

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

APPEAL NO. 152/2018

BETWEEN:

JOHN KAWADILU KALENGA

1st APPELLANT

*(Suing as Joint-Administrator of
The estate of the late John C. M. Kalenga)*

MUSUSU MAMBO KALENGA

2nd APPELLANT

*(Suing as Joint-Administrator of
The estate of the late John C. M. Kalenga)*

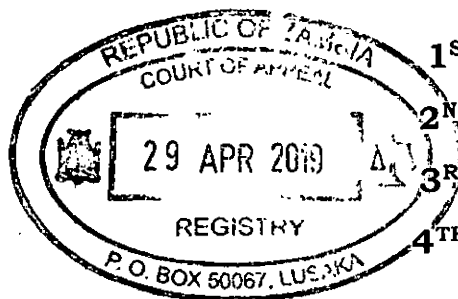
AND

VINOD SADHU

INDHIRA SADHU

NISHIMA SADHU

UDDIT SADHU



1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

CORAM: Mchenga DJP, Chishimba and Mulongoti, JJA

On 20th February, 2019 and 29th April, 2019

For the Appellants:

Mr. J. Madaika of JM Advocates

For the Respondents:

*Mr. E.S. Silwamba, SC of Eric Silwamba,
Jalasi & Linyama Advocates and Mrs. I. M.
Kunda, SC of George.Kunda & Co*

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. **Rhesa Shipping Co. SA v Edmunds (1985) 2 ALL E.R. 712 HL (The Popim)**
2. **Indo Zambia Bank v Christine Banda SCZ Appeal No. 178 of 2014**
3. **Zambia Telecommunications Co. Ltd v Mulwanda & Ngandwe SCZ Judgment Number 7 of 2012**
4. **Pascal & others v ZCCM Investments Holdings Plc CAZ Appeal No. 92 of 2108**
5. **Howard & Company (Africa) Limited v Behrens (1972) ZR 171**
6. **Pigeon Investments Limited v Amiran Limited 2003/HPC/0272**
7. **City Express Service Limited v Southern Cross Motors Limited Appeal No. 198/2006 (SCZ/8/262/2006)**
8. **Dominic Mulaisho v Attorney General (2012) ZR 551**
9. **BP Zambia Plc v Zambia Competition Commission and 3 Others (2011) ZR 148**
- 10 **Baxter v Baxter (1948) AC 274**
- 11 **Sable Hand Zambia Limited v ZRA (2005) ZR 109**
- 12 **Kalumba Kashiwa Mwansa and another v Kenneth Mpofo and The Attorney General SCZ SJ No.34 of 2018**
- 13 **Caledonian Railway v North British Railway (1881) 6 App. Cas. 114**

Legislation and other works referred to:

1. **The Limitation Act 1939**
2. **Halsbury's Laws of England 4th edition, volume 28 paragraphs 618 and 916 to 917.**
3. **Bryan A. Garner (editor) Black's Law Dictionary, 10th edition, Thomson Reuters**

This is an appeal against the High Court decision which dismissed the plaintiffs' case, (now the appellants), on grounds of it being statute barred.

At this stage, it is necessary to say a little about the background of the case. The appellants, as joint administrators of the estate of their late father John C. M. Kalenga (who died intestate in 1993), sued the defendants (now respondents) claiming *inter alia*:

- "(i) An order that the change of shares from John C.M. Kalenga to the defendants was fraudulent and done without obtaining the consent of the late John C.M Kalenga or his administrators, and without following the proper procedure for change of shareholding;**
- (ii) An order for the PACRA records to be amended to reflect the original shareholding of Sun Pharmaceuticals Limited which was fraudulently altered;**
- (iii) An order for the defendants to render an account for all the dealings undertaken under Sun Pharmaceuticals Limited from 1993 to date, including all account statements;**
- (iv) For the Defendants to render an account for all funds received from GRZ through the Ministry of Justice pursuant to the Judgment under cause number SCZ/8/30/2004 and all such funds to be paid back to a nominated account to be created for Sun Pharmaceuticals Limited by the plaintiffs;**
- (v) That all future payments from the Ministry of Justice for the Judgment under cause number SCZ/8/30/2004 be paid into the said Sun Pharmaceuticals Limited account to be opened by the Plaintiffs;**
- (vi) Damages for fraud and misrepresentation perpetrated by the defendants;**
- (vii) An order for the plaintiffs as administrators of the estate of the late John C.M. Kalenga to take over management and control of Sun Pharmaceuticals Limited."**

