

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2023/HP/0938



BETWEEN:

PATRICK KASONDE

(T/A Patrick Kasonde and Company)

APPLICANT

AND

KALUMBA MULENGA

1ST RESPONDENT

KENNEDY CHISANGA KAWANDAMI

(Suing as Joint Administrator of the estate
of Changala Steven Kawandami)

2ND RESPONDENT

NGONYA ESTHER SOKO KAWANDAMI

(Also suing as Joint Administrator of the estate
of Changala Steven Kawandami)

3RD RESPONDENT

FIRST QUANTUM MINERALS LIMITED

4TH RESPONDENT

**BEFORE THE HON. LADY JUSTICE. G. MILIMO- SALASINI AT
LUSAKA IN CHAMBERS ON THE 15TH DAY OF AUGUST, 2025.**

For the APPLICANT

: Mr. M. Muyunda , Messrs
Mando & Pasi Advocates

Ms. M. Kaunda
Messrs. A. Mbambara Lega
Practitioners

For the 1st, 2nd& 3rd RESPONDENT: Mr. W. Mubanga S.C, Messrs
Chilupe & Permanent Chambers

RULING

CASES REFERRED TO:

- 1) **Sithole v The State Lotteries Board (1975) ZR 106**
- 2) **Boniface Joseph Sakala v Zambia Telecommunication Company Limited 2010/HP/727**
- 3) **Prisca Matima Nyambe and Bank of Zambia SCZ Appeal No.207/2012**
- 4) **Maila Rodger Chileshe and Patson Mbao, Mweene Habatwa Vincent Appeal No. 88 of 2021**
- 5) **Henry Mpanjilwa Siwale and 6 Others v Ntapalila Siwale (1999) ZR 84**
- 6) **Zambia National Commercial Bank PLC v Kapeka Button Mhone SCZ Judgment No.30 of 2000**
- 7) **Clarke and Another v Woor (1965) 2 ALL ER 353**

LEGISLATION REFERRED TO:

- i) **The Rules of the Supreme Court of England**
- ii) **The Limitation Act 1939**

OTHER WORKS REFERRED TO:

- i) **Matibini, P. (2017). *Zambian Civil Procedure: Commentary and Cases. Volume 1***

1.0 INTRODUCTION

1.1 This is a ruling on the Applicant's (2nd Defendant in the main matter) notice of motion to raise a preliminary issue. The application is made pursuant to **Order 14A Rule 1 as read together with Order 33 Rules 3 and 7 of the Rules of the Supreme Court of England.**

2.0 BACKGROUND

2.1 The background to this matter is that on 1st June 2023, the 1st, 2nd, and 3rd respondents (1st, 2nd and 3rd Plaintiffs in the main matter) commenced this action against the applicant and the 4th

respondent(the 1st Defendant in the main matter) by way of Writ of Summons and Statement of Claim seeking the following reliefs:

- i) A declaration that the Consent Order entered into between the 1st and 2nd defendants dated 8th May 2009 under cause SCZ/8/216/208 by the Supreme Court, being appeal no. 181/2008 arising from Comp No.43/2007 was null and void and ought to be set aside on account of sloppy mistake, and or misrepresentation and fraud;
 - ii) An order to set aside the Consent Order dated 8th May 2009 entered in cause no. SCZ/8/216/208 (Appeal No.181/2008) between the 1st and 2nd defendant arising from a matter appealed to the Supreme Court by the 1st defendant under Comp No.43/2007, sloppy mistake, and or misrepresentation and fraud;
 - iii) Payment of the Judgment debt;
 - iv) Damages for mental torture;
 - v) Interest on the amount found due and payable;
 - vi) Further or other relief deemed fit; and
 - vii) Costs
- 2.2 The applicant entered appearance and filed a Defence on 19th June 2023. On 21st June 2023, the applicant filed an amended Defence. The applicant subsequently filed a notice of motion to raise a preliminary issue on 18th July 2023 for the Court to determine:

“Whether or not the Plaintiff’s claim is statute-barred under the provisions of section 2 (4) of the Limitation Act, 1939 of England.”

2.3 The application was supported by an affidavit in support and skeleton arguments.

3.0 APPLICANT'S AFFIDAVIT IN SUPPORT

3.1 The notice of motion is supported by an affidavit in support dated 18th July 2023 and is deposed to by the applicant, Patrick Kasonde. He averred that the 1st, 2nd, and 3rd respondents' grievance stems from a Consent Order executed on 8th May 2009. According to the deponent, the 1st, 2nd, and 3rd respondents were fully aware of the details and execution of the Consent Order at the time it was executed.

