

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO.124/2015
SCZ/8/94/2015

BETWEEN:

AUGUSTINE TEMBO

AND

**FIRST QUANTUM MINERALS
LIMITED – MINING DIVISION**



APPELLANT

RESPONDENT

CORAM: Hamaundu, Kabuka and Mutuna, JJS
On 8th May, 2018 and 18th May, 2018

For the Appellant : Mr K. Nchito, Messrs Kapungwe Nchito, Legal Practitioners

For the Respondents: Messrs Charles Siamutwa Legal Practitioners
(Not Present)

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Case referred to:

Zambia Consolidated Copper Mines Limited v Elvis Katyamba & Ors (2006)
ZR 1

Legislation referred to:

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, Section 85(3)

The appellant appeals against the refusal by the Industrial Relations Court of his application to file a complaint out of time. The events that have brought the appellant before this court are these: The respondent dismissed the appellant from employment on 5th June, 2014. The appellant appealed against his dismissal through the respondent's administrative channels. His appeal was dismissed on 30th June, 2014. That being the last administrative avenue available to the appellant, he had ninety days, from 30th June, 2014, in which he could file a complaint in the Industrial Relations Court. In this case, the period was to expire on or about 30th September, 2014. The appellant, however, filed summons on 27th November, 2014, in which he sought leave to file his complaint out of time.

The court refused to grant him leave to file the complaint on the ground that he had filed his summons after the period during which he should have filed his complaint had expired. For the position that it took, the court relied on our decision in the case of **Zambia Consolidated Copper Mines Limited v Elvis Katyamba & Ors⁽¹⁾**. The court's reasoning was that it was not possible to extend a period of time that had already expired.

The appellant appealed to this court on the following two grounds:

- (i) That the court below erred in law when it refused to grant the appellant leave to file his complaint out of time: and,
- (ii) That the court below erred in law when it found that the *proviso* which gives power to extend time within which to file a complaint would only be relied upon before the expiration of the mandatory ninety days.

We think that the second ground of appeal is the one that goes to the root of the issue that the ruling of the court below raised, namely; is it the correct position that an application to file a complaint out of time can only be considered if it is made before the mandatory period for filing the complaint has expired? That in our view is what we are called upon to resolve in this appeal.

In his arguments on behalf of the appellant, learned counsel, Mr Nchito, appeared to agree with the lower court's understanding of our decision in the **Elvis Katyamba** case. However, he went on to argue that the facts in this case can be distinguished from those in the **Elvis Katyamba** case, particularly, in that in the **Elvis Katyamba** case the former employees had failed to give reasons why they had failed to file their complaints in time; while the appellant in this case had given the reason that he had been involved in a road traffic accident. Mr Nchito also argued that, in its current amended

form, the *proviso* to **Section 85(3)** of the **Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia** caters for applicants who are genuinely unable to file their complaints within ninety days.

In arguments that were contained in the heads of argument filed by its advocates, the respondent supported the lower court's interpretation of the decision in the **Elvis Katyamba** case and argued that the point for consideration was not whether or not the appellant had given reasons for his failure to file his complaint out of time but whether he had filed his application for extension of time before the mandatory period had expired.

We have considered the arguments by both sides. We think that the court below misunderstood what we said in the **Elvis Katyamba** case. We will now explain the context in which our statements in that case were made.

The case was decided before **Section 85(3)** of the **Industrial and Labour Relations Act** was amended. In its previous form **Section 85(3)** read as follows:

“(3) 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 the complaint or application:

Provided that, upon application by the complainant or applicant, the court may extend the thirty-day period for a further period of three months after the date on which the complainant or applicant has exhausted the administrative channels available to that person.”

That is the provision that was prevailing when we heard the **Elvis Katyamba** case. In that case, the respondents were a group of former employees of the Zambia Consolidated Copper Mines Limited whose services were terminated either on medical grounds or by way of redundancy. Some employees had had their employment terminated in 1998 while the latest group had had their services terminated in February, 1999. If we use the last group as an example, their complaint should have been filed, at the very latest, in March 1999. However, the whole group filed summons for extension of time to lodge their complaints on 22nd July, 1999; that is more than three months after the mandatory period had expired. What the respondents had argued during the initial application in the Industrial Relations Court was that they had taken steps to have their dispute with the Zambia Consolidated Copper Mines Limited

settled amicably; and that, in their view, by those initiatives, they should have been said to have been pursuing administrative channels.

The argument that was advanced on behalf of the Zambia Consolidated Copper Mines Limited was that, even if it were to be accepted that the initiatives which the respondents had taken were in pursuance of the exhaustion of administrative channels, the respondents had commenced those initiatives well after the mandatory period of thirty days had expired.

This is what we said:

“In terms of the law quoted above, it is mandatory for the IRC 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. This means that a party wanting his or her complaint or application determined by the IRC must file his or her complaint with the court within thirty days of the occurrence of the event which gave rise to the complaint or application. In view of the mandatory nature of the law in Subsection 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. As Mr Chamutangi submitted, we think that an appeal or negotiations for a better package made within the mandatory period has the potential of suspending the mandatory thirty days so that should the court agree with the complainant or applicant, the extension for a further period of three months is, by law, supposed to be from the date the administrative channels have been exhausted” (underlining ours for emphasis)

The underlined part of this passage is very important because what we said subsequently should be understood from the context of that part of the passage.

We then said the following:

“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. There are instances also where a complainant or applicant may engage in further negotiations where she or he is entirely dissatisfied with a package offered to him or her by the employer either by way of redundancy, retirement or mere termination. It must be noted that if the negotiations for a better package or an appeal to a

higher body for redress cannot be commenced within the mandatory thirty days, it is not possible for the court to extend the time that has already expired as per our reasoning in the case of University of Zambia Council v Calder.

This is exactly what happened in the present appeal where the respondents made claims with the appellant well after the mandatory period had expired. It would appear to us that the attempts made by the respondents outside the mandatory period of 30 days were intended to circumvent the law.”

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, as we have observed earlier. Yet that is not the reason why we said that the respondents in that case could not file their complaint out of time. The reason we gave was that they did not pursue administrative channels before the mandatory thirty-day period 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.

Clearly, we did not say that an application to file a complaint out of time should be lodged before the mandatory period expires. Therefore, the court below fell in error in its understanding of our judgment in the **Elvis Katyamba** case.

Now what is the position of the appellant in this case? We must point out that in the form that the law was when we dealt with the **Elvis Katyamba** case, the *proviso* to **Section 85(3)** was meant to cater solely for employees who had pursued administrative channels to seek redress. The law was, however, amended in 2008. It now provides as follows:

“85(3) The court shall not consider a complaint or an application unless the complainant or applicant presents the complaint or application to the court—
(a) Within ninety days of exhausting the administrative channels available to the complainant or applicant; or,
(b) Where there are no administrative channels available to the complainant or applicant, within ninety days of the occurrence of the event which gave rise to the complaint or application:

Provided that –

- (i) Upon application by the applicant, the court may extend the period in which the complaint or application may be presented before it.”**

There is a significant change in the law in that the pursuance of redress through administrative channels is no longer the subject of the *proviso*. Now, even if it takes years to exhaust the administrative channels available, the mandatory period only begins to run when the last of the channels has been exhausted. The section, however, has still retained the *proviso*. This time, the grounds upon which a complainant may apply for extension of time under the *proviso* are not stated. We think, though, that the section now acknowledges that a complainant, be it one who has no administrative channels to exhaust or one who has exhausted such channels, may for some reason fail to file their complaint within the mandatory period. Hence, the *proviso* caters for such a complainant; and allows them to apply for extension of time, giving the reasons that prevented them from filing their complaint within the mandatory period. In that event what we said in the **Elvis Katyamba** case is still applicable. So that, if the complainant gives reasons that are

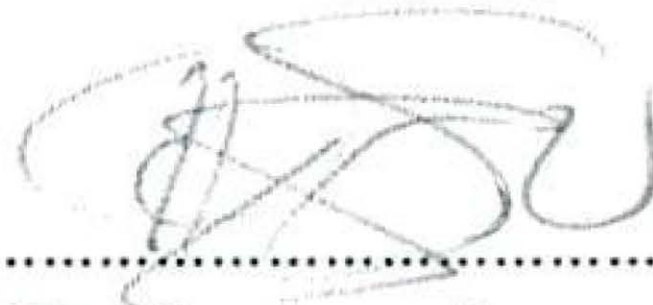
- satisfactory to the court and it is established that those reasons occurred before the mandatory period had expired, that will have the effect of suspending the mandatory period; and if the complainant does not unduly delay to file his application from the time that those reasons ceased to prevent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

In this case, because of the approach that it took, the court below did not consider the reason that the appellant advanced for his failure to file his complaint within the mandatory period. Otherwise, in his affidavit in support of the application, the appellant had averred that on 7th September, 2014, his own motor vehicle, in which at the material time he was a passenger, was involved in a road traffic accident; that he sustained injuries while another passenger in the same motor vehicle died; that, being the owner of the motor vehicle, he became involved in the police process that ensued; and, that he also became

involved in the funeral arrangements for the deceased. All these, according to the appellant, contributed to his failure to file his complaint within the mandatory period.

We have looked at the foregoing reasons. They appear to be genuine. Since the accident occurred before the mandatory period had expired, we think that the reasons should have had the effect of suspending the mandatory period. Further, the appellant appears not to have unduly delayed in making this application from the time of the accident. It is our view that the appellant should have been granted an extension of time to file his complaint.

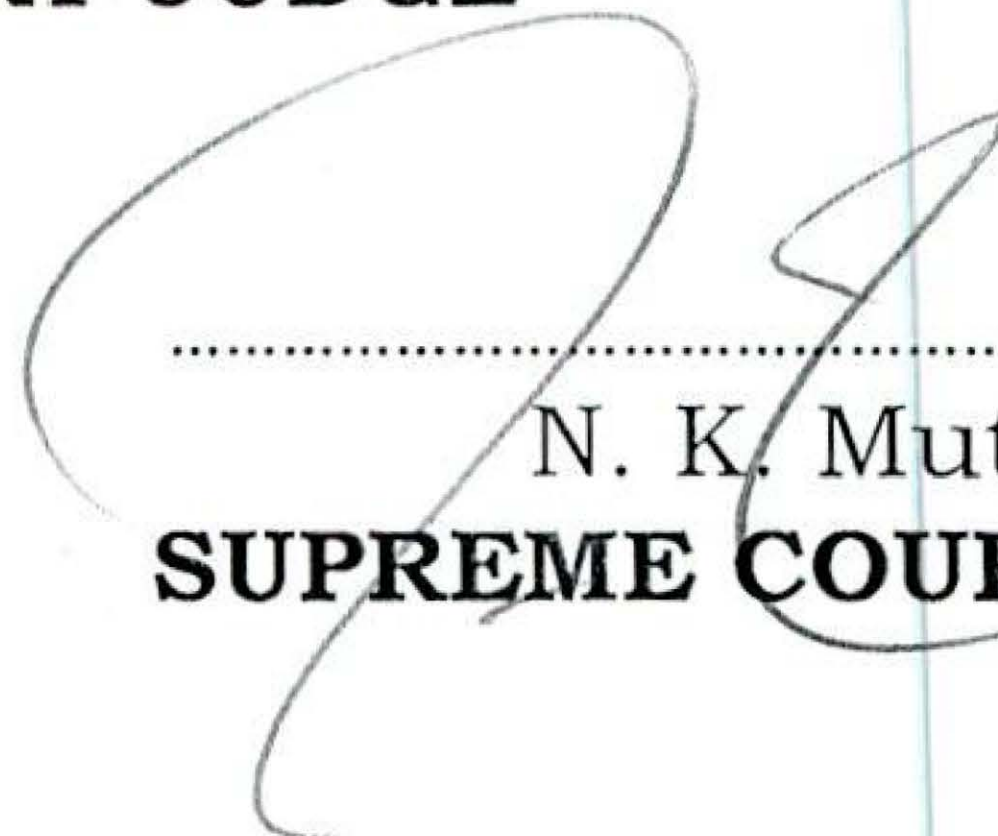
Therefore, we find merit in this appeal. We grant the appellant thirty days from the date hereof for him to file his complaint in the Industrial Relation Court. The parties shall bear their own costs.



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E. M. Hamaundu
SUPREME COURT JUDGE



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J. K. Kabuka
SUPREME COURT JUDGE



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N. K. Mutuna
SUPREME COURT JUDGE