In the accompanying statement of claim, they averred that the deceased died intestate in 1993. The initial administrators of his estate, Elizabeth Kalenga and Winnie Hamalabi were appointed in

1999. They were replaced by the appellants on 10th June 2018. The initial administrators were not paid any dues/dividends on the shares owned by the late John C.M. Kalenga nor were they ever approached by any person for the purchase of the said shares. No consent was ever given for anyone to purchase the shares because the family agreed that they were to be maintained for the benefit of the children of the late John C.M. Kalenga.

In the interim, by an action commenced in the High Court, the Development Bank of Zambia (DBZ) sued Sun Pharmaceuticals Limited claiming that the loan obtained by its predecessor company, Frank & Hirsch (Zambia) Limited, had not been repaid.

The litigation between DBZ and Sun Pharmaceuticals protracted from 1995 till 2004, when the Supreme Court delivered its Judgment by which the company Sun Pharmaceuticals was awarded damages. Then the respondents, as shareholders, started getting payment from Ministry of Justice in 2009. It was then that the appellants became aware that their late father's estate was being denied payment of this money because he was fraudulently removed as a shareholder. Yet his property, Mususu Kalenga building, was used as collateral of the mortgage obtained from DBZ.

The defendants filed a defence and admitted that the loan was secured with the deceased's property and that the title deeds were released to the appellants in 2012, after the outstanding loan was paid to DBZ.

They averred that shareholding never changed after Frank and Hirsch, where the deceased was a shareholder, became Sun Pharmaceuticals. They also denied that since 2009, they had been receiving payments from Ministry of Justice.

The respondents then raised a preliminary issue on the ground that the matter was statute barred by virtue of **section 20 of the Limitation Act (The Act)** which provides that:

"Subject to the provisions of subsection (1) of the last foregoing section, no action in respect of any claim to the personal estate of a deceased person or to any share of interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, of damages in respect of such arrears, shall be brought after the expiration of the six years from the date on which the interest became due."

They maintained that all the incidences referred to by the appellants in their statement of claim occurred more than 14 years ago.

In opposing the application, the appellants averred that **section 20 of the Act** was not applicable to their case as it dealt with actions **against** the estate and not **by** the estate. They also relied on **section 26(b) of the Act**, which provides for postponement of the limitation period due to concealment of fraud.

Counsel argued that the cause of action was therefore postponed by virtue of the concealed fraud in relation to the payments and change of shareholders of the company. Reference was also made to **Halsbury's Laws of England 4th edition, volume 28 paragraphs 916 to 917** in support of the argument that section 20 applies to actions against the estate of the deceased and not on behalf of the estate.

The trial Judge, upon analysing the evidence and perusal of **section 20 of the Act**, found that it applied to the appellants' case which was commenced on behalf of the estate. She reasoned that the initial administrators who were appointed in 1999, should have, with due diligence, discovered that the shareholding of the company had changed. She concluded that time started running in 1999, when the initial administrators were appointed and the action was therefore, statute barred. She further found that **section**

26(b) of the Act was not applicable as there was no concealment of fraud.

