs.

THIS APPEAL

Dissatisfied with the outcome, the Appellant lodged its appeal with three grounds as already set out earlier in this Judgment.

In ground one, the argument is that the Court had no jurisdiction to hear and determine the complaint after the one year period fixed by the law to dispose of the complaint had elapsed.

This argument is anchored on Section 19 (3) (b) (ii) of the Industrial and Labour Relations (Amendment) Act No. 8 of 2008 which provides as follows;

(ii) "***The Court shall dispose of the matter within a period of one year from the day on which the complaint or application is presented.***"

In this case, the complaint was presented to the Court on 6th September, 2017 and going by the said provision of the law, the Court had until 6th September, 2018 to dispose of the matter. However, the Court only disposed of the matter by way of delivery of Judgment on 14th December, 2018, about three months outside the prescribed period.

In fact, by the time the matter was heard on 5th December, 2018, the Court was already out of time by three months. The question then is what is the effect of failure, by the Court to dispose of a matter within the time prescribed by the law?

In order to fully appreciate the question, we decided to review the history of the provision under consideration. It is noted that the

Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia, prior to the 2008 amendment, provided for the jurisdiction of the Court and the time limit for disposal of matters in two separate Sections namely Sections 85 and 94 respectively.

Section 85 (3), particularly, provided for the time within which a complaint was to be presented to the Court and if that time was not adhered to, the Court was divested of jurisdiction to consider the complaint unless an application for extension of time within which to lodge the complaint was made and granted by the Court. For ease of reference, we reproduce sub-section 3 and the proviso thereto hereunder;

> ***"The Court shall not consider a complaint or application unless it is presented to it within thirty days of the occurrence of the event which gave rise to complaint or application".***
> ***"Provided that upon application by the complainant, or applicant, the Court may extend the thirty-day period for three months after the date on which the complaint or applicant has exhausted the administrative channels available to that person."***

This is how the law stood prior to the 2008 amendments and we will return to the amendment later. For now, we turn to Section 94 of the Act which provides for a time limit within which a Judgment

ought to be delivered and we reproduce it hereunder for ease of reference;

> ***(1)"The Court shall deliver Judgment within sixty days after the hearing of the case."***
>
> ***(2)"Failure to deliver Judgment, within the period stipulated in sub-section (1) shall amount to inability by the Chairman or Deputy Chairman to perform the functions of his office and the provisions of the Constitution in dealing with the inability by a Judge to perform his functions under the Constitution shall apply".***

So the law as it was then was clear in that after the provisions of Section 85 (3) had been complied with, then the provisions of Section 94 (1) and (2) would watch to see if the Court would comply with it so that its Judgment should be delivered within sixty days after the closing of the hearing.

If there was no compliance, then the Judge became liable to the provisions of the Constitution by which a Judge could be removed from office for inability to perform his duties.

At the time, the difference between Section 85 (3) and Section 94 (1) and (2) was very clear, in that the former punished the complainant or applicant for failure to adhere to the law in that the said failure

went to the jurisdiction of the Court to hear the complaint. Section 94 (1) and (2) on the other hand seeks to sanction the Judge for inability to perform his duties.

AMENDMENT ACT NO 8 OF 2008

Section 19 (3) of the Act only amended Section 85 of the principal Act by deleting Sub-Section (3) and replacing it with the following;

> ***"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) .....provided that:-**
>
> **(i) Upon application by the complainant, the Court may extend the period in which the complaint or application may be presented before it and**
>
> **(ii) The Court shall dispose of the matter within a period of one year from the day on which the complaint or application is presented to it.**

There is a remarkable difference in the amendment in that it added a time limit for disposal of a matter and in this case, the legislature departed from Section 94 which pegs the starting point at the

completion of the hearing while the amendment goes all the way back to the presentation of the complaint or application.

Considering that Section 94 was not amended, it means that we now have two provisions in the same Act providing for two different time limits within which a complaint or application should be disposed of with different starting points.

In our quest to appreciate the mischief that the legislature intended to cure through the amendment of Section 85 (3) of the Industrial and Labour Relations Act, we consulted the Parliamentary debates of 15th August, 2008 when the amendment Bill was presented for second reading.

In his fairly lengthy ministerial statement on the floor of the house, the then Minister of Labour and Social Security, Mr. Richard Mukuma, only said the following in relation to the proposed amendment to Section 85 (3);

> ***"Mr. Speaker, however, a number of challenges which need to be addressed have been experienced in our labour market. The challenges include, among others the following;***
>
> ***(i) The long time taken to settle industrial disputes"***

The rest of the highlighted challenges are irrelevant to Section 85 (3);

The ministerial statement was followed by a statement by the chair of the Select Committee, honourable Given Lubinda. In his debate, Mr. Lubinda did not say anything relevant to Section 85 (3) and neither did any of the subsequent debaters.

We also checked the Report of the Committee which contains the following statement;

> ***"Section 85 of the Act provides for the jurisdiction of the Court. Under Clause 21, Bill seeks to amend the Act by increasing the time frame within which a complainant or an applicant can present a complaint or an application before the Court. The complaint shall be presented within 90 days of exhausting all available administrative channels and where there are no administrative channels the period is limited to 90 days of the occurrence of the event leading to the complaint or application. However, the Court will be at liberty to extend the period within which a complaint may be brought before it, on application by the complainant. The period for this is not specified. Furthermore, the Court will be required to dispose of the matter within one year of presentation of the complaint before the Court. The Act requires the***

complaint to be presented within 30 days, which period may be extended by the Court for a further period of 3 months after the date on which the complainant or applicant has exhausted available administrative channels."

What we note from the two statements by the Select Committee and the Minister is that the mischief identified was the long time it took, under the then Section 85 (3) to settle industrial disputes as no time limit was provided. Secondly, the legislature proposed to use the time limit in the proposed amendment as the cure for the problem of delay.

The argument may be that there already existed Section 94 which had and still has a time limit. We think that the problem with Section 94 is that time only starts to run after the close of the hearing in which case, a matter can drag on forever, from the date of lodging the complaint or application, until the close of the hearing without consequences. This provision therefore, does not cure the delay in disposing of industrial relations cases.

The 2008 amendment, by counting time from the date of filing the complaint or application, has provided a cure to the problem inherent in Section 94. This is so because now, there is a one year cap from filing until disposal of a complaint.

We also see Section 19 (3) as a tool intended to place both the litigants and the Court on high alert to the consequences of not disposing of a matter within the stipulated period being; loss of jurisdiction by the Court.

On the other hand, Section 94 places the burden on the Court to ensure that once the hearing is concluded, it delivers its Judgment within sixty days. Failure to do so would expose it to the removal procedure under the Constitution.

For the above stated reasons, it is our considered view that Sections 19 (3) of Act No. 8 of 2008 and Section 94 of the Parent Act are deliberately placed in the Industrial and Labour Relations Act as independent provisions to serve different purposes. The two Sections also give aggrieved parties the latitude to invoke either one or the other of the two provisions depending on the circumstances.

Where the matter has not been heard within one year of filing, an aggrieved party can move the Court under section 19 (3) to stop the judge from dealing with the matter any further. If on the other hand, the hearing has been concluded within the one year period but the Judge does not deliver the judgment within sixty days thereafter, then the aggrieved party can move the Court under section 94 of the Act to have the Judge subjected to the removal procedure under the Constitution.

In this particular case, the Appellants could not anchor their defence and appeal on Section 94 as it is inapplicable because the Judge delivered his Judgment within the sixty-day time limit prescribed by the law after the close of the hearing.

The issue for determination then; is whether or not the Judge had the requisite jurisdiction to hear the complaint, after the one year within which to dispose of a matter, prescribed by Section 19 (3) (b) (ii) had elapsed.

THE LAW

The lingering question is; what is the effect of failure to comply with a statutory limitation of time within which to perform a certain duty? In our jurisdiction, there are two cases; one by the Supreme Court of Zambia and the other by the Constitutional Court of Zambia and in both cases, it was a Presidential Election Petition under consideration.

In the case of *Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo and Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, the ECZ and the Attorney-General*[1], the Respondents challenged the jurisdiction of the Court on two fronts. Firstly that Article 41 (2) of the Constitution did not give the Court the mandate to grant any of the remedies sought by the Petitioners among them, annulment of an election. They also argued that the Court could only assume jurisdiction to grant the requested remedies if it relied on Section 18

of the Electoral Act which provides for nullification of a parliamentary election by the High Court.

