

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

2015/HP/0965

BETWEEN:

GLADYS MILINGA

AND

INDO ZAMBIA LIMITED



PLAINTIFF

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 23RD DAY OF
DECEMBER, 2016**

APPEARANCES:

For the Plaintiff : Mr. L. Zulu of Messrs Tembo Ngulube
& Associates

For the Defendant : Mr C. Sianondo of Messrs Malambo &
Company

R U L I N G

LEGISLATION REFERRED TO:

1. ORDER 14A RULE 1 AND ORDER 33 RULE 3 OF THE WHITE BOOK 1999 EDITION.
2. THE LAW REFORM (LIMITATATION OF ACTIONS) ACT CHAPTER 72 OF THE LAWS OF ZAMBIA
3. THE LIMITATION ACT OF 1939
4. HALSBURY'S LAWS OF ENGLAND, VOL 28, 4TH EDITION, REISSUE, PAGE 446, PARA 864

CASES REFERRED TO:

1. CITY EXPRESS SERVICE LIMITED V SOUTHERN CROSS MOTORS LIMITED APPEAL NO. 198 OF 2006
2. NYEKREDIT MORTGAGE BANK PLC V EDWARD ERDMAN GROUP LTD (NO. 2)
3. BOARD OF TRADE V CAYZER, IRVINE AND CO. LIMITED 1927 AC 610

This is the defendant's application to raise a preliminary issue on the point of law pursuant to *Order 14A Rule 1 and Order 33 Rule 3 of the White Book 1999 Edition*. The application was supported by an affidavit filed into Court on 1st July, 2015 deposed to by **Christopher Wakung'uma** the defendant's Chief Manager-Human Resource. The gist of the affidavit evidence is that according to paragraph 3 and 4 of the plaintiff's statement of claim she was employed on 2nd May, 1985 and worked for 24 years. That the 24 years ended on 2nd May, 2009 and that her claim for gratuity ought to have been paid on 3rd May, 2009. The defendant through the deponent averred that the plaintiff commenced the action herein on 23rd June, 2015 which period was more than six years from 3rd May, 2009 when her gratuity ought to have been paid. The deponent contended that the action on contract, like the one before me, ought to have been commenced within a period of six years from the date of the cause of action.

In opposing the application by the defendant, the plaintiff filed an affidavit in opposition on 16th July, 2015 wherein she mainly asserted as follows:

That following her service of 24 years, on the 22nd May, 2009, she applied to be considered for normal retirement as the same depended on the acceptance of the defendant who had the discretion to defer or otherwise extend the time depending on the staffing needs at the time of one's application.

That on 1st June, 2009, the defendant through the chief manager-personnel responded to her application that her

application for normal retirement had been accepted but she was given one month notice up to 30th June 2009 to enable her handover her role.

That according to the terms of conditions of service and in particular clause 7.0 of the said conditions which formed the basis of her claims in the statement of claim, gratuity was payable at the end of contract. Now produced and marked "**GM6-18**" is a copy of the conditions of service as proof thereof.

That while she had served for 24 years as at 2nd May, 2009, she was advised and verily believed that her right to gratuity did not accrue until the end of the contract of service which happened on 30th June, 2009.

That the action having been filed on the 23rd June, 2015, the same was within the statutory period of limitation which only ended on the 30th June, 2015.

She further pointed out that it was the defendant who elected that the contract of employment should come to an end on the 30th June, 2009.

That the suggestion that the gratuity become payable on the 2nd May, 2009 lacked merit and was a mere attempt to deprive her of her accrued right.

The application was heard on 28th October, 2015 and both parties made *viva voce* submissions to augment their affidavit evidence.

Counsel for the defendant, **Mr C. Sianondo** reiterated that the matter herein was commenced six years after the accrual of the cause of action. He cited the case of **City Express Service Limited v Southern Cross Motors Limited appeal No. 198¹** where the Supreme guided that the first place to look at, when consideration when the cause of action accrued is the statement of claim. It was Counsel's contention that the plaintiff's statement of claim precisely showed that what was being claimed was up to 2nd May, 2009. He went on to argue that the action having been commenced on 23rd June, 2015 was a clear indication that the matter was statutory incompetent before Court. He prayed for the matter to be dismissed for being statute barred.

Counsel for the plaintiff, **Mr. L. Zulu**, on the other hand argued that the cardinal issue for the interpretation of the Court was when the cause of action arose in the matter herein. Counsel submitted that the plaintiff's cause of action emanated from *Clause 7 of the terms and conditions* pursuant to which she served the defendant. It was Counsel's submission that exhibit "**GMS**" produced in the plaintiff's affidavit in *Clause 7.1.1* provided that gratuity was to be payable at the end of the contract. He submitted that the pleadings in this matter were very clear and went on to state that paragraph 4 of the statement of claim categorically stated that the end of contract which was also the date when the cause of action accrued was 30th June, 2009. He agreed that 23rd June, 2009 was indeed very close to the date of limitation but was definitely within the said period.

Counsel for the plaintiff insisted that the claimed period was for 24 years but that did not imply that the action accrued on 2nd May, 2009 but rather at the end of the contract. He submitted that under the circumstances the defendant's notice to raise a preliminary issue was frivolous and lacked merit. He prayed for the application to be dismissed with costs to be paid forthwith.

At the close of the application I invited the parties to address me on the implication of the amendment of the *Limitation Act, 1939* by a Zambian statute which reduced the limitation period to three years and how the said statute affects the matter before Court.

Both parties filed additional written submission for which I am greatly indebted.

Counsel for the plaintiff submitted that their scrutiny of the Zambian statutes that amended the *Limitation Act, 1939* reveals that indeed the said statute was amended by the law *Reform (Limitation of Actions, Etc) Act Chapter 72 of the Laws Zambia*. Counsel further submitted that *Section 3 of Chapter 72* is aptly headed as "*Amendment of Limitation Act, 1939, as respects personal injury actions*"

For ease of reference he reproduced the said *Section 3* as follows:-

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 action 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 damage 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 action 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.

He submitted that the full import of the above provision is that the statutory period of limitation in so far as a claim for damages which include personal injuries had been reduced from six years provided under the *Limitation Act, 1939* to three years as per *Chapter 72 of the laws of Zambia*.

In the present matter, the limitation period is six years as provided by *Section 2 of the Limitation Act, 1939* as the cause of action is founded on contract. Counsel contended that the said

section 2 of the Limitation Act, 1939 has not been repealed by *section Chapter 72* but rather the nature of amendment is “*by the insertion of the following proviso at the end of subsection (1) of section 2*”.

In the circumstances, it is our submission that the three years limitation period on which the Honourable Judge invited the parties to submit on has no relevance in the current case as the said period only relates to personal injury claims.

Counsel for the defendant also submitted in his written skeleton arguments that the insertion of the *proviso* as afore reproduced related to the following actions:-

- (i) Negligence, Nuisance or;
- (ii) Breach of duty (whether the duty exists by virtue of contract or independent of any contract or any such provision);
- (iii) Where the damages claimed for the negligence, nuisance or breach of duty consist of or, includes damages in respect of personal injury to any person.

Counsel contended that from the above category and in particular category (ii) it becomes clear that where the duty exist by virtue of a contract, the action should be brought under the three years limitation. It was canvassed by Counsel for the defendant that the statute being clear and the words in the Act being unambiguous and since the action in this matter is premised on a duty which arises out of the contract between the parties herein, it falls under the category of matters which should be commenced within three years. His argument was that the

plaintiff's claim having been brought outside the three years period was therefore statute barred and wrongly before Court.

I have carefully considered the submissions from Counsel for both parties on the applicability of the amended *Limitation Act Of 1939* to the case in *casu*. It is my immediate affirmation that the amendment to *Section 2 of the Limitation Act, 1939* relates purely to personal injury actions and does not extend to actions relating to contract. It is also apparent from *Section 2 (1) (a) of the Limitation Act, 1939* which is couched in the following terms:-

“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;...”

that any action based on a simple contract must be commenced within a period of six years from the date the cause of action accrues. In my considered view a contract of employment is a simple contract and falls under the ambit of the six years limitation period. I therefore agree with the submission by Counsel for the plaintiff that the three years limitation period as amended by the law *Reform (Limitation of Actions, Etc) Act Chapter 72 of the Laws of Zambia* has no relevance to the matter before me. Accordingly, the limitation period for the matter before me is six years from the date it accrued.

This brings me to determine the question of when the cause of action accrued in the matter herein.

In **Nyekredit Mortgage Bank Plc v Edward Erdman Group Ltd (No. 2)**² Lord Nichollas of Birkenhead stated that:

“.... Causes of action for breach of contract and in tort arise at different times. In cases of breach of contract, the cause of action arises at the date of the breach of contract. In cases in tort, the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage.”

Further, the learned authors of **Halsbury’s laws of England, Vol 28, 4th Edition, Reissue, page 446, para 864** state as follows:

“In an action for breach of simple contract, the cause of action is the relevant breach and not the time of damage as breach of contract is actionable per se. Accordingly, such an action must be brought within six years of a breach; after expiration of that period, the action will be barred, although damage may have accrued to the plaintiff within six years of the action brought....”

In **Board of Trade v Cayzer, Irvine and Co. Limited**³ Lord Atkinson made the following observation.

“The whole purpose of this Limitation Action is to apply to persons who have good causes of action which they could if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.”

From the above authorities, it is clear that the general rule is that the cause of action in a simple contract accrues on the date of the breach and that the limitation period begins to run when the plaintiff’s cause of action accrues. The authorities also show that

the limitation period for a matter involving a simple contract is six years.

However, the learned authors of **Halsbury's laws of England 4th Edition, Volume 28, Reissue, at para 1083, page 553** states as follows:

“where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in any such estate, and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right is deemed to have accrued on and not before the date of the acknowledgement or payment.”

Further, the **Limitation Act 1939** provides, under **Section 23(4)**, that:-

“where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment...”

The above authorities show that when a person liable acknowledges a claim, time begins to run afresh, from the date of acknowledgment.

In the matter before me the plaintiff's action arises out of her contract of employment with the defendant. It is evident that the defendant in the letter dated 1st June, 2009 exhibited as **GM1** in

the plaintiff's affidavit in opposition extended the contract of employment for the plaintiff to 30th June, 2009 and acknowledged that the final computation of her terminal benefits was to be availed to her on 29th June, 2009. It is also apparent that in line with Clause 7.1.1 of the plaintiff's conditions of service the payment of her gratuity was to be made at the end of the contract.

On the authorities I have referred to above, it is my considered view that notwithstanding that the plaintiff's claim is for the period 2nd May, 1985 to 2nd May, 2009 her right to gratuity only accrued or started to run when her contract eventually came to an end on 30th June, 2009. Thus, I find that this matter is not statute barred because time began running from the new date which the defendant acknowledged as the plaintiff's end of contract. This application is hereby dismissed and costs shall be in the cause.

Leave to appeal is granted.

Dated at Lusaka this 23RD day of DECEMBER 2016



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M. CHANDA
JUDGE

