IN THE HIGH COURT FOR ZAMBIA **2017/HP/1397**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

B E T W E E N :

MANINGI SAFARIS LIMITED **PLAINTIFF**

AND

ATTORNEY GENERAL **DEFENDANT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 16th day of March, 2018

For the Plaintiffs : *Mr. M. Mutemwa, Messrs Mutemwa Chambers*
For the Defendant : *Mr. T. Musimuko, State Advocate*

R U L I N G

Cases Referred To:

1. *Panorama Alarm System and Security Services Limited v Dar Farms Transport Limited 2011/HK/07*
2. *Lusaka West Development v Turnkey Properties Limited S.C.Z Judgment No. 1 of 1990*
3. *Krige v Christian Council of Zambia (1975) ZR 152 (SC)*
4. *William David Carsle Wise v E.F Hervey Limited (1985) ZR 17*
5. *Daniel Mwale v Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga) v The Attorney General*
6. *Cutts v Head and Another (1984) 2 WLR*
7. *Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State Insurance Corporation v Turnkey Properties Limited (1990) S.J. (S.C)*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court, 1999*

Other Works Referred To:

1. *Halsbury's Laws of England 4th Edition, Volume 17*

This is the Plaintiff's appeal against the Ruling of the Learned Deputy Registrar delivered on 14th November, 2017 in which she dismissed the Plaintiff's action for being statute barred. It is filed pursuant to Order XXX Rule 10 of the High Court Rules and is supported by an Affidavit.

The facts leading to the appeal are that the Plaintiff commenced this action on 18th August, 2017. The Defendant raised an issue *in limine* contesting the Plaintiff's action on the ground that it was filed out of time and after nine (9) years, from the time that its cause of action arose. As a result, the Defendant contended that the action was statute barred. On the other hand, the Plaintiff argued that the parties had been engaged in *ex curia* negotiations and there was a dispute on the quantum of compensation, which

arose in 2013. Thus, the Plaintiff accrued a fresh cause of action as it was still within the limitation period.

The Learned Deputy Registrar considered that the Plaintiff's claim of compensation was predicated by the hunting concession that was cancelled by the Defendant in July 2008; and could not exist in *vacuo*. She consequently held that the Plaintiff's action was statute barred and the *ex curia* negotiations did not prevent the Plaintiff from timely issuing Court process.

Disenchanted by the Learned Deputy Registrar's Ruling, the Defendant brings this appeal fronting the following grounds:

i. *The Learned Deputy Registrar misdirected herself in law and fact when she made a finding that the Plaintiff's action is out of time when it was clear that there was a fresh accrual of action on acknowledgment of debt by the Defendant.*
ii. *The Learned Deputy Registrar misdirected herself in law and fact when she ruled that the Plaintiff's action is out of time when by its conduct, the Defendant had acquiesced to the state of affairs and thus estopped from pleading limitation of action.*

The Plaintiff filed an Affidavit sworn by **Odette Mwela** its Operations Director. He states that the Defendant is indebted to the

Plaintiff and the only issue outstanding between the parties is on the quantum of compensation as shown in the exhibit marked "**OM1**." He states that between 2008 and 2017, there was various correspondence between the parties, which demonstrated that they were firmly locked into *ex curia* negotiations. This is shown in the exhibit marked "**OM2**."

The deponent further states that even if the Plaintiff commenced its action after nine years, it accrued a fresh cause of action when the Defendant acknowledged the debt as shown in exhibit "**OM1**" of his Affidavit. That the acknowledgment consequently revived the Plaintiff's cause of action outside the limitation period. The deponent states that the Defendant's correspondence led the Plaintiff to believe that it acquiesced the state of affairs and it was estopped from pleading statute limitation by its conduct.

Learned Counsel for the Plaintiff filed Skeleton Arguments, where he conceded that the Plaintiff did not timely commence Court process because the parties were locked in negotiations. Further,

there was a lot of correspondence exchanged between the parties on a possible settlement, which went up to 19th January, 2017. Counsel entreated me to consider the implication of the correspondence that was exchanged by the parties; indulging me to the exceptions of the limitation rule as regards a party's conduct.

Counsel argued that the Court has inherent jurisdiction to hear and determine cases and cited section 13 of the High Court Act, which reads:

> **"In every civil cause or matter which shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."**

Counsel contended that the Learned Deputy Registrar should not have restricted herself to section 2(1) of the Limitation Act 1939. She should have considered the Defendant's acknowledgment of

debt amounted to a fresh accrual of action. He fortified his assertion by relying on the provision of section 23(4) of the Limitation Act 1939, which states:

> **"23. Fresh accrual of action on acknowledgment or part payment.**
> **(4) Where any right of action has accrued to recover any debt or other liquidated claim or any claim to the personal estate of the 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 shall be deemed to have accrued on and not before the debt of acknowledgment or the last payment."**

Counsel went on to state that the Defendant's letter of 22nd May, 2013 confirmed the dispute on the quantum of compensation and invariably amounted to an acknowledgment of debt subject to the Plaintiff's justification. Counsel further called in aid sections 24(1) and (2) of the Limitation Act 1939, which read:

> **"24. Formal provisions as to acknowledgments and part payments.**
> **(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment.**
> **(2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or as the case may be, in respect of whose claim the payment is being made."**

Counsel went on to submit that acquiescence was another exception under the Limitation Act 1939 and cited section 29 of the Act as follows:

> "**Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.**"

Counsel added that since there was evidence of acquiescence, the Defendant was precluded from pleading limitation of action, notwithstanding that the Plaintiff did not commence its action in time.

