

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**

2013/HP/1641



BETWEEN:

**BENTLY KUMALO & 29 OTHERS
AND
STANBIC BANK ZAMBIA LIMITED**

**PLAINTIFFS
DEFENDANT**

Before Hon. Mrs. Justice M.S. Mulenga this 7th day of August 2014

For the Plaintiffs : Mr. M. Mando of Messrs M.L. Mukande and Company
For the Defendant : Mrs. N. M. Simachela of Messrs Nchito and Nchito

R U L I N G

Cases cited:

1. **Barclays Bank Plc v Augustine Mwana Muwina & 58 Others SCZ/8/5/2009,**
2. **Kabindima Hotelier and Others v Standard Chartered Bank 2012/HP/138**
3. **Burdick vs Garrick 1 Law Rep. 5 Ch 243**
4. **Kitchen v Royal Air Forces Association [1958] 2 ALL ER 214**
5. **Shell and BP v Connidaris and Others (1975) ZR 174**

Legislation referred to:

1. **Limitation Act 1939 sections 2, 19 and 26**
2. **High Court Act Cap 27, Order 14**
3. **Rules of the Supreme Court 1999 Edition, Order 14A**

This Ruling is on the application by the Defendant to have this matter dismissed for being statute barred. It is made pursuant to Order 14A Rule 1 of the Rules of the Supreme Court 1999 Edition. The affidavit in support of the application dated 25th April 2014 is sworn by counsel for the Defendant who states that a perusal of the

Statement of Claim reveals that the basis of the Plaintiffs' claim against the Defendant is the Pension Scheme Regulations Act of 1996 and all the Plaintiffs left the employ of the Defendant around that time. That the action is statute barred having been commenced 17 years after the cause of action accrued and should be accordingly dismissed.

In opposition, the Plaintiffs filed an affidavit dated 5th May 2014 sworn by Lillian Sepiso Shea a legal assistant in the Plaintiff's firm who states that she is one of the Plaintiffs but whose name does not appear on the list of Plaintiffs. She states that the Plaintiffs are former employees of the Defendant and their claim is for Pension Benefits that they contributed as members under the Defendant's Pension Fund as per Writ of Summons and Statement of Claim. That the said Pension Benefits are being held under a Pension Fund created by a Trust Deed of which the Plaintiffs were beneficiaries as per exhibit marked "LSS3".

At the hearing, counsel for the Defendant argued that from paragraph 8 of the Statement of Claim it appears that the action is premised on the Pension Scheme Regulations of 1996. That section 2(1)(d) of the Statute of Limitations 1939 states that actions to recover any sum under an enactment must be made within 6 years from the date of action accrued. This cause of action accrued in 1996 but was only commenced in 2013. She prayed that the matter be dismissed for being statute barred.

In response counsel for the Plaintiffs argued that it is not correct to argue that this action is premised on an Act of Parliament. That the action is premised on a Trust Deed that provided for Pension benefits to the Plaintiffs. The mention of the Act of Parliament is because pension benefits are regulated by statute but the claims before court emanate from a pension scheme exhibited as "MSL3". The Trust Deed shows that the Plaintiffs are mere beneficiaries of the pension fund and this being trust property, it is not subject to the Limitation Act.

That section 19(1)(b) of the Limitation Act 1939 provides for exemption of trusts or trust properties. This pension fund is being managed by trustees as stipulated in the Trust Deed. This claim is therefore a claim by beneficiaries of trust property from the trustees and falls squarely within section 19(1)(b) of the Limitation Act. Counsel then cited the case of **Barclays Bank Plc v Augustine Mwana Muwina & 58 Others SCZ/8/5/2009**, wherein Silomba, J came to the same conclusion that pension funds are not subject to the Limitation Act. Counsel then cited a High Court decision, which is not binding on this Court though persuasive, of **Kabindima Hotelier and Others v Standard Chartered Bank 2012/HP/138** wherein Judge Chisanga came to the same conclusion that pension benefits fall under section 19(1)(b).

Counsel prayed that the preliminary issue should be dismissed with costs.

In reply, counsel for the Defendant submitted that section 19(1)(b) of the Limitation Act is clear that the action must be to recover from the trustee and the reading of the Trust Deed shows that the Defendant is not a trustee but the employer. That this takes the case out of the realm of section 19(1)(b) and therefore should be dismissed for being statute barred.

I have considered the application and the submissions. This application is brought pursuant to Order 14A Rule 1 of the Rules of the Supreme Court (RSC) 1999 edition which provides that:

"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
(a) such question is suitable for determination without a full trial of the action, and
(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."

Order 14A thus provides for the court to determine the construction of any document arising in any cause or matter at any stage of the proceedings and this covers the Trust Deed herein which is in contention.

Section 19(1) of the Limitation Act 1939 provides:

"No period of Limitation prescribed by this Act shall apply to an action by a beneficiary under a trust being an action –

- a) **In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy;**
- b) **To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his own use."**

This provision is clear that the limitation period does not apply where there is fraud or fraudulent breach of trust. Professor Keaton defines a trust in the text book **Law of Trusts (8th ed. 1963)** at pages 3 as follows:

"A trust..... is the relationship which arises whenever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed cestui que trust) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee, but to the beneficiaries or other objects of the trust."

In the case of **Burdick vs Garrick 1 Law Rep. 5 Ch 243** Lord Justice Gifford held as follows:

"I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and keep it until it is called for they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

The exhibited Trust Deed dated 1st June 1975 between Grindlays Bank International (Zambia) limited and unnamed trustees is the one that governs the pension scheme for the benefit of the Plaintiffs. It appears that the said Trust Deed was taken over by the Defendant as successor of Grindlays Bank and the trustees are apparently Professional Life Assurance as mentioned in correspondence between parties. One of the objects of the Trust Deed was to set up the pension scheme and to hold money received

from time to time by the trustees for the benefit of the members. There has been neither dispute by the Defendant nor denying the existence or validity of the Trust Deed thus there is no reason to doubt that it was created for the benefit of the Plaintiffs herein. Therefore the Defendant's application as regards the trustees falls within the scope of section 19 of the Limitation Act 1939 as the same protects the Plaintiffs.

The trustees role vis a vis the Plaintiffs was to receive money for the benefit of the members. Therefore as per the decision in **Burdick vs Garrick (3)** above, the trustees for now appear not to have discharged their duty by paying the monies so held. Hence an appeal to the lapse of time is not sustainable.

It is also worth noting that the Plaintiffs have only sued the Defendant as the former employer and not the trustees who should also come to Court and answer to how the money received on behalf of the beneficiaries was disbursed.

Order 14 Rule 5 (1) of the High Court Rules Chapter 27 of the Laws of Zambia provides that:

"If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge

thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause."

This matter is such a one in which it is proper and just to order the joinder of the trustees so that they can answer for themselves and all issues in contention should be finally determined. I hereby order that the trustees be joined to the proceedings as the 2nd Defendant and counsel for the Plaintiffs is to draw up the order and serve all the documents on them.

I now turn to the issues in contention as raised between the Plaintiff and the Defendant. The arguments by the parties reveal two issues for determination, namely, whether this action is premised on the Pension Scheme Regulations of 1996 which fall under Acts of Parliament and whether the claim against the Defendant, who is not the trustee, falls outside the ambit of section 19(1)(b) of the Limitation Act and is consequently statute barred.

Counsel for the Defendant contends that this matter is statute barred as the basis of the Plaintiffs claim against the Defendant is the Pension Scheme Regulations Act of 1996 and all the Plaintiffs left the employ of the Defendant around that time. Further that the Defendant is not a trustee under the pension Trust Deed and therefore the action is outside the ambit of section 19 (1)(b) of the Limitation Act

In response counsel for the Plaintiffs contends that the pension benefits are being held under a pension fund created by a Trust Deed of which they are beneficiaries. That the action falls under section 19(1)(b) of the Limitation Act and is therefore not statute barred.

I have considered the Writ of Summons and Statement of Claim and the Plaintiff's main claims are couched as follows:

- i) *Declaration that the Plaintiffs are still members of the Defendants pension fund by virtue of the contributions that still stand to their credit in the pension fund.*
- ii) *Payment of full pension benefits.*
- iii) *In the alternative, refund of the employees' contributions to be computed together with compound interest from respective dates of exit from employment."*

These claims are in line with the Plaintiffs' submission that they are based on the pension fund created by the Trust Deed. The fact that there is mention in the Statement of Claim of the Pension Scheme Regulations Act of 1996 and its provisions does not mean that the same is the basis of the Plaintiffs' claim. It is not in dispute that actions founded upon an Act or legislation is subject to the limitation period of six (6) years. The Regulations have only been cited in support of the Plaintiffs' case. I find that the Plaintiff's action is premised on the Trust Deed creating the pension fund and not the Pension Scheme Regulations of 1996.

The second issue for determination is whether the claim against the Defendant, who is not a trustee, falls outside the ambit of section 19(1)(b) of the Limitation Act 1939. Section 19(1)(b) as quoted above specifically relates to trustees who are partly or privy to any fraud. From the facts so far adduced by the parties at this interlocutory stage, it is apparent that the Defendant is not a trustee under the pension scheme. In the statement of claim the Plaintiff state that the Defendant got and retained the employer contribution from the pension scheme but which assertion is denied in the defence stating that the employer contribution was retained by the pension scheme and never returned to the Defendant. In this case section 19(1)(b) of the Limitation Act does not apply to the Defendant.

The main contention appears to be based on clause 9 of the exhibited Trust Deed which gives a member three options on leaving the employer's (Defendant's) service as follows:

- “(i) *to take pension commencing on the Normal Pension Date in respect of his own contributions under the scheme.*
- (ii) *if the pension benefit is secured by a group policy or policies of assurance, with the consent of the Assurer, to continue his contributions direct to the assurer and secure such pensions at the Normal Pension Date as his past and future contributions shall provide; or*

- (iii) *to take a refund of all his contributions under the scheme towards his pension with interest there on at 3 % per annum compound subject to the provision of Rule 21.”*

The Plaintiffs' position is that the Defendant without their consent withdrew and refunded the Plaintiffs their own contributions. In other words that the Plaintiffs did not exercise this option and were therefore entitled to their pension. This is what has been a subject of correspondence between the parties since the time of the Plaintiffs' early retirement to the time this action was instituted as shown in the Plaintiff's bundle of documents. The Defendant's letter at pages 30 and 31 is the only one that acknowledges that the Defendant decided to withdraw the Plaintiff's own contribution from the pension fund without their consent or specific instruction as provided in the Trust Deed. This letter is dated 6th December 2007 and states at page 31 that:

“In the said letter, the Bank indicated that it intended to include pension refund in the calculation of your retirement benefits and requested you to indicate if you preferred any other alternative option in relation to your pension contributions. Therefore, by necessary implication and by your conduct, you actually opted that the Bank refunds you pension contributions as proposed by the Bank in the said letter of 23rd September 1997.”

This action and acknowledgment by the Defendant brings it within the provisions of section 26 of the Limitation Act 1939 which provides:

“Where, in the case of any action for which a period of limitation is prescribed by this Act, either-

- (a) The action is based upon the fraud of the Defendant or his agent or of any person through whom he claims or his agent, or**

- (b) The right of action is concealed by the fraud of any such person as aforesaid, or
- (c) The action is for relief from the consequences of a mistake.
- The period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.”

The Defendant’s action of selecting the option on behalf of the Plaintiffs without their consent amounted to fraudulent conduct. In **Kitchen v Royal Air Forces Association [1958] 2 All ER 214** it was stated that fraud in this section 26 is not confined to deceit and dishonesty. Lord Evershed MR in the same case stated that equitable fraud covered conduct which, having regard to some special relationship between the two parties concerned, was an unconscionable thing for the one to do towards the other. In this instant case, it was unconscionable for the Defendant to make an election on behalf of the Plaintiffs contrary to the provisions of the Trust Deed. The elected option apparently worked to the detriment of the Plaintiffs’ rights or interest. This shows an element of dishonesty.

I am mindful of the Supreme Court guidance in **Shell and BP v Condidaris and Others (1975) ZR 174** that it is not desirable to make comments which might have the effect of pre-empting the decision to be determined on merit at trial or which would have the effect of determining the issues in contention at interlocutory stage.

From what has been stated above and in light of the Defendants acknowledgement in the letter of 6th December 2007, I find that

time began to run in the case against the Defendant from this date of discovery of the fraudulent or illegal act by the Defendant. This action was commenced on 6th November 2013 and is thus within the 6 year period of limitation which lapsed on 5th December 2013.

I am satisfied that this action against the Defendant is not statute barred.

This preliminary issue fails and is dismissed.

Costs will remain in cause.

Leave to appeal is granted.

Dated this 7th day of August, 2014



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M.S. MULENGA
HIGH COURT JUDGE