

**IN THE COURT OF APPEAL FOR ZAMBIA. CAZ APPLICATION 56/2021
HOLDEN AT LUSAKA CAZ/08/190/2021
(CIVIL JURISDICTION)**

BETWEEN:

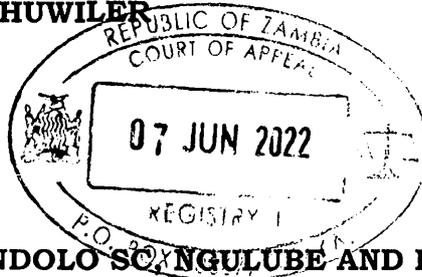
**PILATUS ENGINEERING COMPANY LIMITED
JOSEPH NIKLAUS HUWILER**

**1ST APPELLANT
2ND APPELLANT**

AND

ALFRED KALWANI

RESPONDENT



CORAM: KONDOLO SC, NGULUBE AND BANDA-BOBO JJA

On 25th January, 2022 and on 7th June, 2022

For the Applicants : Mr. I.M. Simbeye of Messrs Muyatwa Legal Practitioners

For the Respondent : Mr. M. Mushenya of Messrs Wright Chambers

R U L I N G

KONDOLO SC, JA delivered the Ruling of the Court

CASES REFERRED TO:

- 1. Finsbury Investment Limited v Antonio Ventriglia and Manuela Ventriglia CAZ/08/126/2018).**
- 2. Citibank Zambia Limited v Suhayl Dudhia CAZ/16/2020**
- 3. Guardall Security Group Limited v Reinford Kabwe CAZ/44/2019.**

LEGISLATION REFERRED TO:

- 1. The Court of Appeal Act No.7 of 2016 (CAZ)**
- 2. The Court of Appeal Rules, SI No. 65 Of 2016 (CAR)**

3. Industrial and Labour Relations (Amendment) Act No. 8 of 2008,

1. INTRODUCTION

1.1. This is an application to vary the decision of a single Judge of this Court for leave to appeal out of time and for stay of execution pending the determination of the appeal pursuant to **section 9(b) Court of Appeal Act (CAZ)** as read with **Order 10 Rule 4 (6) and (7) and Rule 5 Court of Appeal Rules, (CAR)**.

1.2. The application was supported by an affidavit and the Respondent duly filed an affidavit in opposition.

2. RELEVANT FACTS IN THE HIGH COURT

2.1. The renewed application before this Court arises from a Judgment delivered by Mwansa J of the Industrial Relations Division (IRD) on 16th March, 2021.

2.2. The material before the Court in this matter, whose cause number in the lower Court was COMP No. IRC LK/570/2016, is rather thin but the Respondent's (the Complainant in the lower Court) affidavit in opposition filed on 20th January, 2022 has exhibited the affidavit he filed in support of his

Notice of Complaint. It is dated 1st December 2016 and marked “AK 1”.

- 2.3. It is therefore clear that the complaint in this matter was filed on or about 1st December 2016 and the trial judge only delivered his judgement on 16th March 2021 slightly over 4 years and 3 months after the complaint was filed.

3. THE ARGUMENTS

- 3.1. At the hearing, in the course of his arguments, learned Counsel for the Applicants, Mr. Simbeye submitted that the Judgment of the lower Court was delivered outside the one-year time limit prescribed by the **Industrial and Labour Relations (Amendment) Act** (the “**Act**”).
- 3.2. Counsel for the Respondent Mr. Mushenya, appeared to have been completely taken by surprise by this submission. He didn't dispute that the Judgment had been delivered outside the prescribed period and simply argued that the Applicant had sat on his rights and cannot bring up the issue at this stage.
- 3.3. We asked Mr. Mushenya whether there was any fetter as to when to raise an issue that challenges the jurisdiction of a

court to exercise its authority. His simple response was that he would leave it to the Court.

4. OUR DECISION

- 4.1. The law is settled that when a jurisdictional issue is raised, it must be addressed before moving onto any other issues. **(see Finsbury Investment Limited v Antonio Ventriglia and Manuela Ventriglia** ⁽¹⁾.
- 4.2. We have considered the issue raised by the Applicant and the response offered by the Respondent.
- 4.3. The issue raised by the Applicant is in essence an application *in limine* and the manner in which it was raised is a matter of serious concern to us. Our rules clearly state that interlocutory applications must be raised formally by notice of motion or summons.
- 4.4. The main reason for this is that the court should be aware of the issue before the matter comes up and more importantly the opposing party should not be subjected to an ambush. See **Order 7 Rule 1 (1) CAR**. Despite several reminders, various Counsel have continued this wanton disregard for procedure. We now sound a warning that, in the future, we

may be inclined to punish such conduct with the payment of costs.

4.5. With regard to the issue before us, we refer to the case of **Citibank Zambia Limited v Suhayl Dudhia** ⁽²⁾ in which we upheld our decision in the case of **Guardall Security Group Limited v Reinford Kabwe**⁽³⁾.

4.6. In the **Guardall Case (supra)** the Appellant filed a complaint in the IRD on 6th September, 2017. The matter was heard on 5th December, 2018 and judgment was passed against the Complainant on 14th December, 2018. The Complainant appealed to this Court and the Respondent reacted by moving us to dismiss the appeal for want of jurisdiction of the lower Court, on the basis that it proceeded to hear this matter on 5th December, 2018 and passed Judgment on 14th December, 2018 after a period of one year had elapsed contrary to the provisions of **Section 19 (3) (b) (ii) of The Act**. We held that the IRD of the High Court had fallen foul of the cited law and we dismissed the appeal.

4.7. **Section 19 (3) (b) (ii) of The Act** provides as follows;

Section 19 (3) (b) (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."

4.8. In the **Citibank Case (supra)** we held as follows;

"The Record shows that in casu, the complaint was filed on 23rd July, 2013 and Judgment was delivered on 29th November, 2019 after a period of over six years.

The trial Court fell foul of Section 19 (3) (b) (ii) and in keeping with our decision in the Guardall Case the Judgment of Mwansa J is accordingly set aside."

4.9. As earlier indicated, *in casu*, there is no dispute that Judgment in this matter was delivered over 4 years after the complaint was lodged by the Respondent in the IRD.

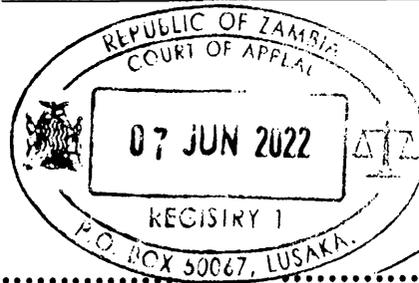
5. CONCLUSION

5.1. In the premises, we set aside the Judgement of Mwansa J as we did in the earlier cases and we remit the record to the IRD 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.

5.2. We further order that each party shall bear its own costs.

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE



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P.C.M Ngulube
P.C.M NGULUBE
COURT OF APPEAL JUDGE

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A.M. Banda-Bobo
A.M. BANDA-BOBO
COURT OF APPEAL JUDGE