IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 110/2014

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

CHARLES TIME MBILIKA AND 1,295 OTHERS APPELLANTS

AND

THE ATTORNEY- GENERAL RESPONDENT

CORAM: Phiri, Kajimanga, Kabuka, JJS

On 7th March, 2017 and 29th March, 2017.

FOR THE APPELLANT: Mr. A. Siwila and Mr. M. Lisimba, Messrs. Mambwe Siwila & Lisimba Advocates.

FOR THE RESPONDENT: N/A

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Khalid Mohamed v The Attorney-General (1982) ZR 49 (SC).
2. Salomon v Salomon & Co. (1897) A.C. 22 HL. (1).
3. Kasengele v Zambia National Commercial Bank Limited (2000) Z.R. 72.
4. Attorney General v Roy Clarke (2008) Z.R. 38 Vol. 1 (S.C.).

5. Twampane Mining Co-operative Society Limited V E and M Storti Mining Limited (S.C.Z. Judgment No. 20 of 2011).

Legislation referred to:

1. The Companies Act Cap. 388, S. 346.
2. The Companies (Amendment) Act No.6 of 1995.
3. Supreme Court Practice 1999 (White Book) Orders 14A and 33.
4. The Limitation Act,1939, S.26, (c), 2(1)(a).

Other Works referred to:

1. Halsbury's Laws of England, 3rd Edition, Volume 24, paragraph 590, 636, 4th Edition paragraph 1122.

On the 1st of April, 2014 the High Court sitting at Lusaka delivered a judgment dismissing the appellants' action on grounds that it was statute barred. The appellants have now appealed to this court against that judgment.

The facts of the case were in substance common cause. The appellants were all employees of Zambia Airways Corporation Limited ('Zambia Airways Corporation'), a company that was wholly owned by the Government. Zambia Airways Corporation was itself a subsidiary of the Zambia Industrial and Mining Corporation Limited (ZIMCO) group of companies, in which the

Government was the major shareholder. The appellants who were employed on diverse dates, had served Zambia Airways Corporation for various periods of time. The conditions of service that applied to them were the ZIMCO permanent terms and conditions of service

On 26th August, 1994 the ZIMCO Board of Directors held a meeting at which it was resolved that, for purposes of computing terminal benefits, all allowances received by an employee serving under ZIMCO conditions of service, were to be incorporated in the employee's salary. Three months after this resolution was passed, on 4th December, 1994, the Government placed Zambia Airways Corporation under liquidation and the appellants' employment was thereby, effectively terminated.

Another three months later, Government through Mr. Ronald Penza who was, then Minister of Finance, issued a Circular letter dated 28th March, 1995, directing implementation of the Board resolution requiring that, for purposes of computing terminal benefits in the ZIMCO group of companies, allowances must be incorporated in the employee's salary.

Following that directive, on 16th June, 1995 the Government on the one part and Messrs James Mundoka Kawesha and Mundia Fred Sikatana, who were representing the appellants on the other part, signed an agreement. By this agreement, the appellants in consideration of the Government's undertaking to pay them terminal benefits to which they would have been entitled under the ZIMCO conditions of service; agreed to subrogate all their entitlements due and payable from the Liquidator of Zambia Airways Corporation by assigning the same to the Government. Particulars of the terminal benefits the appellants were to receive from Government were specified in the agreement in issue as follows:-

(a) Twenty-four (24) months salaries;

(b) One month's salary for each completed year of service;

(c) Three months pay in lieu of notice;

(d) Occupation of Company accommodation rent free from the date of the Corporation's Voluntary Liquidation to the 30th day of June, 1995, or to be paid housing allowance covering the said period, or the respective landlords accommodating the eligible employees to be paid the rent due for the said period.

(e) Long service gratuity for employees who had served for a minimum of ten (10) years of continuous service as follows:

(i) One month's salary for each completed year of service for the first ten (10) years of continuous service;

(ii) One and half month's salary for each completed year of service for a period above ten (10) years of service and up to the twenty (20) years of continuous service;

(iii) Two months' salary for each completed year of service for a period above twenty (20) years of service and up to thirty (30) years of continuous service;

(iv) Two and half month's salary for each completed year of service in excess of thirty (30) years of continuous service.

