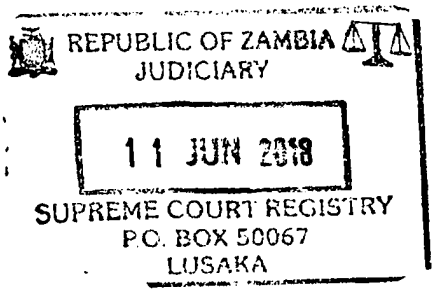
IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO.163/2015**

HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

RAJAGOPALAN KOTHANDA RAMAN **APPELLANT**

AND

JENALA NGWIRA **RESPONDENT**

CORAM: Hamaundu, Kaoma and Kabuka, JJS.
On 5th June, 2018 and 11th June, 2018.

FOR THE APPELLANT: N/A

FOR THE RESPONDENT: N/A

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Zambia Consolidated Copper Mines Limited v Elvis Katyamba and Others (2006) Z.R.1.
2. Augustine Tembo v First Quantum Minerals Limited – Mining Division, SCZ Appeal No. 124/2015.
3. Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited, 2011 Vol. 3 Z.R. 67.

Legislation and Other Works referred to:

1. The Industrial and Labour Relations Act Cap. 269, S. 85 (3).
2. The Industrial and Labour Relations (Amendment) Act No. 8 of 2008 S. 19 (3) (a) (b) (i).
3. The Interpretation and General Provisions Act Cap. 2, S.35.
4. The Constitution of Zambia (Amendment) Act No. 2 of 2016 article 118 (1) (2) (e).
5. Halsbury's Laws of England 4th Edition, Butterworths, 1985, London, paragraph 1134.

The appellant had applied to set aside the respondent's Notice of Complaint filed before the Industrial Relations Court for irregularity for having been filed out of time. The court declined to grant the application on the ground that, the respondent was only late in filing by one day, which was not fatal. The appellant now appeals that decision to this court.

The relevant facts on which the impugned decision is anchored can be briefly stated. The respondent was employed as a domestic worker of the appellant in 1999. She worked for him for fifteen (15) years until sometime in April, 2014 when she fell ill and was unable to report for work, as a result. On 30th April, 2014 the appellant summarily dismissed the respondent from employment.

When her pleas for the appellant to reconsider his decision went unheeded, the respondent on 30th July, 2014 proceeded to

file a Notice of Complaint before the Industrial Relations Court (IRC). This was ninety-one days after the occurrence of the event complained of, contrary to the provisions of **section 85 (3) (b) of the Industrial and Labour Relations Act, Cap. 269** as amended by **section 19 (3) (a) (b) (i) of Act No. 8 of 2008** which states that, such complaints must be filed within ninety days.

The record shows the Deputy Chairperson of the IRC who was dealing with the matter, did, on 6th August, 2014 at his own instance, direct that the appellant should file an Answer to the Notice of Complaint within 21 days. That directive was subsequently reduced to a formal order which was issued by the court. The appellant contended that this order was only served on him on 29th August, 2014 when the 21 days had lapsed. Upon instructing counsel to act for him in the matter, he was advised that there was no obligation on him to file an Answer. He was further advised that the Notice of Complaint was in any event, filed after the expiry of the ninety days mandatory period allowed by the relevant law for filing such documents.

Counsel for the appellant accordingly, applied to set aside the court order directing the appellant to file an Answer. Counsel also challenged the validity of the Notice of Complaint on the basis that

it was filed out of time. The summons relating to the said application stated that it was issued pursuant to **section 85 (3)** and was headed *"Summons to set aside Order compelling Filing of the Answer and to dismiss Notice of Complaint for irregularity."*

In his affidavit filed in support of the said application, the appellant deposed that, the respondent's Notice of Complaint was *"irregular"* for having been issued out of time, without first obtaining leave of the court.

In her affidavit in opposition, the respondent, did not deny that her Notice of Complaint was filed out of time. Her only contention was that, a day's delay would not prejudice the appellant in any way as to justify the setting aside of her Notice of Complaint.

