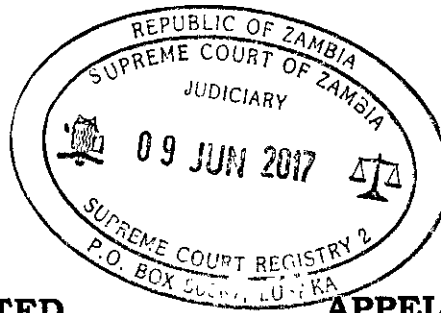


IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 182/2014

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

STANBIC BANK ZAMBIA LIMITED

APPELLANT

AND

BENTLEY KUMALO & 29 OTHERS

RESPONDENT

Coram: Hamaundu, Wood and Kaoma JJS.

On 6th June, 2017 and 9th June, 2017.

For the Appellant: Mr. N. Nchito SC – Messrs Nchito and Nchito

For the Respondent: Mr. M.M. Mwitumwa – Messrs M. L. Mukande & Company

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred To:

1. *Burdick v Gamick* 1 Law Reports 5 Chapter 243
2. *Sablehand Zambia Limited v Zambia Revenue Authority* (2005) Z.R. 109
3. *Hanif Mohammed Bhura (Suing pursuant to a Power of Attorney granted in his favour by Mehrunisha Bhura) v. Yusuf Ibrahim Issa Ismail – Appeal No. 146 of 2013*
4. *Sithole v The State Lotteries Board* (1975) Z.R. 106

5. *Standard Chartered Bank Limited V Kambindima Wotela and 163 others – Appeal No. 1/2014*

Legislation Referred To

1. *Pension Scheme Regulation Act No. 28 of 1996*
2. *Section 2, 19 and 26 of the Limitation Act 1939*
3. *Order 14 rule 5 (1) of the High Court Act Cap 27 of the Laws of Zambia*

Others Works Referred To

1. *Order 14A rule 1, Order 18/8/8, Order 18/12/5 and Order 18/12/7 of the Rules of the Supreme Court 1997 Edition*

This is an appeal against a decision of the High Court dismissing the appellants' application to dismiss the respondents claim on the ground that it was statute barred.

The facts leading to this appeal are these. On 6th November, 2013, the respondents commenced an action for a declaration that they were still members of the appellant's pension fund and as such were entitled to payment of full pension benefits. In the alternative, they claimed a refund of their contributions together with interest. The appellant filed a conditional appearance on 21st November, 2013 denying liability on the ground that the respondents were only entitled to the appellant's contributions at

maturity or when they transferred their credit to another scheme. The appellant further denied liability on the ground that the respondents' membership to the pension fund terminated on the date they left the appellant's employ and received a refund of their contributions as provided by the scheme rules. In addition, the appellant denied liability on the ground that the respondents' claim was statute barred having accrued in 1996.

On 25th April, 2014, the appellant filed a summons under Order 14A rule 1 R.S.C. to dismiss the matter for being statute barred as it was commenced 17 years after the cause of action accrued. The application was opposed on the basis that the respondents were claiming pension benefits held by the appellants under a pension fund created by a Trust Deed of which the respondents were beneficiaries. The respondents exhibited a copy of the Trust Deed dated 1st July, 1975 made between the appellant's predecessor, Grindlays Bank International (Zambia) Limited, and some unnamed trustees. The respondents did not allege any fraud or concealment by the appellant in their writ of summons, statement of claim or even

the affidavit in opposition to the summons to dismiss the matter for being statute barred.

It was argued in the court below that the respondents' action was not premised on the Pension Scheme Regulation Act No. 28 of 1996 (*"the Act"*) but on the Trust Deed that provided for pension benefits to the respondents. The respondents argued that they mentioned the Act in their statement of claim because pension benefits are regulated by statute. Their claim therefore arose from the pension scheme and not from the Act as was argued by the appellant in the court below. The respondent submitted that section 19 (1) (b) of the Limitation Act 1939 (*"the Limitation Act"*) does not provide a time limit for claims against trusts or trust properties. They submitted that since this was a claim by the respondent as beneficiaries of the property in the hands of the trustee it fell within section 19 (1) (b) of the Act and the appellant could not therefore rely on the argument that it was statute barred.

The appellant responded that section 19 (1) (b) of the Limitation Act was clear that the action must be to recover from

the trust and since the appellant was not a trustee but an employer, this took it out of the realm of section 19 (1) (b) and it could rely on the argument that it was time barred as against the appellant.

The learned judge agreed with the respondents and held that the limitation period does not apply where there is fraud or fraudulent breach of trust. She held that the trustees' role in relation to the respondents was to receive money for the benefit of the members and on the basis of the case of *Burdick v Gamick* 1 *Law Reports* 5 Chapter 243¹, the trustees did not appear to have discharged their duty by paying the monies they held.

The learned judge considered the fact that the trustees were not parties to the proceedings and ordered that they be joined to the proceedings pursuant to Order 14 rule 5 (1) of the High Court Rules Cap 27 of the Laws of Zambia.

With regard to the respondents' argument that the action was premised on the Act and as such was outside the ambit of section 19 (1) (b) of the Limitation Act, the learned judge took the

view that even though the Act was referred to in the statement of claim, that did not mean that that was the basis of the respondents' claim. She held that the regulations had only been cited in support of the respondents' case and found that the action was premised on the Trust Deed creating the pension fund and not the Act.

The second issue the learned judge determined was whether the claim against the appellant, who is not a trustee, falls outside the ambit of section 19 (1) (b) of the Limitation Act. She concluded that section 19 (1) (b) specifically relates to trustees who are party or privy to any fraud. She, however, formed the preliminary view that the appellant is not a trustee under the pension scheme. She reached this preliminary view on the basis of the statement of claim which stated that the appellant got and retained the employer's contribution from the pension scheme and the defence which denied this assertion. She then concluded that in this case, section 19 (1) (b) of the Limitation Act does not apply to the appellant.

The learned judge proceeded to consider the meaning of clause 9 of the Trust Deed which gives a member three options upon leaving the appellant's service. The three options are as follows:

"If a member should leave the employer's service for any reason before the normal pension date otherwise than on Early Retirement in accordance with Rule 7 he shall have the following options:

- i) to take a pension commencing on the Normal Pension Date in respect of his own contributions under the scheme.*
- ii) if the pension benefit is secured by a Group Policy of Policies of Assurance, with the consent of the Assurer, to continue his contributions direct to the Assurer and secure such pensions at the Normal Pension Date as his past and future contributions shall provide, or*
- iii) to take a refund of all his contributions under the Scheme towards his pension with interest thereon at 3% per annum compound subject to the provisions of Rule 21."*

She also considered the correspondence which was exhibited and found that the appellant's letter of 6th December, 2007 acknowledged that the appellant decided to withdraw the respondents' own contributions from the pension fund without

the respondents' consent or specific instructions as provided in the Trust Deed. She further found that this acknowledgement by the appellant brings it within the provisions of section 26 of the Limitation Act.

According to the learned judge, the appellant's actions of selecting the option on behalf of the respondents without their consent amounted to fraudulent conduct. She cautioned herself against commenting further on the matters so as not to pre-empt her decision because the matter was still at the interlocutory stage. She then dismissed the application to dismiss the matter for being statute barred.

The appellant has appealed to this court on the grounds that:

1. *The court below erred in law and infact when it found that the respondents' action fell within the provisions of section 26 of the Limitation Act 1939 when the respondents did not plead fraud in their statement of claim.*
2. *The court below erred in law and infact when it found that the appellant's letter of 6th December, 2007 constituted an acknowledgment*

of liability and/or dishonesty when this finding was unsupported by the evidence on record.

3. *The court below erred in law and in fact when it found that the action was not statute barred when it was commenced seventeen (17) years after the cause of action accrued.*

The appellant has argued in respect of the first ground of appeal that the provisions of section 26 of the Limitation Act make it clear that the action must be based on the fraud of the defendant or the right of action concealed by the fraud of the defendant.

The appellant argued that the respondent did not plead any fraud in relation to the appellant. The appellant relied on the case of *Sablehand Zambia Limited v Zambia Revenue Authority*² and Order 18/12/7 R.S.C to support its argument that fraud needs to be specifically pleaded before a party can rely on it.

The respondents have, in relation to the first ground of appeal, relied on the case of *Hanif Mohammed Bhura (Suing pursuant to a Power of Attorney granted in his favour by Mehrunisha Bhura) v. Yusuf Ibrahim Issa Ismail*³ and argued that

a court cannot ignore the glaring face of fraud or corruption simply because fraud has not been specifically pleaded. This decision is seemingly in contrast with the case of *Sablehand Zambia Limited v Zambia Revenue Authority*⁴ in which this Court had earlier held that fraud needs to be specifically pleaded before a party can rely on it.

We appreciate the fact that this matter is still in its nascent stages, but a cursory look at the writ of summons reveals that the respondents are seeking a declaration that they are still members of the appellant's pension fund, payment of full pension benefits and in the alternative, a refund of their contributions. The statement of claim expands on the relief sought but makes no mention of any allegation of fraud. In addition, the affidavit in opposition to the summons to dismiss the matter for being statute barred does not allege any fraud or concealment on the part of the appellant. It is on this basis that this matter must be distinguished with the *Bhura* case. In the *Bhura* case, this Court acknowledged the necessity of specifically pleading fraud and in fact implored counsel in future to include particulars of the fraud

as this is a requirement when pleading fraud. In the *Bhura* case, the pleadings and the evidence left the court in no doubt that there was fraud although particulars were not provided as required by Order 18 RSC. We should take this opportunity to yet again state that it is a requirement to specifically plead fraud and to give particulars. The White Book, in our view, provides sufficient guidance on how fraud should be dealt with in pleadings. Order 18/8/8 of the 1997 edition of the Rules of The Supreme Court states as follows on how fraud should be pleaded:

“(9) Fraud – It is the duty of counsel not to enter a plea of fraud on the record “unless he has clear and sufficient evidence to support it” – (see per Lord Denning in Associated Leisure Ltd v. Associated Newspapers Ltd [1970] 2Q.B. 450, p.456). Any charge of fraud or misrepresentation must be pleaded with the utmost particularity.”

Para 18/12/7 RSC states that “Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts (Davy v. Garrett (1878) 7 Ch. D. 473, p.489; Behn v. Bloom (1911) 132 L.T.J. 87; Claudins Ash Sons & Co. Ltd v. Invicta Manufacturing Co. Ltd 29 R.P.C. 465 H.L).”

Para 18/12/5 RSC puts it as follows:

“(5) Concealed fraud – when a pleader seeks to avoid the Limitation Act 1980 by pleading concealed fraud under s.32, he must state his case with the utmost particularity, or the pleading may be struck out under r.19 or under the inherent jurisdiction of the Court... The fraud alleged must be the fraud of the person setting up the Statute or of someone through whom he claims...”

On the other hand, “fraud’ in this context envisages unconscionable conduct in regard to the parties’ relationship and the trustee’s conduct will not be regarded as “unconscionable” when he did not know that he was acting in breach of trust and in such case there would be no “concealment” by him.”

It is bad practice to try and elicit fraud in examination in chief and hope that it will not be objected to so that the court can consider it. A plea of fraud is a very serious allegation which requires a higher standard of proof. That is why in *Sithole v The State Lotteries Board*⁴ we held that if a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities. It is, therefore, imperative that a party is given adequate warning of the claim it is likely to face. In the matter at hand, the pleadings or affidavit in opposition to the

summons to dismiss the matter for being statute barred, do not suggest in any way that fraud has been alleged. In addition to that, the learned judge raised the issue of fraud on her own for the first time in the judgment. This, she was not entitled to do as no party had raised it in the pleadings.

It is quite clear from what we have stated in relation to the first ground of appeal that the learned judge had indeed misdirected herself as the appellant was a settlor of the Trust Deed and was not a trustee within the meaning of section 19 (a) of the Limitation Act as read with section 26(a). She had further misdirected herself by holding that there was fraudulent conduct on the part of the appellant without any pleadings or evidence to that effect. The first ground of appeal therefore has merit and it succeeds.

The second ground of appeal attacks the findings by the learned trial judge that the appellant's letter of 6th December, 2007 constituted an acknowledgment of liability and or dishonesty when this finding was unsupported by the evidence on record.

The main argument by the appellant in respect of this ground of appeal is that the question that was before the court for resolution was whether or not the claim by the respondents was statute barred. The appellant argued that the court went beyond the scope of the application to make comments which go to the merits of the claim.

We have read the letter of 6th December, 2007 and in particular the last paragraph which the learned judge referred to in her judgment. The paragraph reads as follows:

"Given the facts cited above, we believe that you are not eligible for any further pension dues as you received a refund of your contributions after leaving employment. Besides the refund was mentioned in our early retirement letter to you dated 23 September, 1997. In the said letter, the Bank indicated that it intended to include pension refund in the calculation of your retirement benefits and requested you to indicate if you preferred any other alternative option in relation to your pension contributions. Therefore, by necessary implication and by your conduct, you actually opted that the Bank refunds you pension contributions as proposed by the Bank in the said letter of 23 September, 1997."

We agree with the appellant's argument that the learned judge exceeded the scope of the application before her. What was before the learned judge was an application for the disposal of a case on a point of law on the ground that the matter was statute barred. The respondents' statement of claim did not allege any fraud. Paragraph 13 of the defence raises the defence that the matter is statute barred. There is no reply on the record of appeal to this particular defence. The learned judge was therefore not at liberty to infer fraud from the letter of 6th December, 2007 in the absence of compliant pleadings. We do not accept the argument by the respondents that the letter of 6th December, 2007 was a contradiction and amounted to dishonesty because this letter was written after the letter of 23rd September, 1997 which explained the terminal benefits due to Bentley Kumalo. It was, therefore, an error on the part of the court below to attach so much weight to the letter of 6th December, 2007 and find that it constituted an acknowledgement that the appellant withdrew the respondent's contributions from the scheme without the respondents' instructions and further that this amounted to fraudulent

conduct on the part of the appellant. We accordingly allow this ground of appeal.

The appellant has argued in its third ground of appeal that the court below erred when it found that time began to run on 6th December, 2007 as the date when the respondents discovered the fraudulent or illegal act by the appellant. The appellant argued that the respondents left the employ of the appellant for different reasons and on different dates between 1996 and 1997. When the respondents retired, they received a refund of their own contributions in accordance with the Pension Scheme rules. The appellant pointed out that Bentley Kumalo was aware of the payment of his pension contributions on 23rd September, 1997. It could not therefore be said that he only discovered that the appellant had paid out his contributions to the Pension Scheme on 6th September, 2007. The appellant argued that time began to run in 1997 and not in 2007. The respondents commenced their action against the appellant in 2013 which was sixteen years after they had left the employ of the appellant and had received

their pension benefits. The appellant argued that the respondent's claim was therefore statute barred.

The appellant concluded by arguing that the respondents' statement of claim shows that the basis of the claim is the Act which was caught up by Section 2 (1) (d) of the Limitation Act which limits the time within which to commence actions under an enactment to six years from the date the cause of action accrued. The appellant argued that since the respondents did not plead fraud in their statement of claim, the action cannot fall under Section 26 of the Limitation Act and the time must be reckoned from 1996 when the Act came into force and when the respondents left the employ of the bank.

The issue, as we see it under the third ground of appeal, is whether the respondents could commence this action more than six years after they had left the employ of the appellant. We agree with the appellant that since the respondents did not plead fraud in their statement of claim or affidavit in opposition, the action cannot fall under Section 26 of the Limitation Act which postpones the limitation period in case of fraud or mistake.

The respondents claim does not come under Section 26 of the Limitation Act but under Section 19 of the Limitation Act which deals with the limitation of actions in respect of trust property. We say so because this action arises over a dispute in connection with a Trust Deed relating to the respondents' pension benefits. Section 19 of the Limitation Act provides as follows:

"19. Limitation of actions in respect of trust property;

- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action.*
 - (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
 - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.*
- (2) subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of Limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:*

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
- (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a*

judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and the Act had been pleaded in defence."

It is quite apparent that the appellant is not a trustee under the Trust Deed for it to come within the provisions of section 19 of the Limitation Act although it is the settlor of the trust deed. Section 19 (1) (a) relates to an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. The appellant was not a trustee although it was a party to the Trust Deed.

The respondents' claim is premised on both the Act and the Trust Deed as can be seen from paragraphs 8 to 10 of the statement of claim which place reliance on the Act as the basis for the claim and paragraphs 3 to 7 and 12 to 13 which rely on the Trust Deed as the other basis for the claim. The judge, in her ruling, concluded that the fact that the Act is mentioned, that does not mean that the Act is the basis of the respondents' claim. We do not agree with this finding. Pleadings serve the purpose of giving notice to the other party as to what the claim is all about so that a case can be tried with clarity and expedition.

Paragraphs 8, 9 and 10 of the statement of claim leave us in no doubt that the respondents were relying on the various provisions of the Act to support their claim. The point being made in paragraph 8 is that those respondents who left employment after 1996 were subject to the provisions of the Act while paragraph 9 is relying on section 18 of the Act which deals with conditions of compliance of Pension Schemes. Paragraph 10 makes specific reference to rule 2 (2) (c) (iv) of the fourth schedule of the Income Tax Act Cap 323 which prohibits the return of contributions made to a pension fund or scheme by the employer to it. All those paragraphs we have referred to were drafted for a purpose. They form the basis of the respondents' claim under the Act, the Income Tax Act Cap 323 and the Trust Deed. They could not have been included for no reason when so much emphasis has been placed on them in the statement of claim. Since the respondent relied on the various provisions of the Act and the Income Tax Act Cap 323, they had to show that their claim was brought within six years from the date on which the cause of action accrued in order to comply with section 2 (1) (d) of the Limitation Act which states that:

"2. Limitation of actions of contract and tort, and certain other actions.

(i) 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;

b)

c) ...

d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

The learned judge therefore fell into error when she held that the Act was not the basis of the claim as it is inextricably linked to the Trust Deed in the statement of claim and was therefore subject to section 2 (1) (d) of the Limitation Act which required it to have been commenced within six years from the date on which the cause of action accrued.

The learned judge in her ruling held that the acknowledgement by the appellant brought it within the provisions of section 26 of the Limitation Act. We do not agree. Section 26 of the Limitation Act provides that:

“26. Postponement of limitation period in case of fraud or mistake.

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

- a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
- b) the right of action is concealed by the fraud of any such person as aforesaid, or*
- c) The action is for relief from the consequences of a mistake.*

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

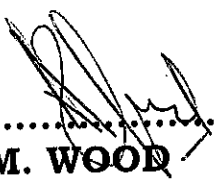
This section requires a party who wishes to rely on it to comply first with Order 18/12/5 R.S.C which requires a pleader pleading concealed fraud to state his case with the utmost particularity or Order 18/12/7 RSC which requires fraudulent conduct to be distinctly alleged and as distinctly proved before relying on it. A party who does not plead fraud together with the particulars of such fraud cannot rely on section 26 nor should a court on its own motion endeavor to find fraud when it has not been pleaded with particulars and proved. We agree with the appellant that since fraud was not pleaded and there was no

concealment, the action cannot fall under section 26 of the Limitation Act and therefore time must be reckoned from 1996 when the Act came into force and when the respondents left the employ of the appellant. This in effect means that they are time barred by virtue of section 2 of the Limitation Act as against the appellant. We further agree with the submission on behalf of the appellant when this appeal was heard that this case should be distinguished with the case of *Standard Chartered Bank Zambia Limited v Kambindima Wotela & 163 others*⁵ because in that case there was an element of concealment as the employees were not aware of the actuarial valuation. In the present case, the appellant clearly informed Bentley Kumalo on 23rd September, 1997 what his terminal benefits would be made up of. As such he was aware and if he was not satisfied, he should have commenced proceedings within the limitation period. We note from the ruling that the learned judge ordered that the trustees should be joined to the proceedings. The respondents are at liberty to pursue their claims against the trustees but cannot do so against the appellant as the appellant is not a trustee. The net effect of our judgment is that all grounds of appeal are allowed.

J24

The ruling of the court below is set aside with costs against the respondents both here and in the court below. We order that this matter should be referred to the High Court so that the respondents can pursue their claim should they wish to do so.


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E.M. HAMAUNDU
SUPREME COURT JUDGE


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A.M. WOOD
SUPREME COURT JUDGE


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R.M.C. KAOMA
SUPREME COURT JUDGE