IN THE HIGH COURT FOR ZAMBIA **2018/HPC/0456**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BIMAL THAKER **PLAINTIFF**

AND

ACCESS FINANCIAL SERVICES LIMITED
(In Liquidation) **1ST DEFENDANT**

ACCESS LEASING LIMITED (In Liquidation) **2ND DEFENDANT**

THE ATTORNEY GENERAL **3RD DEFENDANT**

Before the Honourable Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka this 7th of April, 2020.

For the Plaintiff:	*Mr. M. Z. Mwandenga of Messrs. Mwandenga & Company.*
For the 1st & 2nd Defendants:	*Mr. H. A. Chizu of Messrs. Chenda, Chizu & Associates.*
For the 3rd Defendant:	*Mr. D. M. Mwewa, Ag. Snr. State Advocate from Attorney General's Chambers.*

RULING

Cases referred to:

1. *Credit African Bank Limited (In Liquidation) v. Elias Namo Kundiona (2003) Z.R. 61.*
2. *Emmanuel Nkatia Chirumba v. Union Bank Zambia Limited (In Liquidation) SCZ Judgment No. 7 of 2003.*
3. *Charles Time Mbilika & Others v. Attorney General (2012) Z.R. 550.*
4. *Dominic Mulaisho v. Attorney General (2012) Z.R. 550.*
5. *Ronex Properties v. John Laing Construction Limited & Others [1982] 3 All E.R. 969.*
6. *Dr. J. W. Billingsley v. J. A. Mundi (1982) Z.R. 11 (SC).*
7. *Kalyoto Muhalyo Paluku v. Granny's Bakery Limited, Ishaq Musa, Attorney*

General & Lusaka City Council (1999) Z. R. 119.

8. *Tilling v. Whiteman [1980] 1 All ER. 59.*
9. *Teklemicael Mengstab & Company v. Ubuchinga Investments Limited CSZ Appeal No. 218/2013.*

Legislation referred to:

1. *The Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book), Order 14A, rule 1; Order 18, rule 8; and Order 11, rule 4(1).*
2. *The Companies Act Chapter 388 of the Laws of Zambia, s.317.*
3. *The Banking and Financial Services Act Chapter 387 of the Laws of Zambia, ss. 87B & 107 (2).*
4. *The Banking and Financial Services Act No. 7 of 2017.*
5. *The Corporate Insolvency Act No. 9 of 2017, ss. 58, 66, 98 (2) & 138.*
6. *The Limitation Act 1939, s. 2(1)(a).*

Publications referred to:

1. *Halsbury's Laws of England 4th Edition, Vol. 28, at paragraph 640.*
2. *Halsbury's Laws of England 4th Edition, Re-issue Vol. 44 (1) at paragraph 1287.*

By summons taken out on 4th December, 2018, the 1st and 2nd Defendants applied to set aside writ of summons for irregularity pursuant to Order 14A, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (RSC).

The application is supported by an affidavit of even date sworn by Maulu Outmet Hamunjele, one of the Liquidation Managers for the 1st and 2nd Defendants (hereinafter referred to as "the Defendants"). He deposed that the Plaintiff issued court process which shows that the Defendants are in liquidation and that a search on the court record revealed that no leave of court was obtained. That, on advice from his advocates, which advice he truly believes and trusts to be correct, the

court action is prematurely commenced or wrong in law for failure by the Plaintiff to obtain leave to proceed against a company in liquidation.

It was further deposed that the statement of claim shows that the cause of action arose in or about 2003 and is statute barred as the Plaintiff commenced the action after the six-year period within which a party must bring a claim for debt. That, in view of the above averments, this is a proper case in which this Court should set aside the writ of summons for irregularity.

The Plaintiff filed an Affidavit in Opposition dated 15th January, 2019 and sworn in his name, Bimal Thaker. He deposed that the Defendants' application made pursuant to Order 14A RSC is misconceived. That, to the best of his knowledge and belief, the liquidation of the Defendants is not being done as a winding-up by the court and that no winding-up order was made by the Court to wind up the Defendants under the Companies Act Chapter 388 of the Laws of Zambia. He further deposed that the winding-up of the Defendants is being done under the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia. That, prior to the Defendants being placed under compulsory liquidation by the Bank of Zambia on 27th November, 2008, the Defendants were taken possession of on 13th January, 2003.

The deponent further stated that the Banking and Financial Services Act, Chapter 387, has since been repealed and replaced by the Banking and Financial Services Act No. 7 of 2017 and that with this enactment, and that of the Corporate Insolvency Act No. 9 of 2017, the winding-up which has not yet been concluded may have to be proceeded with under

the said pieces of legislation. Further, that the Banking and Financial Services Act of 2017, does not require leave of court before an institution being compulsorily wound up can sue or be sued.

He further deposed that he had been advised by his advocates, whose advice he verily believed, that section 18 of the Banking and Financial Services Act No. 7 of 2017, provides that the provisions of the Act are overriding in relation to other written laws insofar as concerns financial services, with the exception of the Securities Act. That, therefore, the provisions requiring leave to be obtained before a company in liquidation can sue and be sued contained in the Corporate Insolvency Act, do not apply to these proceedings.

In response to the Defendants' deposition that the action was commenced against entities that were not in existence, the Plaintiff stated that the Defendants were still in existence as the liquidation was still on going. As regards the Defendants' statement that the action was statute barred, it was the Plaintiff's averment that time will start running at the completion of the liquidation of the Defendants. The Plaintiff went further to depose to issues pertaining to a case in the High Court of London and further, to assert his right of claim to the monies thereby causing the affidavit to suffer the inclusion of things that ought not to have been included. I will thus, not reproduce the same here as I do not consider them appropriate for the purpose of determining this application. The Plaintiff concluded by stating that the Defendants' application is misconceived and an abuse of court process.

On 28th January, 2018, the Defendants filed an Affidavit in Reply sworn by Maulu Outmet Hamunjele. As regards paragraphs 8 to 10 of the Plaintiff's Affidavit in Opposition stating that the application to set aside was wrongly brought pursuant to Order 14A, the deponent stated that the application was properly before court and was filed within 14 days of the conditional memorandum of appearance. That, as regards paragraphs 11 to 31 of the Affidavit in Opposition stating that the Banking and Financial Services Act No. 7 of 2017, does not require leave of court, the Defendants replied that the Plaintiff conceded that no leave was obtained. Further, that it was wrong for the Plaintiff to state that there was no need for leave as the winding-up started in 2003 under the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia. With regard to paragraphs 32 through to 37 of the Affidavit in Opposition, stating the Plaintiff's entitlement, the deponent stated that the issue for now is whether the action is properly before court.

It was the deponent's further assertion that paragraph 33 of the Affidavit in Opposition where the Plaintiff exhibited "BT1", should be disregarded as the said exhibit is an unauthenticated extract from a court case that does not disclose the full facts and outcome of the said action. That, this Court should not allow the Plaintiff to forum shop as the said matter has already been decided by a competent court. Further, regarding paragraphs 38 to 41 of the Affidavit in Opposition alluding to the statute of limitation and that the same should have been pleaded in the defence, the Defendants stated that the statute of limitation was properly raised

and did not have to be in the defence. The deponent reiterated that the action was wrongly before court and that it should be dismissed.

The Defendants filed their Skeleton Arguments on 4th December, 2018. It was argued that the action was commenced wrongly as there is a statute specifically providing on how actions concerning companies in liquidation should be commenced. It was submitted that sections 66 and 98(2) of the Corporate Insolvency Act No. 9 of 2017, require leave of court to be obtained before a company in liquidation can sue and be sued. The Defendants submitted that the legal requirement for leave of court in such cases is settled. In support of this argument, reliance was placed on the case of *Credit African Bank Limited (In Liquidation) v. Elias Namo Kundiona*[1] and *Emmanuel Nkatia Chirumba v. Union Bank Zambia Limited (In Liquidation)*[2].

In relation to the issue of statute bar, the Defendants argued that the action has been brought outside the limitation period of six (6) years provided by section 2(1)(a) of the Limitation Act, 1939. The Defendants submitted that this position of the law was confirmed in the case of *Charles Time Mbilika & Another v. Attorney General*[3]. It was the Defendants' further contention that the Plaintiff's claim arose from the amounts which were allegedly deposited with the Defendants between 1996 and 2003. That, the Plaintiff had sued on the basis of a letter dated 21st February, 2003 to the Liquidation Manager for the Defendants in which the Plaintiff sought the return of deposits held in his name at the 1st and 2nd Defendant's financial institutions. Thus, it was argued that the cause of action accrued in 2003 and fifteen (15) years had passed.

The case of *Dominic Mulaisho v. Attorney General*[4] was called in aid in which the Court stated as follows:

> *"the statutory time period begins to run immediately on accrual of the cause of action (being when the Plaintiff's rights to institute a suit arises)."*

The Defendants concluded by asking the Court to strike out writ.

The Plaintiff filed his Skeleton Arguments on 15th January 2019. He chronicled the background to this application and pointed out that paragraphs 3 and 8 of the Defendants' Affidavit in Support of the application are contradictory. It was the Plaintiff's contention that in paragraph 3 of the Affidavit in Support, the deponent stated that he is one of the Liquidation Managers for the Defendants whilst in paragraph 8 of the same Affidavit, he stated that the action was commenced against an entity which he believed did not exist at law. Thus, the Plaintiff submitted, that paragraph 8 of the said Affidavit should not be taken into consideration as it has no probative value.

Further, the Plaintiff argued that the application was made pursuant to Order 14A, rule 1 of the RSC. He submitted that Order 14A, rule 1 is meant for applications where questions of law or construction of a document are to be determined. That, in the instant case, what the Defendants seek is to strike out the writ and that as such, the application should have been brought pursuant to Order 11, rule 1 (4) of the Rules of the High Court, Chapter 27 of the Laws of Zambia. Thus, the Plaintiff submitted that the application is misconceived and should be dismissed.

In response to the Defendants' argument that leave of court should have been obtained before commencing the action, the Plaintiff stated that this approach by the Defendants is misconceived. The Plaintiff contended that in advancing their case, the Defendants called in aid section 98 (2) of the Corporate Insolvency Act No. 9 of 2017, which the Defendants argued had similar provisions with section 317 of the Companies Act, Chapter 388 of the Laws of Zambia. Arising from this, the Plaintiff argued that the Defendants called in aid the said sections because they want to seek solace in the case of *Credit Bank Limited (In Liquidation) v. Elias Namo Kundiona* (supra). In this regard, the Plaintiff urged this Court to note that section 317 of the Companies Act, Chapter 388 of the Laws of Zambia dealt with an issue that was applicable to a creditor's voluntary winding-up, which is what the Credit Bank Limited (In Liquidation) case was concerned with.

It was the Plaintiff's argument that the Corporate Insolvency Act No. 9 of 2017, has no equivalent to section 317 of the repealed Companies Act, Chapter 388 of the Laws of Zambia. The Plaintiff submitted that the current action is not dealing with a creditor's voluntary winding-up. That, the Defendants are being compulsorily wound up by the Bank of Zambia after being taken possession of pursuant to the provisions of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, which has since been repealed and replaced by the Banking and Financial Services Act No. 7 of 2017. It was submitted that the repealed Act, Chapter 387, did not provide for leave of court before a bank or financial

institution can sue or be sued. That, equally, Act No. 7 of 2017 does not require leave of court.

The Plaintiff further argued that section 98 (2) of the Corporate Insolvency Act, which the Defendants relied on in arguing that leave of court should have been obtained before commencing this action, is found in Part VII of the Act which provides for matters concerning winding-up by court. The Plaintiff further referred to section 58 of the Corporate Insolvency Act and submitted that the circumstances contemplated by the said section do not exist in the instant case. Equally, that the calling in aid of section 66 of the Corporate Insolvency Act by the Defendants, does not help with their application as the said section is concerned with winding-up by the court which is also not the case in the instant case. It was reiterated that in the case before Court, the Defendants were placed under compulsory liquidation. Based on the foregoing, the Plaintiff submitted that there was no need for leave of court before commencing the action.

As regards the Defendants' plea of statute of limitation, the Plaintiff submitted that the action was commenced by writ of summons. It was argued that since it was commenced by writ of summons, the Defendants ought to have put in a defence in which the plea of statute of limitation could have been raised, as the plea must be specifically pleaded. In support of this argument, I was referred to Order 18, rule 8 of the Rules of the Supreme Court, 1999 Edition. It was thus, argued that as no defence was or has been filed by the Defendants, the plea of statute of limitation is therefore, misconceived.

The Plaintiff submitted further, that the Defendants premised their application to set aside writ on the basis that the writ was irregularly issued as there was no leave of court and also that it was time barred. It was argued that this was a misconception as the writ was regularly issued out of the Commercial Registry of the High Court. Reliance was placed on the case of *Ronex Properties v. John Laing Construction Limited & Others*[5], to reiterate the argument that the defence of limitation of action should have been specifically pleaded in the defence. That, had the defence of limitation been pleaded in a filed defence, the Plaintiff would have had opportunity to reply to it and he would have raised any other relevant issues, such as the fact that the Plaintiff is entitled to be paid the money as a depositor in accordance with section 107 (2) of the Banking and Financial Services Act, which section has been preserved by section 171 (1) of Act No. 7 of 2017. The Plaintiff submitted that the matter should be allowed to go to trial so that the Court can pronounce on matters in controversy. Further, that the Plaintiff would be deprived of its right to be paid the money deposited if the matter is determined at this stage.

It was the Plaintiff's further submission that the Defendants' application had two limbs. The first being an application to strike out writ of summons and the second one being an application to dismiss the matter. As regards the application to dismiss the matter, the Plaintiff argued that this limb is not supported by the summons filed by the Defendants on 4th December, 2018. The Plaintiff contended that the application for 4th December, 2018 was *"for an order that the writ of*

summons issued herein be set aside or struck out for irregularity". It was argued that the second limb should not be entertained as it is not properly before court. In support of the preceding statement, reliance was placed on the case of *Dr. J. W. Billingsley v. J. A. Mundi*[6], wherein the Court stated *inter alia* that:

> *"the court should only deal with the particular application before it."*

It was thus, submitted that the Court should only concern itself with matters contained in the application of 4th December, 2018 and not allow the Defendants to enhance claims through skeleton arguments.

The Plaintiff further contended that the Defendants filed a conditional memorandum of appearance on 14th November, 2018 and later filed this application on 4th December, 2018. It was argued that Order 14A pursuant to which the Defendants filed the application requires that a party files a notice of intention to defend before making an application. That, in the absence of a notice of intention to defend, the Defendants cannot rely on Order 14A. The Plaintiff submitted that he is not oblivious of the case of *Kalyoto Muhalyo Paluku v. Granny's Bakery Limited, Ishaq Musa, Attorney General & Lusaka City Council*[7] where the Supreme Court stated that:

> *"it is well settled in law that a preliminary issue can be raised at any stage of the proceedings, even at the outset of the case...."*

Whilst agreeing with the holding in the Kalyoto case *(supra)*, the Plaintiff submitted that the Defendants should have adhered to the

requirements of Order 14A of filing notice of intention to defend before making the application.

Further, the Plaintiff argued that not all reliefs can be said to be affected by the statute of limitation. My attention was drawn to one of the reliefs that the Plaintiff is claiming which reads as follows:

> *"A declaration that the Plaintiff's claim must be dealt with by the Liquidation Manager as part and parcel of winding down the affairs of the 1st and 2nd Defendant."*

On the basis of the aforementioned relief, the Plaintiff submitted that the said declaration cannot be affected by the statute of limitation on account that at the time of the commencement of this action, the liquidation of the Defendants had not yet been concluded. It was argued that the Liquidation Manager has a continuing responsibility of ensuring that the interests of depositors such as the Plaintiff are taken care of. The Plaintiff thus contended that setting aside or striking out the writ will invariably adversely affect the above-quoted claim and the Plaintiff will not be in a position to pursue the claim to its logical conclusion. Placing reliance on the case of *Tilling v. Whiteman*[8], the Plaintiff submitted that this Court, as a court of first instance, should not allow cases to be tried on preliminary points of law but instead allow finding of facts through a hearing.

The Plaintiff concluded by submitting that the Defendants' application lacked merit and should be dismissed with costs.

I have considered the parties' submissions and arguments for and against the application. Two issues have been raised by the Defendants,

namely, that the Plaintiff did not obtain leave of court before commencing the action and that the action is statute barred.

Before dealing with the other issues raised, I will first consider the Plaintiff's argument that the application should not have been brought pursuant to Order 14A as the Defendants are seeking to set aside the writ. Order 14A, rule 1 states as follows:

> *"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 ..."*

The Order is to the effect that a party can raise a preliminary issue for determination of any question of law or construction of any document. In this case, the Defendants' application seeks the Court's determination on two questions, namely; whether leave of court was required before this action was commenced by the Plaintiff and secondly whether or not the action is statute barred. Both of these are questions of law and fall within the ambit of Order 14A.

The Plaintiff also advanced the argument that Order 14A pursuant to which the Defendants filed the application requires that a party files a notice of intention to defend before making an application. That, in the absence of a notice of intention to defend, the Defendants cannot rely on Order 14A. I am inclined to disagree with this contention for the reason that the practice that is followed in our jurisdiction for applications under Order 14A of the RSC is that once service of the writ of summons and statement of claim has been effected on the defendant, the defendant can either enter an appearance and file a defence or if the defendant has an

issue with the writ of summons, he can enter a conditional appearance and file the necessary application to set aside the writ for irregularity. While such an application can be made under the provisions of Order 11, rule 1 (4) of the High Court Rules, there is nothing to prevent a defendant from proceeding under the provisions of Order 14A of the RSC after entering a conditional appearance, in a case such as the one before this Court, where there are questions of law for determination.

I therefore, find that the application was properly brought pursuant to Order 14A.

Regarding the Plaintiff's argument that the Defendants should have filed a defence in accordance with Order 18, rule 8 of the RSC, it is my view that this argument is misconceived. The matter was commenced by writ. And true to the core, if the Defendants had wished to proceed to defend, they would have filed in a defence. The Defendants however, chose to raise a preliminary issue pursuant to Order 14A RSC. They were within their rights. Order 14A is clear and gives litigants the liberty to raise a preliminary issue at any stage of the proceedings. The writ was taken out on 5th November, 2018. The Defendants entered a conditional memorandum of appearance on 16th November, 2018 and on 4th December, 2018, filed this application. The Defendants were within their time limits for filing firstly, the conditional memorandum of appearance and secondly, the preliminary issue.

With that settled, I now turn to the question of whether or not leave of court was required before the Plaintiff commenced the action. The Defendants called in aid the case of Credit African Bank and section 98

(2) of the Corporate Insolvency Act for its argument that the Plaintiff did not get leave of court before commencing action and therefore, the writ of summons should be set aside for irregularity. To this end, the Plaintiff argued that the Credit African Bank case concerned a creditor's voluntary winding-up in contradistinction to the present case which involves a company being compulsorily wound up by Bank of Zambia. Further, that the case of Credit African Bank concerned section 317 of the Companies Act, Chapter 388 which has since been repealed and replaced. It was submitted that section 98 (2) of the Corporate Insolvency Act No. 9 of 2017, is not the same as section 317 of the repealed Companies Act, Chapter 388.

I have read section 98 (2) of Act No. 7 of 2017. It states as follows:

> *"After the commencement of a winding-up, no action or proceeding shall be proceeded with or commenced against the company, except by leave of the Court and subject to such terms and conditions as the Court directs."* (Emphasis supplied).

The section is clear in its terms. After the commencement of a winding-up, leave of court is required to either proceed with an action that may already have been begun or to commence a fresh action. The Plaintiff further argued that section 98 (2) is found in Part VII of the Act which provides for matters covering winding-up by the court. This is a misreading by the Plaintiff as Part VII of the Act is titled "Voluntary Winding-Up".

Further, I have also read the case of Credit African Bank. The case concerned the misconception about the purpose of getting leave of court

under section 317 of the Companies Act, Chapter 388 of the Laws of Zambia (repealed Act). The issue of what kind of winding-up did not come up and it was thus, not considered by the Supreme Court. Section 317 did not differentiate under what kind of winding-up leave of court was to be obtained before a company in liquidation can sue or be sued. It simply placed a requirement for leave of court to be obtained before a company in liquidation could sue or be sued or indeed proceed with an action which may have begun prior to the company going into liquidation. The Plaintiff's argument that the Credit African Bank was concerned with a creditor's voluntary winding-up and does not aid the Defendants' case as the issue at hand is that of a compulsory winding-up, is flawed. So is its assertion that the Corporate Insolvency Act does not have an equivalent of section 317 of the repealed Companies Act. Section 317 of the repealed Companies Act was retained in its form and is now section 98 (2) of Act No. 9 of 2017.

Equally flawed is the Plaintiff's argument that section 66 of the Corporate Insolvency Act does not aid the Defendants' case as the said section deals with the winding-up by the court which is not the case before Court. Section 66 states as follows:

> *"Where a winding-up order is made or a provisional liquidator is appointed, an action or proceeding shall not be proceeded with, or commenced against, a company except by leave of the Court and subject to such terms and conditions as the Court may impose."*

Section 66 above does not allude to a winding-up by the court. It simply provides that leave of court should be obtained before proceeding with or commencing an action against a company under liquidation.

As regards the Plaintiff's argument that section 18 of the Banking and Financial Services Act of 2017 gives the Act superiority over other Acts relating to financial institutions, I have perused through section 18 referred to and it does not address the issue as alleged by the Plaintiff. Section 18 of Act No. 7 of 2017 addresses the issue of loss of licence by a financial service provider. The section which provides that the Banking and Financial Services Act 2017 will prevail where there is inconsistency is section 4 (1). It states as follows:

> *"Where any written law relating to, or impacting on, banking business or financial services is inconsistent with this act, the provisions of this act shall, to the extent of the inconsistency, prevail."*

Section 4 is in relation to banking business or financial services. 'Banking business' as defined by section 2 means:

(a) "receiving deposits, including chequeing and current account deposits, and the use of the deposits, either in whole or in part, for the account and at the risk of the person carrying on the business to make loans, advances or investments;

(b) providing financial services; and

(c) any custom, practice or activity, prescribed in rules issued by the bank, as banking business;"

'Financial service' means any one or more of the following services:

(a) commercial or consumer financing services;

(b) brokering;

(c) factoring, with or without recourse;

(d) finance leasing;

(e) financing of commercial transactions, including forfeiting;

(f) issue and administration of credit cards, debit cards, traveller's cheques or banker' drafts;

(g) *issue of guarantees, performance bonds or letters of credit, excluding those issued by insurance companies;*

(h) *lending on the security of, or dealing in, mortgages or any interest in real property;*

(i) *payment of cheques or other demand orders drawn or issued by customers and payable from deposits held by the payer;*

(j) *purchase and sale of foreign exchange;*

(k) *issue of debentures and money market instruments;*

(l) *the acceptance of deposits;*

(m) *issue of building society and mutual society shares, with characteristics similar or identical to deposits;*

(n) *venture capital funding;*

(o) *micro-financing;*

(p) *development financing; and*

(q) *any other service that the bank may designate, excluding the underwriting, marketing or administration of contracts of insurance or reinsurance.*

In my view, section 4 is not intended to cover situations where a financial institution is undergoing liquidation. On the contrary, it is meant to provide and cover financial institutions that are still going concerns. It is only in such instances that the Banking and Financial Services Act of 2017, will prevail over any other Act that is inconsistent with its provisions. In the case before me, the Defendant financial institutions are undergoing liquidation. They are corporate entities that are still in existence, albeit, not carrying on banking business or financial services. This argument is therefore, flawed.

In addressing the Plaintiff's assertion that the winding-up, which is still on-going may have to be proceeded with under the provisions of the

Banking and Financial Services Act of 2017, which repealed and replaced the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, I seek recourse to section 171 (1) of the Banking and Financial Services Act of 2017, which states as follows:

> *171. (1) Despite the repeal under section 170 –*
>
> *(a) .....*
>
> *(b) any application pending, in accordance with the repealed Act, shall be deemed to have been made in accordance with the corresponding provisions of this Act;"*

Section 171 provides for continuity and thus, I agree with the Plaintiff's submission that the liquidation of the Defendants which is still on-going, will have to be proceeded with under the new enactment, being the Banking and Financial Services Act 2017.

The Plaintiff seems to suggest that since the Banking and Financial Services Act of 2017 does not provide for leave of court to be obtained before a company in liquidation can sue and be sued, then the litigants herein should dispense with the requirement for leave of court. I have studied both the repealed law and the one repealing it. Neither of them has any provision relating to the requirement or non-requirement of leave of court, nor a procedure for liquidation proceedings. Under the repealed law, Chapter 387, there was section 87B which provided that the provisions of the Companies Act, Chapter 388 (repealed), would be applicable where a financial business became insolvent. This section provided a referral mechanism for financial institutions that had become insolvent to be dealt with under the liquidation provisions of the

Companies Act, Chapter 388. Hence, whereas Chapter 387 had a referral mechanism for winding-up, Act No. 7 of 2017 does not.

The above notwithstanding, the Companies Act, Chapter 388 has since been repealed and replaced by the Companies Act No. 10 of 2017. The Companies Act of 2017 has no provision for winding-up procedure. This is in contradistinction to the repealed Companies Act which provided for winding-up under Part XIII, sections 262 through to 365. The winding-up provisions contained in the repealed Companies Act have since been codified into the Corporate Insolvency Act of 2017 which provides for winding-up of not only of insolvent corporate entities but also those that are solvent.

Much as the winding-up of the Defendants was proceeded with pursuant to the provisions of the repealed Banking and Financial Services Act, a reading of the parties' affidavits brings to the fore that the winding-up was premised on the insolvency of the Defendants. As alluded to in the preceding paragraph, the winding-up would have been proceeded with under the Companies Act, Chapter 388 pursuant to section 87B of Chapter 387. As neither the repealed Banking and Financial Services Act, Chapter 387, nor the new enactment, Act No. 7 of 2017, provide for procedure for liquidation proceedings, the provisions for winding-up under the Corporate Insolvency Act No. 9 of 2017 will be applicable. This is pursuant to section 138 of the said Act which provides for all body corporates that are under liquidation to be proceeded with under its provisions unless that body corporate has specific provisions for winding-

up incorporated in the Act creating it. For ease of reference, section 138 reads as follows:

> *(1) "Subject to this section, this part shall apply, with necessary modifications, to any*
> *body corporate incorporated in Zambia, not being a company.*
> *(2) "This section shall not apply to a body corporate incorporated by or under any law of*
> *Zambia if the law makes specific provisions for the winding-up of bodies corporate formed by or under it."*

Having settled that the winding-up of the Defendants will be proceeded with pursuant to the provisions of the Corporate Insolvency Act of 2017, section 66 of the said Act requires that leave of court be obtained. This section is found under Part VI titled "winding-up by court." Section 98 (2) of the same Act also requires that leave of court be obtained and the section is found under Part VII of the Act titled "voluntary winding-up." It goes without saying, therefore, that whether a winding-up is compulsory or voluntary, leave of court should be obtained before a company in liquidation can sue and be sued. Hence, the Plaintiff's argument that the Defendants' winding-up was compulsorily done pursuant to the provisions of the Banking and Financial Services Act, and therefore, leave was not required, is unsound.

Coming to the second issue of limitation of action, I deem it necessary to give the history of the case so as to set the timeline. In 2003, January 13th, Bank of Zambia took possession of the Defendants' financial institutions. On 21st February, 2003, the Plaintiff sought to be paid deposits held at the Defendants' financial institutions. Bank of

Zambia placed the Defendants under compulsory liquidation on 27th November, 2008. In march, 2012, the Liquidation Manager filed a Liquidation Schedule at the High Court of Zambia but the said Schedule did not specifically make mention of the Plaintiff's account but merely indicated that the Plaintiff's funds were unclaimed depositor funds.

The writ was taken out on 5th November, 2018 and on 16th November, 2018, the Defendants entered a conditional memorandum of appearance. On 4th December, 2018, the Defendants raised a preliminary issue in which they sought the court to determine if the Plaintiff's action was competent in the absence of leave of court and secondly if the action was not statute barred.

In advancing its argument that the Defendants should have specifically pleaded the defence of statute bar which would have enabled the Plaintiff to reply, the Plaintiff relied on the case of *Ronex Properties v. John Laing* (supra), where Donaldson LJ said as follows:

> *"...English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded..."*

He went further to state that:

> *"...Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead the defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and abuse of the process of the court and support his application with evidence..."*

The above quotes are instructive, unambiguous and persuasive. A statute of limitation can either be pleaded in a defence in clear cut cases

or it can be raised in a preliminary issue. For this reason, it is my view that the Defendants were within the law in raising the statute of limitation through a preliminary issue.

The question that remains for my consideration is whether or not the action is statute barred. The Defendants submitted that the action was statute barred as it was brought after six years as provided by section 2(1)(a) of the Limitation Act, 1939. Section 2(1)(a) states that actions founded on simple contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The learned authors of Halsbury's Laws of England, vol. 28, 4th Edition, at paragraph 661 write as follows:

> *"...Actions founded on simple contract applies to the personal remedy on a simple contract debt which is charged on land but without any document under seal; to a simple contract debt which is recited in a deed, unless there is in the deed an express or implied contract to pay it; to an action against the equitable assignee of leaseholds in possession, grounded on his liability to perform the covenants in the lease; to an action founded on foreign judgment; to a claim for a penalty under a byelaw of a chartered company; and to a claim for indemnity under the enactments relating to registered land."*

In the case before me, the Plaintiff claims for payment of monies that are alleged to have been deposited with the Defendant financial institutions. From the affidavit evidence, the Defendants do not deny that the Plaintiff was a depositor at their financial institutions. There is also affidavit evidence by the Plaintiff that a Liquidation Schedule for provable debts had been filed at the High Court of Zambia. This remains

undisputed. From these facts, I do not think that this scenario qualifies to be captured under the heading of simple contract.

Paragraph 640 of Halsbury's Laws of England, vol. 28, 4th edition states as follows:

> *"Proceedings in bankruptcy or for the winding-up of a company are for the benefit of all creditors, and prevent time from running in respect of provable debts in favour of the person or company indebted. If as a condition of rescinding a receiving order money is paid into court to provide for all debts in full, the debts are not barred, even though payment is not claimed within six years of the rescinding of the order."*

The import of the above quote is that where a company has been wound up and provable debts are paid into court for the purpose of paying off creditors, time does not run as against the creditors. In other words, the creditors in respect of whom provable debts are paid into court, can claim their payment even after six years. They cannot be estopped from claiming payment on the premise that six years has elapsed since the provable debts were deposited into court.

For the reasons aforesaid, it is this Court's finding that the action herein is not statute barred. The Plaintiff was therefore, within his right to bring the action at the time and date that he did. Therefore, the preliminary issue fails in respect of limitation of action. However, the application succeeds in respect of the question of whether or not leave of court should have been obtained before this action was commenced. The Defendant Companies are companies in liquidation and pursuant to the provisions of sections 66 and 98(2) of the Corporate Insolvency Act of 2017, the Plaintiff should have obtained leave of court before commencing

the action, but did not do so. Consequently, the writ of summons is set aside. Each party to bear own costs.

Leave to appeal is granted.

Delivered at Lusaka this 7th day of April, 2020.

DR. W. S. MWENDA
JUDGE