The record shows, in reaction to the appellant's application to set aside the Notice of Complaint, learned counsel for the respondent filed a Notice of Motion to raise a Preliminary Issue. The gist of this Preliminary Issue was to request the court to dismiss the appellant's application to set aside Notice of Complaint on grounds that, it was made under a wrong provision of the law.

The record also shows the trial court dealt with the two applications together i.e. (i) the appellant's application to set aside Notice of Complaint; and (ii) the respondent's Preliminary Issue to set aside the said application in (i), for having been improperly brought pursuant to **section 85 (3).** At its sitting of 26th November, 2014 to consider the said applications, the trial court maintained its position of 6th August, 2014 and merely directed that the appellant should file an Answer to the Notice of Complaint.

Counsel for the parties were this time, further ordered to execute a Consent Order which would allow the matter to proceed to trial. In so doing, the court expressed the view that, a delay of one day in filing a Notice of Complaint was not fatal to the matter. The appellant was also at the said sitting, now ordered to file his Answer within five days, failure to which the court informed his counsel that, *"they would be debarred from taking part in the proceedings."*

When the matter next came up on 5th February, 2015 counsel for the appellant had not executed the Consent Order to allow the matter to proceed to trial. The court reiterated its position to the parties, yet again, that a day's delay in filing the Notice of Complaint was not fatal. The court further informed the parties

that even in the absence of an executed Consent Order, its initial directive still stood as a Ruling of the court. The effect of this Ruling was that, the Notice of Complaint having been filed only a day out of time, would stand as having been properly filed. Dissatisfied with that decision, the appellant appealed to this Court, advancing one ground of appeal, stated as follows:

1. **The learned judge erred in law by dismissing the appellant's application to set aside or to dismiss the respondent's Notice of Complaint notwithstanding that it was statute barred having been filed a day after the expiry of the mandatory 90 days.**

In heads of arguments and submissions filed in support of the sole ground of appeal, counsel for the appellant referred us to **section 19 (3) (a) (b) (i) of Act No. 8 of 2008** which amended **section 85 (3) of the Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia.** His arguments were that the section in issue makes it clear that for a complaint to be competently presented before court in the circumstances such as the ones in the present appeal, it must be filed within ninety days from the day of the occurrence of the event giving rise to such complaint. Counsel submitted that, the use of the word **"shall"** in **section 19 (3)** imposes a mandatory obligation on the part of the court not to entertain a complaint lodged after the expiry of the ninety days

period. The case of **Zambia Consolidated Copper Mines Limited v Elvis Katyamba**[1] was relied upon for the submission, where we held that:

> **" it is mandatory for the Industrial Relations Court not to entertain a complaint or application unless such complaint or application is brought within thirty days from the event which gave rise to the complaint or application."**

In relying on that case, it was nonetheless pointed out by counsel that at the time the **Katyamba**[1] case was decided, the relevant period specified in the law was thirty days, while at present, it is ninety days. The amendment notwithstanding, counsel urged us to find that the **Katyamba**[1] case remains good law and the principle upon which it was decided, is still a good guiding principle.

It was counsel's further argument, that the proviso to **section 19 (3)** allows the trial court to entertain a complaint filed after the expiry of the mandatory period, upon exercising its discretion to extend the said time, on an application made by the complainant to that effect. Counsel noted that, it is not in dispute in this case that the respondent's complaint was filed a day after the expiry of the ninety days period and was thus, out of time. That, by virtue

of **section 19 (3)** the court below had no jurisdiction to entertain the Notice of Complaint, without first granting the respondent leave to file out of time. In the event, that the court should not have proceeded to entertain the complaint, contrary to the provision of **section 19 (3)** aforesaid. Counsel ended by submitting to the effect that, the refusal to grant the appellant's application to dismiss the respondent's Notice of Complaint on the ground that it was irregular, was wrong, as the application was competently before the trial court.

There were no heads of argument filed in response on the part of the respondent and at the hearing of the appeal, there was no attendance by the advocates on both sides. After confirming that they were duly served with documents notifying them of the date for hearing this appeal, we adjourned the matter for judgment.

We have considered the arguments and submissions from counsel for the appellant and the law to which we were referred. We find the main issue raised for determination in this appeal is one hinged on jurisdiction of a trial court to hear a matter filed after the specified statutory period for hearing such a matter has lapsed or expired.

According to learned authors of **Halsbury's Laws of England 4th Edition, Butterworths, 1985, London paragraph 1134** on what is meant by the term, the period **'within'** which an act must be done:

> **" The general rule in which a period is fixed 'within' which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him.**
>
> **This general rule applies irrespective of whether the limitation of time is imposed by the act of a party or by statute. Thus, where a period is fixed 'within' which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is excluded in the computation."**

The essence of the requirement to do something **'within'** a specified period of time as defined above is wholly captured by **section 35** of the **Interpretation and General Provisions Act Cap. 2 of the Laws of Zambia** which provides for computation of time. **Subsection 35 (a)** clearly excludes the day of the occurrence of the event, as states that:

> **" (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done."**

Section 85 (3) (b) of the Industrial and Labour Relations Act, brought in question in this appeal which provides for filing of Complaints or Applications to facilitate such filing, reads as follows:

> **"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:**
>
> **Upon application by the complainant or applicant, the court may extend the period in which the complaint or application may be presented before it."**

That provision is indeed mandatory as correctly submitted by counsel for the appellant and previously held by this Court in the **Katyamba**[1] case, amongst others. We maintained that position in a more recent decision, **Augustine Tembo and First Quantum Minerals Limited – Mining Division**[4] where we explained the rationale in **Katyamba**[1], in the following words:

> **" We must point out that the application that we were dealing with in that appeal was filed more than three months after the mandatory period of thirty days had expired.... Our reasoning there was obvious and clear: had the respondents engaged in administrative channels before the thirty-day period had expired, that would have had the effect of suspending the mandatory period; and we would have allowed them to file their complaint. But, because they did not pursue administrative channels within the mandatory period, there was nothing that stopped the period from running, until it expired; and, once that period had expired, the court could not extend it. That was the meaning of our judgment in that case."**

We re-iterate, that the requirement to file a Notice of Complaint within ninety days of the occurrence of the event, as provided by the relevant statute, under **section 85 (3) (b)** is mandatory. The respondent in the present appeal was dismissed on 30th April, 2014. Excluding the date of dismissal, time started running from 1st May and ended ninety (90) days later on 29 July, 2014. The appellant only filed her Notice of Complaint on 30th July, 2014 which was a day after the period limited by statute for doing so had expired. The general position is that, once statutory time expires the court has no jurisdiction to deal with a matter; and where there is no jurisdiction, the court's hands are tied.

In so saying, we are mindful of the Constitutional provision in **article 118 (1) (2) (e)** requiring 'that justice be delivered without

undue regard to procedural technicalities.' We are however, in no doubt that consideration of that article will depend on the particular facts of the case presented.

As we said in the case of **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited**[5], rules of the court must be observed. They are there for a purpose, to ensure orderly conduct of court proceedings, fair play between all the parties involved in the litigation and control by the court of the whole process, without which real justice would prove to be elusive. In the absence of rules as a guiding factor, confusion and anarchy would reign, as litigants would do their own thing, at their own time and in their own way.

On the particular facts of this case, the trial court had absolutely no jurisdiction to extend a statutory period that had expired. The respondent's possible option to enter the court was to invoke the exception in the proviso to **section 85 (3)** for leave to file her Notice of Complaint out of time.

For the reasons given, the sole ground of appeal is upheld and this appeal accordingly succeeds. We set aside the trial court's order directing the matter to proceed and compelling the appellant

who was defending the matter, to file an Answer, for a defendant is under no obligation to defend any matter brought against him. Although the appeal has wholly succeeded, in the circumstances of this case, we find an appropriate order on costs, is for each party to bear their own costs and we so order.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE