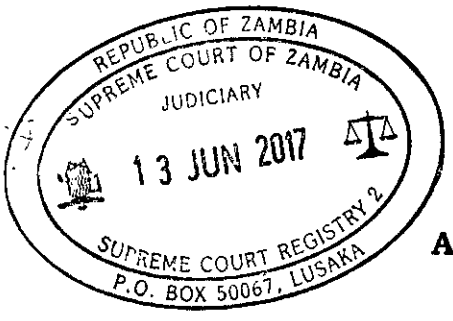
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 178/2014**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

INDO ZAMBIA BANK **APPELLANT**

AND

CHRISTINE BANDA **RESPONDENT**

Coram: **Hamaundu, Malila and Musonda, JJS**
On 6th June and 13th June, 2017

For the Appellant: Mr. C. M. Sianondo, Malambo & Co.

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Indo-Zambia Bank Limited v. Mushaukwa Muhanga: (2009) Z.R. 266**
2. **Indo-Zambia Bank Limited v. BOAZ Kadochi Chinkamba: SCZ Appeal No. 99/2013**
3. **BEAMAN v. ART Limited: [1949] 1 ALL ER 465**
4. **Tito v. Warrel (No. 2), Tito v A-G (1977) 3 ALL. ER 129:**
5. **Isaac Chali v. Liseli Mwale (1995-97) Z.R. 199**
6. **Attorney General v. Major Samuel Mbumwae & 1419 Others: SCZ Appeal No. 83/2010**
7. **Nevers Sekwila Mumba v. Muhabi Lungu: SCZ Judgment No. 200/2014**
8. **King v. Victor Parsons & Co. (1973) ALL. ER. 206**

9. ***Bulli Coal Mining Co. v. Osborne and Archer v. Moss***
10. **BEAMAN v. ARTS Limited [1949] 1 ALL ER 465 AT 469, 470 [1949]**
11. ***Kitchen v. Royal Air Forces Association & Another (1958) ALL ER 241***
12. **Boniface Joseph Sakala v. Zambia Telecommunications Co. Limited: SCZ Selected Judgment No. 46 of 2016**
13. **Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture (Suing as a Firm): SCZ/8/52/2014**
14. **Wilson Zulu v. Avondale Housing Project Limited [1982] Z.R. 172**
15. **Edith Tshabalala v. The Attorney-General: SCZ Judgment No. 17 of 1999**

Legislation referred to:

1. **Order 14A Rule 1 of the Rules of the Supreme Court (the White Book), 1999 Edition**
2. **Limitation Act, 1939 of the United Kingdom**
3. **British Acts Extension Act, Chapter 11 of the Laws of Zambia**
4. **Real Property Limitation Act 1833, S.26**

Other works referred to:

1. ***Essential Contract Law,* 2nd Edition, (London, Cavendish Publishing) at page 78**
2. ***Black's Law Dictionary,* 9th Edition (2009)**

This appeal is arising from a Ruling of a High Court Judge sitting at Lusaka whereby that court dismissed an application which had been launched on behalf of the appellant (the defendant in the court below) to have the action which had been pending before the same court dismissed on a point of law pursuant to Order 14A Rule 1 of the Rules of the Supreme Court (the **White Book**), 1999 Edition.

The application in question was founded on the provisions contained in the Limitation Act, 1939 of the United Kingdom which applies in this country by virtue of the British Acts Extension Act, Chapter 11 of the Laws of Zambia. In terms of that application, the appellant sought to have the respondent's action dismissed on the basis that the same was time-barred.

The facts and circumstances surrounding the dismissal of the application in question are fairly free from controversy and can quickly be recounted.

On 15th June, 1987, the respondent was employed by the appellant as a clerk on permanent and pensionable terms. She subsequently rose through the ranks until she attained the position of branch manager. As branch manager, the respondent started enjoying terms and conditions of employment which were applicable to management staff.

On 5th May, 2007, the respondent wrote to the appellant's chief manager-personnel, expressing her desire to retire from the appellant with effect from 15th June, 2007. The 15th of June, 2007 was to mark the respondent's 20th year in the service of the appellant.

In her said letter, the respondent sought to be paid her *'retirement package as per normal retirement conditions of service."*

On 14th June, 2007, the appellant's managing director wrote to the respondent accepting the respondent's decision to proceed on normal retirement. Upon accepting the respondent's decision, the appellant's managing director advised the respondent that her last working day was to be the 30th of June, 2007 while her retirement dues were to be paid to her on the basis of 3 months' pay for each completed year of service. According to the managing director's letter, the respondent's retirement dues were to be computed on the basis of clause 24.1 of the appellant's Revised Management Terms and Conditions of Service.

Following her final exit from the appellant, the respondent was paid a total sum of K939,372,914.00 by way of her retirement dues. This figure was computed on the basis of the formula earlier alluded to in this judgment and was net of all taxes.

On 16th July, 2014, the respondent instituted an action in the High Court of Zambia against the appellant seeking the recovery of a sum of K994,824.00 by way of gratuity arising from her employment by the appellant.

In her statement of claim, the respondent pleaded, *inter alia*, that the appellant had ***"failed, neglected or otherwise wrongfully omitted to pay the gratuity"*** to her.

On 31st July 2014, the appellant's counsel filed a Notice to Raise a Preliminary Issue on a point of law in the High Court of Zambia on behalf of the appellant in terms of which the appellant was seeking to have the respondent's action dismissed on account of the same having been time-barred under the provisions of the Limitation Act, 1939.

In the affidavit in support of the Notice to raise a preliminary issue, it was deposed on behalf of the appellant that, as the gratuity which the respondent was seeking to recover via her court action ought to have been paid to her on 31st July, 2007, the court action was statute-barred as a period exceeding six (06) years had expired from the time when the relevant cause of action accrued.

For her part, the respondent filed an affidavit opposing the preliminary application. In that affidavit, the respondent deposed that the gratuity which she was seeking to recover via her court action had been fraudulently concealed from her by the appellant and that she only discovered this fact when her former workmate

by the name of Mushaukwa Muhanga was paid her gratuity in 2009 following a judgment which was pronounced in her favour by this court.

On 28th August, 2014 the appellant reacted to the respondent's opposing affidavit to its preliminary application by filing an affidavit in reply in which the deponent of that affidavit deposed that it was not possible that the appellant could have fraudulently concealed the respondent's entitlement to the gratuity which she was seeking because the same had been embedded in the same contract which the respondent had exhibited in her affidavit and which contract had always been in the respondent's possession and custody. According to the deponent of the appellant's affidavit in reply, the respondent should have instituted her legal action within 6 years from the date when she left the appellant if she felt that her contract of employment with the appellant entitled her to gratuity. In the view of the deponent of that affidavit in reply, both the appellant and the respondent were contracting parties and that it was neither the duty nor the responsibility of the appellant to advise the respondent as to her legal rights under the contract which had subsisted between the duo.

Aside from what was deposed to in the parties' respective affidavits, their respective counsel also filed skeleton arguments to buttress the positions which they had respectively taken.

The learned Judge in the court below considered the affidavit depositions which had been deployed before her as well as the parties' respective skeleton arguments and proceeded to make the following pronouncements:

> **"After a careful read of the English cases cited by Mr. Zulu and the Supreme Court decision in the case of *INDO-ZAMBIA BANK V. MUHANGA[1] of 2009*, which led the Plaintiff to discover that she was not paid gratuity when she retired in 2007, I am of the considered view that the Defendant did fraudulently conceal this payment to the Plaintiff. I say so because in 2007 when the Plaintiff retired both parties thought she had been paid her benefits in full. Indeed the Defendant contends in paragraph 5 of the Affidavit in Reply that what it paid to the Plaintiff is what it deemed and continue to deem due to the Plaintiff. Further, in paragraph 7, that it did not have a duty to advise the Plaintiff of the right she had under the contract of employment as both the Plaintiff and the Defendant were contracting parties. I note also that in the *Muhanga[1]* case, the Defendant had contended that employees working on permanent and pensionable basis were not entitled to gratuity. The Supreme Court held that the respondent was entitled to gratuity in accordance with clause 7.0 of the contract.**

The *Muhanga* decision was followed by the Supreme Court in *INDO-ZAMBIA BANK LTD V. BOAZ KADOCHI CHINKAMBA (11) of 2014*[2] cited by Mr. Sianondo.

The respondent in that case sued the Bank after the Muhanga decision [and] Mr. Sianondo also argued that appeal on behalf of the Bank. He contended, *inter alia*, that the respondent accepted his retirement pay without question [because] he understood that he was employed on a permanent and pensionable basis and therefore not entitled to gratuity.

It is not disputed that the Plaintiff in *casu* retired in 2007. At that time both parties accepted that she was paid her dues in full. It is also not disputed that the Plaintiff only became aware that gratuity was not paid to her in 2009. Then she instituted these proceedings in 2014.

The Plaintiff's Counsel contends that there was fraudulent concealment by the Defendant of the Plaintiff's entitlement to gratuity and time only started running in 2009 when the plaintiff discovered she was entitled to it. Counsel relied on *section 269(b) of the Limitation Act*, which provides for postponement of the limitation period where the right of action is concealed by the fraud of the Defendant or his agent etc.

After a careful analysis of this case, it is not disputed that both parties became aware in 2009 that the Plaintiff who was employed on permanent and pensionable basis was entitled to gratuity in accordance with clause 7.0 of the contract. This was after the Muhanga decision was pronounced by the Supreme Court. As earlier intimated, I am inclined to find that there was fraudulent concealment by the Defendant in this case. I note that the Muhanga[1] case was between the Defendant and its former employee Muhanga, such that after the Supreme Court pronounced that Ms

Muhanga, who was employed on permanent and pensionable basis, was entitled to gratuity, the Defendant had a duty to inform the Plaintiff at that stage and since it did not do so it fraudulently concealed this entitlement. The Plaintiff got to know on her own. I find therefore, that time began running in 2009 not 2007. Accordingly, the Plaintiff's claim is within time. I am fortified by the English cases cited.

It was clearly stated in those cases that the limitation period was postponed due to the fraudulent concealment of facts by the Defendant or its agents.

And as contended by Mr. Zulu and held in BEAMAN[3] case "fraud in *section 26(b)* of the Limitation Act was not confined to fraud which was sufficient to give rise to an independent cause of action .... That on the facts, the Company's conduct, by the manner in which it converted the owners chattel and in circumstances calculated to keep her in ignorance of the wrong it had committed amounted to fraudulent concealment within the meaning of *section 26(b)* and therefore, the period of limitation was postponed under that paragraph of the section.

In *casu*, the Defendant did not disclose to the Plaintiff after the Judgment in 2009 and to date contends that the Plaintiff was paid what it deemed and continue to deem due to the Plaintiff. To me the Defendant's actions amount to fraudulent concealment and as already stated time started running in 2009 when she discovered the entitlement. The Plaintiff acted diligently after discovering the fraudulent concealment and brought the action with time. From 2009 to date it's a period of five years. The action arose out of contract as argued and should have been commenced within six years."

The appellant was not satisfied with the ruling of the court below and, consequently, proceeded to launch this appeal after securing the requisite leave of the court below on the basis of the following grounds which are set out in the memorandum of appeal:

> **"GROUND 01**
>
> **The Court below erred both in law and in fact in holding that the Appellant fraudulently concealed the payment to the Respondent and thereby finding that the Respondent's action was not statute barred.**
>
> **GROUND 02**
>
> **The Court below erred both in law and in fact in holding that the Appellant fraudulently concealed the Respondent's payment when the Court established that both parties thought that the Appellant had been paid her benefits in full.**
>
> **GROUND 03**
>
> **The Court below erred both in law and in fact in holding that there was fraudulent concealment by the Appellant by considering the legal rights ascertained by other parties, who had brought their actions in time, to which the Respondent was not a party."**

Both counsel for the parties filed their respective heads of argument to buttress their respective positions. Mr. Sianondo, the learned counsel for the appellant, argued grounds one and two together.

Counsel opened his arguments by repeating the material averments which were contained in the appellant's two affidavits which had been filed to support the application whose outcome is now the subject of this appeal and whose contents we have already alluded to in this judgment. In particular, counsel highlighted the fact that the gratuity which formed the basis of the respondent's court action was embedded in the same contract which the respondent had even exhibited to her own affidavit opposing the preliminary application. Under those circumstances, counsel argued, the gratuity which was being pursued by the respondent could not have been fraudulently concealed from her. Counsel further argued that it was quite odd indeed for the court below to have made a finding of fact suggesting that both parties (that is, the appellant and the respondent) believed that the respondent had been paid her retirement benefits in full while, at the same time, reaching the conclusion that the appellant fraudulently concealed the payment of the gratuity in question to the respondent. Counsel then went on to cite and quote passages from some English cases which we consider to be of very doubtful relevance to the arguments which counsel was canvassing save for the following

passage by Meggary V.C. which was drawn from the case of **Tito v. Warrel (No. 2), Tito v. A-G[4]:**

> **"I also have in mind one of the general principles of the legislation on limitation... This is that, once time begins to run, it runs continuously and that this principle can be ousted only by a statutory provision..."**

Mr. Sianondo accordingly submitted that the respondent's cause of action having accrued on 31st July, 2007, the time did not stop running following the alleged fraudulent concealment but continued to run until the action was statute-barred. According to Mr. Sianondo, the postponement or suspension of time on account of a subsequent fraudulent concealment was introduced by Section 1(2) of the 1980 U.K. Limitation Act which does not apply to our jurisdiction.

With regard to the third and final ground of appeal, counsel for the appellant advanced what we consider to have been a rather startling argument, namely, that, by relying on this court's judgments in the cases of ***Indo-Zambia Bank Limited v Mushaukwa Muhanga***[1] and **Indo-Zambia Bank Limited v BOAZ Kadochi Chinkamba**[2] in its ruling now under attack, the court below extended the interest of the respondent to the judgments we have just cited above to which the respondent was not a party. To

fortify the aforestated argument, counsel cited the decisions of this court in **Isaac Chali v Liseli Mwale**[5] and **Attorney-General v. Major Mbumwae & 1419 Others**[6] in which we said that a court is precluded from considering or taking into account the interests of non-parties when considering a matter before it.

The appellant's counsel concluded his arguments by submitting that some of the language which the court below had employed in its ruling now under appeal suggested that that court was considering the interest of the respondent when it was discussing decisions of this court to which the respondent was not a party.

On behalf of the respondent, counsel also filed his heads of argument in response to the appellant's heads of argument.

Counsel for the respondent opened his arguments by noting that, at the time when the appellant accepted the respondent's application to retire, the former alluded to the latter's entitlement to be paid retirement benefits on the basis of three (03) months' pay for each completed year of service. The appellant did not, at that time, advise the respondent or state anything about paying her (that is, the respondent) gratuity.

According to the respondent's counsel, at the time of the respondent's final exit from the appellant bank on 30th July, 2007, both the appellant and the respondent were unaware of the respondent's entitlement to gratuity. The two only became aware of such entitlement in 2009. According to counsel, the court below actually acknowledged the fact we have just alluded to in its ruling which is the subject of the present appeal. According to counsel, the position which the court below acknowledged in its ruling, as aforesaid, was neither disputed nor did it become the subject of appeal by the appellant.

The respondent's counsel further argued that once the respondent became aware of her entitlement to be paid gratuity in 2009 she took steps in the way of instituting legal proceedings for the recovery of her gratuity in 2014.

With regard to the common knowledge which was allegedly imputed to both parties to this appeal, namely, that the respondent was only entitled to the benefits which were availed to her in July, 2007, counsel for the respondent argued that the logical conclusion which could be drawn from the two parties' ignorance *vis-à-vis* the respondent's entitlement to be paid gratuity was that

both had been labouring under a common mistake. Counsel then went on to define the term "common mistake" by borrowing from ***Black's Law Dictionary***, 9th Edition (2009) whose editors have defined the term as ***"a mistake that is shared and relied on by both parties to a contract".***

The respondent's counsel also argued that although the issue or defence of 'common mistake' was not raised in the manner in which he was raising it, he was alive to the fact that the court below did, in effect, make reference to this phenomenon when she made the finding that both parties herein were only alive to the retirement benefits which the appellant had proceeded to avail to the respondent in July, 2007 but not the gratuity. Accordingly, learned counsel submitted that he felt perfectly in order to raise mistake as a recognised defence in the law of contract in the context of the issues which were at play in the court below and which issues have now been escalated to this court. Put differently, the respondent's counsel was raising 'mistake' as a point of law which, he insisted, he was entitled to do in any court and at any time. Learned counsel proceeded to fortify his point by citing our decision in **Nevers Mumba v. Muhabi Lungu**[7] where we said:

> **"This court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected.**
>
> ...
>
> **It would indeed be calamitous were we to accept the argument implied in the respondent's Counsel's submission that any legal argument and authority not advanced before a lower court cannot be made before this court."**

The respondent's counsel also called in aid the provisions contained in Article 118(2) (e) of the Constitution of Zambia (Amendment) Act, 2015 to buttress the point that justice must be administered without undue regard to procedural technicalities. Learned counsel accordingly proceeded to invite us to accept his argument that the appellant and the respondent's mistaken belief that the latter was not entitled to gratuity had the effect of suspending the limitation period from 2007 to 2009 when both parties realised their mistake. Counsel accordingly cited our decision in **Indo-Zambia Bank Ltd. v. Muhanga**[1] to reinforce his argument.

Learned counsel for the respondent went on to advance arguments which sought to remind us about our duty to intervene, in the name of equity, in matters such as the one at play. In this regard, counsel drew our attention to a passage from the judgment

of Somervell LJ in **Beaman v. ART Limited**[3] where his Lordship said:

> **"I think 'fraud' in S.26 (b) should have the same meaning as 'fraud' in the Real Property Limitation Act 1833, S.26, and in the general equitable principles on which this Section of the Act is based and which it extends."**

Beyond drawing our attention to Somervell, L.J.'s passage as we have just quoted it above, learned counsel for the respondent also called our attention to a passage on 'common mistake' by Jurist G. Monahan (2001) in his Book titled "***Essential Contract Law"***, 2nd Edition, (London, Cavendish Publishing) at page 78 to the following effect:

> **"Equity will only intervene if the five conditions below are all satisfied:**
>
> **(a) There was a common misapprehension;**
> **(b) The misapprehension was of a fundamental nature;**
> **(c) The party seeking the equitable relief must not be at fault;**
> **(d) It must be unconscionable to allow the other party to benefit from the mistake;**
> **(e) The rights of third parties must not be unjustly affected."**

According to counsel, the elements which have been identified above do sit comfortably well with the circumstances of the relief which the respondent is seeking in the action which was disrupted following the launching of the preliminary issue which is the

subject of the present appeal. To cite just a few of the elements, counsel argued that there was a common misapprehension by both the appellant and the respondent that the latter was not entitled to gratuity; secondly, the respondent was not at fault and, thirdly, it would be unconscionable to allow the appellant to benefit from the common mistake.

The respondent's counsel also drew our attention to the **Beaman**[3] case and to the judgment of Lord Denning, M.R. in **King v. Victor Parsons & Co.**[8] where His Lordship said (at pages 209-210):

> ***"The law***
> ***By s 26(b) of the Limitation Act 1939, when-***
>
> ***'the right of action is concealed by the fraud of [the defendant, or his agent] ... the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could, with reasonable diligence have discovered it ...'***
>
> ***By s 31(7) 'right of action' includes 'cause of action.'***
> ***The word 'fraud' here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The cases show that, if a man knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on***

the Statute of Limitations as a bar to the claim: see: Bulli Coal Mining Co. v Osborne and Archer v Moss[9]. In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly': see Beaman v ARTS Ltd ([1949] 1 ALL ER 465 at 469, 470, [1949] 1 KB 550 at 565, 566)[10]. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further enquiry least it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough: see Kitchen v Royal Air Forces Association[11]. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if, by an honest blunder, he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations."

As to the third ground of appeal, counsel for the respondent took the position that his opposing colleague had wholly misapprehended the import of the ruling of the court below. Counsel made the brief point that the **Muhanga**[1] and **Chinkamba**[2]

decisions of this court did not serve to determine the respondent's rights or interests in her own action.

On 1st June, 2017, the learned counsel for the appellant filed heads of argument in reply on behalf of the appellant. Counsel opened these arguments by reiterating his earlier contention that the action which the respondent had instituted in the court below was time-barred as it had been commenced outside the requisite six years for such matters. Counsel cited our decision in **Boniface Joseph Sakala v. Zambia Telecommunications Co. Limited**[12] to support his contention and added that there was nothing that the appellant had done or not done which could have served to prevent the respondent from proceeding with her court action to recover the gratuity which she was belatedly seeking in the action in the court below. Counsel further reiterated his earlier point that the respondent was in possession of everything that she needed to prosecute her claim in court within the prescribed period.

As regards the issue of common mistake which the respondent's counsel had canvassed in the respondent's heads of argument, Mr. Sianondo contended that this was a new issue which did not arise in the court below and that, in consequence, it

cannot be legitimately raised at this stage since it required the adducing of relevant evidence. In this regard, learned counsel for the appellant discounted the relevance and applicability of the cases which the learned counsel for the respondent had relied upon in his arguments to support the contention that the respondent was at liberty to raise a point of law at any time in the course of the proceedings.

With regard to the respondent's counsel's invocation of Article 118(2) (e) of the amended Constitution of the Republic of Zambia, the appellant's counsel's reaction was that Article 118(2) (e) was confined to "procedural technicalities" and could not be properly summoned for the purpose of overcoming a substantive legal issue such as was contained in the Limitation Act, 1939. Once again, counsel also reiterated his earlier contention that a matter such as the constitutional provision in question could not be properly called in aid because it had not been raised in the court below.

Finally, learned counsel for the appellant closed his arguments in reply by quoting a passage from our decision in **Access Bank (Z) Limited v. Group Five/Zcon Business Park Joint Venture (Suing as a Firm)**[13] by which we discounted some

of the misconceptions around Article 118(2) (e) of the amended Republican Constitution including the notion that the duty which is cast upon litigants to observe procedural requirements which guarantee the orderly conduct of litigation had been constitutionally paralysed and rendered redundant.

At the hearing of the appeal, Mr. Sianondo, the learned counsel for the appellant confirmed that he had filed two sets of arguments being the primary ones which were filed on 18th November, 2014 and the appellant's heads of argument in reply which were filed on 1st June, 2017. Mr. Sianondo further confirmed that he was relying on the filed arguments and had nothing useful to add save that he stood ready to take any questions that the court deemed necessary to put to him.

For his part, counsel for the respondent filed a Notice of non-attendance in which he confirmed that the respondent was relying entirely on the filed heads of argument.

In his response to the questions which were put to him, Mr. Sianondo accepted that the trial court had made a finding of common mistake between the two parties as regards what retirement benefits were due to the respondent. However, Mr.

Sianondo insisted that the appellant was never at any point mistaken as to what retirement benefits were due to the respondent nor did the appellant conceal or fraudulently conceal any benefits which were due to the respondent.

With regard to the conditions which Order 14A of the **White Book** (1999 Edition) sets and requires to be fulfilled before any litigant can invoke the procedure which that Order regulates, Mr. Sianondo indicated that he was not aware of any such conditions or requirements.

We are supremely grateful to both counsel for their useful and profitable exertions before us.

We have considered the arguments which were canvassed before us on behalf of the two parties in the context of the Ruling under attack and the relative record of appeal.

As we begin to interrogate and bring our reflections to bear on the issues at play in this appeal, we propose to begin by locating the contest which has now been escalated to this court in what we consider to be its appropriate perspective.

As the opening or introductory narrative of this judgment unravelled, the respondent officially retired from the appellant

bank in June, 2007 but only had her final exit from the institution on 31st July, 2007 when she also received what, according to the findings of the trial court, both herself and the appellant believed to have been her full retirement dues. Assuming, for now, that at the time when the respondent retired and exited/received her retirement benefits from the appellant she had felt that she had an outstanding claim or claims against the appellant, the appellant had, in terms of Section 2(1) of the Limitation Act, 1939 of the United Kingdom, to legally pursue such a claim or claims within the prescribed limitation period of six (06) years commencing on or about 31st July, 2007 when the relevant cause of action could have accrued. Having regard to the foregoing, the respondent remained at liberty to institute any legal action that she would have deemed appropriate for the purpose of pursuing her claim or claims between 31st July 2007 and 31st July, 2012.

Moving away from the above hypothetical narrative to the real and practical scenario which had, in fact, presented itself in this matter, the record reveals that the respondent only instituted the action which is now the subject of this appeal on 16th July, 2014, that is, close to two years beyond the normal limitation period which had or could have been ordinarily available to her in the

context of the hypothetical scenario which we momentarily presented above.

Within two weeks of instituting her action, the respondent's action was met with a swift legal challenge which had been mounted by the appellant and which sought to annihilate the action on the basis that the same was legally stale or time-barred, thanks to the provisions of the Limitation Statute earlier mentioned upon which the appellant had anchored its challenge as earlier recounted.

The reaction of the respondent to the preliminary challenge which her action had faced was that as she only became aware of her entitlement to gratuity in 2009 in the circumstances earlier revealed in this judgment, the appellant's preliminary challenge had been misconceived in that the relevant limitation period of six years which applied to her action only started running in 2009 and was only going to lapse in 2015, that is, well after the respondent's action had been instituted (in 2014).

Before arriving at its ruling repudiating the appellant's preliminary challenge on the basis that the appellant had

concealed the respondent's entitlement to gratuity, the court below made the following findings of fact:

(a) That, at the time of the respondent's retirement in 2007, both the appellant and the respondent thought or believed that the latter had been paid her retirement benefits in full (pages R.8 and R.9 of the ruling);

(b) That, both the appellant and the respondent only "became aware in 2009 that the [respondent] who was employed on permanent and pensionable basis, was entitled to gratuity in accordance with clause 7.0 of the contract" pursuant to which the respondent was serving the appellant (page R.10 of the ruling);

(c) That, the appellant did not inform the respondent when the former became aware – through the Muhanga case[1] – that the latter was entitled to gratuity (P. R.10 of the ruling); and

(d) That, the limitation period for the respondent's cause of action started running in 2009 and not 2007.

As earlier noted, in mounting its challenge against the ruling now being appealed against, the appellant argued grounds one and two together.

The contentions which were mounted on behalf of the appellant under the first and second grounds of appeal were that it was not possible that the appellant could have fraudulently concealed the gratuity which the respondent was seeking to recover in her action because this gratuity was, firstly, embedded in the same contract which both the appellant and the respondent had

been in possession of and that, in point of fact, the respondent had even exhibited that contract in her own affidavit opposing the appellant's preliminary application and, secondly, both the appellant and the respondent thought that the latter had been paid her benefits in full.

For her part, the respondent's reaction to the appellant's assertions was to the effect that, although at the time of her leaving the bank she thought that her benefits had been paid in full she, subsequently (that is, in 2009), became aware of her entitlement to gratuity from Ms. Mushaukwa Muhanga, her former workmate, who had successfully secured the payment of her gratuity as a result of the intervention of this court in the **Muhanga**[1] matter.

We have considered the first two grounds (that is, grounds one and two) upon which this appeal was founded in the context of the arguments which were canvassed before us and can immediately observe that the grounds in question principally revolve around findings of fact. Having made this observation and related it to the appellant's arguments around the grounds in question, the conclusion that the arguments fail to attain that level of convincing clarity that can warrant interference with the lower

court's findings becomes obvious and unavoidable. In this regard, it is worthy of serious note that while the learned Judge in her ruling now under attack poignantly and decisively found, as a fact, that the limitation period for the respondent's action to recover her gratuity started running in 2009, there is not even the faintest reference to this key and decisive finding in the appellant's heads of argument. Indeed, even this court's seminal decision on the subject of when an appellate court can interfere with a trial court's findings of fact, namely, **Wilson Zulu v. Avondale Housing Project Limited**[14], was barely cited in the appellant's heads of argument, apparently, only for the purpose of drawing or quoting the oft-quoted passage from that judgment. Indeed, not even one of the four or five principles which that decision speak to by way of projecting the circumstances when an appellate court can properly interfere with findings of fact by a trial court was applied or related to the affidavit evidence which had been placed before the lower court and in the context of either of the two grounds of appeal that we are interrogating. The net effect of this failure is that the findings of fact by the trial Judge as earlier identified in this judgment remained intact and unscathed. Beyond the foregoing, and, accepting that the trial court's finding that the respondent's

cause of action accrued in 2009 and that the relevant limitation period started running then, the conclusion that the respondent's entitlement to gratuity was fraudulently concealed can scarcely be assailed. In this regard, we propose to seek succor from the meaning which was assigned to the expression 'fraudulent concealment' by Lord Denning M.R. in the English case of **King v. Victor Parsons & Co. (a Firm)**[8] as quoted in the appellant's Heads of Argument:

> ***"In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly': see Beaman v ARTS Ltd ([1949] 1 ALL ER 465 at 469, 470, [1949] 1 KB 550 at 565, 566)[10]. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further enquiry least it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough: see Kitchen v Royal Air Forces Association[11]. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different.***

In the context of this appeal, the respondent complained that even after the appellant became aware, that is, in 2009, following the **Muhanga**[1] judgment, that the respondent was a potential, if not an actual beneficiary of the outcome of **Muhanga**[1], it chose to remain mute by not telling the respondent "anything about it" (to borrow Lord Denning M.R.'s words in **King v. Victor arsons & Co.**[8]**).** The appellant chose to say "nothing" or "[turned] a blind eye" to the possibility that what it had done by keeping the respondent in the dark about a possible "right of action" which might well have arisen in her favour on account of her unpaid gratuity in consequence of the **Muhanga**[1] outcome could work against the appellant. Indeed, having regard to Lord Denning's words in the case earlier quoted, the appellant had concealed the respondent's right of action by its conduct as exemplified above. The appellant had, to quote Lord Denning's words, once again, concealed the respondent's right of action ***"by fraud as those words have been interpreted in the cases".*** Indeed, Lord Denning M.R had concluded his reflections on this point by saying:

> ***"... [This] court [can] not allow [the appellant] to get away with conduct of that kind [even if the appellant] had no dishonest motive."***

We have liberally quoted the words of Lord Denning, M.R. in **King v. Victor Parsons & Co.[8] (a firm)** because we consider that they aptly describe the situation which arose in 2009, that is, following our decision in **Muhanga**[1], in so far as that situation affected the appellant and the respondent.

All said, the effect of our preceding reflections around the first and second grounds of appeal is that the grounds are devoid of merit and cannot possibly succeed. They stand dismissed.

Even if we be wrong in reaching the conclusion which we momentarily announced, the unscathed findings of the court below did point to the fact that both the appellant and the respondent or, at any rate, the respondent, had been unaware, that is, prior to the **Muhanga**[1] outcome, that the respondent had been entitled to retirement benefits beyond what she received in 2007.

Indeed, the **Muhanga**[1] outcome served to awaken both the appellant and the respondent or, at least, the latter, to the reality that they, or, at any rate, she, had been mistaken (using this word in its ordinary grammatical sense of being ***'incorrect'*** or ***'wrong'*** or ***'in error'***) by having believed that the respondent/she had been paid her retirement benefits in full. If we be correct in stating what

we have just stated, then section 26 (c) of the Limitation Act, 1939 appears to have afforded the respondent another window which had served or operated to postpone the limitation period which was applicable to the cause of action around the appellant's search for the relief which she had set about to pursue in the court below. For the removal of any doubt, Section 26 (c) of the Limitation Act, 1939 provides as follows:

> **"Where, in the case of any action for which a period of limitation is prescribed by this Act [and] the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered ... the mistake."**

Having regard to the lower court's findings of fact as earlier noted (which findings or conclusions had included, for the removal of any doubt, the finding that both the appellant and the respondent had been laboring under the mistaken impression that the latter had been paid her retirement benefits in full), it can hardly be a far-fetched proposition to suggest that, as both parties, or, at least, the respondent had been labouring under the mistaken impression that her full retirement benefits had been availed to her, the applicable limitation period for the respondent's search for her gratuity only started running in 2009 as earlier explained. Indeed, it can scarcely be doubted that, in some sense, the

respondent's action in the court below had been instituted for the purpose of securing 'relief' which, because of her mistaken belief that she had received her full benefits when she exited from the appellant bank in 2007, she had not pursued the same until after she had realized her mistake following the **Muhanga**[1] outcome.

In this regard, it must be borne in mind, as Lord Green M.R. observed in **Beaman v. ARTS Limited**[3], that Section 26 of the Limitation Act, 1939,

> **"... is a section of general application [which] applies to every sort of action which is affected by the Act. Of these many can properly be said to be based on fraud (or mistake) ... In all such cases fraud [or mistake] is a necessary allegation in order to constitute the cause of action. In other actions, ... fraud (or mistake) is not a necessary allegation at all."**

As earlier noted, and based on the lower court's unscathed findings of fact, it does seem to us that Section 26 (c) of the Limitation Act, 1939, which is anchored on 'mistake' did afford an additional or alternative window (to fraud) which had served to postpone the limitation period which governed the claim which the respondent had launched in the court below in the manner that that court had suggested.

In our view, sufficient evidence (pointing to the appellant and the respondent's or, the respondent's, mistaken impression) was deployed before the court below which had entitled that court even to grant the alternative relief founded on 'mistake' which the second window we earlier described afforded. In this regard, we did observe in **Edith Tshabalala v. The Attorney-General**[15] that,

> **"the High Court has jurisdiction under S.13 of the High Court Act, Cap. 27 to offer alternative relief or remedies where justified by the pleadings and the evidence."**

It accordingly follows that the first two grounds of appeal would fail even on the basis of what we have adumbrated above.

We now turn to consider the appellant's third and last ground of appeal.

Under ground three, the appellant attacks the ruling of the court below ostensibly because the lower court had considered ***"the legal rights ascertained by other parties who had brought their actions in time [and] to which the respondent was not a party."***

It will be recalled that when, earlier in this judgment, we were setting out the appellant's grounds of appeal, we did comment that we found ground three rather startling. Not surprisingly, even

counsel for the respondent opined in their heads of argument that "...the appellant [had] misapprehended the lower court's references to the **Muhanga**[1] and **Chinkamba**[2] **cases."** We entirely agree with the respondent's counsel's conclusion on the point.

While we would agree with counsel for the appellant that the lower court did not package some of the views which it was conveying in its ruling the subject of this appeal, or, in like manner, the positions which the court had taken therein, it is an utterly preposterous travesty to conclude that the lower court had, in some way or other, tied and considered the interest or interests of the respondent to cases to which she had not been a party. In all seriousness, how could the court below have "tied" and "considered" the "interests" of the respondent (upon whom the court had jurisdiction) to the **Muhanga**[1] and **Chinkamba**[2] cases which had been decided and concluded by this court much earlier? For the removal of any doubt, this court, unlike the Industrial Relations Court, does not observe the principle or notion of parties and non-parties being bound by a judgment on account of being "similarly circumstanced" as enjoined by Section 85(6) of the Industrial and Labour Relations Act, Cap. 269.

While it may be correct that the lower court might have been inspired by the outcomes in **Muhanga**[1] and **Chinkamba**[2], that court was not in a position to secure the application of those outcomes to the respondent in the context of the respondent's own matter which had not even been substantively determined. In truth, we find ground three to be wholly untenable and it accordingly fails.

In sum, the appeal has failed on all the grounds and stands dismissed, with costs.

The meaning and effect of this outcome is that it opens the way for the action in the court below which was disrupted following the launching of the appellant's preliminary application to proceed and take its rightful course.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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DR. M. MALILA, SC
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE