

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:

2014/HP/1097

CHRISTINE BANDA

AND

INDO ZAMBIA BANK LIMITED

PLAINTIFF

DEFENDANT



Before Hon. Mrs. Justice J. Z. Mulongoti
on the 30th day of OCT, 2014

For the Plaintiff: Mr. L. Zulu, Messrs Tembo Ngulube & Associates

For the Defendant: Mr. C. Sianondo, of Messrs Malambo & Co.

R U L I N G

Cases cited:

1. DONOVAN V. GWELOYS LTD (1990) 1 WLR 472
2. HILTON V. SUTTON STEAM LAUNDRY (1946) K.B68
3. STELLA UPTON V. WILLIAM DERECK WALKER (1971) ZR 192 (CA)
4. ATTORNEY GENERAL V. MAJOR SAMUEL MBUMWAE AND 1419 OTHER OFFICERS AND SOLDIERS APPEAL NO 83/2010 (Unreported)(SC)
5. CITY EXPRESS SERVICES LTD V. SOUTHERN CROSS MOTORS LTD (2007) ZR 203
6. BEAMAN V. ARTS LTD (1949) 1 ALLER 465
7. BULLICOAL MINING CO. V. OSBORNE (1899) AC 363
8. KITCHEN V. ROYAL AIRFORCES ASSOCIATION & ANOTHER (1958) ALLER 241
9. SHELDON & OTHERS V. RHM OUTWRIGHT (1995) 2 ALL ER 558
10. INDO ZAMBIA BANK V. MUHANGA (2009) ZR 266 (SC)
11. INDO-ZAMBIA BANK LTD V. BOAZ KADOCHI CHINKAMBA APPEAL NO. 99/2013 (SC)

Legislation referred to:

1. LIMITATION ACT 1939
2. EMPLOYMENT ACT, CHAPTER 268 OF THE LAWS OF ZAMBIA

The Ruling is for an application to raise a preliminary issue on point of law pursuant to order 14A Rule 1 and order 33 Rule 3 of the White Book. The application was made on behalf of the Defendant by Notice and affidavit in support sworn to by one Christopher Wakung'uma, the Defendant's Chief Manager – Human Resources.

He deposed inter-alia that, the Plaintiff was retired from the Defendant's employ on 30th July 2007 after serving 20 years. That therefore the gratuity, she is claiming ought to have been paid on 31st July 2007. That the Plaintiff commenced this action on 16th July 2014, a period more than six years from the date of cause of action and it is thus statute barred.

The Defendant also filed the Defendant's Skeleton Arguments. It was submitted that a contract of employment is like any other contract and by virtue of *Section 2(1)(a) of the Limitation Act 1939*, which applies to Zambia by virtue of the British Acts Extension Act, the action should have been brought before expiry of six years from the date on which the cause of action accrued.

That paragraphs 3 and 5 of the statement of claim reveals that the cause of action accrued on 31st July 2007 and the six years period elapsed on 31st July 2013. The case of **DONOVAN V. GWELOYS (1)** was cited that “*the primary purpose of the limitation period is to protect a Defendant from injustice of having to face a stale claim, which he never expected to deal with.*”

It was also argued that in dealing with statute of limitation, the court does not look at the merit of the case as stated in **HILTON V. SUTTON STEAM LAUNDRY (2)** and **STELLA UPTON V. WILLIAM DERECK WALKER (3)**, The Zambia Cases of **ATTORNEY GENERAL V. MAJOR SAMUEL MBUMWAE** and **1419 OTHER OFFICERS AND SOLDIERS (4)** and **CITY EXPRESS SERVICES LTD V. SOUTHERN CROSS MOTORS LTD (5)** were discussed at length in which the Supreme Court upheld the defence of limitation Act. This court has been urged to dismiss the action for being statute barred with costs to the Defendant.

The Plaintiff filed and swore an Affidavit in Opposition. She deposed that the Defendant fraudulently and with intent to deprive her of her entitlement to gratuity which she had already earned and amounting to K994,824.00, concealed the payment to her. She only discovered this in 2009 after a former workmate was paid her gratuity after Judgment in her favour by the Supreme Court. The Plaintiff exhibited the conditions of service, which entitled her to gratuity, marked "CB1-13".

The Defendant's filed an Affidavit in Reply sworn by the same Christopher Wakung'uma. He deposed that the exhibit "CB1 to CB13" is a contract upon which the Plaintiff seeks to claim her gratuity. And thus it is not possible for the Defendant to have concealed the purported benefit under a contract which the Plaintiff had and continues to have custody and possession. That the Defendant therefore, denies the allegation that it either

fraudulently or otherwise concealed any fact in this matter. That the Defendant paid to the Plaintiff what it deemed and continue to deem was due to her. That her former workmate sued for her gratuity within time and the court upheld her claim.

At the hearing of the application learned counsel for the Defendant Mr. Sianondo of Messrs Malambo and Company informed the court that he was relying on the Affidavits in Support and in Reply and the Skeleton Arguments. He submitted that upon perusal of the affidavit in opposition, it was clear that the Plaintiff was not denying that the matter was commenced outside six years but contends that the Defendant fraudulently concealed the Plaintiff's entitlements. He argued that the Plaintiff has produced the contract she intends to rely upon and therefore, it is not possible for the Defendant to have concealed her entitlements which were calculated in accordance with 'CB17' and 'CB12' of the Affidavit in Opposition. According to counsel the allegation of fraud, which requires a higher standard of proof cannot be sustained in view of the fact that the Plaintiff had a contract. The court was urged to allow the application and dismiss the action.

Learned counsel for the Plaintiff Mr. Zulu opposed the application and relied on the Affidavit in Opposition. He submitted that the Defendant concealed payment of gratuity which was only discovered in 2009. That though the Plaintiff retired in 2007, the time started running in 2009 after she discovered the concealment and thus the period is less than six years to date.

Mr. Zulu relied on *Section 26 of the Limitation Act* and argued that where the action is based on fraud of the Defendant, or his agent, or the right of action is concealed by fraud or the action is for mistake, the time will begin running after the Plaintiff discovers the mistake. In addition that section 26(b) provides for right of action where there is concealment of fraud by the Defendant. It was further contended that concealment is an act of refraining from disclosure. He quoted Black's Law dictionary that, ***"fraudulent concealment is affirmative suppression or hiding with intent to deceive or defraud of a material fact or circumstances one is legally or sometimes morally bound to reveal."*** And that is what the Defendant did to the Plaintiff. The Defendant did not inform the Plaintiff at the time she retired in 2007, that she was entitled to gratuity for having served 24 years with the Defendant. Further, this money which is equal to K994,824=00 was retained by the Defendant for its benefit. The Defendant was under moral and legal obligation to disclose this to the Plaintiff. And that the Defendant by its action breached section 51 of the Employment Act.

The case of **BEAMAN V. ARTS LTD (6)** was cited where it was held that *"the word fraud in section 26(b) of Limitation Act was not confined to fraud which in its nature was sufficient to give rise to an independent cause of action but has same meaning as in the Real Property Limitation Act 1883, Section 26 and in Equity. There could be fraudulent concealment of a right of action which was not subsequent to the act which gave rise to the right of action but*

acquired its character from the manner in which the act was performed".

The court was urged to use equitable principles in defining fraudulent.

Further, that in **BULLICOAL MINING CO. V. OSBORNE (7)**, it was observed that there can be fraudulent concealment even when the person doing so, has not taken active steps to conceal it. And in **KITCHEN V. ROYAL AIRFORCES ASSOCIATION & ANOTHER (8)**, it was held that there can be fraudulent concealment even when there is no deceit or dishonest because it is not confined to such. According to counsel the fact that the Plaintiff had the contract cannot absolve the Defendant of concealment and *section 51 of the Employment Act* mandated it to inform the Plaintiff. The case of **SHELDON & OTHERS V. RHM OUTWRIT (9)** was cited where the House of Lords held that *"where there has been concealment, the Plaintiff has full or six years from date of discovery of concealment"*.

That the Plaintiff's case, in casu, is not tainted by the Defendant's action not to disclose.

In response Mr. Sianondo submitted that in paragraph 5 of her affidavit, the Plaintiff has made it abundantly clear that she served under conditions of service she exhibited. That if she had alleged that she never had sight of the contract, it would have been a different story. In addition that section 51 fell under

General provisions and what needed to be explained were changes in the nature of employment like duties to be performed by an employee, not what has arisen in casu.

I have considered the affidavits by the parties and the skeleton arguments and submission by counsel.

I took time to study the English cases cited by Mr. Zulu. In **BEAMAN V. ARTS LTD**, supra, the Court of Appeal held that under section 26(a) and (b) of the Limitation Act, the period of limitation was postponed because the action was based upon fraud of the company and the right of action was concealed by the fraud. The brief facts were that the Plaintiff who was the owner of four packages deposited with the Defendant from 1935 to 1938, travelled abroad and due to the war was unable to return to England. In January 1940 she wrote to the Defendant asking it to send the packages to her at Athens but this became impossible because Italy also joined the war. The Defendant then in August 1940 examined the contents of the packages and decided to donate them to the Salvation Army and made no attempt to communicate with the owner and made no full entry of it in its books. In 1946, the Plaintiff returned to England and claimed the packages. After being informed of the position, she sued for damages for conversion. This Judgment was followed in **KITCHEN V. ROYAL FORCES ASSOCIATION** supra, where it was also observed that the word fraud in section 26(b) of the Limitation Act, 1939, was not confined to deceit or dishonesty.

The Defendant in casu, has denied fraudulently concealing to the Plaintiff that she was entitled to gratuity in accordance with clause 7.0 of her contract of employment. According to the Defendant, the Plaintiff had the contract with her all the time and thus it was not concealed from her.

After a careful read of the English cases cited by Mr. Zulu and the Supreme Court decision in the case of **INDO ZAMBIA BANK V. MUHANGA (10)** of 2009, which led the Plaintiff to discover that she was not paid gratuity when she retired in 2007, I am of the considered view that the Defendant did fraudulently conceal this payment to the Plaintiff. I say so because in 2007 when the Plaintiff retired both parties thought she had been paid her benefits in full. Indeed the Defendant contends in paragraph 5 of the Affidavit in Reply that what it paid to the Plaintiff is what it deemed and continue to deem due to the Plaintiff. Further, in paragraph 7, that it did not have a duty to advise the Plaintiff of the right she had under the contract of employment as both the Plaintiff and the Defendant were contracting parties. I note also that in the Muhanga case, the Defendant had contended that employees working on permanent and pensionable basis were not entitled to gratuity. The Supreme Court, held that the respondent was entitled to gratuity in accordance with clause 7.0 of the contract. It was stated that,

*“if the insertion of words ‘**permanent and pensionable**’, was a result of careless drafting, then under the doctrine of ‘*contra preferentem*’ the document has to be construed against them and in favour of the respondent.”*

The Muhanga decision was followed by the Supreme Court in **INDO-ZAMBIA BANK LTD V. BOAZ KADOCHI CHINKAMBA (11)** of 2014 cited by Mr. Sianondo.

The respondent in that case sued the Bank after the Muhanga decision. Mr. Sianondo, also argued that appeal on behalf of the Bank. He contended inter alia, that the respondent accepted his retirement pay without question and that he understood that he was employed on a permanent and pensionable basis and therefore not entitled to gratuity. As aforesaid the appeal was dismissed and the Muhanga decision was followed.

It is not disputed that the Plaintiff in casu retired in 2007. And as noted at that time both parties accepted that she was paid her dues in full per exhibit 'CB17'. It is also not disputed that the Plaintiff only became aware that gratuity was not paid to her in 2009. Then she instituted these proceedings in 2014. The Defendant contends that the case is statute barred as the cause of action arose in 2007 in fact 31st July 2007 and being instituted now way beyond six years it should be dismissed in accordance with section 2 of the Limitation Act.

The Plaintiff's counsel contends that there was fraudulent concealment by the Defendant of the Plaintiff's entitlement to gratuity and time only started running in 2009 when the Plaintiff discovered she was entitled to it. Counsel relied on *section 26(b) of the Limitation Act*, which provides for postponement of the

limitation period where the right of action is concealed by the fraud of the Defendant or his agent etc.

After a careful analysis of this case, it is not disputed that both parties became aware in 2009 that the Plaintiff who was employed on permanent and pensionable basis, was entitled to gratuity in accordance with clause 7.0 of the contract. This was after the Muhanga decision was pronounced by the Supreme Court. As earlier intimated, I am inclined to find that there was fraudulent concealment by the Defendant in this case. I note that the Muhanga case was between the Defendant and its former employee Muhanga, such that after the Supreme Court pronounced that Ms Muhanga, who was employed on permanent and pensionable basis was entitled to gratuity, the Defendant had a duty to inform the Plaintiff at that stage and since it did not do so it fraudulently concealed this entitlement. The Plaintiff got to know on her own. I find therefore, that time began running in 2009 not 2007. Accordingly, the Plaintiff's claim is within time. I am fortified by the English cases cited.

It was clearly stated in those cases that the limitation period was postponed due to the fraudulent concealment of facts by the Defendant or its agents.


And as contended by Mr. Zulu and held in **BEAMAN** case "fraud in section 26(b) of the Limitation Act was not confined to fraud which was sufficient to give rise to an independent cause of action That on the facts, the Company's conduct, by the

manner in which it converted the owners chattel and in circumstances calculated to keep her in ignorance of the wrong it had committed amounted to fraudulent concealment within the meaning of *section 26(b)* and therefore, the period of limitation was postponed under that paragraph of the section.”

In casu, the Defendant did not disclose to the Plaintiff after the Judgment in 2009 and to date contends that the Plaintiff was paid what it deemed and continue to deem due to the Plaintiff. Going by the **BEAMAN** case, the Defendant clearly intends not to pay the Plaintiff this money despite the Supreme Court pronouncement in 2009. To me the Defendant’s actions amount to fraudulent concealment and as already stated time started running in 2009 when she discovered the entitlement. The Plaintiff acted diligently after discovering the fraudulent concealment and brought the action within time. From 2009 to date it’s a period of five years. The action arose out of contract as argued and should have been commenced within six years.

For the foregoing, the preliminary issue is dismissed with costs to the Plaintiff.

Delivered at Lusaka this 30th day of OCT 2014.



J. Z. MULONGOTI
HIGH COURT JUDGE