

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

2019/HP/1917

BETWEEN:

BRENDA MOYO (Suing as Administrators of Estate of the late Job Moyo) **APPLICANT**

AND

UNITED QUARIES LIMITED



**BEFORE HON. MRS. JUSTICE G. MILIMO – SALASINI IN CHAMBERS 25TH
DAY AUGUST, 2020**

APPEARANCES:

For the Applicant : Mr. J. Zimba of Messrs. Makebi Zulu
Advocates

For the Respondent : Mr. M.J. Milambe of Messrs. Dove Chambers

R U L I N G

CASES REFERRED TO

1. HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V. EDGAR CHAGWA LUNGU AND OTHERS RULING NO. 33 OF 2016: 2016/CC/0031
2. INDO ZAMBIA BANK V. CHRISTINE BANDA (SCZ APPEAL NO. 178 OF 2014)

LEGISLATION REFERRED TO

THE LAW REFORMS (LIMITATION OF ACTIONS) ACT CHAPTER 72 OF THE LAWS OF ZAMBIA;

1. THE LIMITATION ACT 1939
2. THE RULES OF THE SUPREME COURT OF ENGLAND 1965 (WHITE BOOK) 1999 EDITION, VOLUME 1.

OTHER WORKS REFERRED TO:

1. HALSBURY'S LAWS OF ENGLAND, VOLUME 28, PARAGRAPH 1949
2. A.G. GUEST, CHITTY ON CONTRACT, GENERAL PRINCIPLES, 26TH EDITION (LONDON; SWEET AND MAXWELL, 1989), 1267.

This is an application by the Applicant, the Defendant in the main action, by Notice of Intention to Raise Preliminary Issue (**Notice**) on a point of law pursuant to Order 14A of the Rules of the Supreme Court 1965 (White Book) 1999 Edition, Volume 1 (**RSC**) as read together with Section 3 (a) of the Law Reforms (Limitation of Actions) Act Chapter 72 of the Laws of Zambia (**Cap 72**). The Applicant sought for this Honorable Court to determine whether the Plaintiff's action is properly before this Honorable Court as according to the Defendant, the matter was statute barred by the time of commencement of the action.

Accompanying the Notice was the Affidavit in Support of Notice of Intention to Raise Preliminary Issue on a Point of Law (**Affidavit in Support**) sworn by one **Yu Wa Ping**, the Managing Director of the Defendant Company, at Lusaka on the 13th day of December 2019. The said affiant deposed in paragraph 5 that the action whose originating court process was filed into this Honorable Court on the 29th day of November 2019, by way of Writ of Summons and the accompanying Statement of Claim, was as a result of the demise of the late one Job Moyo, who died on the 26th day of July, 2011. Further, the affiant deposed in paragraph 6 and 7 of the Affidavit in Support that the Plaintiff's action is statute barred as it is borne out of the alleged negligence and breach of statutory duties which was held by the Defendant to the deceased.

In paragraphs 8, 9 and 10 of the Affidavit in Support, the affiant swore that as a result of the matter being statute barred, the Plaintiff's action is improperly before this Honorable Court, as such it is proper for this Honorable Court to exercise its discretion to dismiss the Plaintiff's action and that no prejudice will be occasioned to the Plaintiff by the dismissal of this action.

On the 21st day of January 2020 this Honorable Court issued Notice of Hearing to the effect that the matter was to be determined on the 2nd day April 2020. As a result of the advent of the Coronavirus (**COVID19**) which led to the suspension of court proceedings before the Courts, the said Notice of Hearing was later rescheduled to the 25th day of June 2020 for the *inter-parte* hearing of the preliminary issue raised by the Defendant.

At the hearing on the 25th day of June 2020, the contestation by Counsel for the Defendant was that the Plaintiff's action arising from personal injury was statute barred as it was not brought within three (3) years contrary to *Section 3 (a) of Chapter 72*. Counsel submitted that since the Plaintiff's action was not brought within three (3) years from the events that gave rise to the cause of action, the claims raised in the Statement of Claim were statute barred. Therefore, Counsel beseeched this Honorable Court to dismiss the Plaintiff's action on point of law on ground that the Plaintiff's action is statute barred.

In opposition, Counsel for the Plaintiff informed this Honorable Court that the Respondent was relying on the Affidavit in Opposition filed on the 23rd day of June 2020 and sworn by one

Joseph Katati. In supplementing the Affidavit in Opposition, Counsel submitted *viva voce* that the Plaintiff's delay in commencing the action was as a result of the Defendant not paying the estate of the late Mr. Job Moyo on time. Counsel respectfully drew the Court's attention to the case of **Indo Zambia Bank v. Christine Banda**¹ in which the Supreme Court considered the circumstances which could be considered to entitle a Plaintiff to a cause of action commenced at the time when the matter is statute barred.

Counsel for the Plaintiff submitted that the Defendant in this case did not disclose to the Plaintiff that the Defendant would not compensate the Plaintiff but made an impression that the Defendant would pay the Plaintiff after the Workers' Compensation Fund and National Pension Scheme Authority (NAPSA) makes the funds available.

Counsel submitted further that the Plaintiff's action fell under *Section 26 of the Limitations Act, 1939* which provides that:

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 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 consequences of mistake.*

the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it:

Consequently, Counsel prayed that this application should fail and invited this Honorable Court to hold that this action is properly before the Court.

In reply Counsel for the Defendant submitted that in the case of **Indo Zambia Bank v. Christine Banda** the issues before the Court were contractual and related to payment of gratuity and as such, they are clearly different from the issues *in casu* which relate to personal injuries as disclosed in the Statement of Claim. Counsel submitted further that the Plaintiff has not pleaded fraud in the Writ of Summons and Statement of Claim.

In response to the submission by the Plaintiff's Counsel that the matter *in casu* fell within the ambit of *Section 26 of the Limitation Act 1939*, Counsel submitted that the said provision refers to postponement of limitation period in case of fraud or mistake. Counsel submitted, in response, that it is now a settled principle that all specific issues upon which a party seeks relief ought to be specifically pleaded as per the requirements of *Order 18 of the RSC*. Counsel submitted that the Plaintiff did not specifically plead fraud or mistake in its pleadings, therefore, the authorities relied on by the Plaintiff are inapplicable to this action.

Counsel for the Defendant, therefore, invited this Honorable Court to hold that its application is on firm ground and beseeched the

court to find merit in its application and to dismiss the Plaintiff's action on ground that the same is statute barred.

I have carefully considered the facts deposed to in the affidavits by the parties together with the supplementary *viva voce* submissions made by the respective parties' Advocates in relation to the Defendant's application for preliminary issue on point of law for this Honorable Court to determine whether the Plaintiff's action is properly before this Honorable Court on ground of being statute barred. I am grateful to both parties for their submissions.

In assessing whether the matter is statute barred for want of prosecution, it behoves me to consider the provisions of *Chapter 72* referred to by Counsel for the Defendant and thereafter the provisions of the *Limitations Act 1939* referred to by the Plaintiff. *Section 3 (a) of Chapter 72* provides that:

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.

Section 3 (2) Chapter 72 also provides that:

In 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-

- (a) *the preceding provisions of this section shall have effect as if for the words "six years" there were substituted the words "three years."*

In view of the cited provisions of the law, I pause a bit to answer the question whether the Plaintiff's action is for damages for negligence and also whether the action has been brought within the indicated timeframe as per the cited law. In answering this question, it is necessary to consider the contents of the Statement of Claim and the averments and claims made therein by the Plaintiff. The contents of paragraphs 5, 6 and 7 of the Statement of Claim seem to be *inter alia* the anchor of the Plaintiff's claims, the allegations in those paragraphs are that:

- 5. On or about 26th July 2011, Mr. Job Moyo (the deceased) reported for work and was working at the Defendant's crusher as always when in the course of his duty he came in contact with the conveyor belt which completely cut off his right arm thereby causing fatal injuries and traumatic amputation of his arm.**

6. Further to paragraph 5 above, the deceased was taken to the hospital where he was pronounced dead.

7. The accident the deceased was involved in was entirely caused by the negligence and breach of statutory duties by the Defendant Company.

Consequent to the averments made by the Plaintiff in the cited paragraphs of the Statement of Claim, the Plaintiff correctly specifically pleaded negligence and thereafter claimed from the Defendant for compensation for causing the horrible death of the deceased and damages for the Defendant's breach of duty of care to the deceased resulting into the deceased's death.

It is clear from the cited contents of the Plaintiff's Statement of Claim that the Plaintiff's action is for damages for the Defendant's alleged negligence and that the claims are as a result of the death of one Job Moyo who died on the 26th day of July 2011. I therefore find as a matter of fact that the action having commenced by the Plaintiff on the 29th day of November 2019, was commenced at least about eight (8) years post the occurrence of the events that led to the deceased death to which the Plaintiff's claims relate.

In terms of law, the general principles governing the law on limitation of actions are that once time has started running, it continues to do so until proceedings are commenced or the claim is barred (Vide, **A.G. Guest, Chitty on Contract, General Principles, 26th Edition (London; Sweet and Maxwell, 1989), 1267**). Also, that the consequence of commencing an action outside the time prescribed by an Act or Statute denies the court

jurisdiction to entertain the Plaintiff's action. The foregoing observation is fortified by a plethora of judicial precedents by the Superior Courts such as the holding of the Constitutional Court in the case of **Hakainde Hichilema and Geoffrey Bwalya Mwamba v. Edgar Chagwa Lungu and Others**,² to the effect that **whenever the legislature prescribes a timeframe within which an act should be done, doing it outside that timeframe renders the act done a nullity for want of prosecution because at that point the courts lack jurisdiction.**

I therefore find as a matter of fact and indeed of law that the Plaintiff's action ought to have been commenced within three (3) years from the happening of the events that led to the death of one Job Moyo. Invariably, by commencing this action on the 29th day of November 2019, eight (8) years after the death of one Job Moyo, this action became statute barred. Consequently, this Honourable Court lacks jurisdiction to entertain the Plaintiff's action.

However, the determination of the application does not end there as I still need to consider the Plaintiff's argument in opposition that the delay to commence an action was occasioned by the Defendant's failure to pay the deceased's estate. The Plaintiff argued further that the Defendant made an impression to the Plaintiff that it was going to pay the deceased's estate upon receiving payments from the Workers' Compensation Fund and NAPSA. The Plaintiff's Counsel submitted that it is this impression by the Defendant which was relied on by the Plaintiff which delayed the commencement of the Plaintiff's action.

I have considered the submission by the Plaintiff's Counsel. It can only be gleaned therefrom that the Plaintiff and the Defendant, in principle agreed by way of an attempt to settle out of court that the Defendant would compensate the deceased's estate upon receiving payments from the Workers' Compensation Fund and NAPSA. However, in terms of the principles of law on limitation of actions, I have already alluded to the principle that when time starts running, it continues to do so until an action is commenced or time stops running at which point the matter is deemed to be statute barred. Further, it is also trite law that negotiations for *ex curia* settlements do not stop time from running (Vide, **Halsbury's Laws of England, Volume 28, Paragraph 1949**). As such I find it difficult in the circumstance to exercise my discretion in favour of the Plaintiff given the inordinate delay to commence this action. I therefore find and hold that the attempt to settle the matter outside court did not stop time within which this matter was supposed to be commenced from running. Such delay only operated, regrettably, to the detriment of the Plaintiff.

I now turn to consider the argument by the Plaintiff that its action does not fall under *Section 3 (a) of Chapter 72* but that the same falls under *Section 26 of the Limitation Act 1939*, earlier cited. On the other hand, Counsel for the Defendant argued that the Plaintiff has not specifically pleaded fraud and mistake in its Statement of Claim contrary to the provisions of *Order 18 of the RSC*.

I concur with the submission by Counsel for the Defendant that, there is a requirement by the *Order 18 Rule 8 (16) of the RSC* for the Plaintiff to specifically plead fraud. A perusal of the Plaintiff's

Statement of Claim discloses that the Plaintiff has neither pleaded fraud nor mistake. I take notice that parties to a civil action are bound by their pleadings. Therefore, having not specifically pleaded fraud or mistake contrary to the said provision of the **RSC** I fail to find merit in the submission by Counsel for the Plaintiff.

With the foregoing in mind, I find that as a matter of law the Plaintiff's action is statute barred. Therefore, this Honourable Court lacks jurisdiction to entertain the Plaintiff's case. Consequently, I grant the application by the Defendant with costs to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 25th day of August, 2020



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G. MILIMO – SALASINI
HIGH COURT JUDGE