They further argued that if the Court found that Section 18 of the Electoral Act applied to a Presidential Election Petition, then it should also find that Section 27 (1) of the Electoral Act, which limits the determination of a Parliamentary Election Petition to 180 days, equally applies to a Presidential Election Petition in which event the Court would have lost jurisdiction as the 180 days had been exceeded by more than two years.

In dealing with the above submission by the Respondents, the Supreme Court had this to say at page 160 of its Judgment;

> ***"In our view, Section 18 of the Electoral Act does not directly apply to Presidential Election Petitions. To argue otherwise would be to limit the wide provision of Article 41 (2) of the Constitution under which the Court is at large to consider any grounds in resolving questions referred to it".***

In dealing with the issue of whether it had power to grant the remedies requested by the Petitioners, including annulment of the election without having recourse to Section 18 of the Electoral Act, the Supreme Court stated as follows; at page 160;

"However under Article 42 (2) of the Constitution, the election of the President can be challenged on any question, either of law relating to the election of a President or the validity of election itself. In trying the question alleged, the Court is at large to look at the conduct of the Presidential election itself or indeed the compliance of the provisions of the applicable law. Should the Court be satisfied on any proven facts, that a candidate was not validly elected, or indeed that the relevant laws were not complied with so as to negate legitimacy of the election, it will void such election."

In responding to the question of whether Section 27 (1) of the Electoral Act, prescribing 180 days to determine a Parliamentary Election Petition applied to a Presidential Election Petition, the Supreme Court said the following at page 161;

"The Respondents have also submitted that in the event that we hold that Section 18 of the Electoral Act applies to Presidential Election Petitions, we should also hold that Section 27(1) of the Electoral Act which prescribes the time limit of 180 days within which to determine an election petition should also apply to a Presidential Election. We have found that Section 18 of the Electoral Act does not directly apply to Presidential Election Petitions. Though for different reasons, we

uphold the petitioners' submissions that the 180 days limitation does not apply".

Then on the same page, the Court went on to state (Obiter);

"On the other hand, even if Section 27(1) would be applicable, strict adherence to it would lead to a number of illogicalities and absurdities in both, Parliamentary and Presidential elections in that regardless of any reason, a petition which exceeds 180 days must cease or collapse in midstream without any determination. This, in our view, would be most unsatisfactory. Perhaps, this explains why the Section is silent on what should happen when a petition has exceeded 180 days. We take note that in practice most Parliamentary Election Petitions and even the last Presidential Election Petition exceeded 180 days."

Our view is that in dismissing the arguments by the Respondents that the Supreme Court lacked jurisdiction both to grant the reliefs sought by the Petitioners and on account of the lapse of 180 days, the Supreme Court clearly said Sections 18 and 27(1) of the Electoral Act, did not apply to Presidential Election Petitions.

The Supreme Court held that Article 42 (2) of the Constitution was so widely couched that it granted it jurisdiction to hear, determine and annul a Presidential election upon sufficient evidence.

While Section 18 of the Electoral Act was held not to be directly applicable, Section 27(1) was dismissed outrightly whereupon the Court found that the 180 days limitation did not apply albeit for other reasons.

We now consider the Constitutional Court Judgment in the case of *Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu, Inonge Wina, Electoral Commission and Attorney General.*[2]

In that Petition, the Court abruptly ended the petition when, by a majority of three to two, it ruled that it had lost jurisdiction to hear the petition on account of the expiry of the time limit of 14 days within which to hear a petition prescribed by the Constitution.

This is what the Court said;

> ***"As Articles 101(5) and 103(2) of the Constitution limit the period within which a Presidential Election Petition must be heard by this Court to fourteen days after the filing of the election petition, the Court cannot competently hear a petition outside this period... our position therefore, is that the petition stood dismissed for***

want of prosecution when the time limited for its hearing lapsed and therefore, failed by reason of that technicality. This is because the Petitioners failed to prosecute their case within fourteen days of it being filed. That being the case, there is no petition to be heard before this court as at today."

Article 101 (5) of Constitution Act No. 2 of 2016 provides as follows;

"The Constitutional Court shall hear an election petition filed in accordance with Clause (4) within fourteen days of the filing of the petition."

Article 103 (2) provides as follows;

"The Constitutional Court shall hear an election petition relating to the President elect within fourteen days of the filing of the petition".

The difference we note between the Supreme Court decision in the Mazoka petition (Supra) and the decision of the Constitutional Court above is that in the former, the Supreme Court faced no provision of the law that set a time limit within which to hear a Presidential Election Petition after holding that Section 27 (1) of the Electoral Act did not apply to a Presidential Election Petition.

The Supreme Court, in its obiter, observed that it was common practice in Parliamentary Election petitions and the Presidential Election Petition of 1996 to exceed the 180 day limit. In fact, the 2001 Presidential election petition, which was under consideration at the time, took more than three years to be determined.

That delay led to the proposals to introduce a time limit within which a Presidential Election Petition ought to be determined. This was so because of the dissatisfaction among the citizenry that a President whose election was being challenged should remain in office for a larger part of the tenure period without knowing his fate. The result was the introduction of Articles 101(5) and 103(2) in Act No. 2 of 2016 which introduced a fourteen day time limit. The Constitutional Court then followed the law to the letter and interpreted the two provisions as going to jurisdiction.

In our short period of existence as a Court, we also had occasion to consider the issue of time limit in the case of *ZEGA Limited v The Zambia Revenue Authority*. [3]

The brief facts were that Zambia Revenue Authority (ZRA) assessed ZEGA for Tax. ZEGA disputed the assessed amounts and appealed to the Tax Appeals Tribunal on two grounds. The tribunal allowed the first ground and dismissed the second.

Dissatisfied with the outcome, ZEGA appealed to this Court fronting three grounds. The parties however filed a consent Judgment before we could hear the appeal with respect to grounds one and two.

We heard ground three which challenged the tribunal's jurisdiction to deliver its ruling outside the time set by the Act and the Regulations.

The relevant provisions are Section 10 of the Tax Appeals Act and Regulations 16 (1) of the Revenue Appeals Tribunal Regulations Statutory Instrument No. 43 of 1998.

Under Section 10 of the Act, the Tribunal shall render its decision within sixty days of concluding the hearing.

Regulations 16 (1) provides as follows;

> ***"The Tribunal may deliver its decision at the end of a hearing but in any case, the decision shall be put in writing and sent to all parties to the appeal within fourteen days of delivering the decision."***

The Tribunal rendered an oral ruling nearly a year after the hearing and only delivered its written ruling eleven years after the hearing.

We considered the law and authorities from within and without our jurisdiction. On the local front we considered two cases, namely; *Zambia Revenue Authority v Fillimart Investments Limited*[4] and *Hakainde Hichilema and Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia.*[5]

In the *ZRA v Fillimart* case supra, the Supreme Court of Zambia had this to say;

> ***"To minimize the effects of delays on tax payers, which werepointed out by the Committee, Section 10 of the Tax Tribunal Act has provided that the Tribunal must render its decision within sixty-days after conclusion of the hearing of the matter.***

The Supreme Court here identified minimizing the effect of delay as the reason for the time limit set by Section 10 of the Act.

This reasoning resonates with the rationale for amending Section 85 (3) of the Industrial and Labour Relations Act as well as the inclusion of Article 101(3) and 103(2) in the Constitution (Amendment) Act No. 2 of 2016.

We however, note that the Constitutional provisions and the Statutory provisions limiting time do not provide a remedy for none

compliance as the Supreme Court of Zambia commented obiter in the Mazoka case.

In the ZEGA case, we also considered cases from Foreign jurisdictions but before we leave the local jurisdiction, it is important to mention that the Constitutional Court took a different view from the obiter Judgment of the Supreme Court of Zambia in the Mazoka case notwithstanding that the Constitution equally is silent on what should happen when a petition has exceeded the stipulated time limit, in this case fourteen days.

The Constitutional Court adopted the purposive approach in interpreting Article 101(3) and 103(3) of the Constitution and this is what the Court said at page J15 of its Judgment;

> ***"Article 101(2) and 103(2) of the Constitution limit the period within which a Presidential Election Petition must be heard by this Court to fourteen days after filing of the Election Petition. The Court cannot competently hear a petition outside this period".***

We also considered the case of *Wahl v Round Valley Bank* [6] and *State v Richie* [7] both from the United States of America. The two cases held that after the expiry of a stipulated time, a tribunal loses jurisdiction as to the subject matter.

In the case of *Elliot v Piersol* [8] the Federal Supreme Court made the following statement;

> ***"Without authority, its Judgments and orders are regarded as nullities. They are not voidable, but simply void and form no bar to a recovery sought even prior to a reversal in opposition. They constitute no justification and all persons concerned in executing such Judgments or sentences, are considered in law as trespassers".***

With the above authorities, we decided that the Ruling rendered by the Tax Appeals Tribunal eleven years after the time limit of sixty days had elapsed was a nullity for want of jurisdiction.

We then went on to state that the remedy for the Appellant would be to re-commence the proceedings before the Tribunal although in this case, the Judgment was academic as the parties had settled by consent Judgment.

DOES SILENCE ON EFFECT OF LIMIT ALLOW DISCRETION?

Again, in the ZEGA case, we considered authorities on the meaning of the word "shall" and we found the following;

In Black's Law Dictionary at page 1375, "Shall" is given the following import;

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command and one which has always or which must be given compulsory meaning."

In the case of *Independent School Dist v Independent School District,* [9] it was held as follows;

"When used in statutes, contracts or the like, the word "shall" is generally imperative or mandatory".

In the *People v O' Rourke,* [10] *it* was put as follows;

"In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials, or where a public interest is involved or where the public or persons have rights which ought to be exercised or enforced, unless

a contrary intent appears, but the context ought to be very strongly persuasive before it is softened into mere permission."

The proviso to Section 19 (3) (b) (ii), which is the subject of this appeal, uses the word "shall" as follows;

"The Court shall dispose of the matter within a period of one year from the day on which the complaint or application is presented to it."

So if we apply the signification of the word "shall" in ordinary and common parlance as stated in the authorities cited above, Section 19 (3) (b) (ii) is mandatory and leaves no room to the Judge to use discretion to dispose of a matter outside the one year period from the date of presentation of the complaint or application.

The Appellants have submitted that after the expiration of the period, the Court becomes functus officio. We think this is not the correct position at law as the term refers to the status of an official or a document that has completed its task or performed his duty and served its purpose.

We are instead of the view that the effect of a limitation provision in an Act of Parliament is to limit jurisdiction of the Court as to the matter before it to within that stipulated period.

Failure to act within the set time limit robs the Court of jurisdiction to take any further action in that matter. Whether or not the non-compliance has been caused by the Court or other players is immaterial as the cesser of jurisdiction is by act of law.

It will be observed that the Legislature does provide in many instances, a window through which a time limit may be extended. In the case of Section 19 (3), paragraph (b)(i) gives that window but only for the extension of the time for presenting a complaint or an application. It does not extend to paragraph (b) (ii) which makes it mandatory for the Court to dispose of the matter within one year from the date of presentation of the complaint or application.

OTHER JURISDICTIONS

In other jurisdictions, they have also strictly interpreted such provisions whether constitutional or statutory.

In the Nigerian case of *ANPP v GONI*[11] it was held that ***"if what is to be done is not done within the time so fixed, it lapses as the Court is robbed of its jurisdiction to continue to entertain it".***

In the case of *Chief Dominic Onuorah Ifezue v Livinvs Mbadugha and Another* [12] the Supreme Court of Nigeria had occasion to consider the following provision, Section 258 (1) of the 1979 Constitution of Nigeria provides as follows;

"Every Court established under this Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof".

The Federal Supreme Court of Nigeria heard the appeal on 23rd March 1981 and on 26th March, 1981 after which it concluded the matter and recorded in the proceedings as follows;

"Judgment reserved".

In accordance with Section 258(1) of the Constitution, three months from 26th March, 1981 would end on 26th June, 1981. Nothing happened at the end of the period but on 9th November, 1981, the records showed that the appeal had come up before the Court of Appeal and adjourned to 16th November, 1981 when the appeal was reopened.

As of that date, the Judgment had not been delivered for seven months and three weeks outside the period set by the Constitution. Soon after hearing submissions from counsel on the question whether an order of non-suit was desirable in the circumstances, counsel advanced fresh arguments in addition to the earlier ones. The Court then delivered its Judgment.

The main question for determination by the Federal Supreme Court of Nigeria was whether the Court of Appeal had jurisdiction to pass Judgment outside the stipulated period of three months.

The precise ground of appeal the Supreme Court addressed its mind to, was set out as follows;

> *The learned Justices of the Federal Court of Appeal erred in law by giving (SIC) Judgment in this case contrary to Section 258 of the Constitution of the Federal Republic of Nigeria 1979.*

They then went on to set out the particulars of the error as follows;

> *(i) The learned Justices of the Federal Court of Appeal after arguments and reply by counsel for both parties on 23/3/81 and 26/3/81 respectively adjourned the case for Judgment. No Judgment was given within the constitutional stipulated period of three months.*
>
> *(ii) After the said period the learned Justices continued with the case and gave Judgment on the 23rd day of November 1981, non-suiting the Plaintiff/appellant contrary to the views openly expressed by the learned Justices on the day when the addresses by counsel were concluded.*

(iii) *The delay in delivering the Judgment operated adversely against the interest of the Plaintiff / Appellant and affected the justice of the case.*

(iv) *Throughout the proceedings before the said adjournment for Judgment, the question of non-suit was never raised either by the Court or any of the parties. Counsel were not asked to address the Court on the issue or point.*

The lead Judge then stated that he would not concern himself with the third sub-paragraph but that he would only concern himself with the first and second sub-paragraphs which were specifically germane to the issues.

The arguments by counsel on both sides, including one who appeared as amicus curiae focused on the interpretation of Section 258(1) of the Constitution and its legal effect.

The question was whether the Section was mandatory or directory and this question was discussed in the light of the historical perspective of the Section and the mischief it was intended to prohibit.

The fact that the Section did not provide sanctions for its violation was also considered as weighing in favour of the argument that the Section was merely directory and not mandatory notwithstanding the use of the word "shall".

In his submission on the issue under sub-heading: *Effect of Contravention of Statutes Generally;* Chief Williams, who appeared as amicus curiae summed up as follows;

> ***"The provision of Section 258(1) of the Constitution which is to be considered in this brief requires all Courts established by the Constitution to deliver their Judgments within a period of 3 months after evidence and final addresses. There can be no doubt that the provisions of the Section are meant to be obeyed and complied with .....What are the legal consequences for breach or contravention of the law? Does the breach or contravention render what was done by the public authority or other person null and void or does it render it voidable at the instance of a person interested? Is the person who contravened the law liable to a penalty? -------- .If the law maker or the Legislature feels strongly enough about possible contraventions, it can and often does impose a penalty as sanction. But where no penalty is imposed, the stipulation remains nonetheless binding like any other law. Like any other law however, it is liable to be breached. In this case the Supreme Court is faced with the legal consequence of a breach or contravention of the statute which happens to impose no penalty."***

Chief Williams argued that since Parliament had the freedom to make laws the way it wants, when it makes a law without attaching a penalty then its contravention, though actionable, does not nullify the act.

After considering all the submissions and arguments by counsel, judicial and academic authorities from within Nigeria and other jurisdictions, the Supreme Court made a number of holdings among them the following;

> ***"Failure by any of those Courts to give its judgment within the period required by the Section, is a violation of the provision and the so-called Judgment delivered outside the period is no judgment at all and accordingly null and void and entirely of no legal effect."***

> ***"It has been argued that to nullify such a Judgment is to punish innocent parties. That argument is unacceptable because in every case where a Judgment is set aside by an appellate Court, some losing party suffers, by the appeal being decided against him. Such a subjective consideration should not and will not deter an Appeal Court from deciding an appeal according to legal justice."***

The Court also referred and got inspiration from the statement by Devlin J (as he then was) in St. John Shipping CRPPN v J. Rank Ltd [13] when he said;

> ***".....one must not be deterred from enunciating the correct principle of law because it may have startling or even calamitous results....."***

Ultimately, the Court, by an overwhelming majority of six to one, allowed the appeal on the basis that the section was mandatory and breach thereof rendered the Judgment null and void.

The lead Judge, with whom five others agreed, concluded the Judgment in the following words;

> ***"Finally, having regard to all the foregoing, I am firmly of the view that on a proper construction of the words of Section 258(1) of the Constitution, having regard to the mischief intended to be prevented, the 1979 Constitution required that the Judgment of the Court of Appeal in this matter be delivered within three months of its being 'reserved' by the Court after the hearing of the appeal and that failure to do so invalidated the so-called Judgment delivered after that period. The appeal must be allowed and is hereby allowed. The so-called Judgment is declared null and void and for the avoidance of any doubt, it is hereby set aside. The appeal is***

remitted to the Court of Appeal before a different panel for hearing and determination according to law."

We are firmly in agreement with the interpretation adopted by the Supreme Court of Nigeria as regards the effect of a statutory time limitation.

We also find the mischief identified in Section 258 (1) of the 1979 Constitution of Nigeria to be similar to the one in Section 19 (3) (b) (ii) of Act No. 8 of 2008 of our law; namely to deter inordinate delays in disposing of labour related matters.

We strongly believe that side-stepping the plain unambiguous words of the legislature would be to make the law void and contemptuous of Parliament.

The other case of importance we considered is from India which has a time limit for delivery of Judgments. The provision, unlike in the Nigerian case where it was constitutional, is statutory as is the case under consideration in this appeal.

Order 20 of the Indian Civil Procedure Code 1908 as amended in 1976 provides that;

"the Civil Court shall, after the case has been heard, pronounce Judgment on a date not exceeding thirty days."

In the case of *Bhagwandas Fatechani Daswani v HPA International and Others*[14] the Supreme Court of India, *on appeal in a case where Judgment in the Court below had taken close to five years to be delivered, made short work of it when it stated as follows;*

"Long delay in delivery of Judgment gives unnecessary rise to speculations in the minds of the parties to a case. Moreover the Appellants, whose appeals have been dismissed by the High Court, may have the apprehension that the arguments raised at the bar have not been reflected or appreciated while dictating the Judgment nearly after five years..... We therefore, on this short question, set aside the Judgment under appeal without expressing any opinion on the merits of the case and remit the case to the High Court for deciding the appeal afresh on merits."

CONCLUSION

In light of the views we have expressed and the various authorities we have referred to, it is abundantly clear in our minds that Section 19 (3) (b) (ii) of Act No. 8 of 2008, was in response to the numerous

complaints of delayed disposal of cases in the Industrial Relations Court.

It would also appear to us that these complaints kept coming notwithstanding the presence, within the Industrial and Labour Relations Act of Section 94 which prescribed a time limit of sixty days within which to deliver a Judgment after the hearing of the matter. The provision was being breached notwithstanding the provision of a possible removal of the judge for non-compliance.

We take the view that Section 19 (3) (b) (ii) is a re-enforcement to Section 94 (1) to cover, not only breaches caused by the Judge, but also those caused by the litigants. We would go further to state that in couching ground one by using the word "ought" when the actual word used by the section is "shall."

The fact that no penalty is provided by Section 19 (3) (b) (ii) for breach thereof, does not make it merely directory but implies a termination of jurisdiction on the part of the Court to do anything further on the matter.

As regards sanctions, we are of the view that if it is shown that the breach is caused by the Judge, Article 143 (b) of the Constitution is still applicable even if the Section does not specifically provide for it as does Section 94.

We therefore, allow ground one of the appeal and declare the Judgment delivered by the Hon. Mr. Justice E. L. Musona on 14th December 2018, null and void for want of jurisdiction and set it aside accordingly.

In view of the decision on ground one, grounds two and three of the appeal are rendered otiose. We accordingly remit the record to the Industrial Relations Division of the High Court for re-hearing before another Judge of competent jurisdiction.

In order to comply with the time limit which started running upon presentation of the complaint, we order that the complaint is hereby deemed to have been filed on the date of this Judgment.

We further order that parties shall bear their own costs.

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M. M. KONDOLO
COURT OF APPEAL JUDGE

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

.....

M. J. SIAVWAPA
COURT OF APPEAL JUDGE