Counsel further submitted that the Defendant was estopped from denying its conduct of acquiescence and cited the case of **Panorama Alarm System and Security Services Limited v Dar Farms Transport Limited**[1], where Mulongoti J (as she then was) quoted the following passage:

> **"In smith v Hughes (10), per Blackburn J.**
> **"If whatever a man real's intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."**

Counsel submitted that the Defendant's issue *in limine* had no merit and should not have been entertained. The Learned Deputy Registrar misdirected herself when she failed to consider that the Defendant's conduct gave rise to the Plaintiff's accrued right of action. He prayed to Court to reverse the decision of the Learned Deputy Registrar.

In response, **Tennyson Msimuko**, swore an Affidavit in Opposition on behalf of the Defendant. He states that the Defendant's letter referred to in the Plaintiff's Affidavit was marked "salve jure". That the Plaintiff should not have divulged it without its consent. He also states that although the Plaintiff and the Defendant were corresponding, the fact did not prevent the Plaintiff from timely instituting Court proceedings within the limitation period. The deponent avers that the Defendant's conduct never amounted to a waiver or an admission of a debt owed to the Plaintiff.

In the Skeleton Arguments, Learned Counsel submitted that the parties executed a hunting concession agreement in 2003. It

was cancelled by the Defendant in July, 2008. Nine years had passed from the time that the concession agreement was cancelled. The Plaintiff failed to take action and as a result, its action was statute barred according to section 2(1) of the Limitation Act.

Counsel went on to submit that the Plaintiff's cause of action arose in 2008 and it did not accrue a fresh cause of action in 2013 because the Defendant never acknowledged a debt owed to the Plaintiff. Counsel submitted that the Defendant's letter dated 22nd May, 2013 exhibited in the Plaintiff's Affidavit "**OM3**" was written without prejudice. It was wrong for the Plaintiff to reproduce the letter without its consent. He added that the letter was not evidence of the Defendant's acknowledgment of debt owed to the Plaintiff. He relied on the case of **Lusaka West Development v Turnkey Properties Limited**[2].

Counsel referred me to the Learned Authors of Halsbury's Laws of England 4th Edition, Volume 17 who state at paragraph 212 that:

> **"Letters and oral communication made during a dispute between the parties, which are written or made for the purpose of settling a**

dispute and which are expressed or otherwise proved to have been made without prejudice cannot generally be admitted as evidence."

He further cited paragraph 213 the Learned Authors of Halsbury's Laws of England 4th Edition, Volume 17, where they state that:

"The contents of a communication made 'without prejudice' are admissible when there has been a binding contract between the parties arising out of it.....but there are not otherwise admissible. Thus they cannot be used as admissions, or as acknowledgment to prevent a debt from becoming statute barred."

Counsel contended that the Plaintiff could not rely on the Defendant's letter dated 22nd May, 2013 to prove an admission of debt in view of the cited authorities. He insisted that the Plaintiff was precluded from setting up an estoppel against statute and adverted to the case of **Krige v Christian Council of Zambia**[3], where Baron, DCJ as he then was stated:

"As to estoppel, the matter is in my view concluded against the Plaintiff by the principle that one cannot set up an estoppel against a statute and I entertain no doubt that the same rule applies whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estoppel properly so called or some analogous principle or "quasi-estoppel".

Counsel concluded with a prayer to Court urging me to dismiss the Plaintiff's appeal for lack of merit and costs.

I have earnestly considered the appeal together with the Affidavits and Skeleton Arguments filed herein. The facts are generally agreed by the parties and are briefly recapitulated as follows: On 18th August, 2017, the Plaintiff issued a Writ of Summons and Statement of Claim endorsed with a claim for:

(i) The sum of US$734,434 with interest being losses occasioned by the Department of National Parks and Wildlife (formerly ZAWA) as a result of cancellation of the hunting concession agreement granted to the Plaintiff on 28th November, 2002 and 17th February 2003;
(ii) Costs and
(iii) Any further relief the Court may deem fit.

On 8th September, the Defendant raised an issue *in limine* before the Learned Deputy Registrar, where it challenged the Plaintiff's action for being statute barred. On 14th November, 2017, the Deputy Registrar delivered a Ruling where she held that the Plaintiff's action was statute barred and dismissed it.

It is trite that the Limitation Act, 1939 of the United Kingdom applies in Zambia subject to the amendments set out in the Law Reform (Limitation of Actions) Act. Section 2 (1) (a) of the Limitation Act 1939 provides that:

> **"the following action should not be brought after the expiration of six years from the date on which the cause of action arose, that is to say:**
> **a) Actions founded on simple contract..."**

In the case of **William David Carsle Wise v E.F Hervey Limited**[4], the Supreme Court stated that:

> **"(a) a cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other upon which he can establish a right or entitlement to a judgment in his favour against another."**

In this case, the Plaintiff contended that when its cause of action arose in 2008, it entered into *ex curia* negotiations with the Defendant until 19th January, 2017, which failed. It however, accrued a fresh action on 22nd May, 2013, when the Defendant acknowledged the dispute on the quantum of compensation.

The Defendant argued that the Plaintiff's cause of action arose nine years ago and it missed its opportunity to assert its rights in Court. Its action was statute barred and could not be resuscitated by a non-existent claim of acknowledgment of debt. In the case of **Daniel Mwale v Njolomole Mtonga (sued as Administrator of the**

Estate of the late Gabriel Siwanamutenje Kapuma Mtonga) v The Attorney General[5], the Supreme Court held *inter alia* that:

> **"....The Statute of Limitation when raised, brings forth a serious legal question as to whether the Court has jurisdiction to entertain the action before it, given that it was brought outside the limit period. It hardly bears repeating that the issue of jurisdiction is a threshold question and a lifeline for continuing any proceedings. Where a Court holds the opinion that it has no jurisdiction, the very basis for continuation of the proceedings before it – it must forthwith cease to deal with that matter. In our view, the issue of statutory bar when raised is as much about the jurisdiction of the Court as it is a statutory defence for a party. It is a legal point touching on both the court's jurisdiction and a provision of a statute..."**

The Supreme Court further stated that:

> **"...time begins to run when there is a person who can sue and another to be sued, when all facts have happened which are material to be proved to entitle the Plaintiff succeed..."**

From the Plaintiff's Statement of Claim, it is clear that the Defendant cancelled the Plaintiff's hunting concession in July, 2008. *Prima facie* this event set into motion the Plaintiff's cause of action and it should have commenced Court action. In my view, the fact that the parties were locked into ex curia negotiations did not prevent the Plaintiff from asserting its rights.

The issue however before Court is embodied in the Plaintiff's submissions and borders on a claim of an accrued fresh cause of action in 2013. It is associated with the Defendant's letter of 2013 in the Plaintiff's Affidavit marked exhibit "**OM3**". The Plaintiff contends that the letter was the basis of the Defendant's acknowledgment of debt. The Defendant argued that it did not accept liability and its letter dated 22nd May, 2013 was written on a without prejudice basis. The issue that arises for determination therefore, is whether the Plaintiff accrued a fresh cause of action as a result of the Defendant's letter?

Learned Counsel for the Plaintiff argued that the "without prejudice" correspondence in this case was admissible and proved the exception to limitation. This is because the Plaintiff believed that the Defendant had acknowledged the debt. The proposition was disputed by Counsel for the Defendant.

In the case of **Cutts v Head and Another**[6], the Court held that:

> **"An offer to settle an action made without prejudice but subject to a clear reservation of the right to refer to it on the issue of costs was admissible for that purpose in all cases where the issue was more than a simple money claim."**

In the **Cutts** case, the the Court envisaged a clear reservation of the right to refer to the "without prejudice" correspondence. This principle of law is relevant in our jurisdiction. Thus, for one to produce without prejudice communication there must be a clear reservation stating that the other party has a right to refer to the "without prejudice" correspondence.

I have perused the letters contained in the Plaintiff's Affidavit marked "**OM1**" - "**OM3**" and find that the Defendant did not make the reservation to produce the correspondence. I also find that correspondence was made in the course of ex curia negotiations and should not have been divulged by the Plaintiff. It was in any event, of very little assistance to Court.

I am fortified by the case of **Lusaka West Development Company Limited, B.S. K. Chiti (Receiver), Zambia State**

Insurance Corporation v Turnkey Properties Limited[7] where the Supreme Court held that:

> **"As a general rule, therefore, without prejudice communication or correspondence is inadmissible on grounds of public policy to protect genuine negotiations between the parties with a view to reaching a settlement out of court..... "**

It is patently clear from the facts of this case that the Plaintiff's claim does not meet the exception prescribed in the **Turnkey** case. Assuming that the letter was not written salvo jure, I would have still arrived at the same decision because after carefully considering the letter, I find that it did not amount to an acknowledgment of debt. It was rather a request for clarification from the Plaintiff following its letter dated 22nd April, 2013. I therefore, hold that the Plaintiff has not accrued a fresh action and its claims are statute barred.

Accordingly, I dismiss the Plaintiff's appeal and award costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 16th day of March, 2018.

M. Mapani-Kawimbe
HIGH COURT JUDGE