

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



**2017/HP/0192**

BETWEEN:

**GLADYS NYONI MVULA**

**PLAINTIFF**

AND

**ZAMBIA PUBLIC PROCUREMENT AUTHORITY**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7<sup>th</sup> DAY OF JUNE,  
2017**

*For the Plaintiff : In person*

*For the Defendant : Ms M. Njobvu*

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## **R U L I N G**

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CASES REFERRED TO:

- 1. Bank of Zambia V Jonas Tembo and Others SCZ No 24 of 2002**

LEGISLATION REFERRED TO:

- 1. The Rules of the Supreme Court, 1999 Edition**
- 2. The Limitation Act, 1939**
- 3. The British Acts (Extension) Act, Chapter 10 of the Laws of Zambia**
- 4. The Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia**

This is a ruling on an application made by the Defendant to dismiss the matter on a point of law, pursuant to Order 14A of the Rules of the Supreme Court, 1999 edition. Counsel relied on the affidavit filed in support of the application on 25<sup>th</sup> April, 2017, as well as the skeleton arguments of even date.

It was Counsel's submission that in terms of Order 14A Rule 1 (1) of the Rules of the Supreme Court 1999, edition the court may on upon the application of any party or of its own motion determine any question of law or the construction of any document arising in any cause or matter, at any stage of the proceedings, where it appears that such question is suitable for determination without a full trial of the action. Further that under Order 14A Rule 1 (1) (b) such determination will finally determine the matter, subject only to any possible appeal.

That in this case the application by the Defendant is for an order to dismiss this action on the ground that it is statute barred, in line with Section 2 (1) (a) of the Limitation Act, 1939. Counsel stated that this is premised on the fact that paragraphs 11 and 12 of the statement of claim shows that the cause of action arose in 2006, when the Plaintiff was charged with forgery, misappropriation of funds and theft, and was also dismissed in the same year.

Counsel stated that based on those facts the Plaintiff is now claiming damages for defamation of character, nervous shock, mental anguish as well as payment of terminal benefits up to the time of retirement. She further submitted that these claims are founded in contract and tort, whose limitation period according to Section 2 (1) (a) of the Limitation Act, is six years from the date the cause of action accrues.

It was stated that the record shows that this action was commenced on 6<sup>th</sup> February, 2017, a period of more than six years after the cause of action accrued. Therefore this action is statute barred, and ought to be dismissed on that basis.

Further in the submissions, Counsel stated that the second question for question for determination relates to the matter being res judicata. It was Counsel's submission that the Plaintiff is seeking to re-litigate matters that were decided upon by the Industrial Relations Court, now the

Industrial Relations division of the High Court under cause number COMP/262/2006. That in particular the Defendant seeks the payment of salaries and benefits up to the age of retirement, which is the same relief which was sought before the Industrial Relations Court.

Reference was made to the case of ***BANK OF ZAMBIA V JONAS TEMBO AND OTHERS SCZ No 24 of 2002*** where the Supreme Court held that in order for a defence of res judicata to succeed, it is necessary to show that not only was the claim the same, but also that the Plaintiff had an opportunity of recovering and but for his own fault, might have recovered in the first action, that which he seeks to recover in the second.

Counsel argued that it was their submission that in the case filed before the Industrial Relations Court in 2006, the Plaintiff could have recovered salaries and other benefits, as the facts relied upon are the same, and further she could have also recovered damages for the alleged defamation of character. It was therefore Counsels' prayer that the matter be dismissed with costs for being statute barred, res judicata and an abuse of court process.

In response the Plaintiff indicated that she would respond to the application viva voce. Her submission was that she was charged with the offences of making a false document, uttering a false document, and theft by public servant. She appeared before the Subordinate Court in 2006, and judgment was delivered on 24<sup>th</sup> May, 2012.

That according to Section 26 of the Limitation Act, 1939 the cause of action for matters based upon the fraud of the defendant or his agent or of any person through whom he claims, or his agent, or where a right of action is concealed by the fraud of a person, only begins to accrue when the Plaintiff has discovered the fraud as the case may be, or he would with reasonable diligence have discovered it.

She stated that pursuant to this, the cause of action in this matter only began to accrue when the judgment in the Subordinate Court was delivered, therefore the six years has not elapsed, and the action is therefore not statute barred. Her contention was that she was defamed by the Defendant, and it is only after the Subordinate Court vindicated her, that she took up the action. She prayed that the application be dismissed, and the matter proceeds to trial.

Counsel for the Defendant in reply reiterated that the period of limitation for actions founded in contract and tort is six years from the date of accrual, with the exceptions provided in Section 26 of the Act. She maintained that the cause of the action in this matter arose in 2006, and not 2012, as alleged by the Plaintiff.

With regard to the submissions by the Plaintiff on concealment by the defendant of an action by way of fraud, it was stated that the Plaintiff had cited the provision out of context, as no facts had been pleaded or submitted by the Plaintiff to show that this cause of action was concealed by the Defendant in any way. That the judgment of the Industrial Relations Court that had been exhibited shows that the Plaintiff objected to being dismissed on the basis of the allegations of forgery, misappropriation and theft. Thus nothing was concealed by the Defendant from the Plaintiff, and that ignorance of the law is no defence.

Further that the said judgment shows that the Plaintiff was represented by Counsel in the court, and therefore the Plaintiff had not shown that this case falls within the exceptions provided in Section 26 of the Limitation Act, 1939. Counsel reiterated the earlier prayer that the application be dismissed with costs.

I have considered the application. Order 14A of the Rules of the Supreme Court, 1999 edition pursuant to which the application was made provides as follows;

***“(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.***

***(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just”.***

The issues raised by the Defendant in this application are that the matter is statute barred, and res judicata. These are questions of law, and are therefore suitable to be determined pursuant to Order 14A of the Rules of the Supreme Court.

The first argument is that the action is statute barred as the cause of action arose in 2006, going by the limitation period for actions founded in tort and contract, which is six years. The Plaintiff in her submissions argued that this action falls within the exceptions provided in Section 26 of the Limitation Act, 1939, and therefore the action only began to accrue in 2012, when the judgment of the Subordinate Court was delivered.

A perusal of the writ of summons and statement of claim filed on 7<sup>th</sup> February 2017 shows that the Plaintiff claims damages for defamation of character as the Defendant alleged that she stole ZMW75, 000.00, damages for nervous shock, mental anguish and loss of public image, as well as payment of salary arrears and other benefits up to the time of retirement. Claims for damages for defamation of character, mental shock, and mental anguish are recovered in actions for tort, although

damages for mental anguish may be recovered in contract as well. The payment of salary arrears arise out of a contract of employment.

The Limitation Act 1939 applies to Zambia by virtue of Section 2 of the British Acts Extension Act Chapter 10 of the Laws of Zambia. Section 2 of the Limitation Act, 1939 states that **"2. (1) The following actions shall be brought after the expiration of six years from the date on which a cause of action accrued, that is to say-**

**(a) actions founded on simple contract or on tort....."**

This section was amended, and the amended provision was incorporated into our law by virtue of Section 3 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia which provides that;

**"3. In its application to the Republic, the Limitation Act, 1939, of the United Kingdom, is hereby amended as follows:**

**(a) by the insertion of the following proviso at the end of subsection (1) of section 2:**

***Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.....***

**(c) by the insertion in subsection (1) of section 31 after the definition of "personal property" of the following definition:**

***"personal injuries" includes any disease and any impairment of a person's physical or mental condition".***

Going by the amendment to the Act as seen above, actions founded in tort must be commenced within three years of the date of accrual of the action, while for those founded in contract it is six years.

The Plaintiff did not dispute this, but argued that her cause of action was postponed by virtue of Section 26 of the Act, and only began to accrue after the judgment of the Subordinate court was delivered in May 2012.

Section 26 of the Act provides that the limitation period for actions based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent, or the right of action is concealed by the fraud of any such person, or the action is for relief from the consequences of a mistake, time 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 contention by the Plaintiff is that this cause of action only began to run after the Subordinate court passed judgment, acquitting her of having made a false document, uttering a false document and theft by public servant. These charges were known to the Plaintiff, and she defended herself on those charges. I do therefore agree with Counsel for the Defendant that the instances stated in Section 26 of the Act that postpone the limitation period are not applicable in this matter.

That being said it has not been disputed by the Plaintiff that the cause of action arose in 2006 when she was charged and tried, and also dismissed from employment. I note that the Plaintiff in this matter waited for the outcome of the criminal proceedings before instituting this action. Criminal proceedings do not stop time from running, and it was therefore incumbent upon the Plaintiff to commence the action within the

prescribed statutory limitations, so that she could have been within time. The action by the Plaintiff is therefore statute barred.

With regard to the claim for payment of salary arrears up to the date of retirement, the argument by the Defendant is that it is res judicata as the Industrial Relations Court adjudicated on the same in 2006 in cause number COMP/ 262/ 2006. The judgment of the Industrial Relations Court delivered on 29<sup>th</sup> May, 2015 which is exhibited as 'ICC3' on the affidavit in support of the application shows that the Plaintiff claimed a declaration that she was wrongfully and unfairly dismissed, an order of reinstatement, damages for wrongful and unlawful dismissal, damages for unfair dismissal and compensation for loss of employment.

All her claims did not succeed before that court. She now claims payment of salary arrears up to the date of retirement. In the matter before the Industrial Relations Court the Plaintiff could have been able to recover salary arrears had she successfully prosecuted her claim for reinstatement. Like I have said this claim failed. I do not see how she can now commence this action claiming salary arrears, when her dismissal has never been set aside. I therefore agree that the claim for salary arrears is res judicata in line with the decision in the case of **BANK OF ZAMBIA V JONAS TEMBO SCZ No 24 of 2002**.

On that basis I find that this action is not only statute barred, but also res judicata, and I accordingly dismiss it. In view of the fact the matter involves claims pertaining to the employment of the Plaintiff, I order that each party bears their own costs. Leave to appeal is granted.

**DATED THE 7<sup>th</sup> DAY OF JUNE, 2017**

*Kaunda*

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**S. KAUNDA NEWA  
HIGH COURT JUDGE**