

IN THE COURT OF APPEAL OF ZAMBIA

APPLICATION 35/2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JOHN KAWADILU KALENGA

1st APPLICANT

(Suing as joint administrator of estate of
the late John C.M. Kalenga)

MUSUSU MAMBO KALENGA

2ND APPLICANT

(Suing as joint administrator of the estate
of the late John C.M. Kalenga)

AND

VINOD SADHU

1ST RESPONDENT

INDHIRA SADHU

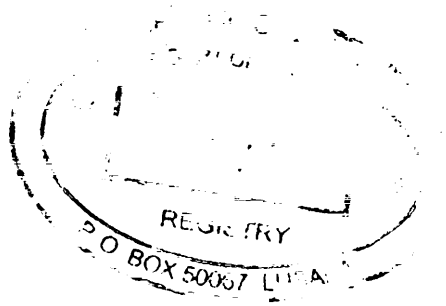
2ND RESPONDENT

NISHIMA SADHU

3RD RESPONDENT

UDDIT SADHU

4TH RESPONDENT



Coram: Mchenga, DJP, Makungu and Siavwapa, JJA

On the 18th July 2019 and 21st November 2019

For the Applicants: J. Madaika, JM Advocates

For the Respondents: E.S. Silwamba SC, Eric Silwamba, Jalasi &
Linyama, with I.M. Kunda SC, George Kunda & Company

R U L I N G

Mchenga DJP, delivered the ruling of the Court

Cases referred to:

- 1.City Express Limited v. Southern Cross Motors Limited
Appeal No. 198/2006 (SCZ/8/262/2006)
- 2.Attorney-General v. Seong San Company Limited SCZ
Appeal No. 182/2010
- 3.Savenda Management Services v. Stanbic Bank Zambia
Limited SCZ No. 10/2018
- 4.Kitwe City Council v. William Ng'uni [2005] Z.R. 57
- 5.Catherine M. Kabika v. Ben Mubiana Malama SCZ Appeal
No. 175/2009
- 6.Promart Investments Limited T/A Chas Everitt v.
African Life Financial Services Limited and Others
SCZ Appeal No. 7 of 2013
- 7.R v. Ashdown [1974] 1 ALL ER 800

Legislation referred to:

- 1.The Limitation Act, 1939 Act of the Parliament of
the United Kingdom
- 2.The Court of Appeal Act No. 7 of 2016 Laws of
Zambia
- 3.The Court of Appeal Rules Statutory Instrument No.
65
- 4.The Supreme Court of Zambia Act, Chapter 25 Laws of
Zambia
- 5.The Companies Act Chapter 388 Laws of Zambia
(repealed)

Introduction

1.The applicants', have, by motion, sought the leave of this court, to appeal to the Supreme Court, against the judgment of the court, (CAZ/8/173/2019) dated 29th April 2019.

Background

2.The background to the application is that the applicants, as joint administrators of the estate of the late John C.M. Kalenga, sued the respondents in the High Court, seeking, *inter alia*, orders that; the Patents and Companies Registration Agency (PACRA) amend records to reflect the original shareholding of Sun Pharmaceuticals Limited as the same were fraudulently altered; the respondents render an account of all dealings undertaken by Sun Pharmaceuticals Limited from 1993 to date, including accounts statements of funds received from the Government of the Republic of Zambia pursuant to a judgment under cause number SCZ/8/30/2004; and damages for fraud and misrepresentation perpetuated by the defendants.

3. Before the commencement of the trial, the respondents raised a preliminary objection to the proceedings, arguing that the action was statute barred by virtue of **Section 20 of the Limitation Act 1939**. They argued that it was on account of the incidences referred to by the applicants in their Statement of Claim, having occurred more than 14 years before the suit.
4. The High Court upheld the objection, holding that the Limitation Act applied to the appellants' case.
5. Dissatisfied with the ruling of the court below, the applicants appealed to this court. We upheld the High Court's ruling after finding that **Section 20 of the Limitation Act** applied to this case and the claims were statute barred. We took the view that the respondents did not waive their right to raise the preliminary issue by filing their defence. We also held that a preliminary issue on grounds that a matter is statute barred can be raised at any stage of the proceedings, the case of **City Express Limited v. Southern Cross Motors Limited**¹ refers.

6. Further, we took the view that provisions of **Section 19(1) of the Limitation Act** would only be applicable to **Section 20** of that Act if there was a trust under the deceased's estate. There was no evidence that there was a trust under the applicants' father's estate.
7. Turning to the issue of fraudulent concealment as alleged by the applicants, we considered **Section 26(6) of the Limitation Act**, which allows courts to stop time or postpone the limitation period, where the defendant conceals the acts giving rise to the action. We found that the fact that the respondents did not respond to the applicants' letters was insufficient to prove concealment of fraud. We thus upheld the trial judge that **Section 26(6) of the Limitation Act** was inapplicable on the facts of this case.
8. Equally we found the doctrine of ***ex turpi causa*** inapplicable to the facts of this case because it applies to a party (especially plaintiff) who is trying to rely on his or her own wrong doing by placing liability on a defendant.

Basis of application for leave to appeal

9. The applicants now seek leave to appeal against the court's judgment pursuant to **section 13** of the **Court of Appeal Act** and **Order XI of the Court of Appeal Rules** as read together with **Section 24(6) of the Supreme Court of Zambia Act**⁴. The motion is supported by an affidavit deposed to by the 2nd applicant. He has deposed, *inter alia*, that the interpretation of **Section 20 of the Limitation Act**, is a novel issue, that has not been adjudicated upon by the Supreme Court; and that this court overlooked the list of authorities and heads of argument, that the grounds of appeal disclose several novel matters fit for consideration by the Supreme Court.

10. It is also deposed that the intended grounds of appeal, which are set out in the motion, have very high prospects of success in the Supreme Court.

11. The applicants also filed list of authorities and heads of argument in support of the motion. According

to counsel, there are four cardinal issues sought to be raised in the intended appeal.

11.1. The first is the interpretation of **Section 20 of the Limitation Act**. It is contended that section, to the extent that it deals with estates, has not been adjudicated upon in detail, and therefore there is need for development of our jurisprudence.

11.2. The second issue, questions whether it was appropriate for this court to dismiss the applicants' entire claim, including equitable claims, contained in their pleadings. According to counsel, the judgment of this court is in conflict with the settled position of the Supreme Court that equitable claims are not subject to the provisions of the **Limitation Act**. The case of the **Attorney-General v. Seong San Company Limited**² was referred to.

11.3. The third issue is that the court failed to address all of the applicants' arguments and specifically omitted to address the issue of accrual

of cause of action. Counsel argued that arguments on the issue were overlooked and this issue on its own is a valid ground for this court to grant leave to appeal.

11.4. The fourth and final point the intended appeal seeks to raise, is the question whether the Limitation Act can extinguish statutory fiduciary duties. It is argued by the applicants that the 1st respondent, as Managing Director in the company to which the deceased was the majority shareholder, owed a fiduciary duty imposed upon directors by the **Companies Act.**

12. Counsel contended that these issues are worthy of consideration by the Supreme Court and accordingly prayed that leave be granted.

Opposition to the motion

13. The respondents opposed the application and an affidavit was filed to that effect. It was deposed that these proceedings were instituted 12 years from the date that the cause of action accrued, that being on

or about, 3rd August 1993. It is further averred that the applicants have been only able to demonstrate that they differ with the interpretation of **Section 20 of the Limitation Act, 1939** given by the High Court and subsequently upheld by this court.

14. It was also deposed that the proposed grounds of appeal have very low prospects of success, do not raise any points of law of public importance, and do not raise any compelling reasons for leave to be granted.
15. The respondents also filed heads of argument in opposition to the motion of even date. Counsel restated the law governing our jurisdiction to grant leave to appeal to the Supreme Court. We were also invited to consider the case of **Savenda Management Services v. Stanbic Bank Zambia Limited**³ and a plethora of the court's decisions on the question of leave to appeal.
16. It was argued by counsel that the applicants' motion does not satisfy the threshold envisaged by the provision of **Section 13 of the Court of Appeal Act**. It is submitted that the applicants have not demonstrated

that the intended appeal has reasonable prospects of success. That the applicants' argument that **Section 20 of the Limitation Act, 1939** does not apply in *casu*, is devoid of merit, because whether a literal or a purposive interpretation is adopted, the inevitable conclusion is that **section 20 of the Limitation Act**, applies to any claim either against or on behalf of a personal estate.

17. Further, that there is no compelling reason to believe that this court did not consider the applicant's argument to warrant the grant of leave. It was submitted that the list of authorities and heads of argument are for the convenience of the court. Reliance was placed on the cases of **Kitwe City Council v. Willian Ng'uni⁴**, **Catherine M. Kabika v. Ben Mubiana Malamo⁵** and **Promart Investments Limited T/A Chas Everitt v. African Life Financial Services Limited and Others⁶**.

18. On the question of the appeal raising a point of law of public importance, it was submitted that what

amounts to a point of law of general public importance is determined on a case by case basis. Reliance was placed on the case of **R v. Ashdown**⁷, *inter alia*, to the effect that where a party seeks to rely on a point of law of general public importance, as a ground to apply for leave to appeal to the Supreme Court, the point of law must be formulated, which the court should then agree is of general public importance. It was submitted that the mere fact that the applicants differ with both the High Court and the Court of Appeal, in the interpretation of **Section 20 of the Limitation Act**, does not constitute a matter of public importance or provide any other compelling reason why this appeal should be heard by the Supreme Court of Zambia.

19. It was ultimately submitted that the applicants have lamentably failed to demonstrate why the application for leave to appeal should be granted. We were urged to dismiss the application with costs.

Courts assessment of motion and arguments

20. **Section 13 of the Court of Appeal Act** clearly spells out the circumstances under which this court can grant leave to appeal to the Supreme Court, in a civil matter. The relevant parts, provide as follows:

"(3) The court may grant leave to appeal where it considers that -

- (a) the appeal raises a point of law of public importance;
- (b) ;
- (c) the appeal would have a reasonable prospect of success; or
- (d) there is some other compelling reason for the appeal to be heard."

21. We have considered the arguments by counsel and whether the issues raised meet the conditions prescribed in **Section 13 (3) (a), (c) and (d)** of the **Court of Appeal Act**, in order for us to grant leave to appeal in accordance with **order XI(I) of the Court of Appeal Rules**.

22. It has been argued by the applicants, that a fresh interpretation of **Section 20 of the Limitations Act** by the Supreme Court is required, in so far as it relates

to estates, as it is necessary for the development of our jurisprudence. A consideration of the first and second issues raised shows that the core of the applicants' argument is that **section 20 of the Limitation Act** only applies to actions against the estate of the deceased and not those on behalf of the estate. We literally considered **Section 20** in the grammatical and ordinary sense of its wording and found that the provision did not in any way imply the interpretation ascribed to it by the applicants.

23. Clearly the provision speaks of actions in respect of **any** claim to the personal estate of a deceased person. The provision is self-evident as nothing further can be read from it. Therefore, the first and second issues raised do not in any way meet the threshold set out in **Section 13 (3) (a), (c) or (d) of the Limitation Act.**

24. The third issue argued by the applicants, attacks the court's judgment, on the basis that we overlooked and omitted to address the applicants' arguments on

fresh accrual of cause of action, as raised in ground four of the appeal from the lower court, and that the court overlooked all the arguments contained in the appellants' list of authorities and heads of argument, in reply.

25. It is trite that a list of authorities and heads of argument are for the convenience of the court. In the case of **Kitwe City Council v William Ng'uni**⁴, the Supreme Court had this to say over a similar complaint:

"We have gone so far as to show that the courts order was not obeyed, but what is important is for the parties to note that the learned trial Judge was not bound to consider counsel's submissions as those were meant only to assist the trial court in shaping up its judgment.

To that extent, we do not find any merit in ground one and it is accordingly dismissed."

26. We find that this is an issue that has already been pronounced upon. The issue of consideration or lack thereof, of a list of authorities or heads of argument, raises no point of law of public importance, has no prospect of success, and is not a compelling reason to

exercise our power, to grant leave to appeal to the apex court.

27. The last issue raised in the intended grounds of appeal, challenges our decision in arriving at the position that the respondents owed no duty of disclosure to the appellants in terms of the **Companies Act**. It is submitted by the applicants that the court did not pronounce itself on whether the fiduciary duties imposed on directors could be waived or whether they can be defeated by the statute of limitations.

28. This proposed ground is meritless because we did not make any finding to the effect that the respondents owed no duty of disclosure to the appellants in terms of the **Companies Act**. At page J30 of our judgment we said the following:

"We did not consider the arguments by the respondents' counsel on the **Companies Act** and the **Probates (Resealing) Act** as they are not appropriate at this stage where the appeal was purely on whether the matter is statute barred or not."

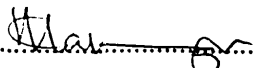
29. We have no hesitation, in stating that the proposed grounds of appeal, on the basis of the **Companies Act**,


have no prospects of success, as the issues for our determination on appeal were confined to whether the matter was statute barred or not.

Decision of the court

30. Having found no basis on which to grant leave to appeal to the Supreme Court, in terms of **Section 13** of the **Court of Appeal Act**, we dismiss the application with costs to the respondents, to be taxed in default of agreement.


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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
M.J. SIAVWAPA
COURT OF APPEAL JUDGE