Dissatisfied with the Ruling, the appellants appealed to this court raising four grounds as follows:

- "1. The learned trial Judge erred in law and fact when she held that section 20 of the Limitation Act 1939 is applicable to a claim such as the one brought by the plaintiffs in this action whereby the plaintiffs are not claiming against the estate of John C.M. Kalenga but on behalf of the said estate seeking reliefs against third parties (the Defendants).*
- 2. The learned trial Judge erred in law and fact when she held that time started running when the initial administrators were appointed and imputed or inferred knowledge of the existence of a cause of action on the said initial administrators, or that they sat on their rights, without any evidence on record on which such an inference or assumption could be based. In light of the pleadings demonstrating fraudulent concealment by the defendants, the inferences drawn by the trial Judge in respect of the initial administrators are perverse.*
- 3. The learned trial Judge erred in law and fact when she held that the provisions of section 26 of the Limitation Act, 1939 are not applicable to this case.*
- 4. The learned trial Judge erred in law and fact when she glossed over the plaintiffs' arguments relating to fresh accrual of the cause of action and the arguments relating to the Ex-Turpi Causa rule, which were not properly addressed in the said Ruling."*

Both parties filed heads of argument. The respondents' counsel also filed additional heads of argument.

The appellants' counsel contends in ground one, that the trial court misdirected itself as to the import of **section 20 of the Act**. It is counsel's view that, in order to understand **section 20 of the Act**, it is important to review the provisions of **section 19 of the Act**, which deals with limitation of actions by beneficiaries against a trust, where there had been breach of trust or fraud in relation to the administration of a trust. Therefore, **section 20 of the Act** is not detached from **section 19 of the Act** as the Legislature intended the two sections to be interpreted in a similar fashion as they both relate to claims against estates.

Section 20 of the Act is therefore not inclusive but restrictive. It does not apply to claims such as the one brought by the appellants in the court below. The words "**any claim to the personal estate**", restricts **section 20 of the Act** to claims only against the personal estate of the deceased and not those on behalf of the estate.

Learned counsel equally placed reliance on **Halsbury's Laws of England 4th Edition Volume 28 paragraph 618** which is couched thus:

*"Actions against estates of deceased persons. The Limitation Act 1939 applies to actions against the estates of deceased persons or their personal representatives other than actions for which a special period of limitation is prescribed by any other enactment. **Express***

provision is made as to the limitation of actions claiming the personal estate of a deceased person. (underlined for emphasis)

Proceedings against a deceased person's estate in tort are now subject to the same limitation as if there had been no death."

Reliance was also placed on paragraph 857, which is couched as follows:

"Actions claiming Personal Estate of Deceased Person

857. Benefits under will or on intestacy. Subject to the principle that no period of limitation applies to an action by a beneficiary in respect of a fraud or fraudulent breach of trust to which a trustee was privy, or to recover from a trustee trust property or the proceeds of it in the trustee's possession or received by him and converted to his own use, any action in respect of a claim to the personal estate of a deceased person or to any share or interest in such estate, whether under will or on intestacy, must be brought within twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of those arrears, may be brought after the expiration of six years from the date when the interest became due. The limitation applies to all action to recover legacies, whether charged on land or not, including annuities if charged on personality only, as long as administration has not been completed.

The limitation applies only to a claim by a beneficiary against a personal representative but, in a case where the personal representative has distributed the estate of the testator or intestate, to a claim by a beneficiary against a person who has been wrongly paid or overpaid. (underlined for emphasis)

An action brought by a residuary legatee against a personal representative for administration of the testator's estate is an action

to recover a legacy, even though it is not alleged that the personal representative had in his hands at the date of bringing the proceeding, assets out of which to pay the legacy. A personal representative who has distributed, is therefore, protected after twelve years, but will be liable to proceedings, subject only to questions of laches or acquiescence, for so long as he retains assets in his hands."

Accordingly, the holding by the lower court that **section 20 of the Limitation Act 1939**, applies to the current case flies in the teeth of the said section and the commentaries by the learned authors of Halsbury's Laws of England. The court below fell into error when it dismissed the appellants' action based on the provisions of **section 20 of the Act**.

Ground two was argued on the basis that the lower court ignored the evidence tendered by the appellants that they knew about the funds at Ministry of Justice in 2009, but only obtained concrete proof in 2016 after their advocates engaged the Attorney General's Chambers.

Furthermore, that it was wrong for the lower court to draw, an inference that the previous administrators knew or acquiesced to anything, in the absence of evidence to that effect. It was for the respondent to prove so and not for the court to shift the burden.

Relying on the case of **Rhesa Shipping Co. SA v Edmunds**¹, counsel contended that in that case Lord Brandon guided that Judges should not fill gaps in the evidence with their own findings or inferences. Inferences must be based on the facts presented and must not go against the evidence. In *casu* the following inferences were not supported by the evidence:

"(a) that time started running when the initial administrators were appointed; and

(b) that the said administrators sat on their rights."

In relation to ground three, it was argued that the statement of claim revealed that there was concealment by the respondents of their fraudulent activities since 2009. The 1st respondent is aware of the entitlements due to the estate of the deceased including dividends and profit share but used his confidential position as Managing Director of Sun Pharmaceuticals Limited, to conceal facts and manipulate the shareholding structure of the company.

The 1st respondent also concealed the payments he has been receiving from the Ministry of Justice on behalf of Sun Pharmaceuticals, which funds are supposed to be accounted for

as they do not belong to the respondents but to Sun Pharmaceuticals.

Additionally, that the 1st respondent had even opened secret accounts in Switzerland where he has been receiving the payments meant for Sun Pharmaceuticals Limited. It was difficult for the appellants to discover these accounts until after their advocates engaged the Ministry of Justice in 2016.

Furthermore, even the officers at PACRA have been unhelpful as the letters of enquiry authorised by the appellants have been ignored as is demonstrated by the letter to PACRA exhibit MMK10b, in the affidavit in support of interim prohibitive and mandatory injunction, which to date has received no response.

It is the appellant's further contention that the trial Judge misdirected herself when she held that **section 26(b) of the Limitation Act** does not apply to the case. Reliance was placed on the Supreme Court decision in **Indo Zambia Bank v Christine Banda**², where it was held that:

"In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the

breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly'.

Learned counsel concluded that there was fraudulent concealment by the respondents in this case over the payments and change of shareholders which served to postpone the limitation period.

In ground four, which was argued based on the legal maxim "*ex turpi causa non oritur actio*" which is Latin for "*a party cannot seek a legal relief based on his/her own illegal or immoral conduct.*" It was submitted that the maxim applied to the respondents as in their defence, they failed to respond to the appellant's queries with regard to how shares were taken away from the deceased in Sun Pharmaceuticals.

The argument escalated further that the 1st respondent took fraudulent advantage of his confidential position as Managing Director of Sun Pharmaceuticals and of the fact that the administrators of the late John C.M. Kalenga had no clue as to what was going on in the company. Therefore, the respondents cannot use their fraudulent concealment of their activities as a shield to guard them from the claims the appellants presented in

the court below because their fraudulent actions are illegal and immoral.

And, that since the trial Judge did not consider the arguments on *ex turpi*, she, therefore, did not consider all matters in controversy, contrary to the Supreme Court decision in **Zambia Telecommunications Co. Ltd v Mulwanda & Ngandwe**³. For these reasons we were urged to set aside her Ruling.

At the hearing of the appeal, Mr. Madaika who appeared for the appellants, orally submitted that once they filed their defence, the respondents waived the right to raise preliminary issues. Thus, the best they could do is to amend their defence to plead the statute of limitation. In support of this argument, reliance was placed on our decision in the case of **Phillip R. Pascal & Others v ZCCM Investments Holdings Plc**⁴.

Additionally, that the pleadings in this case like in the **Pascal case**⁴ are complex such that it is not clear when the cause of action arose. This issue would require to be resolved at trial. Even the issue of when the shares were converted would require to be resolved at trial.

The respondents contended in the heads of arguments filed by Messrs George Kunda and Company, that **sections 19 and 20 of the Limitation Act** are not one and the same. That the phrase '*subject to*' does not mean one section should operate the same as the one it is subject to. In *casu*, it would entail that when dealing with an estate and it becomes known that there is trust property, **section 19 (1) of the Act** ought to be considered first.

Additionally, that the appellants' claims in the High Court are anchored on the estate of the deceased in particular his shares in the company. Learned counsel amplified that just by showing that they were joint administrators the appellants would have been entitled to the shares of the late (if he had any), in accordance with **section 190 (4) of the Wills and Administration of Wills Act**.

However, the appellants slept on their rights by not following the provisions of the law to deal directly with the company over the alleged shares of the deceased.

It was the further submission of counsel, that the trial Judge properly gave the literal meaning to **section 20 of the Act** and rightly concluded that it applied to proceedings where there is a claim concerning the personal estate of a deceased person. And, that shares in a company constitute the personal estate of a deceased

person. Thus, this case was captured by **section 20 of the Act**. Accordingly, it is statute barred.

Regarding ground two, the respondents' counsel argued that it is not an error for a Judge to make inferences which may operate in favour of another party. An inference, according to Black's Law Dictionary, is **"a conclusion reached by considering other facts and deducing a logical consequence from them."**

The trial Judge considered the common facts and concluded that time begun to run upon appointment of the administrators, since the estate had a person to sue on their behalf once the administrators were appointed. The case of **Dominic Mulaisho v Attorney General**⁸ was relied upon that:

"The statutory time period begins to run immediately on the accrual of the action. That is when the plaintiff's right to institute a suit arises, if he brought the suit after the statutory period has run, the defendant may plead the statute of limitation as a defence."

It was equally argued that courts have no jurisdiction to extend or abridge time which has expired under the statute of limitations as held in **BP Zambia Plc v Zambia Competition Commission and 3 Others**⁹ that:

"(2) although order 3/5/1 of the rules of the Supreme Court empowers the court to extend or abridge the time within which certain acts should be done, the court has no discretion to extend or abridge the time where a statute provides no discretion..."

Ground three was argued on the basis that fraudulent concealment as defined by **Black's Law Dictionary** is **"the affirmative suppression or hiding with intent to deceive or defraud, of a material fact or circumstance that one is legally (or sometimes morally) bound to receive"**

Learned counsel argued that fraud, once pleaded, must be proved to a higher standard than mere balance of probabilities as it is criminal in nature as held in cases like **Baxter v Baxter**¹⁰, **Sable Hand Zambia Limited v ZRA**¹¹ and **Kalumba Kashiwa Mwansa & another v Kenneth Mpofu and The Attorney General**¹².

The trial Judge found that there was no proof of actual fraudulent concealment when she held that:

"It is common knowledge that information relating to companies is held in a public registry such as PACRA, in Zambia. As has been demonstrated by the Plaintiffs information is accessible from the same upon a search being conducted. As already stated as at 1999 there were legally appointed administrators of the estate of late Mr. John C.M. Kalenga. The exhibit print out from PACRA also shows that there were Annual Returns filed on behalf of Sun Pharmaceuticals from as far as 2003. I find that had there been reasonable diligence on the part of the Administrators of the

Estate of late Mr. John C.M. Kalenga the changes in the shareholding of Sun Pharmaceuticals could have been discovered. However, the Administrators of the estate sat on their rights and have come too late in the day to attempt to rely on fraud to stop the time running. I find that this is not an appropriate case for section 26 to be applied."

Accordingly, since there was no fraud, time began to run in 2003 when annual returns were filed at PACRA. And, that with due diligence, the appellants would have discovered the alleged fraud by 2003. Consequently, by the time they carried out searches in 2009, instead of earlier the period had already expired.

According to counsel, in terms of **section 26 of the Act**, concealment after the cause of action has arisen, would not intervene to stop time that had already started running. Concealment of fraud can only prevent time from beginning to run.

Lastly, it was argued that the moneys have always been paid to the company Sun Pharmaceuticals and not personally to the respondents. The case, which resulted in the payments, was between Sun Pharmaceuticals and the Government of the Republic of Zambia, to which the appellants could have applied to be joined. This they did not do. Consequently, the matter became statute barred and they are still not parties.

Regarding the argument that the trial Judge did not consider the doctrine of *ex turpi causa*, learned counsel argued that for it to apply, there must be an illegal conduct, not just an allegation or belief of misconduct. Once the trial Judge found no fraudulent concealment, all other connected arguments fell off.

In the additional heads of argument filed by Eric Silwamba, Jalasi and Linyama advocates, the respondents, reiterated that the appellants' case was statute barred and relied on several cases such as **Howard & Company (Africa) Limited v Behrens⁵**, **Pigeon Investments Limited v Amiran Limited⁶** and **City Express Service Limited v Southern Cross Motors Limited⁷** where Chitengi, JS, as he then was, stated:

"Under Order 18/8 the learned trial Judge had not only jurisdiction to hear and determine the preliminary issue relating to statute of limitation and apply it but he was also bound to exercise his jurisdiction because this was a proper case. The action was clearly statute barred at the time of commencing the proceedings. As we said in the Silwamba case the trial would have been a waste of time and resources because the respondents could at any time successfully raise the defence of the statute of limitation."

Regarding the issue of shares being fraudulently taken away from the deceased, reliance was placed on **section 190 of the Companies Act Number 10 of 2017** and **clause 32 of the Standard Articles**

which regulate the management of a company limited by shares as follows:

"(1) Where the registered holder of a share dies or becomes bankrupt, his personal representatives or the trustees of his estate, as the case may be, shall be upon the production of such information as is properly required by the directors, entitled to the same dividends and other advantages, and to the same rights (whether in relation to meetings of the company, or to voting or otherwise) as the registered holder would have been entitled to if he had not died or become bankrupt.

(2) Where two or more persons are jointly entitled to any share in consequence of the death of the registered holder, they shall, for the purposes of these regulations, be deemed to be joint holders of the shares."

It was the further submission of counsel that the order of application of administrator at page 57 of the record of appeal was issued on 22nd July 1999 a period of six years after the death of the deceased. Then almost 25 years after his death, the appellants were issued letters of administration on 1st June, 2018. This was contrary to **section 4 of the Probates (Resealing) Act** which requires duty to be paid. Furthermore, that **Rule 9 of the Probates (Resealing) Rules Government Notice No. 12 of 1920** requires that:

"When application to seal a grant of probate or letters of administration is made after the lapse of 3 years from the

death of the deceased, the reason of delay must be certified to the Registrar, should the certificate be unsatisfactory, the Registrar shall require such proof of the alleged cause of delay as he may think fit."

This was not done in this case. At the hearing Mrs Kunda SC, who appeared for the respondents relied on the heads of argument. Mr. Silwamba, SC, also appearing for the respondents orally submitted that the Pascal case is distinguishable from the appellants' case as it dealt with complex issues unlike in the current case. Furthermore, that in the **City Express Service Limited v Southern Cross Motors Limited**⁷ case, the Supreme Court guided that the issue of a case being statute barred can be raised at any stage.

We have considered the arguments by counsel on behalf of the respective parties.

Flowing from the grounds of appeal and the arguments, the cardinal issue the appeal raises is, whether the appellants' case is statute barred in accordance with **section 20 of the Limitation Act, 1939**. Key to this issue is the question whether there was fraudulent concealment by the respondents as a result of which the limitation period was postponed and time started running in 2009, when the appellants allegedly discovered the fraud.

We shall deal with grounds one and two simultaneously, as they both deal with **section 20 of the Act**. We must state from the outset that having perused the provisions of **section 20 of the Act**, we are of the considered view that it is applicable to the case in hand, as determined by the trial Judge using the literal meaning or the so called golden rule of construction, as stated by Lord Blackburn in **Caledonian Railway v North British Railway**¹³ that:

"There is not much doubt about the general rule of construction Lord Wensleydale enunciated that which he called the golden rule of construing all written engagements. I find that he stated very clearly in Grey v Pearson [1857] 6 HL 61 in the following terms: "I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted-at least in the Courts of Law in Westminster Hall-that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words must be adhered to..."

To give effect to the appellants argument that **section 20 of the Act** only applies to actions against the estate of the deceased and not those on behalf of the estate, would result in an absurdity and against the golden rule of construction above. This would lead to an inconsistency with the other provisions of the statute. **Section 20 of the Act** does not in any way, even imply such an interpretation, as argued by the appellants' counsel. We are also

not persuaded by his arguments based on Halsbury's Laws of England, which we opine have been misapplied in this case.