3.2 He explained that at the material time, he was retained as counsel for the 1st respondent and the late Changala Steven Kawandami, as a result, he was empowered to sign court documents on their behalf and by their instruction. That he represented them in an action in the Industrial Relations Court under cause number COMP No.43/2007, where Judgment was granted in their favour. Following the Judgment, the 4th respondent appealed to the Supreme Court.

3.3 During the appeal proceedings, the parties agreed to execute a Consent Order on mutually agreed terms, which is exhibited as "**PK1**". He further stated that the Consent Order was prepared in accordance with the instructions he was given. That the instructions were to accept the 4th respondent's offer to withdraw the appeal, settle legal costs, and re-employ the 1st respondent and the late Changala Steven Kawandami. In addition, it was a term of the Consent Order that they would have no claim against the 4th respondent. He further stated that upon executing the Consent Order in accordance with the instructions he was given, he sent a

copy of the said Consent Order to the 1st respondent, who acknowledged receipt and signed the same in May 2009.

3.4 It was also stated that as a result of executing the Consent Order, the 1st respondent and the late Changala Steven Kawandami returned to work for the 4th respondent, where they remained until their voluntary retirement and dismissal, respectively.

3.5 That the 1st, 2nd, and 3rd respondents have brought a claim for the Judgment debt awarded by the Industrial Relations Court on 14th August 2008. The deponent stated that over fourteen years have passed since delivery of the Judgment, and that a party has up to twelve years to exercise their right of action in relation to any Court judgment. Therefore, their claim is statute-barred.

3.6 In addition, the 1st, 2nd, and 3rd respondents' right of claim for an action for fraud or mistake against the applicant accrued at the time when the alleged fraud or mistake was, or with reasonable diligence could have been, discovered by the 1st, 2nd, and 3rd respondents. That the alleged act of fraud or mistake was known to the 1st, 2nd, and 3rd respondents in May 2009. Therefore, any claim they had ought to have been brought to Court before the lapse of twelve years from May 2009.

4.0 1ST RESPONDENT'S AFFIDAVIT IN OPPOSITION

4.1 The 1st respondent, Kalumba Mulenga, filed his affidavit in opposition on 19th September 2023. He deposed the affidavit on behalf of the 2nd and 3rd respondents.

4.2 He denied the contents of the applicant's affidavit in support and stated that the respondents were not aware of the execution of the Consent Order in May 2009, as its terms were settled solely by the

applicant and the 4th respondent. He deposed that they only became aware of the Consent Order by default in or around June 2021 through the 2nd respondent, who was advised by the registry staff in Ndola. It was not disputed that the applicant had the authority to sign documents on behalf of the 1st, 2nd, and 3rd respondents upon being instructed, but instructions to settle a Consent Order in the Supreme Court were not given to the applicant. He averred that the said Consent Order was signed contrary to the respondents' consent, knowledge, and contrary to their instructions contained in the letter from the applicant to the 4th respondent dated 23rd April 2009. The letter is exhibited as **"KM, KCK, NESK1"**.

4.3 Further, that the Consent Order was not on mutually agreed terms as alleged because it was at variance with the instructions in the letter dated 23rd April 2009 exhibited as **"KM, KCK, NESK1"**. The applicant neglected to include the terms referred to in the letter. The respondents did not give the applicant contrary instructions to those contained in the letter dated 23rd April 2009. Therefore, the applicant could not claim to have adhered to the respondents' instructions as alleged. In addition, there were no instructions stating that the respondents forfeited the awards granted to them in the Judgment of the Industrial Relations Court, hence their claim that the applicant executed the Consent Order with the 4th respondent by misrepresentation or mistake.

4.4 The deponent refuted the applicants' assertions that the Consent Order was sent to him. He stated that the applicant never delivered a copy of the Consent Order to him or the 2nd and 3rd respondents, and neither was the receipt of it signed or acknowledged.

- 4.5 In response to the applicant's assertions that the matter is statute-barred, the deponent stated that the applicant's fraud, mistake, or misrepresentation was only discovered by the respondents around June 2021 when its existence came to their knowledge after the applicant concealed it from them. The limitation period shall not begin to run until a plaintiff discovers the fraud or mistake, as the case may be. He deposed that in this instance, the fraud and mistake were only discovered in June 2021.
- 4.6 As a result of the applicants' actions, the respondents wrote to him on 22nd June 2021 expressing their dissatisfaction. The letter is exhibited as **"KM, KCK, NESK2"**. The applicant's non-response to the letter prompted them to lodge a complaint with the Law Association of Zambia. The letters to the Law Association of Zambia are exhibited as **"KM, KCK, NESK3"** and **"KM, KCK, NESK4"**.
- 4.7 The deponent stated that from the time of the Judgment of the Industrial Relations Court up to the date of issuance of the Writ of Summons and Statement of Claim, the applicant did not draw the respondents' attention to the existence of the Consent Order. He deposed that during the proceedings in the Industrial Relations Court, he indicated that he did not intend to return to work for the 4th respondent. That the Court subsequently made a finding at J11 that the 1st respondent and the late Changala Steven Kawandami abandoned their claim for reinstatement, therefore leaving them with two other remedies, namely, payment of their salaries and allowances as well as damages for unlawful dismissal.
- 4.8 The deponent explained that the agreement to be paid and re-employed came after a discussion with the applicant and Robert

Chernier, who wanted him and the late Changala Steven Kawandami to return to work. He stated that he was hesitant and expressed concern about the possibilities of being dismissed again, but Robert Chernier indicated he would protect them unless they committed a serious offence. After he signed the contract of employment, Robert Chernier's attitude changed, and he became aggressive when reminded about payment of the judgment sum. In addition, he threatened that he would hire the best lawyers to make sure what was awarded in the Judgment of the Industrial Relations Court would not be paid to him and the late Changala Steven Kawandami.

4.9 In or about 2021, he approached the Human Resources Manager, Bornface Muntumbwe, who advised that there was no information and documentation regarding the awarded amounts in the files and advised that he and the late Changala Steven Kawandami contact their advocates on the same. That he later engaged the Finance Manager, Apton Banda, regarding the Judgment, who advised that the money had been paid out but was returned to the 4th respondent.

4.10 He further deposed in December 2020, he saw the applicant in Ndola concerning the 4th respondent's reaction to the payment. That the applicant advised him to keep working, stating that he would be paid. Further, the applicant expressed shock that the 4th respondent had not paid them and assured him that he and the late Changala Steven Kawandami would be paid.

4.11 The deponent stated that in 2012, he and the late Changala Steven Kawandami vigorously continued following up on the matter with the applicant and the 4th respondent, which led to differences between

the late Changala Steven Kawandami and Robert Chernier. He further stated that he believed that the said differences led to the late Changala Steven Kawandami's transfer from Solwezi to Ndola, where he was subsequently dismissed. According to the deponent, he believed that if he continued pursuing the Judgment sum awarded, he risked being dismissed.

4.12 He deposed that the 2nd and 3rd respondents' efforts to pursue the payments with the applicant could not yield successful results. In 2015, the 2nd and 3rd respondents had complained to him, stating that the applicant was not helpful. They then decided they would appoint a different a lawyer to replace the applicant. The 2nd and 3rd respondents then advised him that they had gone to see the applicant with a copy of the Judgment, who expressed shock that the 4th respondent had not paid them.

4.13 The 1st respondent deposed that he, in fact, advised the applicant that the money had not been paid and asked him to travel to Ndola. In December 2020, he had travelled to Ndola to meet the applicant and the 2nd respondent. At the meeting, the applicant expressed disappointment that the 4th respondent had not paid, stating they would be compelled to pay. Further, the applicant requested time to study the file and also stated that the 4th respondent had no defence as he had a judgment in his favour that needed to be enforced. As a result, he applied for voluntary separation because he could not pursue the matter while still employed by the 4th respondent, as he risked being dismissed.

4.14 That he conducted a search at the High Court, which showed that there was a stay of execution. The applicant thereafter advised that it

was necessary to file a Notice to Proceed in the matter. That the applicant also advised that he would apply to discharge the Stay of Execution and substitute the name of the deceased with the 2nd respondent.

4.15 On 16th June 2021, the applicant withdrew the application, and the Judge closed the matter. He deposed that he believed this was the date the 2nd respondent discovered there was a Consent Order. That the applicant did not explain the reason why he withdrew the matter. Afterwards, the 4th respondent approved his request for voluntary separation and he left the employ of the 4th respondent in 2021.

5.0 2ND RESPONDENT'S AFFIDAVIT IN OPPOSITION

5.1 The 2nd respondent filed his affidavit in opposition on 5th February 2024, to which he deposed. That he only became aware of the Consent Order in June 2021. That he could have only been aware of the details and execution of the Consent Order if a copy or copies of the Consent Order had been made available to him or the 1st and 3rd respondents.

5.2 The deponent admitted that the applicant was authorised to sign documents on behalf of the 1st, 2nd and 3rd respondents upon being instructed, but was not authorised to sign the Consent Order in disregard of their instructions or to execute instructions without their knowledge and consent.

5.3 It was stated that the applicant was not authorised to depart from the instructions given to him in writing by the 1st, 2nd and 3rd respondents in a letter dated 23rd April 2009 marked "**KCK2**". That the 1st, 2nd, and 3rd respondents did not agree to have the Consent

Order executed or to execute it under the terms contained therein. Their instructions in the said letter were for them to be re-employed under fresh conditions, in addition to being paid their benefits in full. However, they were not privy to the instructions in the Consent Order, which in effect would result in them having no further claim against the 4th respondent upon costs being paid to the applicant.

5.4 The deponent stated that the and the late Changala Steven Kawandami would not have been re-employed based on the Consent Order because it was never shown to them, as it was filed without their knowledge and consent. Instead, he and the late Changala Steven Kawandami were re-employed under fresh contracts. As a result of the applicant's dealings, the 1st and 2nd respondents wrote to the applicant expressing their dissatisfaction in a letter dated 22nd June 2021, exhibited as "**KCK3**". In addition, they lodged a complaint with the Law Association of Zambia, and this is evidenced in the letters marked "**KCK4**" and "**KCK5**".

5.5 It was stated that the cause of action started running in June 2021 when the fraud, mistake, and misrepresentation were discovered and not in May 2009.

6.0 APPLICANT'S SKELETON ARGUMENTS IN SUPPORT

6.1 Counsel for the applicant firstly submitted that the application was properly before the Court as the applicant entered appearance and filed its Defence. It was further submitted that a combined reading of **Order 14A, Rule 1, as read together with Order 33, Rules 3 and 7 of the Rules of the Supreme Court of England, allows the applicant to raise a preliminary issue that the Court can**

determine without a full trial, thereby disposing of the case in its finality.

6.2 Learned counsel referred to **section 2 (4) of the Limitation Act 1939**, which provides as follows:

“An action shall not be brought upon any Judgment after the expiration of twelve years from the date on which the Judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.”

6.3 Counsel submitted that the 1st, 2nd, and 3rd respondents have brought their claim for payment of a judgment debt awarded by the Industrial Relations Court on 14th August 2008 under cause number COMPNo.43/2007. That the matter herein was commenced on 1st June 2023, a period exceeding fourteen years from the date of the Judgment. It was argued that, according to **section 2 (4) of the Limitation Act 1939**, the 1st, 2nd, and 3rd respondents ought to have commenced the matter before the lapse of twelve years, which should have been before 14th August 2020. Therefore, they have lost the right to claim the judgment debt awarded by the Industrial Relations Court.

6.4 Learned counsel also refuted that the 1st, 2nd, and 3rd respondents claim that the Consent Order dated 8th May 2009 under cause number SCZ/8/216/208 ought to be set aside on grounds of mistake, misrepresentation, and fraud as it offends the provisions of **section 26 of the Limitation Act. Section 26 of the Limitation Act** provides as follows:

“Where in the case of any action for which a period of limitation is prescribed by the Act, either-

(a) The action is based upon the fraud of the defendant or his agent or any person through whom he calls his agent, or

(b) The right of action is concealed by the fraud of any such person

(c) 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 fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it....”

6.5 That the 1st, 2nd, and 3rd respondents allege that the applicant acted fraudulently or by sloppy mistake when he executed the Consent Order. Counsel argued on the strength of **Sithole v TheState Lotteries Board**⁽¹⁾ that when a party alleges fraud, the onus of the party alleging fraud is greater than a simple balance of probabilities.

6.6 Learned counsel submitted that the applicant performed his duty as counsel for the 1st respondent and the late Changala Steven Kawandami meticulously and per their instructions. Counsel stated that in the event the Court decided to consider the fraud claims, then it would reiterate its argument that the claim is statute barred under **section 26 of the Limitation Act**.

6.7 Counsel also stated that, whilst in cases of fraud or mistake, there is a postponement of the limitation period, which, operates to allow a plaintiff who has suffered loss due to fraud or mistake to take action against the offender from the time the fraud or mistake was discovered or could be discovered with reasonable diligence, this instance, the respondents knew the contents of the Consent Order at the time it was being executed. It was submitted that with full knowledge and in agreement with the terms of the Consent Order,

the 1st respondent and the late Changala Steven Kawandami returned to work for the 4th respondent. According to counsel, it was absurd for the 1st, 2nd, and 3rd respondents to assert that they only became aware of the Consent Order in June 2021, when the Judgment of the Industrial Relations Court did not order the re-employment of the 1st respondent and the late Changala Steven Kawandami by the 4th respondent.

6.8 In addition, learned counsel held the view that the 1st respondent and the late Changala Steven Kawandami, upon returning to employment, had the opportunity to conduct a search at the Supreme Court registry to see and obtain a copy of the Consent Order. However, they did not, as they were fully aware of its contents at execution.

6.9 Counsel urged the Court to dismiss the matter with costs.

7.0 1ST, 2ND& 3RD RESPONDENT'S ARGUMENTS IN OPPOSITION

7.1 In support of their position, the 1st, 2nd and 3rd respondents filed skeleton arguments on 19th September 2023. Learned counsel for the 1st, 2nd and 3rd respondents contended that the action is not statute-barred in accordance with **section 2(4) of the Limitation Act 1939** that requires an action upon any judgment to be brought within twelve years. It is argued that the 1st, 2nd and 3rd respondents only became aware of the existence of the Consent Order in 2021.

7.2 Counsel submitted that although the applicant claimed that the Consent Order was sent to the 1st respondent, who signed and acknowledged receipt of the same, he failed to state the date when it was signed for or when it was received. Learned counsel contended that there is no proof of the 1st respondent receiving the Consent

Order. In addition, there is no proof that the Consent Order was drafted in accordance with the 1st respondent's instructions. Counsel referred to the applicant's letter to the Law Association of Zambia stating that he had the opportunity to show the Legal Practitioners Committee that the 1st respondent signed and acknowledged receipt of the Consent Order but he failed to do so.

7.3 Counsel queried the form in which the 1st respondent consented to the Consent Order being signed, whether the same was done through a letter or via email.

7.4 It was argued that the law under **section 26 of the Limitation Act 1939** is clear in that in cases of fraud or mistake, the limitation period begins to run when the plaintiff discovers the fraud or mistake. In this case, the 1st, 2nd and 3rd respondents discovered the fraud in June 2021. The cases of **Boniface Joseph Sakala v Zambia Telecommunication Company Limited⁽²⁾** and **Prisca Matima Nyambe and Bank of Zambia⁽³⁾** were relied on to buttress the argument on the postponement of the limitation period on account of fraud.

7.5 The instructions given to the applicant concerning the terms of settlement were in the letter of 23rd April 2009, exhibited as **"KM, KCK, NESK1"**. The said instructions were for the 1st, 2nd and 3rd respondents to be reinstated to their jobs with full benefits, but the phrase "reinstatement with full benefits" was not included in the Consent Order either by mistake or fraud by both the applicant and 4th respondent.

7.6 In the letter containing the instructions, there was no provision for the respondents to be re-employed on "mutually acceptable

conditions". The term "mutually accepted conditions" was unilaterally introduced by the applicant. Learned counsel submitted that the applicant has failed to show where the 1st, 2nd and 3rd respondents agreed to the terms of the Consent Order. Reliance was placed on the case of **Maila Rodger Chileshe and Patson Mbao, Mweene Habatwa Vincent**⁽⁴⁾, where the Court of Appeal stated as follows:

"It is clear that the parties are not agreed on the date of the right of action accrued, making it a triable issue that needs further interrogation. There is need for evidence to be adduced to prove the date of accrual before concluding that the matter is statute barred."

7.7 Counsel submitted that the terms of the Consent Order are strange as they do not reflect the 1st, 2nd and 3rd respondents' award by the Industrial Relations Court, and that this was deliberately excluded. Further, the 1st, 2nd and 3rd respondents in their letter to the applicant dated 22nd June 2021, appearing at pages 48 and 58 of the agreed bundle of documents, informed the applicant that he never communicated that he signed the Consent Order at their last meeting.

7.8 It was contended that the applicant ought to have treated the 1st, 2nd and 3rd respondents' claims with priority as the Consent Order excluded payment of their benefits in full, which was at the core of the action against the 4th respondent. The applicant only included his costs. In support, the case of **Henry Mpanjilwa Siwale and 6 Others v Ntapalila Siwale**⁽⁵⁾ was cited where the Court held as follows:

“The appellants were persons who were affected by the grant of the Certificate of Title to the Respondent and were not consulted before this was done. The appellant had as much right to the land as the respondent, being all children to the deceased.”

7.9 In response to the applicant’s arguments that the 1st, 2nd and 3rd respondents had the opportunity to conduct a search at the Supreme Court Registry to obtain a Consent Order, learned counsel argued that the applicant was appointed to act for his clients and owed them a duty to represent and report any progress relating to the matter. That his clients relied on him as their lawyer for his honest performance and as a result of their relationship at the time. Therefore, it was unconscionable for them to conduct a search as he would always express surprise that they had not been paid, as stated at paragraph 17 of the amended Statement of Claim. Counsel referred to the case of **Zambia National Commercial Bank PLC v Kapeka Button Mhone**(supra), where the Supreme Court held as follows:

“There is an important public policy consideration that persons dealing with members of an honourable profession title lawyers can safely expect to repose trust and confidence. There is no carelessness involved in taking the word of a lawyer.”

7.10 It was submitted that the applicant represented the respondents, and at no time did they act in their personal capacity. Counsel argued that the applicant could not, therefore, transfer his responsibility to his clients who were helpless and without counsel. It was further argued that according to **Zambia National Commercial Bank PLC v Kapeka Button Mhone**, the 1st, 2nd and

3rd respondents took the word of their lawyer, who was a member of an honourable profession. Therefore, they were not careless in taking the word of their lawyer and opting not to conduct a search at the Supreme Court registry.

7.11 Learned counsel referenced **Rule 14 of the Legal Practitioners Practice Rules 2002**, which provides that;

“A practitioner in private practice shall ensure that clients are at all relevant times given appropriate information as to the issues raised and progress in the matter.”

7.12 It was argued that in accordance with **Rule 14** above, the applicant needed to ensure that the respondents were at all relevant times given the appropriate information as to the issues raised in the progress of the matter. Counsel contended that the applicant’s conduct in failing to disclose that there was a Consent Order in place as far back as May 2009 was not only a breach of Rule 14 but a betrayal and evidence of his unfaithfulness to his clients. In addition, counsel contended that if the applicant cared for his clients, he would have replied to their letter of demand, where he would have given them the necessary information. That the failure to do so was an act of concealment, and a dereliction of duty by the applicant.

7.13 Counsel also referred to Rule 41 of the Legal Practitioners Practice Rules provides that non-compliance, failure, evasion or disregard of the rules without reasonable cause constitutes professional misconduct or conduct unbecoming a practitioner in terms of **section 53 (ii) of the Legal Practitioners Act Chapter 30 of the Laws of**

Zambia. Counsel placed reliance on the case of **Clarke and Another v Woor**⁽⁷⁾ on concealment, where the Court held as follows:

“The Plaintiff’s right of action had been concealed by the Defendant in 1953, and the relationship between him and the Plaintiff at that time was such that his conduct was unconscionable and amounted to concealment of their right of action by fraud within s.26 (b) of the Limitation Act 1939. The Plaintiff could not by reasonable diligence have discovered their right of action before they did in 1961 and, accordingly, it was statute barred.”

7.14 It was submitted that the 1st, 2nd and 3rd respondents have clear evidence to support their claim that the Consent Order was fraudulently executed. Further, that the applicant’s conduct of drafting the Consent Order contrary to the contents of the letter dated 23rd April 2009 was a misuse of trust between him and his clients and was also an act of fraud or mistake by both him and the 4th respondent.

7.15 Counsel urged the Court to dismiss the preliminary issue with costs for lack of merit, as it is an attempt to delay the proceedings as well as an abuse of court process.

8.0 LAW AND DECISION

8.1 I have considered the affidavits and arguments in support of and in opposition to the preliminary issue. The preliminary issue raised is whether the 1st, 2nd, and 3rd respondents’ action is statute-barred according to **section 2 (4) of the Limitation Act**. The reliefs the 1st, 2nd, and 3rd respondents are seeking are payment of judgment debt from a judgment by the Industrial Relations Court dated 14th August 2008. They are also seeking to set aside a Consent

Order and declare it null and void on account of sloppy mistake, and or misrepresentation and fraud.

8.2 The learned author of **Zambian Civil Procedure Volume 1**, Justice P. Matbini as then was, at page 160 explains that the purpose of the limitation period is to protect a defendant from claims and states as follows:

“Simply stated, the purpose of the law on limitation is that defendants should not be faced with stale claims brought many years after relevant events. Claimants should be given a reasonable period of time in which to bring proceedings and, if they do not do so, the cause of action (though not extinguished as a matter of law) is barred, that is to say, the claimant still has a cause of action but one that cannot be enforced.”

8.3 The **Limitation Act of 1939**, being the applicable law in Zambia on the limitation of actions, provides as follows under **section 2 (4)**:

“An action shall not be brought upon any Judgment after the expiration of twelve years from the date on which the Judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.”

8.4 The law is clear that the limitation period for the enforcement of a judgment is twelve years. In this case, the Judgment that the 1st, 2nd and 3rd respondents seek to enforce was delivered on 14th August 2008. The current proceedings for its enforcement were commenced on 1st June 2023, over fourteen years after the judgment was delivered. As such, the prescribed limitation period has long

expired. The action ought to have been brought within twelve years from when the judgment was delivered.

8.5 However, **section 26 of the Limitation Act** provides for the postponement of a limitation period in the event of fraud or mistake. **Section 26 of the Limitation Act. Section 26 of the Limitation Act** provides as follows:

“Where in the case of any action for which a period of limitation is prescribed by the Act, either-

(a) The action is based upon the fraud of the defendant or his agent or any person through whom he calls his agent, or

(b) The right of action is concealed by the fraud of any such person

(c) 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 fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it...”

8.6 The 1st, 2nd, and 3rd respondents assert that the Consent Order of May 2009 executed by the applicant on their behalf was not authorised by them as they did not agree to the terms therein. As a result of the execution of the Consent Order, they were denied the right to claim their benefits under the Judgment of the Industrial Relations Court, which was not their intention. The letter dated 23rd April 2009 to the 4th respondent stated their terms, which were to be reinstated with their benefits paid in full.

8.7 They contend that they only discovered that the Consent Order was fraudulently executed in 2021, therefore, the limitation period only began to run in 2021. As a result, the matter is not statute-barred and thus, they are within the timeframe to bring this action.

- 8.8 It is common cause that the late Changala Steven Kawandami passed away on 20th July 2015. The 2nd and 3rd respondents commenced the proceedings in their capacity as administrators of the deceased's estate, alleging that the applicant fraudulently executed the Consent Order in 2009 contrary to their instructions and also failed to inform or disclose to them of the existence of the Consent Order, which consequently disadvantaged them.
- 8.9 From the outset, it must be clarified that, contrary to the submissions of counsel for the 1st, 2nd, and 3rd respondents, the applicant did not receive instructions regarding the Consent Order from all three respondents. As already stated, the 2nd and 3rd respondents were appointed as administrators of the late Changala Steven Kawandami on 16th May 2023 and as such, they cannot attest to events that occurred during the deceased's lifetime. The 2nd respondent in his affidavit in opposition states that the applicant was not authorised by the late Changala Steven Kawandami to enter into the Consent Order on those terms. Yet, the 2nd respondent was not privy to any communications between the late Changala Steven Kawandami and the applicant. Although I have reviewed the letter dated 23rd April 2009, in which the applicant informed the 4th respondent that the clients had agreed to be reinstated to their jobs with full benefits, this correspondence alone is insufficient to support the 2nd respondent's factual claim regarding what transpired at the time. The 2nd respondent cannot speak to matters to which he was not privy.
- 8.10 **Section 26 of the Limitation Act 1939** extends the limitation period in instances of fraud or mistake, and the limitation period will

begin to run from the time the fraud was discovered or when it could have been discovered with due diligence. The assertion that the 2nd and 3rd respondents only became aware of the Consent Order in 2021, to trigger the postponement of the limitation period, is untenable for the reason that they were not parties to the Consent Order or the proceedings before the Industrial Relations Court. Accordingly, only the evidence of the 1st respondent, who was directly involved in those proceedings and was employed by the 4th respondent, is relevant in determining whether or not there was fraud, mistake, or misrepresentation surrounding the Consent Order, and whether such could have been discovered through a reasonable diligence search.

8.11 Having determined that the matter should have been commenced within twelve years of the judgment being delivered, the issue for determination is when the alleged fraudulent execution of the Consent Order was discovered, or could reasonably have been discovered with due diligence to assess whether the limitation period should be postponed. The Consent Order in question provided as follows:

“IT IS HEREBY AGREED and ORDERED by CONSENT of the parties for purposes of settling this matter and without any admission of liability by any of the parties that:

- 1. The appellant will re-employ the 1st and 2nd respondent on terms and conditions mutually acceptable;**
- 2. It is agreed that the appellant’s notice of appeal in this matter is hereby withdrawn upon the sealing of this Consent Order;**
- 3. The appellant will pay the 1st and 2nd respondent’s advocates, Messrs Patrick Kasonde and Company the sum of K70,000,000**

(Seventy Million Kwacha) being legal costs incurred in this action and in the action in the Court below upon this Consent Order being duly signed and sealed by the Honourable Supreme Court.

- 4. Upon the payment of the aforementioned sum in (3) above to the Respondents' advocates, the 1st and 2nd respondents will have no further claim against the appellant whatsoever or at all both in this action in the Supreme Court of Zambia and in the action in the Industrial Relations Court of Zambia as the above is in full and final settlement of the Respondents' claims."**

8.12 The applicant contends that the 1st respondent and the late Changala Steven Kawandami were aware of the execution of the Consent Order and its terms. The applicant stated that a copy of the Consent Order was sent to the 1st respondent in May 2009, who acknowledged receipt of it and signed for it. The 1st respondent argued that the applicant did not show proof before Court that service of the Consent Order was indeed effected on him. In the circumstances, I do agree that proof of service would be necessary to support the applicant's position that the Consent Order was sent to the 1st respondent. In its absence, I am not convinced that the Consent Order was sent to the 1st respondent in May 2009 as alleged.

8.13 The applicant argues that the 1st respondent and the late Changala Steven Kawandami were employed as a result of the terms agreed to under the Consent Order. That the Consent Order was known to them as far back as 2009. In contrast, the 1st respondent at paragraph 19 of his affidavit in opposition indicated that he did not intend to return to the employ of the 4th respondent. He states that the agreement to be re-employed came after a discussion with the

applicant and their manager Robert Chernier, and not as a result of the Consent Order.

8.14 I find it difficult to accept the 1st respondent's position that he did not know that there was a Consent Order. The Consent Order not only provided for their employment on mutually agreed terms but also for the withdrawal of the 4th respondent's appeal. Notably, the 1st respondent does not explain his understanding of how the appeal was withdrawn despite the fact that the appeal in the Supreme Court did not proceed. Both the late Changala Steven Kawandami and the 1st respondent were re-employed in 2009. While the late Kawandami was subsequently dismissed on 18th April 2012, the 1st respondent voluntarily separated from the 4th respondent in 2021. Given the significant passage of time, it is highly implausible that both individuals remained unaware of the circumstances surrounding the withdrawal of the appeal and their re-employment, particularly the existence of the Consent Order that facilitated both events.

8.15 The 1st respondent claims that he only became aware of the execution of the Consent Order in 2021. Even if this claim is improbable as stated above, **section 2(4) of the Limitation Act** provides that the limitation period begins to run only from the time the fraud is discovered or could, with reasonable diligence, have been discovered. In his affidavit in opposition, the 1st respondent states that he and the late Changala Steven Kawandami began making inquiries about their entitlements under the judgment sum as early as 2012. Specifically, at paragraph 19, he notes that in 2012, he approached the Human Resource Manager, Bornface

Muntumbwe, the Finance Manager, Apton Banda, their Manager, Robert Chernier, and the Applicant regarding payment of the judgment sum. In 2015, the 2nd and 3rd respondents pursued the matter with the applicant, but it was not fruitful. As a result, he resolved together with the 2nd and 3rd respondents to engage a different legal practitioner. All these actions were within the timeframe for enforcing the judgment, prior to the expiration of the limitation period.

8.16 In my considered opinion, the 1st respondent, having taken steps such as initiating inquiries and resolving to engage new legal counsel, could reasonably have accessed the court record to ascertain the status of the matter. This is especially that communication with the respondent did not yield the desired outcome.

8.17 Although it was argued that the respondents did not consider it necessary to conduct a search because they engaged the applicant to act for them, it is my view that if the 1st respondent acted diligently, he would have discovered before 2021 that there was a Consent Order in place that provided for his re-employment and the withdrawal of the appeal which he was a party to. A timely and diligent search of the court record would have revealed both the existence and the contents of the Consent Order. Furthermore, the respondents acted upon paragraph 1 of the Consent Order to be re-employed in the 1st Applicant's company.

8.18 In light of the above, I find that the preliminary issue has merit.

9.0 CONCLUSION

9.1 For the foregoing reasons, the matter is dismissed for being statute-barred.

Leave to appeal is granted.

**DELIVERED IN CHAMBERS AT LUSAKA THIS 15TH DAY OF
AUGUST, 2025.**

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
15 AUG 2025
G. Milimo J

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**HON. JUSTICE G. MILIMO- SALASINI
HIGH COURT JUDGE**