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The correct procedure for commencing an action in the Industrial Relations Division of the High Court: Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc SCZ Appeal No. 99/ 2015 and Concrete Pipes v. Kingsley Kaimba and Another SCZ Appeal No. 014/2015

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The correct procedure for commencing an action in the Industrial Relations Division of the High Court: Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc SCZ Appeal No. 99/2015 and Concrete Pipes v. Kingsley Kaimba and Another SCZ Appeal No. 014/2015

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Facts

In *Edward Chilufya Mwansa and 194 Others v. Konkola Copper Mines Plc,* the Supreme Court dealt with a scenario where several employees had been dismissed and sought to enter an out of court settlement with their employer, through the assistance of the Labour Office. This process lasted over three years.

In *Concrete Pipes v. Kingsley Kaimba and Another*, the Supreme Court dealt with an appeal from a Ruling of the Industrial Relations Court dismissing a preliminary issue in relation to the need to exhaust internal administrative channels before commencing an action before the court.

Holding

The Supreme Court in *Edward Chilufya Mwansa* was of the view that seeking to pursue an *ex-curia* settlement does not halt the 90-day period from running. The Supreme Court in a judgment delivered by Malila JS (as he was then) held as follows:

> In this case, the appellants (the employees) could well have commenced their action in the Industrial Relations Court while they pursued a settlement on a clear understanding that such actions would be discontinued if and when a settlement were reached.

The case thereby fortified the position that the 90-day period only begins to run when the internal administrative channels have been exhausted and once the period has been exhausted, seeking an out of court settlement does not stop the 90-day period from running.

In *Concrete Pipes*, the Supreme Court guided that it is imperative for an employee to exhaust all internal administrative channels before proceeding to court unless the channels are non-existent or are unduly prolonged or totally ineffective.

Significance

Section 85(3) of the Industrial and Labour Relations Act provides that:

> The court shall not consider a complaint or an application unless the complainant or applicant present 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.

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From the above, there are two legs to the jurisdiction of the Industrial Relations Division of the High Court. Firstly, the Industrial Relations Division can only hear a dispute if it is brought within ninety (90) days ('the 90 day rule'). Secondly, it must be brought within 90 days exhausting all administrative channels or where there are no such channels, within 90 days from the date when the dispute or event occurred ('the exhaustion of administrative channels rule').

Section 85 (3) of the Industrial and Labour Relations Act is mandatory when it provides that a complaint must all available administrative channels and bring the claim within ninety (90) days. The use of the word "shall" clearly indicates that exhausting administrative channels is mandatory. This point was brought out by Malila JS (as he was then) on behalf of the Supreme Court in *Edward Chilufya Mwansa*.

On the importance of this rule, in a matter that involved section 85 (3) of the Industrial and Labour Relations Act, the Supreme Court in *Rajagopalan Kothanda Raman v Jenala Ngwira* stated that:

> 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.

The Supreme Court in this case also stated that rules 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 *Edward Chilufya Mwansa case,* the employees failed in reaching a settlement but were nonetheless barred from bringing a claim in the Industrial Relations Court because the 90-day period had elapsed. Further, based on the Supreme Court case of *Eustone David Chola,* an application to extend the time within which to bring a complaint before the court shall be entertained if filed within the said 90-day period, and will only be granted if there is good reason.

The Supreme Court's approach in *Edward Chilufya Mwansa* is significant because it clearly illustrates that where a matter has been referred to an authorised officer, an employee can still approach the court because the mandatory period runs. As such the 90-day rule is a strict one.

The approach in Edward Chilufya Mwansa is a correct one based on other decisions of the Supreme Court. In *Eustone David Chola v. Attorney General*, the employee filed his claim nine (9) years after his dismissal. The Supreme Court confirmed that section 85(3) does not give the Industrial Relations Court any discretion to proceed with trial of a matter which is brought outside the mandatory time to bring the complaint.

As it relates to the rule on exhausting administrative channels, the exhaustion of administrative channels rule, prior to the *Concrete Pipes* case, the Supreme Court in *Lackson Mukuma and 43 Others v Barclays Bank Limited*,[2] held that:

> As correctly observed by the Industrial Relations Court in its judgment in this matter, the requirements of Section 85(3) of the Industrial and Labour Relations Act as amended by Act No. 8 of2008 are that for a complaint to be considered, it should be

[2] SCZ Appeal No. 002/2013.

> presented within 90 days of exhausting the administrative channels available to a complainant or within 90 days from the occurrence of the event.

The Supreme Court in *Lackson Mukuma* further stated that:

> What Section 85 (3) (a) does, in our considered view, is to place the onus on a complainant to show that they were pursuing administrative procedures 90 days prior to the filing of the complaint. Parliament cannot be expected to legislate on when administrative procedures in the various work places should commence as such procedures are provided for in the Grievance and Disciplinary Procedure Codes of the various institutions or contracts of employment and differ from institution to institution.

From the above, the rule on exhausting administrative channels is mandatory before a matter can be commenced before the Industrial Relations Division of the High Court. In *Concrete Pipes and Products Limited v Kingsley Kabimba and Christopher Simukoko*,[3] The Supreme Court highlighted the importance of exhausting all administrative channels before commencing litigation when Malila JS (as he was then) on behalf of the Supreme Court held that:

> It is, of course, significant and advisable that an employee who believes that he has been wrongfully dismissed or has had his employment unlawfully terminated on account of his conduct, should ensure that the available internal disciplinary channels are exhausted before he proceeds to commence legal action. The proceedings of the disciplinary hearing help to 'clear the decks' and give the court additional material to chew on in determining the efficacy of the complaint. Exhausting available grievance redress procedures will also give the parties an opportunity to narrow or altogether clear possible misunderstanding or misperceptions. It also offers an important opportunity to the employee to explain himself on allegation of misfeasance before the ultimate sanction – dismissal – is meted out against him by the employer. In this sense, adherence to any such procedure is imperative.

The case of *Concrete Pipes and Products Limited* emphasised that exhausting internal and other available grievance procedures gives the employer and employee the opportunity to narrow or even possibly clear possible misunderstandings or misperceptions and also offers an important opportunity to the employee to explain himself on allegations of misconduct before dismissal is meted out against him by the employer.

The Supreme Court also guided that an employee need not subject him- or herself to any internal administrative disciplinary procedures if they are non-existent. This accords with section 85(3) of the Industrial and Labour Relations Act which guides that an employee can proceed directly to court where there are no administrative channels available.

We wish to point out that notwithstanding the above, Industrial Relations Division in several cases such that of *Lungwani Choombe & 11 Others v. African Banking Corporation (Z) Limited*,[4] held that section 85 and the substantive provision of the Industrial Relations Court Act no longer apply to the Industrial Relations Division following the Constitutional Amendment that made it a division of the High Court. In reference to the *GDC Logistics* case, the court held that only the Industrial Relations Rules made pursuant to the Act apply to the new court whilst the substantive provisions of the High Court Act will prevail.

[3] SCZ Appeal No. 014/2015.
[4] Comp/IRCLK/15/2018.

The net result of the *Lungwani Choombe* judgment is that rules such as the need for substantial justice, having employment matters brought to court within 90 days, judgment being passed with within 60 days of the complaint being filed no longer apply to the Industrial Relations Division. The court was very clear to emphasise that the Industrial Relations Division of the High Court must be distinguished from the former Industrial Relations Court. The *Lungwani Choombe* decision has been followed in several subsequent Industrial Relations Division decisions and thus the position of the court is that an applicant can file their Notice of Complaint outside the mandatory period following the amendment to the Constitution.

The author of this article disagrees with the approach of the Industrial Relations Division in recent cases on the strength of the Constitutional Court's decision in *Zambia National Commercial Bank Plc v. Martin Musonda & 58 Others*[5] confirmed that whereas the Industrial Relations Court is now a Division of the High Court, the Constitution provides that the procedure for specialised courts is prescribed in specialised Acts of Parliament. The Constitutional Court held:

> For avoidance of doubt, the Industrial Relations Court Rules promulgated under statutory instrument No. 206 of 1974 continue to govern the processes and procedures including the commencement of actions before the Industrial Relations Court Division of the High Court.

The Court held that because a specific piece of legislation has not been drafted to regulate the Industrial Relations Division, the Court will be governed by the Industrial and Labour Relations Act and Industrial Relations Court Rules until new legislation is enacted.

A slight critique of the decision in Concrete Pipes is the failure of the court to deal with the employment dispute within the context of section 85(3) of the Industrial and Labour Relations Act. The Supreme Court further guided that

> …an aggrieved employee need not subject himself to any internal administrative disciplinary procedures where these are non-existent, or are unduly prolonged or totally ineffective. Unreasonable refusal for an employee to subject himself to disciplinary procedures could of course have its own repercussions. The extent to which the employee's choice not to submit to internal administrative disciplinary proceedings may react upon the merit of his case, will of course vary from case to case depending on the peculiar circumstances.

The Supreme Court went further to state that

> Our view nonetheless is that refusal to subject oneself to internal disciplinary procedures goes to the credibility of the complaint in court, rather than to the cause of action itself. In other words, a cause of action is not necessarily lost by reason merely of the fact that internal administrative disciplinary proceedings were not concluded or acceded to. In our estimation, failure or refusal to follow or to subject oneself to disciplinary procedures can only go either to strengthening or to weakening the employee's complaint against the employer

[5] 2017/CCZ/R004.

Had the Supreme Court considered section 85(3) of the Industrial and Labour Relations Act within its proper context, the Supreme Court would have held that the failure to exhaust administrative channels which are available to an employee robs the court of jurisdiction to hear a matter. As highlighted above, exhaustion of available administrative channels is a mandatory requirement and if an employee fails to exhaust these before proceeding to court, the court cannot have jurisdiction to hear the matter. The Supreme Court stated that

> Unreasonable refusal for an employee to subject himself to disciplinary procedures could of course have its own repercussions

It is the author's view that the refusal to submit to administrative channels that are available is fatal and the repercussions are that the court cannot hear the matter. As such, contrary to the Supreme Court's position that the consequences will of course vary from case to case depending on the peculiar circumstances, a correct reading of section 85(3) of Industrial and Labour Relations Act is the inability of the court to consider and determine any complaint or application before it. Therefore, the consequences for failure to exhaust all available administrative channels would be for the court to dismiss the action.

In employment matters before the Industrial Relations Division, it is the exhaustion of available channels and the 90-day rule that give the court jurisdiction. A Court cannot exercise jurisdiction it does not have. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited*,[6] the Court stated thus:

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The Supreme Court in Elias Tembo v Florence Chiwala Salati & Others[7] stated that 'we want to reiterate here that jurisdiction is everything, without it, the Court has no power to make any further step.' As such, if the Industrial Relations Division proceeds to hear any matter brought outside the mandatory 90-day period following the exhaustion of administrative channels, it would be doing so without jurisdiction. It is only when the employee has no administrative channels available may he/she proceed directly to court.

[6] [1989] KLR 19
[7] SCZ Appeal No. 200/2016