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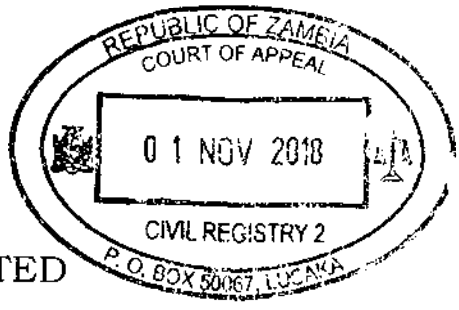
IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.85/2018
HOLDEN AT LUSAKA



(Civil Jurisdiction)

B E T W E E N:

MANINGI SAFARIS LIMITED APPELLANT

AND

THE ATTORNEY-GENERAL RESPONDENT

Coram: Mchenga DJP, Chishimba and Majula, JJA

On 22nd August, 2018 and 1st November, 2018

For the Appellant: *Messrs M. Mutemwa - Mutemwa Chambers*

For the Respondent: *Mrs. M. Shipanuka – State Advocate*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172 (SC).*
2. *Zambia Consolidated Copper Mines Limited vs Chileshe (2002) ZR 86.*
3. *Daniel Mwale vs Njolomole Mtonga (Sued as Administrator of the Estate of the late Gabriel Siwonamutenge Kapuma Mtonga and The Attorney-General (SCZ Judgment No.25 of 2015)*
4. *Lusaka West Development Company Limited, B.S. K Chiti (Receiver), Zambia State Insurance Corporation vs Turnkey Properties Limited (1990) ZR 1 (SC).*

Legislation referred to:

1. *Section 29 of the Limitation of Actions Act 1939.*

Other authorities referred to:

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

The appellant herein, initially appealed against the ruling of the Deputy Registrar in which she dismissed the appellant's matter for being statute barred. The appellant appealed to a Judge at Chambers of the High Court, who also upheld the decision of the Deputy Registrar hence this appeal.

The brief facts of this case are that on 26th November, 2002, the appellant was awarded a Safari Hunting Concession for fifteen (15) years in West Zambezi Upper Hunting Block by the Zambia Wildlife Authority, which is now the Department of National Parks and Wildlife. To this effect a Hunting Concession Agreement was executed by the parties and it came into effect on 17th February, 2003.

In July, 2008, the said Hunting Concession was cancelled by the Zambia Wildlife Authority on account of conservation efforts by the African Parks in Liuwa National Park. The respondent also undertook to compensate the appellant for all losses occasioned.

In line with the undertaking by the respondent, on 7th June, 2013, the appellant submitted its computed losses in the sum of US$734,434 or Kwacha equivalent. This amount was disputed by the respondent

and has remained unsettled to date. This led to the filing by the appellant of a writ of summons in the High Court for an order for payment of the sum of US$734,434 on 18th August, 2017. The respondent challenged the propriety of the matter in light of section 2(1) and 3 of the **Limitation Act 1939.**

The grounds of appeal before this court raise two issues which are as follows:

Firstly, that the learned Judge misdirected herself in law and fact by holding that there was no fresh accrual of action of acknowledging of debt by the respondent notwithstanding the appellant's overwhelming evidence to that effect.

Secondly, non-direction or otherwise, she failed to make a finding on the appellant's unchallenged evidence of acquiescence which effectively estopped the defendant from pleading limitation of action.

In the appellant's heads of argument, it was submitted that the appellant was awarded a hunting concession for 15 years which was prematurely cancelled by the respondent in July, 2008. Counsel pointed out that the respondent undertook to compensate the appellant for all losses occasioned. Counsel referred the court to paragraph 2 of a letter from the respondent dated 22nd May, 2013.

He pointed out that the learned High Court Judge held that the respondent's letter dated 22nd May, 2013 did not amount to an acknowledgement of debt, but was rather a request for clarification from the plaintiff. Counsel also observed that the trial Judge further held

that it was written on a '**without prejudice**' basis and the respondent did not authorize its production.

He went on to refer the court to paragraph 2 of another letter from the respondent dated 19th January, 2017 which, according to Counsel, the court below completely failed to consider. In Counsel's view the 2nd letter amounted to an acknowledgment of the debt and it was written on a **"without prejudice basis."** He contended that it was therefore an error for the court below not to address this aspect. Counsel spiritedly argued that there was a fresh accrual action from the two letters.

Counsel then moved to the issue of acquiesce which he had raised in the court below. He referred the court to paragraph 8 of the appellant's affidavit which reads as follows:

> *"8. That I am further advised by my Advocates and verily believe that in any case by virtue of the correspondent referred to under paragraph 6 above, the defendant is estopped from pleading limitation of action, since by its conduct, the defendant created an impression in the mind of the plaintiff that it acquiesced to the state of affairs."*

Relying on **Section 29 of the Limitation of Actions Act 1939,** Counsel argued that the court has jurisdiction to refuse relief on the ground of acquiescence. That the court below in its ruling glossed over this aspect which entitles this court to interfere with the Ruling in line with the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited*** [1].

He wound up his submissions by arguing that the respondent be estopped from departing from the particular state of affairs as it did not challenge the evidence of the appellant.

We have taken into consideration all the evidence on record and the submissions by the respective parties.

The issue that emerges for determination in our view was whether or not there was an acknowledgement by the respondent to compensate the appellant after the cancellation of Hunting Concession agreement in July, 2008. In this regard we are compelled to address our minds to the provisions of the **Statute of Limitations Act** and as to whether the letters that have been exhibited can be construed to be a confirmation of the respondent's decision to settle the matter. This in turn will have a bearing on whether or not there was a fresh accrual of action as contended by the appellants.