Section 20 of the Act clearly speaks of actions in respect of any claim to the personal estate of a deceased person. Any claim can be against, or on behalf or for, the estate. As ably articulated by the trial Judge, the provision is inclusive and does not in any way restrict its application to claims only against the personal estate of the deceased. Had it been the intention of the Legislature that **section 20 of the Act** should only apply to actions against the estate, they would have expressly stated so.

The trial Judge cannot be faulted for concluding that **section 20 of the Act** applied to this case and invariably, that it was statute barred. Therefore, arguments that she relied on the wrong section are meritless.

Equally meritless are the arguments that the respondents waived their right to raise the preliminary issue because they had filed their defence. As canvassed by Mr. Silwamba SC, a preliminary issue on grounds that the matter is statute barred can be raised at any stage of the case. As the Supreme Court explained over a decade ago in the case of **City Express Service Limited v Southern Cross Motors Limited**⁷ after considering arguments that the

Limitation Act should have been specifically pleaded in accordance with Order 18/8/25 of the Rules of the Supreme Court, observed as follows:

"Order 18/8/6 to 18/8/42 gives examples of matters to be specifically pleaded and the Limitation Act comes specifically under Order 18/8/25. All these rules come under the section entitled 'matters which must be specifically pleaded'. On the face of Order 18/8/25 an impression is created that Mr. Katolo is right in his argument that the learned trial Judge had no jurisdiction to deal with the preliminary issue relating to the statute of limitation because the respondent did not specifically plead it. But this is not correct the whole of Order 18/8 should be read as one. When Order 18/8 is properly read, it is clear to us that Order 18/8/25 is subject to the provisions of Order 18/8 paragraph (1) the net effect of which is, inter alia, that a court cannot be prevented from giving effect, in proper cases, to defences, in this case the statute of limitation, which are not pleaded. We must therefore reject Mr. Katolo's submissions."

Furthermore, that:

"Under Order 18/8 the learned trial Judge had not only jurisdiction to hear and determine the preliminary issue relating to the statute of limitation and apply it but he was also bound to exercise his jurisdiction because this was a proper case. The action was clearly statute barred at the time of commencing the proceedings. As we said in the Silwamba case, the trial would have been a waste of time and resources, because the respondent could at anytime successfully raise the defence of the statute of limitation."

Guided by the Supreme Court, we are of the considered view that the respondents, in this matter, properly raised the preliminary issue based on the statute of limitation, even after filing their defence. The rationale for raising the statute of limitations at any stage, is very patent from the **City Express Limited v Southern Cross Motors Limited**⁷ decision, which is, to avoid wasting resources, defending a stale claim. It defies logic, to have the respondents amend their defence and plead the statute of limitations and await trial and then adjudication of the issue; thereby wasting resources.

Therefore, this was a proper case in which the defence of the statute of limitation could be raised as a preliminary issue, even though not pleaded. And, as argued by Mr. Silwamba SC, the circumstances of the **Phillip R. Pascal & others v ZCCM Investments Holdings Plc**⁴ case are distinguishable from the case in hand. In that case, the issues were found to be complex, with the statement of claim covering 43 pages.

We also observed that the trial Judge properly found that the accrual dates were not clear and thus made it difficult to determine the preliminary issue on the statute of limitations. As such it was not a proper case in which to determine at that stage whether some

of the claims were statute barred or not. Therefore, we agreed with the High Court that the matter should proceed to trial and all issues to be determined afterwards including which claims were statute barred.

In *casu*, the accrual dates are very clear. The deceased died in 1993 and the first administrators were appointed in 1999. The Supreme Court judgment leading to payment of damages to the company was delivered in 2004.

We also agree with Mrs. Kunda SC, that the provisions of **section 19(1) of the Act**, would only be applicable to **section 20 of the Act** if there is a trust under the deceased's estate. The appellants did not adduce any evidence to show that there was a trust under their deceased father's estate.

In view of the foregoing, grounds one and two are devoid of merit and we dismiss them.

Turning to ground three which is based on **section 26 (b) of the Act**, upon which the appellants are contending that the respondents fraudulently concealed the payments from Ministry of Justice following the Supreme Court Judgment in the litigation between DBZ and Sun Pharmaceuticals.

We note from the writ of summons under claims (ii) that the change of shares was done fraudulently and claim (iv) for damages for fraud and misrepresentation. In the statement of claim, the particulars of fraud were stated *inter alia* as changing the shareholding without consent of the late, the respondents' failure to provide evidence of any money being paid for the shares or payment of property transfer tax to ZRA and that the 1st defendant (respondent) has to date failed to avail any documents to the plaintiffs evidencing the purported change of shares into his and his family's names.

These are what the appellants contend are the fraudulent activities which the respondents concealed. According to the appellants because of these activities, **section 26 (b) of the Act**, which provides for postponement of limitation period where the right of action is concealed by fraud, comes into play. Consequently, time in this case begun to run when they discovered the payments in 2009.

It is clear to us that **section 26 (b) of the Act** allows courts to stop time or postpone the limitation period where the defendant conceals the acts giving rise to the action. Can it be said, on the facts of this case, that the respondents concealed the facts giving

rise to the appellants' action? We do not think so. As aptly articulated by the trial Judge, the original administrators who were appointed in 1999, could with reasonable diligence have sued on behalf of the estate when need arose. Additionally, that the facts of shareholding could be easily verified at PACRA, which is a public registry of companies, accessible to all.

The Judge also reasoned that the exhibit print out from PACRA showed that annual returns were filed on behalf of Sun Pharmaceuticals from as back as 2003. In addition that, had there been reasonable diligence on the part of the administrators of the deceased's estate, the changes in the shareholding could have been discovered, in time.

According to the Michigan Law Review, "*the diligence of the plaintiff's inquiry into the existence of a claim is judged according to an objective reasonable person standard. No allowance is made for any trust the plaintiff may have had in the honesty of the defendant's behaviour or representation. The defendant is under no duty to disclose her wrongdoing. Her silence will not stop the clock from running on an injured party's cause of action. Indeed the defendant's denial of wrongdoing does not constitute fraudulent concealment, and will not serve to toll the statute of limitations...*"

Other authors have observed that concealment pertains to matters that were exclusively within the defendant's knowledge and could only have been discovered by the plaintiff through great difficulty.

In *casu*, apart from PACRA records, the issue of payments following the Supreme Court decision is information which was not exclusively within the respondents' knowledge. It is apparent the appellants knew about the litigation and waited till payment, to take action. As canvassed by Mrs. Kunda SC, the appellants could have even applied to be a part of the case while it was in the High Court or even the Supreme Court, as the money is not for the respondents personally but for the company. The litigation was not the only business of the company, as returns were filed as back as 2003.

We opine that the fact that the respondents did not respond to the appellants' letters is insufficient to prove concealment of fraud.

We would therefore uphold the finding of the trial Judge that **section 26 (b) of the Act** is inapplicable on the facts of this case. There was no fraudulent concealment here. The appellants simply failed to act diligently. A reasonable person, would, without

difficulty, have discovered the change of shareholders in time and that payments were due after litigation immediately after the Judgment in 2004.


We find no merit in the arguments on inferences made by the court below. We totally agree with submissions by Mrs Kunda, SC, on this score. Ground three equally fails.

We are inclined to dismiss ground four. We are of the considered view that the doctrine of *ex turpi causa* does not apply on the facts of this case. We do not see what wrongdoing the respondents are guilty of that they are trying to rely on.

As we understand it, the doctrine applies to a party (especially plaintiff) who is trying to rely on his or her wrong doing by placing liability on a defendant. For instance, a trespasser suing a defendant for damages for personal injuries suffered whilst he was trespassing. Ground four also fails.

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.

In the net result, the appeal is dismissed, with costs to the respondents, to be taxed failing agreement.



C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT



F.M. CHISHIMBA
COURT OF APPEAL JUDGE



J.Z. MULONGOTI
COURT OF APPEAL JUDGE