IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 20/2015
SCZ/8/307/2014

BETWEEN:

MACARTHUR MUDENDA — 1ST APPELLANT
CLIFTON MASUA — 2ND APPELLANT

AND

ERICSSON AB ZAMBIA — RESPONDENT

CORAM: Hamaundu , Kaoma and Musonda, JJS

On: 5th September, 2017 and 12th September, 2017

For the Appellants: Mr. M. Chitambala of Lukona Chambers
For the Respondent: N/A

JUDGMENT

Kaoma, JS delivered the Judgment of the Court

Case referred to:

1. **Zambia Consolidated Copper Mines Limited v Elvis Katyamba (2006) Z.R. 1**

Legislation referred to:

1. **Industrial and Labour Relations Act, Cap 269, section 85(3)**
2. **Industrial and Labour Relations Act No. 8 of 2008**

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This appeal arises from a refusal by the Industrial Relations Court (IRC) to grant the appellants leave to file a notice of complaint out of time. The application was made on 30th September, 2014 pursuant to section 85 (3) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia as amended by Act No. 8 of 2008. The application was supported by an affidavit deposed to by both appellants. The respondent opposed the application and filed an affidavit to that effect.

It is clear from the affidavit evidence that the appellants were initially employed by Airtel Zambia Plc (Airtel). They were transferred to the respondent in August, 2011 as a result of outsourcing of some areas of the Airtel Networks functions to the respondent. On 28th March, 2013 the respondent transferred them back to Airtel effective 1st April, 2013 as per some joint business strategy with Airtel. The terms and conditions of transfer indicated, among others, that years of service with the respondent and original date of employment with Airtel would be recognised. The appellants consented to the transfer.

However, on 8th April, 2013 Airtel gave them letters of offer of employment subject to three months probationary period. From the letters of offer of employment, the appellants realised that Airtel did not recognise their transfers. They did not engage the respondent until after they were confirmed in their employment on 9th October, 2013. They wrote a letter of demand to the respondent on 28th October, 2013 which was received on 1st November, 2013.

The appellants alleged that during the period April, 2013 to August, 2013 the 1st appellant engaged Airtel in discussions to establish whether the purported transfers were going to hold but Airtel was non-committal and in their letters of confirmation of employment, Airtel affirmed that it did not recognise their transfers.

It was at that point that the appellants engaged the respondent to resolve the issue of their purported separation package. They failed to do so even through their respective advocates. After protracted negotiations they rejected an offer from the respondent by way of settlement and instructed their advocates to take the matter to court. Their justification for the delay in filing

the notice of complaint was that they were attempting to resolve the matter by resorting to administrative remedies with the respondent.

The position taken by the respondent was that the appellants' services were transferred to Airtel on 1st April, 2013 and that this was the event the appellants were aggrieved about. As far as the respondent was concerned, it did not have administrative channels for resolving the sort of grievance the appellants sought to advance.

It was also the respondent's position that the statutory 90 days from the time the appellants were transferred to Airtel, went by, without them filing a notice of complaint or engaging the respondent about the transfers. It was argued that the appellants did not have an unqualified right to an extension of time and ought to have shown that they engaged the respondent within the mandatory 90 days.

In deciding the matter, the court below considered **section 85(3)** of the **Industrial and Labour Relations Act (as amended by Act No. 8 of 2008)** and **paragraph (i) of the proviso** as well as our decision in the case of **Zambia Consolidated Copper Mines Limited v Elvis Katyamba and others**[1] and found that the dispute

arose on 9th October, 2013 while the application was filed on 30th September, 2014 when it should have been filed on or before 10th January, 2014. Ultimately, the court held that the proviso which gives power to the court to extend time was inapplicable since the application for leave to extend time to lodge complaint was made outside the mandatory 90 days of the occurrence of the event which gave rise to the complaint or application.

Aggrieved by this decision, the appellants appealed to this Court advancing two grounds as follows:

1. **The court below erred in law and fact when it held that the proviso to Section 85(3) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia as amended by Act No. 8 of 2008 is inapplicable to the present case because the application for leave to extend time to lodge complaint was made outside the mandatory 90 days period of the occurrence of the event which gave rise to the complaint or application.**

2. **The Court below erred in law and fact when it relied on the decision in Zambia Consolidated Copper Mines Limited v Elvis Katyamba (2006) Z.R. 1 (SC) which case was decided on Section 85(3) of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia before it was amended by Act No. 8 of 2008 and is based on different circumstances from the present case.**

Both parties filed heads of argument but counsel for the respondent did not attend the hearing of the appeal or excuse his

absence. Counsel for the appellants informed us that he intended to rely entirely on the record and the heads of argument.

We have perused the appellants' heads of argument. We observe with great anxiety that these arguments are contradictory and are also conflicting with counsel's oral and final submissions in court as we shall demonstrate shortly. Therefore, we shall not summarise in any detail, the arguments made by the appellants lest we also end up contradicting ourselves. We shall do so only to the extent of showing the inconsistencies in the appellants' arguments.

In the heads of argument, counsel stated that the gist of this appeal is whether the appellants applied to file the complaint within the stipulated mandatory 90 days after exhausting administrative channels and argued that they complied with the law as amended in 2008. He also argued that before the amendment it was requisite, under the proviso, for the applicant to apply to court for extension of time to file the application in the event that the mandatory 30 days had elapsed but administrative channels were still being pursued. For this argument he relied on the **Elvis Katyamba**[1] case.

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It was also contended that based on the amended section 85(3)(a), the appellants did not need to apply for leave of court to file the complaint out of time as they were within 90 days after exhausting the administrative channels available to them and that the holding that the appellants ought to have applied for extension of time whilst the negotiations were on-going is unattainable in law.

In his oral responses to the questions put to him by the Court, in an effort to clarify the contradictions in the heads of argument, firstly in relation to why the appellants had applied for leave to file the complaint out of time, when their argument is that following the amendment in 2008, leave of court was not required, and further, under what paragraph of section 85(3) the application was made, counsel told us that the application was made under paragraph (a) and (b)(i) and alleged that the appellants had been refused to file their complaint on the basis that they were out of time. Clearly, the appellants never spoke to this allegation in their affidavit in support and they have not spoken to it in their heads of argument.

Secondly, when reminded that in the heads of argument counsel is contending that the word **'or'** as used in section 85(3)(a)

creates two situations and that the application can only be made under one of the two paragraphs and not under both, counsel replied that the application was made under paragraph (a).

Thirdly, when asked about what administrative channels were available to the appellants in terms of that paragraph which they had been pursuing with the respondent, counsel failed to mention any. In his words, it was difficult for him standing there to actually be able to pinpoint the administrative channels that necessitated the delay in the filing of the application for leave save to rely on the letters that were exchanged between the parties.

Fourthly, counsel sidetracked to the issue of the mandate of the IRC to do substantial justice and not to fetter itself with the technicality of the time of the application. When reminded that section 85(3) relates to substantive and not procedural law, he could only concede. Eventually he informed us that, in fact, there were no administrative channels available to the appellants that were being pursued and that the application for leave to file complaint out of time was made exclusively under section 85(3)(b)(i), especially that the proviso only applies to paragraph (b).

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Fifthly, when asked about the applicability of the decision in the **Elvis Katyamba**[1] case to the current case, meaning that the appellants should have filed the application within the mandatory 90 days as required by paragraph (b) since counsel had said there were no administrative channels available to the appellants, his response was that the above case was overtaken by the 2008 amendment and was inapplicable. He then raised a startling issue, which does not appear anywhere in the heads of argument, that an application under paragraph (b)(i) can be made even after expiry of the mandatory 90 days and that the court below erred by dismissing the application on the basis that it was made outside the mandatory 90 days.

As we said earlier, we are referring to the above arguments merely to show the many discrepancies in the statements by counsel for the appellants. This appeal appeared to us to be very important because we were being called upon to interpret the law as amended in section 85 (3) of the Industrial and Labour Relations Act No. 8 of 2008. In our view, this required serious reflection and advocacy and not guess work. Sadly, counsel thought he could

escape our displeasure by intimating that he was standing in for a colleague who was indisposed and did not have time to read the record and that he was at sea, meaning that he did not understand the appeal that he was advancing on behalf of his clients.

We want to take this opportunity, yet again, to caution legal practitioners, particularly those that want to appear before this Court, which is the Court of last resort in this land, without any preparation, that they risk their client's appeals being dismissed for being incompetent. We have found it extremely difficult to deal with this appeal because of the many inconsistencies, some of which, we have highlighted above.

It is clear that counsel for the appellants was not ready for this appeal and remained at sea throughout the hearing. Regrettably for the appellants, it is not the responsibility of this Court to untangle the mess that has been created by their counsel.

And since we do not understand the incongruous statements by counsel, who has not helped us in any way, we decline to pronounce ourselves on this appeal. We shall reserve the interpretation of section 85(3) as amended by Act No. 8 of 2008 to a

proper or fitting case. The inevitable fate of this appeal is that it is dismissed with costs to the respondent here and below.

E.M. HAMAUNDU
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

M. MUSONDA
SUPREME COURT JUDGE