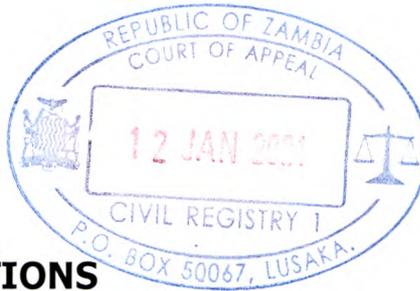


IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL N^o 161/2019

BETWEEN:

CLIFF Z. M. CHISHA



APPELLANT

AND

**ZAMBIA TELECOMMUNICATIONS
COMPANY LIMITED**

RESPONDENT

CORAM: **Chashi, Sichinga and Lengalenga, JJA**
On 24th September, 2020 and 12th January, 2021.

For the Appellant: No appearance

For the Respondent: No appearance

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. BONIFACE SAKALA v ZAMBIA TELECOMMUNICATIONS CO. LTD – SCZ APPEAL N^o 104 OF 2014 (SJ N^o 46 OF 2016)**
- 2. DONOVAN v GWETOYS LTD (1990) 1 WLR 472**

3. **LYONS BROOKE BOND (ZAMBIA) LTD v ZAMBIA TANZANIA ROAD SERVICES LTD (1977) ZR 317 (HC)**
4. **HANBURY v BANK OF MONTREAL (1918) AC 626**
5. **CLEMENT MWEEMPE v THE ATTORNEY GENERAL & ORS – SCZ APPEAL N^o 15 OF 2008**
6. **CHRISTOPHER LUBASI MUNDIA v SENTOR MOTORS LTD (1982) ZR 66**
7. **LONDON PASSENGER TRANSPORT BOARD v MOSCROP (1942) AC 332**
8. **PHILIP K. R. PASCAL & 5 ORS v ZCCM INVESTMENT HOLDINGS PLC – APPEAL N^o 92 OF 2018**
9. **RICHES v DIRECTOR OF PUBLIC PROSECUTIONS (1973) 1 WLR 1019; (1973) 2 ALL ER 935 CA**
10. **PRICE v PHILIPS (1894) WN 213**
11. **RONEX PROPERTIES LTD v JOHN LAING CONSTRUCTION LTD (1983) QB 398**
12. **UNITED ENGINEERING GROUP LTD v MUNGALU & ORS (2007) ZR 30**
13. **CITY EXPRESS SERVICE v SOUTHERN CROSS (2007) ZR 263**
14. **KETTEMAN & ORS v HANSEL PROPERTIES LTD (1988) 1 ALL ER 38**
15. **ZAMBIA SEED COMPANY LTD v CHARTERED INTERNATIONAL (PVT) LTD – SCZ JUDGMENT N^o 20 OF 1999**

Legislation referred to:

1. **THE RULES OF THE SUPREME COURT, 1999.**
2. **THE LIMITATION ACT, 1939.**
3. **THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA.**

1.0 INTRODUCTION

- 1.1 This appeal arises from Hon. Justice E. L. Musona's ruling of 21st March, 2019 by which he allowed the Respondent's application to

raise preliminary issue to determine whether the Appellant's action against the Respondent was statute-barred or not and determined that it was statute-barred and consequently dismissed it.

2.0 BACKGROUND TO THE APPEAL

- 2.1 The background to this appeal is that the Appellant and one, Landson Zyambo, together with nine others commenced an action by way of Writ of Summons against the Respondent their former employer, seeking *inter alia*, retirement packages inclusive of all allowances, allowances on gratuity, housing allowance from date of retirement until payment of terminal benefits and damages for breach of contract of employment.
- 2.2 The parties to that action with the exception of the Appellant, Landson Zyambo and Mulemwa Kalaluka settled the matter by way of Consent Judgment dated 29th January, 2019. By the said Consent Judgment, it was agreed that the Appellant and Landson Zyambo's claims would be determined separately after the Court had determined whether their actions were statute-barred or not.
- 2.3 After the Consent Judgment was entered on 29th January, 2019, the Respondent filed an amended Defence on 5th February, 2019, without

leave of Court in which it introduced an additional paragraph by way of amendment. The amended paragraph 8 was to the effect that:

“The defendant will further aver that the 5th (Cliff Z. M. Chisha) and 7th (Landson Zyambo) Plaintiffs’ action against the Defendant is statute-barred as they retired in 2002 and 2003 respectively.”

2.4 The amended Defence was accompanied by skeleton arguments supporting the Respondent’s application to determine whether or not the action by the Appellant and Landson Zyambo is statute-barred.

3.0 ARGUMENTS ADVANCED BEFORE THE HIGH COURT

3.1 At the hearing of the Respondent’s application Counsel likened the matter to the case of **BONIFACE SAKALA v ZAMBIA TELECOMMUNICATIONS CO. LTD**¹. He further relied on the case of **DONOVAN v GWETOYS LTD**² where it was held that subjecting the Defendant to a stale action would be an injustice. Respondent’s Counsel argued that the Appellant’s and Landson’s Zyambo’s causes of action accrued in 2002 and 2003 respectively, when they retired and that, therefore, their action was statute-barred as it was commenced in 2012.

3.2 Appellant's Counsel opposed the application on a procedural point that the issue of limitation had not been pleaded anywhere save in the amended Defence that was filed without leave of Court. It was his contention that based on Order 20, Rule 3 of the Rules of the Supreme Court, 1999, leave of Court ought to have been obtained before filing an amended Defence after the close of pleadings. He argued that without leave of Court having been obtained, the amended Defence ought not to be considered.

3.3 Respondent's Counsel, however, responded by arguing that amendment of the pleadings can be made at any time. He submitted that the Consent Judgment of 29th January, 2019 clearly stated that the Appellant's and Landson Zyambo's claims would be determined separately after the Court determined whether their claims were statute-barred or not.

4.0 CONSIDERATION OF THE RESPONDENT'S APPLICATION BY THE COURT BELOW

4.1 In considering the application, Hon. Justice Musona considered the arguments advanced by Counsel and he found that Order 20, Rule 3(1) of the Rules of the Supreme Court, 1999 allows a party to

amend the pleadings once without leave of Court before the close of pleadings, and with leave of Court after close of pleadings. Therefore, he accepted that the amended Defence could not be considered as it had been filed without leave of Court.

4.2 He, however, reasoned that the issue of limitation was raised in paragraph 4 of the Consent Judgment after the parties agreed that the Appellant's and Landson Zyambo's claims would be determined separately after the Court considered whether or not their claims were statute-barred. Consequently, he found nothing faulty in the manner in which the Respondent proceeded to argue the issue as it emanated from the Consent Judgment.

4.3 He, therefore, found that it was not disputed that the Appellant retired on 31st December, 2002 while Landson Zyambo retired in 2003. He also found that the action having commenced on 2nd March, 2012, that as at 2019, ten (10) years had passed in respect of the Appellant and nine (9) years with regard to Landson Zyambo. In the circumstances, the Hon. Judge found that in terms of section 2(1)(a) of the Limitation Act, 1939, their claims or action were statute-barred. The said provision states that:

“The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(1) actions founded on simple contract or on tort.”

4.4 He agreed that the cited authority of **DONOVAN v GWETOYS LTD** was, therefore, appropriate in fortifying the Respondent’s application. The Hon. Judge having found that the action was statute-barred as it was brought after the expiration of six years, he allowed the Respondent’s preliminary issue and, accordingly, dismissed the action by the Appellant and Landson Zyambo.

5.0 APPELLANT’S GROUNDS OF APPEAL

5.1 Dissatisfied with Hon. Justice E. L. Musona’s ruling, the Appellant has appealed to this Court and advanced the following grounds of appeal:

- 1. The Court below misdirected itself both in law and in fact when it held that the issue of limitation was not only raised in the amended Defence; and**
- 2. The Court below misdirected itself both in law and in fact when it held that there was nothing wrong with the manner that the defendant argued the issue relating to limitation.**

6.0 APPELLANT’S ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Heads of argument in support of the appeal were filed on behalf of the Appellant. With regard to ground one, it was submitted that the

critical question it raised is whether a party can rely on the Statute of Limitation without pleading it in the pleadings, the other party having objected to the raising of the issue. Appellant's Counsel responded in the negative and submitted that the amended Writ of Summons and Statement of Claim where the Respondent tried to raise the issue of the Statute of Limitation was struck out by the Judge. He contended that the Respondent could not and was estopped from raising the issue of Statute of Limitation as a Consent Judgment is not a pleading. He submitted that the misdirection by the Court below is compounded by its view that paragraph 3 of the Consent Judgment was a preliminary issue raised by the Respondent. To fortify his argument that a Consent Judgment is not a pleading, Appellant's Counsel relied on the case of **LYONS BROOKE BOND (ZAMBIA) LTD v ZAMBIA TANZANIA ROAD SERVICES LTD**³ where the Court held that:

"The function of pleading is to assist the court by defining the bounds of the action, which cannot be extended without the leave of the court and consequential amendment of the pleading. The unfortunate tendency to allow issues not defined in the pleadings to be raised without amending the pleadings, has frequently been denounced (see HANBURY v BANK OF MONTREAL⁴)."

- 6.2 He further relied on the later case of **CLEMENT MWEEMPE v THE ATTORNEY GENERAL & ORS**⁵ where the Supreme Court reaffirmed the decision in the **LYONS BROOKE BOND** case.
- 6.3 To emphasize the function of pleadings, Appellant's Counsel referred this Court to the earlier case of **CHRISTOPHER LUBASI MUNDIA v SENTOR MOTORS LTD**⁶ where it was held that:

"The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such. As was stated by Lord Russell of Killowen at p. 347 in the case of LONDON PASSENGER TRANSPORT BOARD v MOSCROP⁷:

"..... Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged, and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact."

- 6.4 Based on the cited authorities, *in casu* it was argued that the Respondent did not plead the Statute of Limitation as a defence and as such, is not entitled to its protection.

6.5 With regard to ground two, Appellant's Counsel submitted that it raises the question of whether the procedure used by the Respondent was correct. He relied on the case of **PHILIP K. R. PASCAL & 5 ORS v ZCCM INVESTMENTS HOLDINGS PLC**⁸ where this Court gave guidance on the manner the defence of the Limitation Act may be raised when it stated that:

"The rules of limitation as provided for under the Act are the statutory time limits for bringing civil proceedings. The Act provides for statutory defence. Order 18/8 RSC provides that it is for the defendant to plead specifically any relevant period of limitation. The objection therefore, that the action is brought too late must be raised."

Order 18/8(1) RSC provides as follows:

"A party must in any pleading subsequent to the statement of claim plead specifically any matter, for example The expiry of any relevant period of limitation, fraud or any fact showing illegality....."

6.6 Further reliance was placed on the case of **RICHES v DIRECTOR OF PUBLIC PROSECUTIONS**⁹ where it was held that:

"It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of process of the court to show that the plaintiff's cause of action was statute barred and must inevitably fail for that reason."

6.7 Reliance was also placed on Order 18/19/11 RSC which states that:

“Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see PRICE v PHILIPS (1894) WN 213^{10.}” However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the court.”

6.8 It was stated that the same guidance was given in the later case of

RONEX PROPERTIES LTD v JOHN LAING CONSTRUCTION

LTD^{11.}

6.9 Appellant’s Counsel further submitted that in the Zambian jurisdiction, a preliminary point of law or any interlocutory application may be raised either by motion or summons in terms of Order 30, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 14A, Rules 1 and 2 of the Rules of the Supreme Court (RSC, 1999). Orders 14, 18 and 33 of RSC, 1999 were cited rather copiously on matters which must be pleaded, mode of application and limitation.

6.10 In concluding his arguments, Appellant's Counsel submitted that the common thread running through all the authorities cited, is that the party who wishes to rely on the Limitation Act must not only plead it, but bring an application by way of motion or summons to dismiss the matter on that basis in accordance with the cited applicable Rules of the Supreme Court, and supported by an affidavit. He further submitted that for the reasons advanced in his arguments, the Court below misdirected itself by proceeding to entertain the Respondent's application on the basis of clause 3 of the Consent Judgment without following the laid down procedure. He, therefore, prayed that the decision by the Court below be reversed.

7.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL

7.1 The Respondent's arguments were filed into Court on 10th September, 2020.

7.2 With regard to ground one, it was submitted on behalf of the Respondent that the Court below was on firm ground when it held that the issue of limitation was not raised for the first time in the amended Defence. It was pointed out that as shown in paragraph 3 of the Consent Judgment, the Appellant conceded that the issue of

his claims being statute-barred should be raised and determined by the Court. It was argued that, the Appellant was therefore aware that the issue of his action being statute-barred would have to be determined first as agreed in the Consent Judgment. It was further argued that the Appellant by agreeing to be removed from the Consent Judgment and for his action to be determined first on the issue of it being statute-barred, he cannot contend that the said issue should only have been determined if it was specifically pleaded in the defence. It was submitted that, therefore, the Appellant's contention that the Respondent was estopped from raising the issue of statute of limitation on the basis that the same was not in the initial defence, cannot be sustained by virtue of the contents of paragraph 3 of the Consent Judgment. It was further submitted that the effect of paragraph 3 of the Consent Judgment was to amend the Respondent's defence by including the defence of the Appellant's action being statute-barred. It was argued that, therefore, the Appellant was given fair notice of the defence as he was aware that the issue of his action being statute-bared would be raised by the Respondent. It was further argued that the case of **CHRISTOPHER**

LUBASI MUNDIA v SENTOR MOTORS LTD cited by the Appellant's Counsel recognises that pleadings can be amended, as was done *in casu* where the Consent Judgment amended the pleadings.

7.3 It was submitted that, therefore, the Court below cannot be faulted for taking the view that paragraph 3 of the Consent Judgment was a preliminary issue raised by the Respondent. It was further submitted in the alternative, that Order 14A, Rule 1 of the Rules of the Supreme Court, 1999, allows the court, even without any application from either party to determine any question of law. That, therefore, the Court below having perused the Consent Judgment and particularly paragraph 3, was at liberty to determine whether the action is statute-barred or not, even without any formal application being made by the Respondent.

7.4 With respect to ground two, it was submitted on behalf of the Respondent, that its understanding of the issue raised by the Appellant, is that the Court below misdirected itself when it proceeded to determine the issue of whether the Appellant's claims were statute-barred without a formal application by way of summons

or notice of motion. It was submitted on behalf of the Respondent that the Court below rightly observed that there was nothing wrong with the procedure it adopted to determine the issue of whether the Appellant's claims were statute-barred or not, in view of paragraph 3 of the Consent Judgment.

7.5 It was reiterated that Order 14A of the Rules of the Supreme Court, 1999 also allows for an application to be made orally apart from being made by way of summons or notice of motion. It was submitted that this appeal is an academic exercise as the Appellant is not disputing the fact that his action is statute-barred. It was argued that in any case the Respondent is at liberty to seek leave to amend its defence as the matter had not yet been set down for trial.

7.6 It was further argued that the fact that the Consent Judgment has not been impeached, entails that the question of whether the Appellant's claim is statute-barred or not, would still have to be determined before the substantive claims can be considered. To fortify its argument, the Respondent called in aid the case of **UNITED ENGINEERING GROUP LTD v MUNGALU & ORS**¹²

where it was held that:

“An Act of Parliament can provide limitations and a plea of statute bar can be taken as a defence or preliminary point.”

7.7 Based on the cited authority, it was argued on behalf of the Respondent that the learned trial Judge in the Court below, considered the plea of statute bar as a preliminary point of law and thereby directed the parties to address the Court on the issue in accordance with the indication in paragraph 3 of the Consent Judgment. This Court was urged to dismiss the appeal with costs to the Respondent.

8.0 APPELLANT’S AUGMENTATIONS

8.1 At the hearing of the appeal, Mr. Mando, Counsel for the Appellant, augmented the Appellant’s arguments by inviting this Court to consider the case of **CITY EXPRESS SERVICE v SOUTHERN CROSS**¹³, where the High Court adopted with approval the decision in the English case of **KETTEMAN & ORS v HANSEL PROPERTIES LTD**¹⁴ in which the house of Lords held that:

“(However) where a defendant decided not to plead a procedural bar, such as a limitation defence, before trial and fought the case on its merits, it was not open to him to amend his defence during the final stages of the trial in order to plead the procedural defence when it

had become apparent that he was likely to lose on the merits.”

8.2 Relying on the cited case, Mr. Mando submitted that limitation as a defence, can only be relied on if pleaded when the defendant raises a defence or preliminary issue. He further submitted that, therefore, in the present case, it was too late in the day for the Respondent to raise the defence in the course of the hearing.

8.3 There was no appearance by Counsel for the Respondent even though there was proof of service. In the circumstances, this Court decided to rely on the filed arguments in considering the appeal.

9.0 THIS COURT’S CONSIDERATION OF THE APPEAL AND ITS DECISION

9.1 We have considered the grounds of appeal, arguments by the parties, authorities cited, evidence on record and the ruling appealed against.

9.2 In ground one, the Court below is faulted for holding that the issue of limitation was not only raised in the amended Defence that was struck out but in the Consent Judgment. It is trite that a party may amend its pleadings once, without leave of court, before pleadings close in terms of Order 20, Rule 3(1) of the Rules of the Supreme

Court, 1999. In this case the learned trial Judge properly guided himself on the law when he struck out the amended Defence as leave was not obtained to file it after the close of pleadings.

9.3 We note from the evidence on record that, thereafter, the learned trial Judge proceeded to deal with the matter on the basis that the issue of limitation was raised in paragraph 3 of the Consent Judgment which states:

“That the said Mr. Landson Zyambo and Cliff Z. M. Chisha’s claims shall be determined separately by the Court after the determination of the issue of whether their action is statute-barred.”

9.4 Therefore, the question that arises for determination is whether the statutory defence of an action being statute-barred can be raised after pleadings have closed by reason that the parties had consented thereto.

9.5 Firstly, Order 18, Rule 8(1) of the Rules of the Supreme Court, 1999 provides that:

“A party must in any pleading subsequent to the statement of claim plead specifically any matter, for example the expiry of any relevant period of limitation; fraud or any fact showing illegality.....”

9.6 Secondly, the statutory defence of an action being statute-barred can be raised by way of an application to dismiss action for being an abuse of court process, frivolous and vexatious. Hence, in the case of **RICHES v DIRECTOR OF PUBLIC PROSECUTIONS**, it was held that:

“It was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of process of the court to show that the plaintiff’s cause of action was statute-barred and must inevitably fail for that reason.”

9.7 Further reference is made to the English case of **RONEX PROPERTIES LTD v JOHN LAING CONSTRUCTION LTD** where Donaldson, L J at page 398 stated that:

“Where there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the court process.”

9.8 In the present case, from the evidence on record, it is clear that the Respondent was seeking to have the Appellant’s claim struck out on the ground that it was frivolous and vexatious. Hence in the Court

below Counsel for the Respondent argued that the Respondent should be protected from the injustice of having to face a stale claim by the Appellant and he relied on the case of **DONOVAN v GWETOYS LTD.**

9.9 We also observed from the evidence on record, particularly, paragraph 3 of the Consent Judgment that the issue of the Appellant's claim being statute-barred was reserved for consideration after the parties consented to the same. In the case of **ZAMBIA SEED COMPANY LTD v CHARTERED INTERNATIONAL (PVT) LTD¹⁵**, the Supreme Court held that:

"Since the appellants did not challenge the summary judgment and consented to it, they were bound by it."

9.10 In following the Supreme Court decision, we similarly find that the Appellant bound himself to the terms of the Consent Judgment by agreeing to have his claims determined by the court after the question of whether his claims were statute-barred or not was resolved. Therefore, we opine that it was competent for the Court below to hold that the issue of limitation was not only raised in the amended Defence, but the Consent Judgment, and that it was,

therefore, properly before the Court. In the circumstances the case of **KETTEMAN & ORS v HANSEL PROPERTIES LTD** relied on by Appellant's Counsel is of no assistance to the Appellant as it only applies where trial has already taken place and not where the matter is yet to be set down for trial. Therefore, since the Consent Judgment was not impeached or set aside, the Appellant was bound by it and we are of the view that the Court below was on firm ground in finding as it did.

9.11 We, therefore, find that ground one lacks merit and we dismiss it.

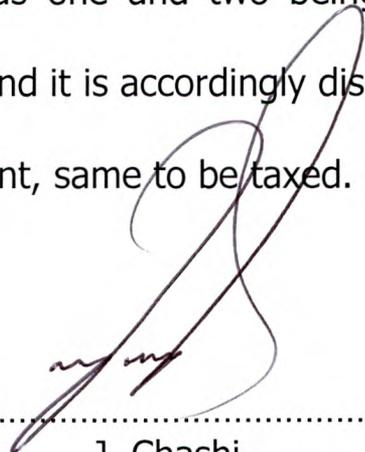
9.12 We turn to ground two which challenges the finding by the Court below that there was nothing wrong with the procedure used to argue the issue relating to limitation.

9.13 From the record of appeal we observed that it was not indicated by what means the Respondent's Counsel made the application before the Court below. Even the Appellant's heads of argument did not state by which method the Respondent's application was made. However, we noted that at page 267 of the record, Respondent's Counsel simply indicated that he was relying on their skeleton arguments and augmented the same. Whilst we accept that it is the

practice and as contended by Respondent's Counsel for an applicant to file a summons, supported by affidavit motion to raise preliminary issue, supported by arguments, we noted from the ruling at p. 11 that the learned Judge relied on the bundle of documents filed into court on 22nd June, 2012 and the authority of **DONOVAN v GWENTOYS LIMITED.** Consequently, we opine that the application was properly before the Court below, by virtue of the Consent Judgment that it was required to hear and determine the issue of limitation. Therefore, we find that ground two also lacks merit and it is disallowed.

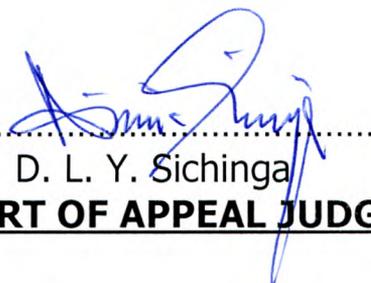
9.14 In conclusion, grounds one and two being unsuccessful, it follows that the appeal fails and it is accordingly dismissed with costs.

9.15 In default of agreement, same to be taxed.



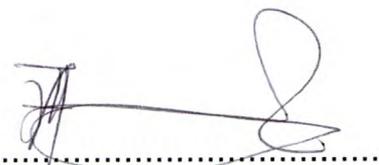
J. Chashi

COURT OF APPEAL JUDGE



D. L. Y. Sickinga

COURT OF APPEAL JUDGE



F. M. Lengalenga

COURT OF APPEAL JUDGE