

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2016/HP/0395**

**B E T W E E N :**

PARES CHANDRA PAL

**PLAINTIFF**

**AND**

GM INTERNATIONAL (Z) LTD  
GILCON (Z) LTD

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers  
on 22<sup>nd</sup> March, 2017**

*For the Plaintiff* : Mr. K. Khanda, Messrs Central Chambers  
*For the Defendant* : Ms. R. Mwambi, Messrs OMM Banda & Co.

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**R U L I N G**

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**Case Authorities Referred To:**

1. *Gabriel Namulambe, Electoral Commission of Zambia and Kapson Fluence Chilufya Appeal No. 180/2013*
2. *Zambia Consolidated Copper Mines v Joseph David Chileshe – 2002 Z.R. 86*
3. *Mususu Kalenga Building and Winnie Kalenga v Richman's Money Lenders Enterprises (1999) ZR 27*
4. *Edpat Trade Investments Limited v Plessey Zambia Limited (2010) 2 ZR 288*
5. *Zambia Revenue Authority v Jayesh Shah (2001) ZR 60*
6. *Daniel Mwale v Njolomole Mtonga (sued as Administrator of the estate of the Late Gabriel Siwonamutenje Kaapuma Mtonga and the Attorney General SCZ Judgment No. 25 of 2015*
7. *William David Carlisle Wise v E F Hervey Limited (1985) ZR 17*

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999 Edition*
3. *The English Limitation Act, 1939*

This is an appeal against the Learned Deputy Registrar's Ruling dated 29<sup>th</sup> November, 2016, in which the Defendants applied *in limine* to dismiss portions of the Plaintiff's claim for being statute barred.

The background to the appeal is that the Plaintiff commenced this action on 2<sup>nd</sup> June, 2014. According to his Statement of Claim, he was employed as a Group Financial Controller by the Defendants until 2008. After the expiration of his contract, the Defendants failed to settle his terminal benefits in the sum of US\$193,292.00.

On 24<sup>th</sup> March, 2015, the Defendant entered conditional appearance raising issue *in limine*, in which they challenged the Plaintiff's mode of commencement of action before the Commercial Court. By a Ruling dated 26<sup>th</sup> June, 2015, the Commercial Court sent the Plaintiff's matter to the General List. On 29<sup>th</sup> November,



2016, the Learned Deputy Registrar granted the Plaintiff leave to amend his Writ of Summons Statement of Claim.

Disenchanted with the Learned Deputy Registrar's Ruling, the Defendant brings this appeal advancing three grounds as follows:

- 1. The Learned Deputy Registrar erred and misdirected herself both in law and fact by ignoring the fact that the action is statute barred as the Plaintiff commenced the action 8 years and 10 months later.**
- 2. The Learned Deputy Registrar erred and misdirected herself both in law and fact by granting the Plaintiff leave to amend the Statement of claim based entirely on dead writ that cannot be brought back to life for non-compliance of the law by the inordinate delay on Plaintiff commencing the action.**
- 3. The Learned Deputy Registrar erred and misdirected herself both in law and fact by ignoring the fact that the cause of action in paragraph 10 of the statement of claim is already a subject of litigation between the 1<sup>st</sup> Defendant and Konkola Copper Mines PLC under cause 2007/HP/1225 which is pending for Arbitration.**

Learned Counsels filed written submissions for which I am indebted. Learned Counsel for the Defendants submitted in ground 1 that the Court below ought to have noted that paragraphs 5, 6, 7 and 10 of the Plaintiff's Amended Statement of Claim issued on 26<sup>th</sup> December, 2016, and the contracts giving rise therein to the Plaintiff's claim in the originating process dated 3<sup>rd</sup> June, 2014, were statute barred. Counsel contended that paragraph 5 of the

Amended Statement of Claim referred to a contract dated 1<sup>st</sup> October, 1999 which expired on 30<sup>th</sup> September, 2000, which is approximately 14 years after the original process of 2014 and subsequently amended in 2016.

Counsel stated that paragraph 6 of the Amended Statement of Claim referred to the contract which expired on 30<sup>th</sup> September, 2001, thereby revealing inordinate delay which she argued was beyond redemption. She also stated that paragraph 7 of the Amended Statement of Claim referred to a contract which expired on 30<sup>th</sup> September, 2005, which is 9 years and was similarly circumstanced in delay.

It was Counsel's submission that paragraph 10 of the Amended Statement of Claim referred to a contract in which the parties agreed that the Plaintiff would be paid a commission of US\$5,000 on 28<sup>th</sup> October, 2006. It was therefore statute barred. Counsel argued that the Plaintiff should have commenced litigation before the expiration of six years from date on which his cause of action arose. Counsel went on to rely on a plethora of authorities to



buttress her assertion on the statute barred claims. She insisted that the contracts mentioned in paragraphs 5, 6, 7 and 10 of the Amended Statement of claim could not now be the basis for enlarging time for the Plaintiff's presentation of claims.

Counsel's arguments in ground two were no different from those in ground 1. She argued that the contract which should have been presented for adjudication was only to be found in paragraph 8 of the Amended Statement of Claim. Counsel called in aid the case of **Gabriel Namulambe, Electoral Commission of Zambia and Rapson Fluence Chilufya**<sup>1</sup> where the Supreme Court stated thus:

**"We must act on settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of amendment, would be barred by the Statute of Limitations, it would be allowing the Plaintiff to take advantage of her former writ to defeat the Statute and taking away an existing right from the Defendant, a proceeding which as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment but certainly as a general rule it will not do".**

Counsel also drew my attention to the case of **ZCCM v Joseph David Chileshe**<sup>2</sup> where the Supreme Court held that:

**"We are of the view that although Order 20 Rule 5 gives the Court power to allow the Plaintiff to amend his writ or any party to amend**

**his pleadings, it does not provide a wide discretion and does not allow a governing principle that an amendment after the expiry of the limitation period will not be allowed unless it is just to do so and it will be just to do if they are peculiar circumstances which make the case an exceptional one”.**

Upon those authorities, Counsel contended that the Plaintiff's action was statute barred. In ground 3, Counsel submitted that the issue raised in paragraph 10 of the Amended Statement of Claim was a subject of arbitration and was therefore res judicata. By including it, Counsel stated that the Plaintiff sought to abuse the process of Court.

In response, Learned Counsel for the Plaintiff globally contended that the Defendant's appeal was filed outside the remit of Order XXX Rule 10 of the High Court Rules. Counsel argued that the proper course for the Defendant should have been to seek leave to appeal out of time. In the absence of an order extending time within which to appeal, Counsel submitted that the notice of appeal was improperly before the Court and incompetent. Thus, the Court was bound to dismiss it for want of jurisdiction.

In response to ground 1 of appeal, Learned Counsel submitted that the Learned Deputy Registrar was on firm ground when she

held that the Plaintiff stayed in the employment of the Defendants until 30<sup>th</sup> June, 2008. By commencing this action on 3<sup>rd</sup> June, 2014, the Plaintiff therefore was well within the limitation period of six years.

In ground 2, Counsel contended that the Learned Deputy Registrar could not be faulted for allowing the Plaintiff to amend his Statement of Claim because it was commenced within the six years limitation period provided for actions based on contract. Counsel equally referred me to the case of **Zambia Consolidated Copper Mines** case.

Counsel contended that the amendments to the Writ and Statement of Claim were merely a form of modification, development or variation of the original cause of action which are permitted by law as demonstrated above. He argued that the Learned Registrar could not be faulted in upholding the law correctly.

In ground 3, Counsel submitted that the ground never arose in the Court below and could not be raised on appeal as held in the



case of **Mususu Kalenga Building and Winnie Kalenga v Richman's Money Lenders Enterprise**<sup>3</sup> where the Supreme Court guided as follows:

**"We have said before and wish to reiterate here that where an issue was not raised in the Court below it is not competent for any party to raise it in this Court".**

Counsel submitted that the averment in paragraph 10 of the Amended Statement of Claim arose from the agreement executed between the Plaintiff and the Defendants. The agreement was to the effect that the Plaintiff would receive a commission on all jobs contracted by his employers with Konkola Copper Mines Plc. Thus, the problems between the Defendants and Konkola Copper Mines Plc. over those contracts had nothing to do with the Plaintiff.

It was Counsel's submission that ground 3 was a radical departure from the objection advanced in the Court below by the Defendants. He cited the case of **Edpat Trade Investments Limited v Plessey Zambia Limited**<sup>4</sup> where Kajimanga J. as he then was held that:

**"A radical departure from the case pleaded should not be allowed since invariably the opponent is ambushed, and would have neither nor opportunity to meet it".**

He concluded by citing the case of **Zambia Revenue Authority v Jayesh Shah**<sup>5</sup> where the Supreme Court held that:

**“We rule that the objection was not well taken. Cases should be decided on their substance and merit and where there has been only a very technical omission or oversight not affecting the validity of the process”.**

I have seriously considered the grounds of appeal and the submissions advanced by the respective parties. In my considered view, grounds 1 and 2 of the appeal canvass the same issue as to whether the Plaintiff's action is statute barred. Therefore, I will deal with both grounds at the same time. I will thereafter proceed to deal with ground 3 of the appeal.

In the present case, the Defendants' contention is that the Plaintiff should have commenced his action in Court within six years from the date that his factual situation arose. As a result, the Plaintiff's action is statute barred. On the other hand, the Plaintiff argues that his claims are not statute barred because he had continuing obligations with the Defendants. Thus, time only begun to run after he left employment in 2008.

The Limitation Act, 1939 of the United Kingdom applies in Zambia subject to the amendments set out in the Law Reform (Limitation of Actions) Act. Section 2 (1) (a) of the Limitation Act provides that:

*“the following action should not be brought after the expiration of six years from the date on which the cause of action arose, that is to say:*

a) **Actions founded on simple contract ..”**

In the case of **Daniel Mwale v Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga) v The Attorney General**<sup>6</sup>, the Supreme Court held *inter alia* that:

*“...the Statute of Limitation when raised, brings forth a serious legal question as to whether the court has jurisdiction to entertain the action before it, given that it was brought outside the limit period. It hardly bears repeating that the issue of jurisdiction is a threshold question and a lifeline for continuing any proceedings. Where a court holds the opinion that it has no jurisdiction, the very basis for continuation of the proceedings before it – it must forthwith cease to deal with that matter. In our view, the issue of statutory bar when raised is as much about the jurisdiction of the court as it is a statutory defence for a party. It is a legal point touching on both the court’s jurisdiction and a provision of a statute ....”*

Further, in the **Daniel Mwale** case, the Supreme Court went on to state that:



***“...time begins to run when there is a person who can sue and another to be sued, when all facts have happened which are material to be proved to entitle the Plaintiff succeed ...”***

In the case of **William David Carlisle Wise v E.T. Hervey**

**Limited<sup>7</sup>**, the Supreme Court held that:

***“(a) 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 upon which he can establish a right or entitlement to a judgment in his favour against another”.***

The controversial amendments in the Plaintiff’s amended Statement of Claim are stated thus:

*(5) Initially the Plaintiff was employed on a contract from 1<sup>st</sup> October, 1999 to 30<sup>th</sup> September, 2000 on a local salary of K1,500.000 per month and an inducement allowance of US\$1,000.00 net per month. The inducement allowance of US\$1,000.00 net per month, was paid for the first six months of the contract after that it was increased to US\$1,200.00 net per month.*

*(6) On 26<sup>th</sup> July, 2000, the Plaintiff was offered another contract up to 30<sup>th</sup> September, 2001 at a local salary of K2,500.00 and inducement allowance of US\$1,200.00 net per month.*

*(7) The Plaintiff’s contract was further renewed from 1<sup>st</sup> October, 2001 to 30<sup>th</sup> September, 2005 at a local salary of K3,000.00 and inducement allowance of US\$1,800.00 net of taxes per month.*

*(10) On 28<sup>th</sup> October, 2006 the parties also agreed that the Plaintiff will receive a Sales Commission at the rate of 5% of the contract sum on jobs contracted with Konkola Copper Mines/Konkola Deep Mining Project and a contract and one such contract was clinched with Konkola Copper Mines/Konkola Deep Mining Project in the sum of US\$1,700.000 on which the Plaintiff was entitled to a commission of US\$85,000.00”.*

After carefully analyzing the sequence of events as disclosed in the Plaintiff's Amended Statement of Claim, I am of the considered view that the Plaintiff's factual situation manifested in the year 2008 when the Plaintiff could attach liability against the Defendants. The Plaintiff should not have waited for his continuing obligations with the Defendants to conclude before commencing litigation. By not taking steps to litigate his claims, he has deprived himself an opportunity for the Court's intervention. The resultant effect accordingly bars the Plaintiff's claims in paragraphs 5, 6 and 7 of the Amended Statement of Claim. I therefore have no jurisdiction to continue the proceedings on those paragraphs, which are accordingly struck out of the Amended Writ of Summons and Statement of Claim.

As regards paragraph 10 of the Amended Statement of Claim, the Plaintiff has not challenged the fact of the arbitration proceedings between the Defendants and Konkola Copper Mines but rather insists that the matter does not affect him. I, am however, bound to acknowledge that where there is a binding arbitration agreement between parties, the Court's jurisdiction is

removed from such proceedings. I therefore, do not agree with the Plaintiff's contention that the Defendant's challenge of paragraph 10 of the Amended Statement of Claim amounts to a radical departure from the case pleaded. I have a responsibility to recognise litigation that is before different Courts or an arbitral tribunal. For that reason, I find that I have no jurisdiction to entertain paragraph 10 of the Amended Statement of Claim, which I accordingly strike out.

Before I conclude, I wish to remark that the order for leave to appeal out of time was only signed by the Learned Deputy Registrar on 7<sup>th</sup> March, 2017, following the notice of appeal dated 7<sup>th</sup> March, 2017. Thus, the objection raised by the Plaintiff which is purely technical and unjustified cannot be a basis for dismissing this appeal, which in my view has merit. I therefore, refuse to accept the Plaintiff's contention on this point.

In the result, the appeal succeeds.

I award costs to the Defendants to be taxed in default of agreement.



Leave to appeal is granted.

Dated this 22<sup>nd</sup> day of March, 2017

*M. Mapani*

M. Mapani-Kawimbe  
**HIGH COURT JUDGE**