

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

2015/HPC/0444

BETWEEN:

MUCKEY DEAN BUTT

AND

PATRICK GODFREY NKOLE  
FAUSTINA MWANGO CHIBOWA  
FRANCIS SUNGWE  
DOROTHY KABILA  
DAVIE NKANDU CHILAMBE  
CHRISTOPHER KAFULA SUNGWE  
TAFIMONWAMONWA MINING COMPANY LIMITED

PLAINTIFF

1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT  
5<sup>TH</sup> DEFENDANT  
6<sup>TH</sup> DEFENDANT  
7<sup>TH</sup> DEFENDANT



*In Open Court before Mr. Justice Sunday B. Nkonde, SC at Lusaka this 5<sup>th</sup> day of April, 2017.*

*For the Plaintiff : Ms. Lydia Sameta of Messrs Mambwe Siwila Lisimba Advocates.*

*For the Defendants : Mr. Terence Chabu of Messrs Terence Chabu & Company*

---

## J U D G M E N T

---

### CASES REFERRED TO:

- 1) *City Express Service Limited v Southern Cross Motors Limited (2006) Z. R. 263*

### LEGISLATION REFERRED TO:

- 1) *Limitation of Actions Act, 1939*

OTHER WORKS REFERRED TO:

2) *Halsbury's Laws of England, 3<sup>rd</sup> Edition, Volume 24.*

By Writ of Summons and Statement of Claim filed on 19<sup>th</sup> October, 2015, the Plaintiff commenced this action against the Defendants claiming for:

- (1) *A declaration that he is still a shareholder in the 7<sup>th</sup> Defendant Company.*
- (2) *A consequential Order that his shareholding be restored on the Register of the 7<sup>th</sup> Defendant Company.*
- (3) *An Order that the 7<sup>th</sup> Defendant Company accounts for all dividends due to the Plaintiff since he became shareholder in 1991.*
- (4) *Interest on any amounts found due.*
- (5) *Further or other relief.*
- (6) *Costs.*

In the Statement of Claim, the Plaintiff averred that he was at the material time a shareholder in the 7<sup>th</sup> Defendant Company in which the rest of the Defendants were purported shareholders. It was further averred that the Plaintiff's shareholding of 15% arose from various monetary contributions made at the inception of the 7<sup>th</sup> Defendant's operations. The 15% shareholding was allotted in October, 1991 and registered at the Patents and Companies Registration Agency (PACRA) but unknown to the Plaintiff and without his consent, the Plaintiff alleged that the shareholding in the 7<sup>th</sup> Defendant was fraudulently changed to reflect the

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup>, Defendants as the only shareholders. The Plaintiff outlined the particulars of fraud as:

- (i) *Withdrawing the shares without the Plaintiff's consent.*
- (ii) *Misrepresenting to PACRA that the Plaintiff no longer had shares in the 7<sup>th</sup> Defendant Company.*
- (iii) *Allotting the Plaintiff's shares to other persons without the Plaintiff's consent.*

The Plaintiff also asserted that he only became aware of the fraud on 29<sup>th</sup> October, 2012 when he conducted a search at PACRA. The Plaintiff further asserted that he had never been invited to any meeting of the 7<sup>th</sup> Defendant and has never received dividends on his shares resulting in loss.

In the Defence filed into Court on 4<sup>th</sup> December, 2015, the Defendants denied the allegation that the Plaintiff was at any time a shareholder in the 7<sup>th</sup> Defendant Company and further that none of the original shareholders sold any shares to the Plaintiff as in fact the 7<sup>th</sup> Defendant had no shares to allot to the Plaintiff. The 7<sup>th</sup> Defendant also averred that there was no shareholder resolution passed to allot 15% shareholding in the 7<sup>th</sup> Defendant and as such no share certificate was issued to the Plaintiff.

The Defendant also denied that the Plaintiff made various monetary contributions at the inception of the 7<sup>th</sup> Defendant's mining operations and further denied the allegation of fraud or misrepresentation to PACRA or withdrawal of shares from the Plaintiff.

On the other hand, the Defendants avered that the Plaintiff illegally gained access to the 7<sup>th</sup> Defendant's documents when one of the shareholders died and made unlawful alterations to pre-signed letterheads and also illegally caused the alteration of the 7<sup>th</sup> Defendant Companies Form 12 without the consent of other shareholders.

Lastly, the Defendants' plea was that the Plaintiff's claim was statute barred as the Plaintiff failed and or neglected to commence the action once the purported allocation of shares in 1991.

On the basis on the facts in the Defence, the Defendant also made a Counterclaim for,

- (i) *A declaration that the alteration to Company's Form 12 was illegal.*
- (ii) *A declaration that the Plaintiff's action is Statute barred.*
- (iii) *Any other relief the Court may deem fit.*
- (iv) *Costs.*

In the Defence to the Counterclaim, the Plaintiff denied having illegally gained access to the 7<sup>th</sup> Defendant's documents or having any pre-signed letterheads or filing any documents at PACRA as alleged by the Defendants.

The Plaintiff also denied that the action was Statute barred and maintained that the fraud was discovered in 2012 when he made a search at PACRA and,

therefore, 6 years had not expired between the time the fraud was discovered and the time of commencement of the action on 19th October, 2015.

The parties by respective Learned Counsel filed Skeleton Arguments whose portions I will refer to in the course of the Judgment.

At the trial of this action, the Plaintiff (PW1) was the only witness. His evidence in-chief was in the following pattern. He stated that he first met the late Gabriel Kabila (the deceased) and the 1<sup>st</sup> Defendant in 1989 when the deceased and the 1<sup>st</sup> Defendant both explained that they were looking for an Investor to help with the mining activities of the 7<sup>th</sup> Defendant. At that time, the deceased was a Shareholder and Managing Director and the 1<sup>st</sup> Defendant a Shareholder and Company Secretary of the 7<sup>th</sup> Defendant.

According to PW1, at the request of the deceased and the 1<sup>st</sup> Defendant, he advanced the duo a loan with a repayment period of 2 to 3 months and after two months, again at the duo's request, an additional loan was given. The third time the two asked for a further loan, PW1 refused but after visiting the 7<sup>th</sup> Defendant's Mine in Kitwe to understand the problems that were being faced, a further loan was given. In return, as guarantee on the loans, the two offered PW1 shares in the 7<sup>th</sup> Defendant. 10% Shareholding was initially agreed upon but was later increased and agreed at 15% and letters to the effect were given to PW1 by the duo. He further stated that he verified the shareholding as dully registered at the Ministry of Commerce and Industry. However, unknown to him, and without his consent, he came to discover on 29<sup>th</sup> October, 2012 when he conducted a

search at PACRA and obtained a print-out that the 1<sup>st</sup> to 6<sup>th</sup> Defendants had changed the shareholding in the 7<sup>th</sup> Defendant to reflect themselves as Shareholders to his exclusion.

In cross-examination by Learned Counsel for the Defendants Mr. Chabu, PW1 maintained that he gave the first loan of K75,000-00 to the deceased and the 1<sup>st</sup> Defendant representing the 7<sup>th</sup> Defendant in 1989 but admitted no loan agreement was signed. PW1 also stated that he did not make efforts to recover the loan because the deceased and the 1<sup>st</sup> Defendant gave a reasonable explanation that the Mine had collapsed and a second loan was required.

PW1 also admitted that there was no Contract signed on the shareholding to him as the deceased and the 1<sup>st</sup> Defendant just gave letters to the effect and told him they were going to speak with the 7<sup>th</sup> Defendant's Board of Directors in Kitwe but made PW1 as a shareholder to guarantee the loans.

PW1, however, admitted that he had been aware of the 7<sup>th</sup> Defendant's dispute on his shareholding from the time of the 22<sup>nd</sup> August, 1997 meeting at which he produced documents to prove the shareholding but these were rejected. To PW1, other persons that attended the meeting were biased against him. PW1 further admitted that he was not able to show any PACRA print-out on his shareholding in the 7<sup>th</sup> Defendant between 1991 and 2012 but explained that this was because his name had been removed as a shareholder at PACRA.

Asked if he remembers the 7<sup>th</sup> Defendant writing the letter dated 26<sup>th</sup> August, 1997 which is at pages 44 to 45 of the Defendant's Bundle of Documents

disputing his shareholding in the 1<sup>st</sup> Defendant, PW1 admitted though he further stated that he never saw the letter until after the passing away of his late father on 14<sup>th</sup> February, 2008 when the letter was found among his late father's belongings.

PW1 also denied having been a Director in the 7<sup>th</sup> Defendant.

In re-examination by Learned Counsel Lydia Sameta, PW1 maintained that he did not receive the letter of 26<sup>th</sup> August, 2017, and insisted that he was still a shareholder in the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant (DW1) was the Defendant's only witness. His evidence in-chief was that there was no authentic PACRA print-out to show that PW1 was a shareholder on the 7<sup>th</sup> Defendant. DW1 further stated that there was no way PW1 could not have been participating in the 1<sup>st</sup> Defendant's meetings from 1991 to 2015 if he was a shareholder. According to DW1, PW1 could also not have had 15,000 shares as 15% shareholding in the 1<sup>st</sup> Defendant considering that the 1<sup>st</sup> Defendant had only 30,000 shares as at 30<sup>th</sup> October, 1991.

In cross-examination by Learned Counsel Mr. Sameta, DW1 stated that it was common practice for the deceased as Managing Director and him (DW1) as Company Secretary respectively of the 7<sup>th</sup> Defendant to pre-sign blank letter-heads but he did not know whether the deceased used these letter-heads or not. He further stated that the letter-heads were pre-signed in 1996 but nonetheless conceded that there was no evidence to show that PW1 got any letter-heads

illegally. He further conceded that PW1 gave contributions to the 1<sup>st</sup> Defendant totaling K112,230-00 but added that the contributions were made on the basis of a verbal promise that as soon as the mine started production, the Plaintiff would be sold the products.

In re-examination by Learned Counsel Mr. Chabu, DW1 disowned the authenticity of the signatures alleged to be his on the two letters; on the 10% and 15% allotment of shareholding from the 7<sup>th</sup> Defendant to the Plaintiff.

Both parties also filed Skeleton Arguments which I intend to make reference to in the course of the Judgment.

The first question I have to decide is whether this action is statute barred and then proceed to determine whether the Plaintiff is a shareholder in the 7<sup>th</sup> Defendant and if so, to what extent and any consequential Orders.

On whether the action is statute barred, in the Defendant's Skeleton Arguments, it is contended that the action is statute barred as it was not brought within 6 years from October, 1991. The Defendants cited **Section 2(1)** and **2(2)** of the **Limitation of Actions Act** which provide as follows:

*" 2. Limitation of Actions of Contract and Tort and certain other Actions:*

*(1) The following actions shall not be brought after the expiration of six years from the date on which the course of action accrued,*

*that is to say:*

*(a) Actions founded on simple contract or on tort.*

*(2) (2) An action for an account shall not be brought in respect of any other matter which arose more than six years before the commencement of the action."*

The Defendants also relied on, inter-alia, the case of **City Express Service Limited v Southern Cross Motors Limited**,<sup>1</sup> on the settled principle that a litigant can plead the benefit of a statute at any stage of the proceedings.

According to the Defendants, the contract of allotment of shares fell within the provisions of **Section 2(1) (a)** of the **Limitation of Actions Act** and, thus, ought to have been commenced within 6 years from October, 1991, when the Defendants refused to recognize the Plaintiff's shareholding in the 7<sup>th</sup> Defendant. Further, that the Plaintiff's claim for an account ought to similarly have been brought within the same 6 months and because this was not done, the action should be dismissed.

The Defendants referred to the letter from the 7<sup>th</sup> Defendant to the Plaintiff dated 26<sup>th</sup> August, 1997 to show when the course of action arose. The letter reproduced here below read as follows:

*Date: 26.08.1997*

*Mr. Mac Dean Butt  
Dean's Spray  
P. O. Box 35718*

*possible, given the long standing and commitment to the Company of the Shareholders who are alleged to have transacted this matter.*

6. *According to the latest submission of Directors and shareholders to the Ministry of Trade and Commerce and Industry Registration of Companies Act. No. 26 of 1994 there, have not been any more submissions since the last one in 1990 made by our Lawyers.*
7. *For these reasons your claim for associating yourself with this Company is not acceptable by us. The Directors/Shareholders have therefore resolved that claims by yourself have no basis and your entry to the Company's plot is banned forth with. You are required to surrender your Company's identification Card and Sticker No. 207 dated 5<sup>th</sup> May, 1997, to the Company within 7 days from the date of this letter.*

*Yours faithfully*

*For/TAFIMONWAMONWA MINING CO. LTD*

*(Signed)*

*M. C. CHIBOWA*  
*CHAIRMAN*

*C.C. M/S ELLIS & CO. LTD – KITWE*

*C.C. THE SECRETARY*  
*ESMAZ*  
*KITWE*

On its part, the Plaintiff's by Learned Counsel contended in the Skeleton Arguments that the action was commenced within time. Learned Counsel cited the Learned Authors of **Halsbury Laws of England, 3<sup>rd</sup> Edition Volume 24, paragraph 403 at page 220** where they state as follows:

***“An action of deceit is an action in tort for which the period of Limitation is six years, and in relation to equitable remedies, Equity acted in obedience to the statute and applied a like Limitation; but the running of time for any action based on fraud, is where the right of action as concealed by fraud, does not begin until the fraud has been discovered. Similarly, the Limitation period applied in equity by analogy will be postponed until the fraud is discovered....”***

Thus, it was argued that the Plaintiff had alleged fraud and, in paragraph 8 of the Statement of Claim, had pleaded that he became aware of the fraud upon conducting a search at PACRA on 29<sup>th</sup> October, 2012. Consequently, the action was in fact commenced 3 years later on 19<sup>th</sup> October, 2015 which according to the Learned Counsel was within the limitation period of 6 years.

As can be noted, both parties are agreeable that the 6 year limitation period applies to this action. The difference is on when the course of action arose or accrued.

I have given anxious consideration to the evidence adduced by the parties as well as the respective arguments put forward on when exactly the course of action arose herein. I right away reject the contention of the Plaintiff that the course of action arose on 29<sup>th</sup> October, 2012 when he purportedly discovered the fraud and instead make the finding that the course of action arose on 22<sup>nd</sup> August, 1997 at a meeting attended by the Plaintiff in person at which his shareholding was

rejected. The rejection of the shareholding was further confirmed in the letter from the 7<sup>th</sup> Defendant to the Plaintiff dated 26<sup>th</sup> August, 1997 reproduced above and which the Plaintiff admitted to have seen but only on the passing of his late father on 14<sup>th</sup> February, 1998.

In short, the Plaintiff could have competently sued on the shareholding claim immediately after the meeting of 22<sup>nd</sup> October, 1991.

I must also here emphasize that from the evidence on record, there was nothing pointing to fraud attributable to the Defendants as alleged by the Plaintiff. Not a single document alleged to have been filed at the PACRA Registry on the Plaintiff's 15% shareholding had a PACRA stamp or was any print-out from PACRA shown at trial that the Plaintiff appeared at one time as a shareholder in the 7<sup>th</sup> Defendant on any Companies Form lodged at PACRA.

In my view, the Plaintiff ingeniously used the PACRA search on 29<sup>th</sup> October, 2012 in an attempt to create a course of action founded on fraud when there was no evidence of fraud either in fact or in law. For the avoidance of any doubt, the allegation that the Plaintiff's name at PACRA as a shareholder was removed or the shareholding altered could only have been sustained if he first showed that his names had in fact been included on any Companies Form or Forms at PACRA in the first place. However, there is no such evidence of his claimed shareholding having at anytime been entered on any of the Forms lodged at PACRA or any proof that the Plaintiff was ever entered in the Register of Members of the 7<sup>th</sup> Defendant.

What was only shown at trial were the two letters of allotment of shares from the 7<sup>th</sup> Defendant to the Plaintiff both dated 25<sup>th</sup> October, 1991.

Therefore, the action having been brought after the 6 years limitation period, it is clearly statute barred and I accordingly dismiss the same.

Having dismissed the action, I see no useful purpose that will be served in going further to determine the other claims made by the Plaintiff against the Defendants.

As to the Defendants' counterclaim that the Plaintiff illegally altered the 7<sup>th</sup> Defendant's Companies Form 12, on the list of Directors, not only were particulars of illegality not pleaded but there was no evidence shown at trial that there was lodged at PACRA Companies Form 12 altered by the Plaintiff or that indeed there was such an altered Form 12 with a PACRA Stamp thereon. In any case, at trial, the Plaintiff denied having been a Director in the 7<sup>th</sup> Defendant. The counterclaim on the aspect, therefore, fails.

Both parties having failed in their respective claims, each party will bear their own costs.

Dated at Lusaka this 5<sup>th</sup> day of May, 2017.

  
\_\_\_\_\_  
HON. JUSTICE SUNDAY B. NKONDE, SC  
HIGH COURT JUDGE