The agreement was made pursuant to **section 346** of the **Companies Act Chapter 388** of the Laws of Zambia, as amended by **Act No.6 of 1995**. The said amendment infact ratified the **GENEVA International Labour Organisation (ILO) Protection of Worker's Claims (Employer's Insolvency) Convention of 1992, Number 173,** by domesticating Part II of the said Convention. What was provided for by the Convention, amongst others, was for insolvent company employers to pay a minimum of their employees' benefits as priority claims and the option to enter into agreements with regard to payment of severance packages.

Following execution of the agreement in issue between the Government and the appellants, the appellants were paid their terminal benefits. The payment cheque for the 1st appellant

Charles Time Mbilika, dated 16th June, 1995, in the sum of K7, 626, 350.51 (un-rebased) was produced in evidence. It confirmed that the appellants were actually paid the same day the agreement was signed. The Pay Statement for the month of June, 1995 was also produced and it indicated what payments constituted the amount paid.

Eleven years after they had received the said payments, the appellants on 1st June, 2006 commenced the action subject of the present appeal, in the High Court, seeking the following relief:

1. **a declaration that, the benefits paid to them were totally inadequate; that they were contrary to ZIMCO conditions of service; and were without their consent. In the alternative, the appellants claimed that they entered into the agreement of 16th June, 1995 on the basis of which they were paid their terminal benefits under a mistake of fact or law as to what they were actually entitled to;**

2. **rectification of the agreement and payment to them, of the difference between the money they were paid as terminal benefits under the agreement and what they were entitled to be paid under the ZIMCO terms and conditions of service applicable to them;**

3. **the said amounts be calculated at the current value, taking into consideration inflation from the time the payment was made to the date of judgment and/or interest thereon as the Court may deem fit;**

4. damages for mental distress and the inconvenience suffered;

5. any other award as the Court may deem just; and

6. costs."

In their statement of claim filed with the writ, the appellants further contended, that the respondent had in the agreement, unilaterally put a ceiling on the amounts payable to them.

The respondent filed a defence denying that it unilaterally put a ceiling on the payments due to the appellants. The respondent averred that, the primary obligation of paying the appellants terminal benefits was that of the Liquidator, but as a result of the subrogation by the appellants who assigned to the Government, all the payments due to them, the Government pursued a claim from the Liquidator for recovery of the money which it had paid the appellants in terminal benefits. After filing the said defence, the respondent made an application to enjoin Zambia Airways Corporation (*In Liquidation*) to the action as 2nd respondent, which application was granted by the Deputy Registrar.

Upon being so enjoined, the 2nd respondent filed its own defence denying the appellants' claims on grounds that, the appellants' rights were subrogated to the Government in consideration of the Government's decision to pay the appellants in excess of the amounts they would have otherwise been paid under the liquidation laws. In the premises, the 2nd respondent averred that, the appellants were estopped from claiming further monies.

Subsequently, the 2nd respondent applied to be struck off from the action claiming that it was not a party to the agreement entered into between the appellants and the Government. The learned trial judge granted this application and struck off the 2nd respondent for misjoinder on grounds that, the pleadings did not disclose the relief sought from the 2nd respondent. This left the Attorney General as the only respondent to the matter.

On 20th May, 2009 the respondent as aforesaid filed a Notice to raise a preliminary issue on a point of law, pursuant to Orders 14A and 33 of the Rules of the Supreme Court Practice, 1999 (White Book). The preliminary issue raised was that the appellants' action was caught up by the Limitation of Actions Act of 1939. According to this Act, actions premised on simple

contracts such as the one in issue, must be brought to court within six years from the time when the right to redress accrued. The respondent's argument was to the effect that, the appellants' right to redress accrued from when they were underpaid, in 1995, but they only commenced their action eleven years later in 2006. The action was therefore statute barred and should properly be dismissed.

The appellants opposed the preliminary issue raised and relied on a newspaper article of 22nd November, 2001 which quoted the Deputy Minister for Transport and Communication as having acknowledged Government's indebtedness to them. The appellants argued that, this constituted a subsequent acknowledgement which revived the limitation period with effect from the date of the acknowledgment.

The appellants' alternative argument was that, their action was anchored on mistake and the Statute of Limitations provides that, where mistake is pleaded as the reason for the delay in commencing the action, time begins to run from the date when the mistake is discovered. That in the present matter the appellants only discovered the agreement pursuant to which they were paid in the year 2004 and this is the year when their right

to redress accrued to them. Having commenced their action two years later, in 2006, they were within the six year limitation period as postponed.

The learned trial judge first considered the arguments premised on acknowledgment. He referred to learned authors of **Halsbury's Laws of England, 3rd Edition, Volume 24,** paragraph 590- **on actions to recover debts and legacies** which states that:-

> **"Where any right of action has accrued to recover any debt** or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, **and the person liable or accountable therefore acknowledges the claim** or makes any payment in respect thereof, **the right is deemed to have accrued on and not before the date of acknowledgment** or last payment." (emphasis in bold supplied)

He further referred to paragraph 592 on the statutory requirements that must be complied with if acknowledgment is to be relied upon, which reads as follows:-

> **"Every acknowledgment must be in writing and signed by the person making the acknowledgement or by his agent. It must be made to the person, or agent of the person, whose title or claim is being acknowledged."**

Upon considering the above position of the law, the learned trial judge declined to accept the newspaper article attributed to

the Minister of Transport and Communication as having acknowledged the Government's indebtedness to the appellants on underpaid terminal benefits. The judge found the article lacked two fundamental ingredients required by the relevant Statute to constitute a valid acknowledgment, in that: (i) it was not made to the appellants; and (ii) it was not signed by the Government.

The learned trial judge then proceeded to consider whether the mistake pleaded by the appellants, could have postponed the limitation period to take effect from the time that they discovered it. The judge quoted the following statement in **paragraph 636 of Halsbury's Laws of England,** stating that: -

> **"where in the case of any action for which a period of limitation is prescribed, the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it."**

The trial judge took into account the appellants' pleadings and noted that they did not disclose the nature of the alleged mistake or when the same was discovered. For that reason, the learned judge decided to defer this aspect of the preliminary

issue, to be determined after hearing evidence at the trial of the matter.

The matter accordingly proceeded to trial. In support of their case, the appellants called two witnesses. The first witness was **Charles Time Mbilika**, a Pilot by profession. The gist of his evidence was that he had served Zambia Airways Corporation under the ZIMCO Management conditions of service. His monthly pay constituted of a salary and eight types of allowances. In calculating his terminal benefits the allowances were not included in the computation of his package and those of his co-appellants, contrary to the resolution of the ZIMCO Board of Directors.

He claimed that he only became aware of an agreement entered into between representatives of the appellants and the Government in 2004, which was long after the retrenchment packages had been paid. This agreement outlined the package that was to be paid to the appellants with a ceiling of about K4 billion. He alleged that the appellants were not consulted before the said agreement was entered into and this was the reason the appellants were now seeking its rectification. In cross-examination however, the witness admitted that Messrs James

Mundoka Kawesha and Mundia Fred Sikatana, were duly authorised representatives of the appellants.

The evidence of the appellants' second witness **Aaron Nkhuwa** was in substance as testified by the first witness. He told the Court below that he was employed as a Cleaner by Zambia Airways Corporation in 1984. At the time of the liquidation, he had risen to the position of Fleet Service Supervisor and was serving under Unionised conditions of service. Apart from his salary, he, like other Unionised appellants, was also paid several allowances which were not incorporated in the salary when computing their severance packages.

The respondent did not call any witness in support of its defence.

After considering the evidence before him, the learned trial judge referred to the settled principle of law that a plaintiff will not automatically succeed merely by reason that a defendant has not defended his case. That in order to be entitled to judgment, a plaintiff must prove his case to the required standard and cited

as authority, the decision of this court in **Khalid Mohamed v The Attorney-General**[1]

The trial judge noted that, Zambia Airways Corporation was a legal entity, separate and distinct from its shareholders, ZIMCO and, ultimately, the Government. He pointed out that at the time of its liquidation, Zambia Airways Corporation had liabilities for which the shareholders were not liable to indemnify it. That, among those liabilities was the debt owed to the appellants in the form of terminal benefits. The learned judge reasoned that, Government as shareholder, was not liable for the payment of the appellants' terminal benefits. The celebrated case of **Salomon v. Salomon & Co**[2] in which this principle was espoused was referred to, where Lord Herschell stated that: -

> **"In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs."**

On the strength of the above position of the law, the judge was of the view that, if the Government was to be held liable for the payment of the appellants' benefits, then that liability could only have arisen from the terms of the contract which the

Government was purported to have executed with Mundia Fred Sikatana and James Mundoka Kawesha on 16th June, 1995. On the evidence before him, the judge had no difficulty in finding that, the appellants had through their said representatives, indeed entered into a contract with the Government for the payment of their benefits.

The trial judge went on to find that the appellants had shown, and it was common knowledge that, since the case of **Kasengele and Others v. Zambia National Commercial Bank Limited**[3], by March, 1995 the Government, as shareholder of ZIMCO Limited, had adopted the policy that the ZIMCO group of companies should incorporate allowances into the basic salary when calculating terminal benefits of employees. The judge noted that the agreement which was made three months thereafter, on 16th June,1995 did not specifically state that the computations should not incorporate allowances into the basic salary in order to be within the K4.6 billion, limit. He further observed that, the respondent in its defence did not deny that the allowances were not incorporated in the salaries of the appellants.

The learned trial judge accordingly found, in the absence of any evidence, that the inclusion of such allowances would have

made the total payments exceed the limit set, it was a breach of the agreement for the Government to calculate the appellant's benefits without incorporating allowances.

That finding notwithstanding, the judge proceeded to consider the preliminary issue he had deferred: whether the appellants' action that they had been underpaid should not be dismissed for being statute-barred, on the ground of mistake of fact or law?

After considering the whole of the evidence before him, the learned trial judge found that the appellants infact started raising grievances about non-inclusion of allowances soon after their packages were paid to them. In the premises, it could not be said that they had ever been mistaken as to how their packages should have been calculated. He accordingly came to the conclusion that, there was no mistake that would have had the effect of postponing the limitation period. The judge held that, as the appellants had commenced their action eleven years after the cause of action had arisen, when they should have done so within six years from 1995, the action was defeated on the

ground that it was statute barred. It is on that basis, that the Court dismissed the action.

The appellants have now appealed to this Court, advancing only one ground of appeal:

> **"that the learned trial judge erred in law and fact when he held that the appellants' claim was statute barred when in fact all available evidence showed that they were within the mandatory six years' period."**

In support of the ground of appeal, learned Counsel for the appellants filed written heads of argument on which they wholly relied at the hearing.

In their written heads of arguments, learned Counsel for the appellants acknowledged that the Limitation Act, 1939 dictates a mandatory six year timeframe within which an action anchored on simple contract can be brought before the Court. Counsel were however, quick to add that **Section 26 (c) of the Limitation Act** provides exceptions to that general rule, which results in postponement of the limitation period in case of fraud or mistake; and the appellants' evidence that they only discovered the mistake in 2004 was not challenged by the respondents. That, the further unchallenged evidence showed

that Government, through the ZIMCO Board, had directed that allowances be included in the computation of redundancy packages. Counsel alleged that unknown to the appellants, the respondent fraudulently entered into an agreement against the directive by the ZIMCO Board. Counsel submitted that, as the appellants commenced this action in 2006, two years after they discovered the mistake, the court was not precluded from considering the unchallenged evidence which is on record. The case of **Attorney General v. Roy Clarke**[4] was relied on for the submission.

Counsel's further submission on the point was that, on the evidence that was before him showing the appellants only discovered the agreement in 2004, the learned trial judge erred when he held that the appellants were aware of the underpayment soon after they were paid in 1995. Consequently, that they were never mistaken as to how their package should have been calculated and could therefore not rely on mistake as the basis for commencing their action in 2006.

Counsel further faulted the learned trial judge for having come to the conclusion that the appellants should have commenced their action within six years from 1995. In Counsel's

view, there was no evidence adduced at trial to support these findings. According to Counsel, the only evidence on the record of appeal is that there was an anomaly or mistake which was only discovered after 2004.

Counsel went on to submit that, a careful perusal of the relief sought in the endorsement on the writ of summons shows that the appellants claimed for relief from consequences of a mistake. In support of this submission, Counsel relied on the explanatory notes to Section 26 of the Limitation Act, 1939 as states that, mistake under paragraph (c) : -

> **"....applies only where the mistake is an essential ingredient of the cause of action e.g. where money has been paid or a contract entered into in consequence of a mistake...."**

In concluding their submissions, Counsel urged this Court to reverse the finding that the appellants' claims are statute barred, which was made by the lower Court.

The Respondent did not defend the appeal and there was no attendance on their part at the hearing.

We have carefully considered the evidence on the record of appeal, the submissions of Counsel and the judgment appealed

against. In our view, this appeal has raised only one issue for our consideration, and this is:

> ***"Whether the limitation period within which the appellants should have instituted this action was postponed on the basis of the fact that the appellants were under a mistake of fact or law as to what they were entitled to and that they only discovered that they had been underpaid in 2004?".***

Counsel for the appellants have submitted that the appellants' evidence, as to when the mistake was discovered, was not challenged by the respondent. Counsel has further argued that according to evidence on the record of appeal, the appellants only discovered that they had been underpaid in 2004, which was two years before they instituted this action, in 2006.

We have looked at the evidence adduced on behalf of the appellants with regard to when the alleged mistake was discovered. The gist of the evidence from the two witnesses for the appellants was that the appellants were not aware of the agreement signed between their representatives and the Government on the computation of their terminal benefits. They have stated that before that agreement, the ZIMCO Board had decided that the redundancy package for all employees under

ZIMCO should be based on an amalgamation of their salaries and allowances. According to the appellants, they only discovered that they had been underpaid when they came across the aforesaid agreement in 2004.

We have noted in this regard, that evidence on the record of appeal confirms and the appellants do not deny, that they were all paid their terminal benefits in 1995. The benefits were computed on the basis of the agreement signed between the appellants' representatives and the Government on 16th June, 1995. It is clear that the package stipulated in that agreement was less than what the ZIMCO Board had decided should be paid to ZIMCO employees who would be declared redundant.

It is also not in dispute that the appellants should have brought this action within six years from 1995. This is in light of Section 2(1)(a) of the Limitation Act, 1939, which provides that: -

> "**2 (I) 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:-**
>
> **(a) actions founded on simple contract or tort; ...."**

The appellants are instead relying on Section 26(c) of the Limitation Act, 1939 to argue that, the above limitation period

was postponed until 2004 when they discovered that they had been paid less than what they were entitled to in terminal benefits. Section 26(c) of the Limitation Act reads as follows:

> "**26. Where, in the case of any action for which a period of limitation is prescribed by this Act....**
>
> **(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 mistake, as the case may be, or could with reasonable diligence have discovered it....**" (underlining for emphasis supplied)

According to paragraph 1122 of Halsbury's **'due diligence'** or **'reasonable diligence'** means:

> **"it must be shown that there has been something to put him *(the plaintiff)* on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of real facts.....if however, a considerable interval of time has lapsed between the alleged mistake and its discovery, that of itself may be reason for inferring that it might, with reasonable diligence have been discovered much earlier."**

In view of the above quotation the further questions then, are: **(i)** ***"when did the appellants discover that they had been underpaid their terminal benefits;*** **(ii)** ***could they with***

reasonable diligence have discovered the underpayment earlier than that date?"

It was not in dispute that the underpayment constituting the breach was effected in June 1995, and for purposes of the six years limitation period, time started to run from 1995. What this implies is that, the appellants should have commenced this action not later than the year 2001. The action was, however, commenced in 2006. The appellants have claimed they could not commence the action earlier as they were under a mistake of fact or law on what amounts they were entitled to, until the year 2004 when they discovered this mistake. That this evidence is on the record of appeal and was not challenged by the respondents.

It is evident from the judgment of the lower Court that the learned trial judge found, as a fact, that the appellants started raising grievances about the non-inclusion of allowances in the computation of the benefits as soon as their packages were paid in 1995. He accordingly, held that, it could not be said that the appellants had ever been mistaken as to how their packages should have been calculated. In answer to questions put to them at the hearing, learned Counsel maintained the position in their

written arguments, that there was no evidence before the trial judge to support those findings.

Having carefully considered the evidence on the record of appeal, we agree entirely with the finding and conclusion reached by the learned trial judge. It is clear to us from the evidence given on behalf of the appellants, that their contention that they only discovered they had been underpaid in 2004, cannot be true. The reason is simple. There is evidence on the record of appeal which shows that the appellants knew, before 2004, that they had been underpaid. For instance, there is on page 196 of the record of appeal, a letter which is dated 6th November, 2001. This letter was written by the appellants to the Deputy Minister in the then, Ministry of Works and Communication, in which they were complaining that they had become destitute because of the **'meager package'** they had been paid. In a portion of the same letter appearing on page 200, under paragraph (b) entitled ***"Money Owed to allowance Receiving Staff"*** the appellants stated that: -

> "As per the ZIMCO Board of Directors' meeting held on 26th August 1994, allowances were to be merged with salaries for the calculation of terminal benefits, and this was done for all

liquidated/closed companies e.g. ZIMCO and its subsidiaries except Zambia Airways employees."

That letter was written by a Ms. Modpher Simpasa Chitalu, in her capacity as Chairperson of the **Ex-Zambia Airways Workers Committee.** In that same letter, Ms. Chitalu disclosed that her Committee was chosen on 1st July, 2000 to represent all the 1,296 (one thousand two hundred and ninety-six) workers present at the time of the liquidation. Certainly, at that time in 2000, the appellants were still firmly within the period of six years from 1995, to commence the action.

The same letter infact discloses that the appellants had been seriously engaged in numerous correspondence with the Ministry of Works and Communication, in an attempt to try and resolve their grievances relating to their terminal benefits, *ex-curia*. Meanwhile, time to seek legal redress for those grievances continued to run. As this Court stated in the case of **Twampane Mining Co-operative Society Limited V. E. and M. Storti Mining Limited**[6]:

"The position of the law is that ex-curia settlement discussions do not and cannot stop the time from running. This principle was ably espoused by the learned authors of Chitty on Contract, General Principles, paragraph 1949, at page 1267, where they stated, inter alia, that once time

has started running, it continues until proceedings are commenced or the claim is barred. Parties must bear in mind that ex-curia settlement discussions may fail, or succeed, hence the reason to be prudent enough to prepare for any eventuality, watch the time and take the necessary steps as provided in the Rules of Court."

Further on the point, paragraph 8 of the appellants' statement of claim shows that the appellants were aware of the underpayment much earlier than 2004. They, in that paragraph averred that, the Government acknowledged the underpayment in 2001. The appellants particularly stated as follows: -

> "That the Plaintiffs upon learning what was taking place in other Government owned companies which were subsequently liquidated and after protracted representations, **the Government** through its Ministry of Communication and Transport **in 2001 did acknowledge the underpayments and promised to come to the aid of the Plaintiffs by making good the shortfall** but has since failed or neglected to do so."

We are mindful of the fact that in arguing the appeal learned Counsel for the appellants' alternative contention, in this regard, was that if we were inclined to consider that the appellants were aware of the underpayment, the earliest date they could have been so aware, is the year 2001. In that event, we were urged to consider that the limitation period was

postponed to 2001 and this is the year time started to run. Since the appellants commenced their action in the year 2006, they were still within the limitation period, as postponed to take effect from 2001.

That argument in our view is still not supported by the evidence on the record of appeal which shows that, the appellants were paid on the basis of the agreement, immediately following its execution and were given redundancy Pay Statements outlining the computations for the terminal benefits paid to them. Particulars of the redundancy benefits were clearly identified together with the basic pay used to compute the same, as can be seen from the Pay Statement of the 1st appellant **Charles Time Mbilika**, at page 194 of the record of appeal. If there were any anomalies with the computations, the appellants ought surely, to have discovered such anomalies upon receiving their payment in 1995, or soon thereafter and not in 2004, as claimed.

While we acknowledge that, where an action is for relief from consequences of a mistake time does not begin to run until the plaintiff discovers the mistake or could with reasonable

diligence have discovered it. The burden of proof still lies on the plaintiff to establish, on a balance of probabilities, that the limitation period was postponed by the alleged mistake in terms of S. 26 (c) of the Limitations Act of 1939 and that they instituted the matter within six years of discovering such mistake. The plaintiff also bears the burden of further establishing, that even if he had employed *reasonable diligence*, he could still not have discovered the mistake earlier.

In our view, the appellants in this appeal failed to prove that they discovered the mistake only in the year 2004. In the light of evidence that they were given their Pay Statements upon payment of their monies, they further failed to prove that, if they had applied reasonable diligence, they would not have discovered the underpayment, almost immediately, from the Pay Statements.

We, therefore, hold that the learned trial judge properly directed himself when he held that the appellants' action was statute-barred. We find no merit in this appeal and we accordingly, dismiss it.

In view of the circumstances of the appellants, the respondent not having defended the appeal, we find an appropriate order on costs, is for each party to bear their own costs of the appeal and we so order.

G.S. PHIRI
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE