IN THE HIGH COURT FOR ZAMBIA **2013/HP/1788**
AT THE PRINICIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

ANNIE KAPUTULA **PLAINTIFF**

AND

ATTORNEY GENERAL **DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mr. W. Simutenda and Mr. N. S. Choonga, Messrs G.D.C. Chambers.

For the Defendant: Lt. F. Mandumbwa and Mr. E. G. Banda, State Advocates.

JUDGMENT

Cases referred to:

1. ***Dominic Mulaisho v Attorney General (2012) Z.R. 551.***
2. ***R.B. Policies At Lloyds v Butler [1949] 2 ALL E.R 226, page 229 and 230.***
3. ***China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited (SCZ selected Judgment No. 8 of 2017).***
4. ***William David Carlisle Wise v E.F. Harvey Limited (1985) Z.R. 179.***
5. ***Daniel Mwale v Njolomole Mtonga SCZ Judgment No. 25 of 2015.***

6. ***Zambia Consolidated Copper Mines Ltd v Chileshe (2002) Z.R. 86.***

7. ***Paolo Marandola & Others v Gianpietro Milanese & Others (SCZ Judgment No. 6 of 2014).***

Legislation referred to:

1. ***The State Proceedings Act Chapter 71 of the Laws of Zambia.***
2. ***The Limitation Act 1939 (England).***
3. ***British Acts (Extension) Act Chapter 10 of the Laws of Zambia.***
4. ***Rules of the Supreme Court 1965 (England and Wales) White Book 1999 Edition.***

The Plaintiff, a former junior non-commissioned officer otherwise called servicewoman, was employed by the Zambia National Service (ZNS). She took out a writ of summons and statement of claim dated December 2, 2013. The action was taken out against the Attorney General of the Republic of Zambia, pursuant to the ***State Proceedings Act Chapter 71 of the Laws of Zambia,*** seeking the following reliefs:

i. ***For an order and declaration that the purported unfair dismissal of the Plaintiff by the Defendant under cover of its letter dated 16th October, 2009 for the alleged AWOL was and is wrongful, illegal, irrational, unfair, null and void and of no legal consequence whatsoever for being in serious and flagrant violation of relevant provisions of the Zambia National Service Act, Chapter 121 of the Laws of Zambia.***
ii. ***For order of reinstatement of the Plaintiff to her former position in the Service or payment of Exemplary and substantial damages in lieu of reinstatement;***
iii. ***For an Order for payment of salary arrears from the effective date of the purported dismissal, namely 16th October, 2009 to date and continuing;***
iv. ***For Order for payment of Exemplary and Substantial Compensatory damages for loss of employment;***

v. ***Payment of the Plaintiffs full Service benefits and gratuity under the current prevailing Zambia National Service Conditions of Service;***
vi. ***For an Order for payment in full of the Plaintiff's full salary during the period of her sick leave;***
vii. ***Further substantial compensatory and exemplary damages for wrongful illegal, irrational and unfair dismissal of the Plaintiff equivalent to not less than 10 years salary;***
viii. ***Exemplary and aggravated Damages for aggravated conduct by the Defendant;***
ix. ***General damages for mental stress, anguish, mental torture, physical stress and attendant inconvenience occasioned to the Plaintiff herein***
x. ***Interest on total award found due and payable by the Defendant to the Plaintiff herein at Current Bank lending rate from 16th October, 2009 to date of full payment;***
xi. ***Costs of the action herein; and***
xii. ***Any other relief the Court may deem fit and just in the circumstances.***

Trial of the case was conducted; the Plaintiff testified and called one witness, her husband, Mr. Kaputula. Equally, the Defendant called two witnesses. Notwithstanding that trial was conducted, it is worth stating that, prior to the matter proceeding to trial, the Defendant raised a preliminary objection which was deferred for determination together with the substantive matter. The preliminary objection was raised on October 3, 2017, by the Defendant via a Notice of Intention to Raise a Preliminary Issue, couched as follows:

> ***That this action is an abuse of the court process as the matter is statute barred.***

The Defendant's application was supported by an affidavit and skeleton arguments, and the Plaintiff responded and filed an affidavit in opposition and skeleton arguments. When deferring the matter to final determination of the case, my learned sister, Sharpe-Phiri J., in her ruling dated February 22, 2018, had this to say:

> ***The Court observes that from the foregoing evidence put on record, many of the questions remain unanswered as to the exact date of the Plaintiff's alleged dismissal. If the court is to go by the Defendant's evidence that the Plaintiff was dismissed in September 2000, then why would she continue receiving a salary three years after her dismissal? It would appear after perusal of the pleadings that the date of the alleged dismissal of the Plaintiff from Zambia National Service, which is central to the consideration and determination of the application before me, is very much an integral part of the contentious issues in the main proceedings. Thus, it would be prudent and just to allow the matter be settled at full hearing when the court has an opportunity to hear the evidence in full from the parties and witnesses hereto.***
> ***The procedure adopted by this court in this regard was upheld in the case of*** *Nyampala Safaris (Zambia) Limited v Zambia Wildlife Authority*. ***In that case, the Supreme Court reserved its ruling on two preliminary issues to the judgment of the main matter as the issues could only be determined on full hearing....***

The preliminary issue goes to the root of the matter, as to whether the Court has jurisdiction or not, to hear and determine the main matter. Accordingly, I will forthwith deal with the issue, and in determining the issue, I will briefly delve into the facts pleaded and the relevant evidence on the record adduced by the Plaintiff and the Defendant respectively.

The Plaintiff's case is that after she was successfully enlisted in the ZNS and completing her training in 1995, and after her pass out in 1996, as a servicewoman, she was posted to a Unit in Mumbwa District, until October 16, 2009. She averred that she was dismissed from employment by letter dated October 16, 2009.

In her testimony, the Plaintiff testified that in 1998, she gave birth to a son, and the child was seriously ill until he died in 2000. She said prior to the death of her child, her husband, Martin Kaputula visited her in

Mumbwa in 1999, and having regard to the serious condition of the child they sought to seek medical attention in Lusaka. She said when leaving the camp, the Officer Commanding (OC), Major Zaza at the Unit gave her a pass. And when she arrived in Lusaka, she said, she went to ZNS Headquarters (HQ) and was granted leave for 28 days. She said the child was admitted for four months at Maina Soko Military Hospital. She added that she also started getting sick and her illness worsened to the extent of her having memory loss, and that she had no energy to walk to notify her employer that she was sick. And in her affidavit in opposition to the preliminary issue, she stated that, she made countless follow-ups with the Defendant on the status of her employment since 2003, and did not receive any response, until October 16, 2009, when she was notified through her advocate, the Legal Aid Board, that she was dismissed.

She testified that from the time she left Mumbwa in 1999, she never went back to report for work, and did not know what happened to her personal effects she left in Mumbwa. She said her last salary was in August 1999.

The Plaintiff said she got better in 2009, and when her husband met her workmate, Corporal Banda, the latter advised him that, the Plaintiff was dismissed from employment. She added that, thereafter she made follow ups with ZNS HQ, and was told that she was dismissed, and sought legal services from the Legal Aid Board. She said in response to the letter by the Legal Aid Board, ZNS responded in a letter dated October 16, 2009, here-below reproduced:

Ref: ...ZNS/A/23/1
The Director Legal Aid Board
New Kent Building
LUSAKA
16 October 2009
Attention: MRS A. N SITALI

Dear Madam,

WRONGFUL DISMISSAL: ANNIE SINGUMA KAPUTULA

With reference to the above subject matter, I write to give the position of the Zambia National Service.

Mrs. Annie Singuma Kaputula was enlisted in the Zambia National Service in 1995 and worked for three years before going AWOL (Absent Without Official Leave) in 1999. In 1998 the Junior Non- commissioned Officer (JNCO) began absenting herself from service duties for long periods exceeding 21days. In total she was absent from work for four (04) months being March, April, September and December 1998. Due to her absenteeism, she appeared for interviews to explain her absence. However, the JNCO did not refrain from her habit of absenteeism.

In 1999 she again went AWOL and this time round, AWOL procedure was instituted and she was discharged. We wish to argue that had the JNCO been rightfully admitted in hospital, the Service would have been notified. The JNCO did not follow laid down procedures. She is a deserter who willfully absconded from work and showed no interest in returning for work.

Her discharge was published in Unit Part II Orders but the JNCO did not show up neither did she send representation. She was subsequently discharged and cleared from the Service in absentia.

At the time of going AWOL, Pte Singuma Kaputula left with military effects and Service belongings which were costed at Kwacha Five Hundred and Eighty thousand, Six Hundred (K580,600.00) and this was recovered from her leave benefits and the remainder to be recovered from her gratuity which was just a pension refund since she only served in the Service for three (03) years. The pension refund amounting to Kwacha Four Hundred and Thirty Four Thousand, Five Hundred and Eleven Ngwee (K434, 511.93) is yet to be paid to her. The delay in paying her pension refund is due to the fact that she has not physically been to pensions office to present herself as per requirement. As for her repatriation, she was paid her total repatriation of Kwacha One Million (K1,000,000.00) on August 23, 2007 on cheque number) 047516.

From the above, I wish to state that Mrs. Annie Singuma Kaputula was rightfully separated from the Service and therefore she cannot be re-instated in any way. It is our sincere hope that you will find this information useful.

The delay in responding to your query is deeply regretted.

Yours faithfully
Signed
T KAUMBASANGO, PSC
Lieutenant Colonel/FOR COMMANDANT

Notably, in paragraph 10 of her statement of claim, she stated that in 2003, she was dismayed and shocked to learn from her colleague that she was dismissed for "Absenting herself Without Official Leave...(AWOL)).

In cross examination she confirmed that her last salary was paid in August 1999. She said she never went AWOL, except she was unwell. She said after the child died in 2002 (sic), it was her that got sick.

The Plaintiff's witness, Martin Kaputula, said he used to periodically update ZNS HQ concerning the Plaintiff's prolonged illness. He said after the expiry of her leave for 28 days, the Plaintiff was put on 10 days bed rest by Major Sosala. He made reference to a document exhibited at page 27 of the Plaintiff's Bundle of Documents dated June 21 1999, wherein it was noted that the Plaintiff's sick leave expired on June 17, 1999. Mr. Kaputula said thereafter the Plaintiff personally started going to ZNS HQ.

Two defence witnesses (DW) were called. The first Defence Witness (DW1) was Major Vivian Samuzimu, the Clinical Officer General, ZNS. He confirmed having worked with the Plaintiff in Mumbwa from 1995 to 1999. He said after the expiry of leave for 28 days, the Plaintiff never returned to work. He added that, the Board of Inquiry was constituted in September 1999, after the Plaintiff was AWOL for 22 days, and made recommendation; as shown here-below (the relevant parts read):

BOARD OPINION

The board is of the opinion that:

a. ***PTE Kaputula S A (Mrs) is voluntarily absent from work 10/08/99 to date and that disciplinary action be taken against her by the appropriate authority.***

b. ***Pending charges against PTE Kaputulu S A (Mrs) be disposed off.***

BOARD RECOMMENDATIONS

The Board recommends that

a. ***As evidence by her resignation, continuous absence from duty and the fighting for posting to Lusaka to go and join her husband, shows that, PTE Kaputula S A (Mrs) is not interested in serving in the Zambia National Service and not ready to work at ZNS Mumbwa. With this back ground the board recommends that she be relieved of her duties.***

b. ***ZNS HQ should not retain a person who opts to resign as the service may end up keeping uninterested party whose duty will be to breed indiscipline and retard the progress of the service.***

The witness explained that after submission of the above recommendations by the Board of Inquiry, ZNS HQ acted; as shown here below:

ZNS/A/16
The Officer Commanding
ZNS Mumbwa Big Concession
P.o Box 830169
MUMBWA ***05 October 2000***

CONFIRMATION OF BOARD OF INQUIRY PROCEEDINGS IN RESPECT OF W013344 PTE KAPUTULA A S OF ZNS MUMBWA WHO WENT AWOL ON 10 AUGUST 1999.

Reference.

A. Your letter MBCF/A/16 dated 11 October 1999

1. ***The Confirming Authority acknowledges the findings of the Board that W013344 PTE KAPUTULA A SINGUMA deserted the Camp willfully and has since not rejoined the Unit.***

> ***2. The Confirming Authority directs that the Servicewoman be discharged from the service and posted to X- list.***
> ***Signed***
> ***H. MATIFEYO***
> ***Lt***
> ***For/ Commandant- ZNS***

DW2 was Lieutenant Colonel (ZNS), Charles Busiku. He recapitulated the testimony of DW1. Suffice to add that, he explained that when a service woman/man was absent from work for a period of 21 days, he/she was amenable to be discharged without his/her attendance before the Board of Inquiry.

The Defendant in its skeleton arguments, submitted that the Plaintiff's action was statute barred, section 2 (1) (a) of the English ***Limitation Act of 1939*** was cited, which provides:

> ***2(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:***
>
> ***(a) actions founded on simple contract or on tort:-***

It was observed that the Plaintiff was discharged in 2000, and the cause of action arose on 30th September 2000. It was therefore contended that the cause of action expired on 1st November 2006. And reference was made to the case of ***Dominic Mulaisho v Attorney General (2012) Z.R. 551***, in which it was held:

> ***The statutory time period begins to run immediately on the accrual of the action. That is when the plaintiff's right to institute a suit arises, if he brings the suit after the statutory period has run, the Defendant may plead the statute of limitation as a defence.***

As to the objects of the principle of limitation of actions, reference was made to the case of ***R.B. Policies At Lloyds v Butler [1949] 2 ALL E.R 226, page 229***, wherein Streatfeild J. had this to say:

> ***One of the principles of the Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end to those matters and that there shall be protection against stale demands.***

In reference to the letter dated October 16, 2009, aforementioned, it was noted that the letter which appears to be relied on by the Plaintiff was merely communicating the status of the Plaintiff when she was discharged in 2000.

And in view of the foregoing, the Court was urged to dismiss the action for being statute barred.

The Plaintiff in response equally filed skeleton arguments. Firstly, it was argued that the notice of intention to raise preliminary issue was defective and incompetent for being in violation of Order 14A and Order 33 rule 3 of the ***Rules of the Supreme Court (White Book) 1999 Edition***. According to Counsel, the application should have been brought by way of summons or motion.

In the alternative, it was argued that the cause of action arose on October 16, 2013 (sic). It was submitted that the Plaintiff only knew of her employment status by letter dated October 16, 2013 (sic). According to the Plaintiff's Counsel, it was argued that prior to the letter dated October 16, 2009, the Plaintiff did not know her employment status, and as such the cause of action arose on October 16, 2009.

I have carefully considered the relevant evidence adduced and the submissions that were made in respect of the issue pertaining to whether the action was statute barred or not. Since this issue was deferred to be determined in this judgment, the objection raised by the Plaintiff regarding the mode of commencing the application is inconsequential. In fact the Plaintiff's Counsel argued that the issue was integrally linked with the main matter, and such, the Court was urged to defer the issue.

The Plaintiff's counter-objection regarding the mode of commencing the application is bound to fail, having regard to compelling pronouncements made by the Supreme Court as regards Order 14 A r.2 and Order 33 r.3 RSC in the case of ***China Henan International Cooperation group Company Limited v G and G Nationwide (Z) Limited (SCZ selected Judgment No. 8 of 2017)***, thus:

> ***The preliminary issue that was before the court below was made by way of a notice to raise preliminary issue pursuant to Order 33 rule 7 of the White Book. The said Order is preceded by Order 33. Rule 3 which permits a court to determine a preliminary issue before, at or after the trial.***
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> ****
>
> ***Whilst the former gives the court jurisdiction to entertain a preliminary issue, the latter sets out what steps the court can take where there is merit in the preliminary issue raised and its determination substantially disposes of the matter.***
>
> ***In terms of how such preliminary issues should be laid before the court, which is in dispute under ground 2, the explanatory notes to Order 33 rule 3 sub-rule 1 and Order 14A of the*** *White Book* ***are instructive. The former Order states that Order 33 rule 3 should be read with among other orders, Order 14A. While Order 14A (2) states that applications tabled before the court***

for determination of any question of law at preliminary stage may be made by summons or motion or orally in the course of any interlocutory application to the court. Therefore, the Respondent had a choice of commencing the application for a preliminary issue either by summons or motion.

The finding we have made in the preceding paragraph brings us to the next question, which is on how motions are to be commenced. The answer to the said question lies in the practice and procedure both in this and other courts that motions are brought before the court by way of notice. There is no rule of law or practice, so far as we are aware, that requires commencement of motions by way of summons only. Consequently, we are of the considered view that the Respondent was on firm ground when it tabled the motion by way of a notice. Further, even though the learned High Court Judge did not pronounce himself on the issue we feel that this omission was not fatal nor did it prejudice the Appellant in view of our finding that the application was properly presented before the court.

In the light of the foregoing, it is without hesitation to state that, the mode adopted to raise the preliminary objection via notice was legally regular and correct.

It is trite and strictly so, that every cause of action in contract or/and in tort must be commenced within the time permitted by statute. It is impermissible to commence an action that over runs the statutory time limit. Clearly, the Plaintiff's claims fall under the law of contract and tort. The English ***Limitation Act 1939***, which by adoption applies to Zambia by virtue of the ***British Acts (Extension) Act Chapter 10 of the Laws***, provides the time limit within which actions premised on contract or/and tort can be commenced. And that period as stated before is six years from the time the cause of action arose. Perhaps the question that may be asked

is what is a cause of action? The answer is to be distilled from the case of ***William David Carlisle Wise v E.F. Harvey Limited (1985) Z.R 179***, wherein it was held:

> ***A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other.***

Furthermore, in the case of ***Daniel Mwale v Njolomole Mtonga SCZ Judgment No. 25 of 2015*** (unreported) the Supreme Court held:

> ***Time begins to run when there is a person who can sue and another who can be sued; when all facts have happened which are material to be proved to entitle the plaintiff to succeed.***

Having regard to the several claims raised by the Plaintiff, it is evident that they are based on the allegation that she was unfairly dismissed by the Defendant, and it this factual situation that the Plaintiff seeks to establish liability for damages in both contract of employment and damages in tort.

It is clear and I am content that the Plaintiff was finally discharged or dismissed from employment in September 2000 for being AWOL for a period of more than 21 days, and the discharge or dismissal was with effect from August 11, 1999 (see Page 12 Defendant's Bundle of Documents). This coincides with the testimony of the Plaintiff that she was removed from the pay roll in August 1999. It is to be noted that, payment of salaries is an incident of a subsisting contract of employment, and permanent cessation or stoppage by an employer to pay salaries to an employee, generally entail termination of employment, more especially if it involves removal from the pay roll for alleged misconduct such as absenteeism. It is undisputed that after the end of the Plaintiff's leave for 28 days on June 17, 1999, and somewhat after an extension of 10 days, by Major Sosala

on June 21, 1999, the Plaintiff never went back to report for work. In the meantime, her last salary was paid in August 1999, and a Board of Inquiry was constituted. The Plaintiff's discharge, as it were, was widely publicized in 2000 within the ZNS fraternity, a document dubbed *Unit Part II Orders* at page 12 of the Defendant's Bundle of Documents attests to this.

And despite being aware about her removal from the pay roll and the circumstances surrounding her removal bordering on her conduct, there is no evidence that the Plaintiff within six years from the time she was removed from the payroll made internal attempts to challenge the same.

According to the Plaintiff, she alleged that she became aware of her dismissal in 2003 through her friend; even then from 2003, for more than six years, the Plaintiff did nothing to challenge the dismissal. Interestingly, when the Plaintiff was cross examined as to why she later resorted to other hospitals other than the Military Hospital, Maina Soko, she replied that, she stopped going to Maina Soko Military Hospital in 2003, because she was dismissed from ZNS. Clearly, the Plaintiff's decision to sue was only carried out in 2013, after over a decade, from the time the cause of action for alleged unfair dismissal and other claims arose.

Paradoxically, the Plaintiff also claimed that she only became aware of her dismissal upon receipt of the letter dated October 16, 2009, written by ZNS to Legal Aid Board. Plainly, the Plaintiff was being elusive, but unsurprisingly, the motive was to manipulate the facts, by attempting to escape the fetters of the Limitation Act. Unfortunately, by the time the Plaintiff was seeking legal services, her demands were already stale, and could not be salvaged by ZNS's response to her "letter of demand" presumably drafted in 2009. As rightly noted by the Defendant's Advocate, the letter dated October 16, 2009, was not a letter of dismissal, but a

recount of events that had transpired from the time the Plaintiff allegedly went AWOL in 1999, and her subsequent discharge.

In the light of the foregoing, I come to the conclusion that the whole action is evidently statute barred, that is to say, all the Plaintiff's claims are stale. And the risk of delaying to commence an action and ending up being statute barred was well elucidated by the Supreme Court in the case of ***Zambia Consolidated Copper Mines Ltd v Chileshe (2002) ZR 86*** in which recourse was had to the learned authors of *Chitty on Contracts* 26th Ed., at paragraph 1949, to the effect that:

> ***The general principle is that once time has started to run, it continues to do so until proceedings are commenced or the claim is barred. The principle (if any is possible in so technical a matter) is that a plaintiff who is in a position to commence proceedings, and neglects to do so, accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period. The principle is illustrated by a famous group of seventh-century cases deciding that the closing of the courts during the Civil War did not suspend the running of time...***

While it may be considered that the Plaintiff was at some stage seriously ill and incapacitated, nevertheless time within which to sue continued to run. I can only graciously sympathize. I am interdicted by law to extend the time beyond the limitation strictly imposed by law. In the case of ***Paolo Marandola & Others v Gianpietro Milanese & Others (SCZ Judgment No. 6 of 2014)*** the Supreme Court held:

> ***[I]t is clear that a court has no discretion to extend a time frame provided by a statute within which to take a particular action.***

Therefore, the main matter, thus the Plaintiff's substantive claims are mortally at an end for the reasons aforesaid. Accordingly, the Plaintiff's

action is wholly dismissed for being statute barred. I make no order as to costs. And leave to appeal is hereby granted.

DATED THIS 14TH DAY OF MAY, 2020.

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THE HON. MR. JUSTICE CHARLES ZULU