STATUTE OF LIMITATIONS ACT 1939

The **Statute of Limitation** (hereinafter referred to as **The Act)** provides under section 2 (1)(a) as follows:

> *"2(1) 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 on tort:..."*

The matter before us is founded on contract and therefore the **Act** is applicable. In terms of the provisions of the **Act** there is a limitation

with regards the time within which a claim should be brought to court. The limitation period is six years and the time starts to run from when the cause of action arose.

The respondent pleaded the defence of statute bar as the cause of action arose in 2008 which is a period of over 9 years. On the other hand, the appellant is contending that the defence of statute bar is not available to the respondent by virtue of **sections 23 and 24** which states as follows:

> *"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."*

> *"24. Formal provisions as to acknowledgments and part payment.*
> *(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making that acknowledgment. Any such acknowledgment or payment as aforesaid may 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."*

The first one is whether there is a fresh accrual of action of acknowledgment of debt and secondly are the respondents estopped from pleading statute of limitation of actions in the fact of the unchallenged evidence of acquiescence?

The starting point in our view is to first establish when the time starts running. It is trite that the time starts to run when the cause of action arose. Failure by a party to institute proceedings within the six-year limitation period will be at their own peril.

There are a litany of cases regarding the consequences that befall a party who does not comply with the limitation period. It is also important to note that the time does not stop running simply because the parties have entered into ex-curia negotiations. In the case of ***Zambia Consolidated Copper Mines Limited v Chileshe,***[2] the Supreme Court stated that:

> *"...the mere fact that negotiations have taken place between a plaintiff ... that is that, once time begins to run, it runs continuously and that this principle can be ousted only by a statutory provision."*

Further, the Supreme Court observed in the case of ***Daniel Mwale vs Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwonamutenye Kapuma Mtonga) vs The Attorney General*** [3] the Supreme Court observed 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..."*

The learned authors of **Halsbury's Laws of England** have opined that:

> *"The mere fact that negotiations have taken place between a claimant and a person against whom a claim is made does not debar the defendant from pleading a statute of limitation, even though the negotiations may have led to delay and caused the claimant not to bring his actions statutory period had passed. It seems, however, that the defendant will be debarred from setting up the statute if, during the negotiations, he has entered into an agreement for good consideration not to do so, or, if he has represented that he deserves that the plaintiff should delay proceedings and that the plaintiff will not be prejudiced by the delay, and the plaintiff has acted on the faith of his representation."*

As can be discerned from the foregoing, the law is very clear, time does not stop running because parties have entered into negotiations. A party cannot seek to benefit form a delay which may have been caused by negotiations.

In relation to the provisions of the **Act,** namely **section 23 and 24** our understanding is that they are specific to partial payment with acknowledgement by the debtor so that if the balance is not paid beyond the limitation period the debtor cannot rely on the time bar to avoid paying the balance.

Pertaining to the case at hand, no payment was paid whatsoever towards the debt.

In our considered view the respondent is entitled to insist on his rights and plead the statute of limitation. We are inclined to find that the respondent properly invoked the **LIMITATION ACT 1939. Sections 23 and 24** called in aid by the appellant cannot avail them.

In light of the foregoing we find that the Judge in the court below was on firm ground.

ACQUIESCENCE

We have scrutinized the letters of the purported acknowledgments referred to us by Counsel for the appellant at pages 51 and 61 of the record. We shall reproduce the letter hereinunder.

> *"Kindly show us how you arrived at K3,892,500,00, you are now claiming to be your loss arising out of the hunting concession agreement which was cancelled."*
>
> *"We have taken note of the contents of your letter and apologise for the late response. We wish to advise that we are still awaiting instructions from our client and we will revert back to you once clear instructions have been obtained."*

In our considered view, both the letters do not speak to or admit liability. A plain reading of the letters that have been fronted as the basis for the fresh accrual of the action are merely responding to the claims being made by the appellant. There is nowhere in the body of the letters where there is clear acknowledgement of liability.

In any event the letter dated 22nd May, 2013 at page 51 is endorsed 'salvo jure.' The net effect of this is that it is inadmissible. The law on 'without prejudice' documents is crystal clear that such communication is inadmissible. The rationale for this was aptly stated in the case of ***Lusaka West Development Company Limited, B.S. K Chiti (Receiver), and Zambia State Insurance Corporation vs Turnkey Properties Limited*** [4] 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 of court."*

As regards the letter dated 19th January, 2017, it indicates that respondents are awaiting instructions from their client in reference to Department of National Parks and Wildlife. This cannot by any stretch of imagination be interpreted as 'acknowledgment' of liability.

We therefore, cannot not fault the Judge in the court below in arriving at the finding that:

> *"It did not amount to an acknowledgement of debt. It was rather a request for clarification from the plaintiffs 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."*

We have equally arrived at the same conclusion and find that the appellant cannot seek refuge in the provisions of **S.23** and **24** of the **Limitation Act** for reasons advanced in the preceding paragraphs.

We therefore find ground two to be destitute of merit. We have found that the appellant failed to discharge its burden of proving its case on a balance of probability which is the requisite standard in civil matters. As was clearly expressed in ***Wilson Masauso Zulu v Avondale Housing Project Limited*** [1].

> *"A plaintiff who has failed to prove his case cannot be entitled to his judgment, whatever may be said of the opponent's case".*

In this regard we dismiss the appeal forthwith. Costs abide the event to be taxed in default of agreement.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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F.M. Chishimba
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE