Library

R1

2015/HP/1707

IN THE HIGH COURT OF ZAMBIA

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

JORDAN FLOWER	**1ST PLAINTIFF**
MATT THOMPSON FLOWER	**2ND PLAINTIFF**

AND

CDC GROUP PLC	**1ST DEFENDANT**
YORK FARM LIMITED	**2ND DEFENDANT**

BEFORE HON. MRS. JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 5TH DAY OF SEPTEMBER, 2016.

For the Plaintiff	:	*Ms. J. Mutemi, Theotis Mataka and Sampa Legal Practitioners*
For the Defendant	:	*Mr. M. Ndalameta, Musa Dudhia and Company*

R U L I N G

CASES REFERRED TO:

1. *Christie Vs Christie 1872 C 199.*
2. *Edward B. Vs Carter 1893 AC 360*
3. *Rossage Vs Rossage 1960 1 ALL ER 600*
4. *Darlington Vs Mitchell Construction Company Limited (1966) Z.R. 10*
5. *Hewer Vs Bryant 1969 1 ALL ER 13.*
6. *Gleeson Vs J Wippell and Company 1977 3 ALL ER 54*
7. *Barber Vs Staffordshire County Council 1996 2 ALL ER 748*
8. *Mpande Nchimunya Vs Stephen Hibwani Michelo (1997) S.J. No 12*
9. *Sinclair Vs British Telecommunications PLC 2000 2 ALL ER 461*
10. *BP Zambia PLC Vs Interland Motors Limited 2001 ZR 37*

11. *Zambia Consolidated Copper Mines Limited V Elvis Katyamba 2006 ZR 1*
12. *Godfrey Miyanda Vs The Attorney General 2009 ZR 76*
13. *Musa Ahmed, Adam Yusuf Vs Mahtani Group of Companies, Finsbury Investments Limited, Chimanga Changa Limited and Rajan Lekrhaj 2011/HPC/0081*
14. *Glocom Marketing Limited Vs Contract Haulage Limited 2011 1 ZR*
15. *Inyatsi Construction Limited Vs Pouwels Construction Zambia Limited 2013/HPC/0265,*
16. *Tebuho Yeta Vs African Banking Corporation Limited Appeal No 117 of 2013 Unreported*
17. *United Nations Federal Credit Union Vs Dora Namasiku Likukela 2014/HPC/0057 unreported*
18. *Boart Longyear (Zambia) Limited Vs Austin Makanya SCZ No 9 of 2016*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court, 1999 Edition*
3. *The Limitation Act, 1939*
4. *The British Acts Extension Act, Chapter 10 of Laws of Zambia*
5. *The English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia*
6. *The Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia*
7. *Halsburys Laws of England Vol. 28, 4th Edition*

This is a Ruling on an appeal to a Judge at chambers against the Ruling of the Deputy Registrar given on 13th April, 2016, dismissing the Defendants' application to strike out the Plaintiff's action for being an abuse of court process. In support of the application Counsel relied on the skeleton arguments filed in support of the appeal.

Counsel for the Plaintiff in opposing the appeal relied on the skeleton arguments filed in opposition to the appeal, on 2nd August 2016.

In reply it was stated that the amendment referred to in the Plaintiff's submissions as not being applicable in Zambia, was actually given effect to under Section 3 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia. It was added that the case of ***EDWARD V B. CARTER 1893 AC 360*** referred to in support of the argument that a minor may repudiate a contract within a reasonable time after attaining the age of majority, did not apply as the House of Lords in that case actually rejected the minors argument, and refused to allow him to repudiate the agreement in question.

It was also argued that it was their contention that in any event, the Plaintiffs' had not sought to repudiate the contract within a reasonable time after attaining the age of majority, as the affidavit shows that one of the Plaintiffs' attained majority in 2012, while the other one did so in January 2014.

Counsel also argued in the alternative that a minor's ability to avoid a contract should be subject to restitutio in integrum being possible, that is the Plaintiff would only be able to avoid the settlement agreement if they returned all the sums of money previously received by them under the agreement, so as to return the parties to their original position, as provided in Chitty on Contracts.

Reference was made to the case of ***TEBUHO YETA V AFRICAN BANKING CORPORATION LIMITED Appeal No 117 of 2013 UNREPORTED*** in which Muyovwe JS at page J23 stated that

"It is trite that for every argument advanced there must be legal authority, and in this case Mr. Sitimela failed lamentably to provide authority for his argument that Section 26 (a) should apply to the case in casu. Counsel simply wanted us to apply Section 26 (a) to suit his client. We must make it clear that were are not prepared to go Mr. Sitimela's way because it was the wrong way".

Counsel prayed that the appeal be allowed with costs.

In the submissions filed in support of the appeal, it was stated that the application to set aside the writ of summons for being an abuse of court process was supported by an affidavit sworn by Tom Varkey filed on 19th October 2015, another affidavit in support dated 4th December 2015 and deposed to by Mark Kenderdine - Davis. The Plaintiffs' filed an affidavit in opposition on 16th November 2015 as well as a further affidavit in opposition on 27th January 2016.

It was argued that the Defendants' object to the use by the Plaintiffs' of the affidavit sworn by Jordan Flowers on 8th November 2015, and filed into court on 16th November 2015. This was on the grounds that the said affidavit had not been authenticated, and also on the ground that it contains objectionable material exchanged on a without prejudice basis.

Counsel submitted that a notice to object to the use of the said affidavit was communicated to this court on 23rd November 2015. Reference was made to Order V Rule 21 of the High Court Rules, Chapter 27 of the Laws of Zambia which states that ***"in every case***

and at every stage thereof, any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered".

Further reference was made to the case of ***ROSSAGE V ROSSAGE 1960 1 ALL ER 600*** where it was stated that;

> ***"where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which adopted waived proof of the facts stated on information and belief".***

Reference was made to the explanatory notes at paragraph 41/6/1 of the Rules of the Supreme Court, 1999 Edition which states that *an affidavit must be pertinent and material and may be ordered to be taken off the file if scandalous and irrelevant material is inserted.*

Therefore it was their argument that the exhibiting of an unauthenticated affidavit amounts to sneaking in evidence in disregard of the rules of court.

The case of ***BOART LONGYEAR (ZAMBIA) LIMITED V AUSTIN MAKANYA SCZ No 9 of 2016*** was also referred to which dealt with the inadmissibility of without prejudice correspondence. It was

stated in that case that as a general rule without prejudice communication or correspondence is inadmissible on the ground of public policy to protect genuine negotiations between the parties, with a view to reaching a settlement out of court.

Thus it was contended that exhibits 'JF3(v)', 'JF3(vi)', 'JF3(vii)', 'JF3(x)', being without prejudice documents were inadmissible. The other case relied on in support of the argument that an affidavit which is scandalous, irrelevant or otherwise oppressive should be struck out was ***CHRISTIE V CHRISTIE 1872 C 199.***

With regard to the action being statute barred, it was submitted that paragraphs 11 and 12 of the Plaintiffs' statement of claim shows that the cause of action arose on 3rd August 1996, and the Plaintiffs' were entitled to sue in that year. Reference was made to Section 4 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia which limits the commencement of actions in relation to fatal accidents to three years from the date when the cause of action arises.

Further reference was made to Order II Rule 1(b) of the High Court Act, Chapter 27 of the Laws of Zambia which provides that;

> ***"where by an section of the Act, or any order or rule of court, or any special order, or the course of the court, any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, and such time is not limited by hours, the following rules shall apply:***

The act or proceeding must be done or taken at latest on the last day of the limited time".

It was submitted that the rules recognize the importance of taking action within the stipulated time frame. The case of ***ZAMBIA CONSOLIDATED COPPER MINES LIMITED V ELVIS KATYAMBA 2006 ZR 1*** was cited as authority for the argument that it is mandatory that actions are brought within the stipulated time.

Counsel submitted that it would be unfair and unjust to allow a stale action to proceed when the Plaintiffs through their next of kin had been aware of the cause of action from 1996, and to bring the action sixteen years later was an abuse of court process. The provisions of Section 22 of the Limitation Act 1939 on the postponement of the accrual of actions for persons under disability, such as infancy was acknowledged, but it was argued that the provision had been pronounced upon in the case of ***HEWER V BRYANT 1969 1 ALL ER 13.***

In that case it was stated that

"the principle lying behind S22 (2) (b) of the Act of 1939 as amended, was that if the infant was in the custody of a parent (as defined for the purpose of the Act of 1939), it would be the natural duty of that parent to undertake and be responsible for the bringing of a proper action to uphold the infant's rights where the infant has been injured, and the Defendant should not be prejudiced if that course of action was not taken; where there was no such custody and there was nobody whose natural duty or natural conduct would be to assist the infant and run the risk of

paying costs, the infant was given an opportunity to bring the action as soon as he attained his majority".

As the Plaintiffs' were in the custody of their mother, they could bring the action, and they had not demonstrated so in their statement of claim or in the affidavits. Further they had not disowned the action commenced under cause number 2000/HP/0907 instituted by their mother on their behalf.

As regards the case being frivolous, vexatious and an abuse of court process, reference was made to the provisions of Order 18 Rule (1) (d) of the Rules of the Supreme Court, 1999 Edition. It was also submitted that the case of ***GODFREY MIYANDA V THE ATTORNEY GENERAL 2009 ZR 76*** held that Order 18 Rule 19 of the Rules of the Supreme Court is to be applied as a summary procedure that determines a threshold issue on a point of law.

It was submitted that the Plaintiffs' action offends Section 13 of the High Court Act which states in part that courts when dealing with matters shall in the exercise of that jurisdiction grant all such reliefs and remedies in all matters, so that all the controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

The case of ***BP ZAMBIA PLC V INTERLAND MOTORS LIMITED 2001 ZR 37*** was cited as a case where the Supreme Court had

guided that litigants should not employ their grievances piecemeal. Other cases cited were ***BARBER V STAFFORDSHIRE COUNTY COUNCIL 1996 2 ALL ER 748*** where it was stated inter- alia that;

> ***"where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest , but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case".***

Counsel stated that the action under cause number 2000/HP/0907 which was dismissed, was instituted by the Plaintiffs' mother against the Defendant, and the matter under cause number 2001/HP/1055 where the settlement was reached was between the Plaintiffs and the Defendant. Therefore there was sufficient identity of the parties in all the actions for *Section 13 of the High Court Act* to apply.

Further that there is privity of interest between the Plaintiffs' in this action and their mother in the dismissed and settled actions for the provisions of Section 13 of the High Court Act to apply. Reliance was also placed on the case of ***GLEESON V J WIPPELL AND COMPANY 1977 3 ALL ER 54*** to support this argument.

Thus the action was an abuse of court process based on the limitation point, coupled with the fact that this action was already determined and settled.

The other argument advanced was that there was irregularity of service of the process, and it was stated that the 1st Defendant is not a Zambian citizen and ought to have been served with notice of the originating process, rather than the originating process itself. The argument was anchored on the provisions of Order X Rule 18 of the High Court Rules which states that;

> ***"where a writ of summons, originating summons or originating notice of motion is issued for service out of jurisdiction upon a person not being a citizen of Zambia, notice thereof and not the originating process itself shall be served upon such person".***

It was argued that since the originating process was already served on the 1st Defendant, the irregularity could not be reversed. However as Order X Rule 18 of the High Court Rules is couched in mandatory terms, the breach was fatal, and going by the decision in the case of ***INYATSI CONSTRUCTION LIMITED V POUWELS CONSTRUCTION ZAMBIA LIMITED 2013/HPC/0265***, the irregularity could not be cured.

In relation to argument that the Plaintiffs should pay security for costs, it was argued that the Defendants were awarded costs under the action that was dismissed, and that in the event that this Hon Court allows the Plaintiffs to proceed, then it was their argument

that this matter be stayed until the costs of the dismissed action are paid.

The provisions of Order XL Rules 7 and 8 of the High Court and the case of ***SINCLAIR V BRITISH TELECOMMUNICATIONS PLC 2000 2 ALL ER 461*** were relied on in support of the argument.
Further in the submissions it was stated that the Plaintiffs' are ordinarily resident outside the jurisdiction and going by the provisions of Order 23 Rule 1 (a) of the Rules of the Supreme Court, 1999, the court having regard to all the circumstances of the case may order the Plaintiff to give security for costs.
It was argued that the Defendants' would be prejudiced by the Plaintiffs' residency in the event that the Plaintiffs' were unsuccessful in their claims, as recovering costs outside the borders of Zambia would be onerous. Further that the Defendants' were not aware of any unencumbered movable or immovable assets registered in the Plaintiffs' names within Zambia that could be attached in execution to satisfy a costs order.

The case of ***UNITED NATIONS FEDERAL CREDIT UNION V DORA NAMASIKU LIKUKELA 2014/HPC/0057 unreported*** was relied on and it was argued that in that case the foreign based Plaintiff who had no assets in Zambia was ordered to pay security for costs in order to protect the Defendant's right to recover from it. This Court was urged to adopt the same reasoning. It was further submitted that the Defendants' are not aware of whether the Plaintiffs' have any real financial means or that they are gainfully employed so that

they would be able to meet the Defendants' costs, if the same were awarded.

In the skeleton arguments in opposition to the appeal, it was argued that contrary to the assertion that exhibit 'JF3' in the affidavit sworn by Leizeigh Katherine Flower before Lisa Kaufman, a Notary Public of Cape Town was not authenticated, the same was authenticated by Moegamat Mia, Registrar at the Western Cape High Court, and therefore the argument had no merit.

With regard to the submission that the action is statute barred and the reliance on the case of ***HEWER V BRYANT*** to support this position, it was submitted that the case concerned the English Court's pronouncement on Section 22 of the Limitation Act of 1939 as amended by the Law Reform (Limitation of Actions) Act, 1954. The said section states that;

> ***"Extension of limitation period in case of disability. If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of three years... from the date when the person ceased to be under a disability..... notwithstanding that the period of limitation has expired..... (2) in the case of actions for damages for negligence ..... or breach of duty..... where the damages claimed by the Plaintiff for negligence ..... or breach of duty consist of or include damages in respect of personal injuries to any person ..... (b) this section shall not apply unless the Plaintiff proves that the person under the disability was not at the time when the right of action accrued to him, in the custody of a parent".***

Counsel submitted that by virtue of the British Acts Extension Act, Chapter 10 of the Laws of Zambia, and the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia, it is the Limitation Act 1939, as it then stood, without the subsequent amendments made thereto by the English legislature, which applies to this jurisdiction.

Based on the foregoing the Plaintiffs' claim is not statute barred and the appeal must fail in that regard.

In relation to the contention that the action is frivolous, vexatious and an abuse of court process within the provisions of Order 18 Rule 19 of the Rules of the Supreme Court, 1999 Edition, it was their argument that the explanatory notes under that Order state that this should only be resorted to in only plain and obvious cases.

The case of ***MUSA AHMED, ADAM YUSUF V MAHTANI GROUP OF COMPANIES, FINSBURY INVESTMENTS LIMITED, CHIMANGA CHANGA LIMITED AND RAJAN LEKRHAJ MAHTANI 2011/HPC/0081*** was cited as a case where this was also reiterated. It was argued that an attempt was made to conduct a search under 2000/HP/0907 but this proved futile, as the file could not be found. The Plaintiffs' mother Lezleigh Katherine Flowers had deposed in her affidavit that she was unaware of the Ruling in that cause as her lawyers had discontinued it.

She had further sworn that she had been coerced into signing the settlement under cause number 2001/HP/1055, and had since instructed their advocates to apply for leave to amend the court proceedings, to include a claim to set aside the consent order relating to the settlement agreement, as the same was not procured by consent.

The submission was that it is trite that at common law any contract entered into on behalf of a minor may be repudiated by the minor within a reasonable time after attaining the age of majority, which is what the Plaintiffs seek to do in this matter.

The authority for this submission was the case of ***EDWARD V CARTER 1893 AC 360*** where the father of the intended husband (then a minor) by a marriage settlement, covenanted with the trustees to pay them an annuity during the life of the intended wife or of any child or grandchild of the marriage, and the trustees were to pay the annuity to the husband during his life or until his bankruptcy, and after determination of his interest for the benefit of the wife and the issue of the marriage.

After coming of age the husband purported to repudiate the settlement. The House of Lords in that case held that the settlement as regards the husband was voidable, and not void and that if he chose to repudiate it, he could do so within a reasonable time after attaining the age of majority.

Therefore the contention in this case was that the Plaintiffs' had within a reasonable time come to court to purse the action. It was further argued that the matter under cause number 2001/HP/1055 was not a separate action per se but was a result of a legal requirement to have the settlement approved by the Court. Thus there was no abuse of court process on the Plaintiffs' part and that the action could not be considered as frivolous and vexatious. Further that the Plaintiffs' seek to challenge the settlement that was reached within a reasonable time after attaining the age of majority.
In opposition to the argument that the process was irregularly served, as the 1st Defendant was served with the originating process and not the notice thereof, the argument was that service of the notice of originating process is not required on a defendant residing outside jurisdiction.
It was argued that Order X Rule 18 of the High Court Rules on which the Defendants sought to rely relates to substituted service as it follows on from Order X Rule 17 which provides for substituted service.

Reference was made to Order X Rule 15 (f) of the High Court rules which provides for service out of the jurisdiction of a writ of summons, originating summons or originating notice of motion. Going by that provision a Plaintiff can obtain leave from the court to serve originating process out of jurisdiction, and not just the notice thereof.

To fortify this argument reference was made to Order X Rule 16 of the High Court Rules which states that an application for leave to issue for service out of jurisdiction a writ of summons, originating summons or originating notice of motion may be made ex-parte to the Court or a Judge on deposit of the writ, summons or notice with the Registrar together with an affidavit in support of such application.

As regards the argument that the Plaintiffs' should pay security for costs, the case of ***GLOCOM MARKETING LIMITED V CONTRACT HAULAGE LIMITED 2011 VOL 1 ZR*** was stated as providing guidance on the considerations to be taken into account by the Court in exercising such discretion, among them the Plaintiffs' bona fides and his prospects of success and whether the application for security is being used oppressively for example to stifle a genuine claim.

The Plaintiffs' submission was that the Defendants' application was malafides intended to prevent the Plaintiffs' from persuing their claims against them. The court was urged to dismiss the appeal and allow the Plaintiffs' to proceed with the action.

The contents of the affidavit in support, affidavit in opposition and affidavit in reply are the same as what is contained in the submissions in support and submissions in opposition to the appeal, so I will not reproduce them.

I have considered the application. In the case of ***DARLINGTON v MITCHELL CONSTRUCTION COMPANY LIMITED (1966) Z.R. 10*** it was stated that

> ***"on an appeal to a judge from a registrar, the former must exercise his judgment and discretion anew and independently as though the matter came before him for the first time, though he must give the weight it deserves to the Registrar's decision".***

Therefore in considering this appeal I will reconsider the application, and take into account the Deputy Registrar's decision. Counsel for the Defendants' stated that they relied on the skeleton arguments filed in support of the appeal on 14th July 2016.

I will address the issue of the defective affidavits first. The first argument pertaining to this issue is that the affidavit filed by the Plaintiffs' and sworn by Jordan Flowers was not authenticated.

Section 3 of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia provides for how documents executed outside Zambia should be authenticated before they can be used in this jurisdiction. It provides that;

> ***"3. Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-***
>
> ***(a) in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office;***
>
> ***(b) in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary***

public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;

(c) in the case of document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;

(d) in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office-

(i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorised under the law of such foreign place to authenticate such document".

The affidavit in support of the summons to strike out the action for being an abuse of court process sworn by Jordan Flower and filed into court on 17th November 2015 shows that Jordan Flower deposed to that affidavit in Constantia Cape Town, South Africa. The said affidavit was sworn before a Notary Public.

For documents executed in South Africa, they would fall under Section 3 (c) of the Authentication of Documents Act, as South

Africa is a former colony of Britain as well as of the Dutch. Thus a document executed in South Africa will be deemed to have been authenticated within the meaning of Section 3 (c) of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia if signed and sealed by the office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner.

I have already stated that the affidavit was sworn before a Notary Public and the signature of the Notary Public was verified by the Registrar of the Western Cape High Court. This is in line with the provisions of Section 3 (c) of the Authentication of Documents Act, and I find that the said affidavit was authenticated.

The affidavit sworn by Leizleigh Katherine Flower and filed on 25th November 2015 was also sworn in South Africa, and before a Notary Public, and the said signature of the Notary Public was verified by the Registrar of the Western Cape High Court. It was therefore authenticated in accordance with the law. Thus the argument that the affidavits were not authenticated and consequently cannot be used in the application is devoid of merit, and accordingly fails.
It was also argued citing the case of ***BOART LONGYEAR (ZAMBIA) LIMITED V AUSTIN MAKANYA SCZ No 9 of 2016*** that the affidavit in opposition sworn by Jordan Flower contains objectionable matters by way of *without prejudice* documents which are inadmissible, and should be expunged from the record.

A perusal of the said affidavit indeed shows that 'JF3(v)', 'JF3(vi)', 'JF3(vii)', 'JF3(x)', are documents that are headed *without prejudice.* These documents are also exhibited as 'LFK1i-iv' on the affidavit in opposition sworn by Leizleigh Katherine Flower.

I have not had occasion to read the case of ***BOART LONGYEAR (ZAMBIA) LIMITED V AUSTIN MAKANYA SCZ No 9 of 2016.*** However I have read the case of ***LUSAKA WEST DEVELOPMENT COMPANY LIMITED V TURNKEY PROPERTIES LIMITED 1990 ZR 1.*** It was stated in that case that;

> ***"as a general rule, therefore, without prejudice communication or correspondence is inadmissible on grounds of public policy to protect genuine negotiations between the parties with a view to reaching a settlement out of court. In this regard we cite the case of Rush and Tompkins Ltd v Greater London Council and Another (1). However, that is only a general rule and, as Mr. Hamir has correctly pointed out, basing his submissions on paragraph 213 of Halsbury's Laws of England, 4th Edition, Volume 17, there may be situations - such as in the case of a settlement - where the issue for determination demands the production for such without prejudice correspondence. However, it is quite clear that the issue here did not really call for the disclosure of the correspondence complained of since it was capable of being resolved without recourse to such correspondence, the starting point being the consent summons signed by both sides and which document epitomised the agreement reached out of the court".***

Order 24/5/45 of the Rules of the Supreme Court, 1999 Edition provides that *the "without prejudice" rule governs the admissibility of*

evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (Cutts v. Head [1984] Ch. 290; [1984] 1 All E.R. 597, CA). The rule applies to exclude all negotiations genuinely aimed at a settlement, whether oral or in writing, from being given in evidence. The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

"Without prejudice" material will be admissible if the issue is whether or not negotiations resulted in an agreed settlement (Walker v. Wilsher (1889) 23 Q.B.D. 335), but in relation to any other issue an admission made in order to achieve a compromise should not be held against the maker of the admission or received in evidence; moreover an admission made to reach a settlement with a party is not admissible in proceedings between the maker of the admission and a different party, even if such proceedings are within the same litigation.

It can be seen from the case and the provisions of Order 24/5/45 that the general rule is that *without prejudice* documents are as a general rule inadmissible in proceedings. However there are exceptions to this rule. One such exception is that *"without prejudice"* material will be admissible if the issue is whether or not negotiations resulted in an agreed settlement.

Thus the question in this matter is whether the *without prejudice* documents are sought to be admitted to establish whether or not negotiations resulted in a settlement. A perusal of the *without prejudice* documents attached to the two affidavits show that they

were exchanged in pursuance of reaching a settlement, which settlement was registered under cause number 2001/HP/1055. In my view the reason for their being exhibited is to show that they are the basis on which the settlement was reached, which settlement is sought to be impugned in this matter.

I do note that the application before me right now is to set aside the action for being an abuse of court process, one of the grounds being that the claim was settled. Therefore the without prejudice documents in this matter show that the settlement was reached. They are admissible in evidence. The objection to the use of the affidavits on that ground also lacks merit, and it fails.

I will now deal with the issue of leave to issue the writ. The Defendants in this matter argued pursuant to Order X Rule 18 of the High Court Rules, Chapter 27 of the Laws of Zambia that the notice of the writ and not the originating process, is what should have been served on the Defendant. The Plaintiffs' on the other hand argued that what is applicable is Order X Rule 15 (f) of the said High Court Act, as Order X Rule 18 relates to substituted service.

Order X Rule 18 of the High Court Rules states

> ***"Where a writ of summons, originating summons or originating notice of motion is issued for service out of the jurisdiction upon a person not being a citizen of Zambia, notice thereof and not the originating process itself shall be served upon such person".***

Order X Rule 15 (f) of the High Court Rules on the other hand provides that;

> ***"Service out of the jurisdiction of a writ of summons, originating summons or originating notice of motion, or of a notice of such writ of summons, originating summons or notice of motion may be allowed by the Court or a Judge whenever-***
>
> ***(f) The action is founded on a tort committed within the jurisdiction; or"***

In my view Order X Rule 15 (f) deals with the requirement of obtaining leave for issue for service of process on any Defendant outside the jurisdiction of the court, while the process of how to make such an application is prescribed under Order X Rule 16. Order X Rule 18 deals with service of the notice only and not the originating process, if the person to be served is not a citizen of Zambia.

It is a well settled principle of law that courts only exercise jurisdiction over persons within their jurisdiction, and in order for it to exercise jurisdiction over a person outside the court's jurisdiction, leave to issue and serve process outside jurisdiction must be obtained. This is what is provided for in Order X Rules 15 (f) and 16. The issue of service of process out of jurisdiction after leave to issue for service is obtained, is contained in Order X Rule 18.

It provides that the notice, and not the originating process, must be served. The Defendants' have raised the irregularity after filing the conditional appearance, entailing that they have not waived the irregularity.

They can challenge the irregularity going by the decision in the case of ***MPANDE NCHIMUNYA v STEPHEN HIBWANI MICHELO (1997) S.J. (S.C.)***

It was stated in that case that

> ***"unlike in cases of irregularity on a writ or in the service of a writ which can be deemed to have been waived if no immediate steps or not steps are taken to set it aside, if a statement of claim discloses no cause of action then the plaintiff is not entitled to judgment, even where the defendant does not apply to strike out the statement of claim or renders a defence***".

I will address the irregularity when I deal with the issue of the action being statute barred.

As regards the argument by the Defendants' that the action is statute barred, this is premised on the fact that the action is statute barred as the cause of action arose on 3rd August 1996. Going by the provisions of Section 4 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia, the action should have been brought within three years from that date.

It was acknowledged that Section 22 of the Limitation Act, 1939 extends the limitation period where the person to whom a right of action accrued was under a disability, such as infancy. The case of ***HEWER V BRYANT 1969 1 ALL ER*** was relied on as authority and it was stated that this case applies as it was decided on the basis of the amendment to Section 22 of the Limitation Act, 1939 being the

Law Reform (Limitation of Actions) Act 1954, which was extended to Zambia by virtue of Section 3 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia.

However the argument by the Defendants' was that the Plaintiffs' had been in the custody of their mother who could have taken out the action on their behalf. That in fact their mother had sued under cause 2000/HP/0907 but the said action was dismissed by Hon Mr Justice P. Chitengi for being statute barred.

The Plaintiffs' argument on the other hand was that the Limitation Act 1939 as it was when extended to Zambia by virtue of the British Acts Extension Act, Chapter 10 of the Laws of Zambia and the English Law, (Extent of Application) Act, Chapter 11 of the Laws of Zambia applies.

Section 22 of the Limitation Act, 1939 provides that;

> ***"if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which the last foregoing section applies, one year from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired".***

Section 22 (b) of amendment Act provides that;

"extension of limitation period in case of disability. If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of three years... from the date when the person ceased to be under a disability..... notwithstanding that the period of limitation has expired..... (2) in the case of actions for damages for negligence ..... or breach of duty..... where the damages claimed by the Plaintiff for negligence ..... or breach of duty consist of or include damages in respect of personal injuries to any person ..... (b) this section shall not apply unless the Plaintiff proves that the person under the disability was not at the time when the right of action accrued to him, in the custody of a parent".

Section 3 of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia provides that;

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

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

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

(b) by the addition at the end of section 22 of the following subsection:

(2) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person-

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

(b) this section shall not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent.

(c) by the insertion in subsection (1) of section 31 after the definition of "personal property" of the following definition: "personal injuries" includes any disease and any impairment of a person's physical or mental condition".

In my view the object of this Act was to extend the amendment to the Limitation Act, 1939 contained in the 1954 amendment, as it relates to the limitation period for claims for personal injuries, as well as the extension period for instituting actions for persons who were under disability when the cause of action arose.

Going by the provisions outlined above the Plaintiffs' in this matter have to show that during the period of their disability, that is when they were minors, they were not in the custody of their parent who could have brought the action on their behalf.

No such argument was advanced in this case, and in fact I agree with Counsel for the Defendants' that in fact the evidence in the affidavits shows that the Plaintiffs' mother did institute an action under cause number 2000/HP/ 0907 on their behalf, but the action was dismissed for being statute barred.

It was also noted that the Plaintiffs' mother commenced the action under cause number 2001/HP/1055 where the settlement reached was registered.

In view of the amendment to the Limitation Act, 1939 which was extended to Zambia by virtue of the Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia, the limitation period for the Plaintiffs' action cannot be extended, so as to accrue up to three years upon the Plaintiffs' attaining the age of majority, as they have not shown that they were not in the custody of their mother.

In short the action is statute barred, and to that extent the Learned Deputy Registrar erred when he held that the claim regarding the Ruling under cause number 2000/HP/0907 was an issue not raised in the earlier claim, and the Defendants' application succeeds.

In view of this the irregularity in the service of the process is of no consequence. Further I will not deal with the aspect of the action being an abuse of the court process, and the application for security

for costs. The action is dismissed for being statute barred. Seeing that the action was taken out in pursuance of a claim to rights, I order that each party shall bear their own costs. Leave to appeal is granted.

DATED THIS 5th DAY OF SEPTEMBER, 2016

Kaunda

S. KAUNDA NEWA
JUDGE