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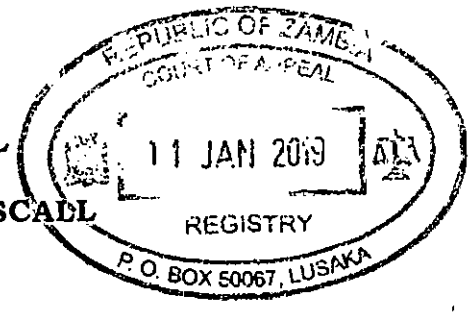
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 92 OF 2018**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

PHILLIP K. R. PASCALL	**1st APPELLANT**
ARTHUR MATHIAS PASCALL	**2nd APPELLANT**
CLIVE NEWALL	**3rd APPELLANT**
MARTIN R. ROWLEY	**4th APPELLANT**
FIRST QUANTUM MINERALS LIMITED	**5th APPELLANT**
FQM FINANCE LIMITED	**6th APPELLANT**
AND	
ZCCM INVESTMENTS HOLDINGS PLC	**RESPONDENT**

CORAM: **Chashi, Lengalenga and Siavwapa, JJA**

ON: **22nd August, 3rd October, 21st November 2018 and 11th January 2019**

For the Appellants: *(1) S. Sikota SC, Messrs Central Chamber*

(2) M. M. Mundashi, SC Messrs Mulenga Mundashi, Kasonde Legal Practitioners

(3) K. Khanda, Messrs Central Chambers

For the Respondent: *(1) B. C. Mutale, SC Messrs Ellis and Company*

(2) Dr. J. M. Mulwila, SC Messrs Ituna Partners

(3) M. Lungu, Messrs Lungu Simwanza and Company

(4) M. Mukuka (Ms) Messrs Eillis and Company

(5) G. Tembo, Messrs Ituna Partners

(6) L. Mbalashi, Deputy General Counsel – In House

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Leopold Walford (Z) Limited v Unifreight (1985) ZR, 203***
2. ***Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture - SCZ /8/52/2014***
3. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172***
4. ***Savenda Management Services Limited v Stanbic Bank Zambia Limited - SCZ Judgment No. 10/2018***
5. ***Francis Xavier Nkhoma v Godfrey Miyanda - National Secretary of the Movement for Multi-Party Democracy*** *(Sued on his own behalf and on behalf of the Movement for Multi-Party Democracy)* - ***SCZ Judgment No. 10 of 1995***
6. ***Prisca Nyambe v Bank of Zambia - SCZ Appeal No. 207 of 2012***
7. ***Riches v Director of Public Prosecutions (1973) 1 WLR, 1019***
8. ***Ronex Properties Limited v John Laing Construction Limited (1983) QB 398***

Legislation referred to:

1. ***The Limitation of Actions Act, 1939***
2. ***The Penal Code, Chapter 87 of the Laws of Zambia***
3. ***The Constitution of Zambia, Act No. 2 of 2016***
4. ***The High Court Act, Chapter 27 of the Laws of Zambia***
5. ***The Supreme Court Practice (White Book) 1999***

This appeal is against the ruling of the learned Judge of the High Court, commercial division, which was delivered on 25th January 2018.

As the record of appeal (the record) reveals, it is a consolidation of two appeals.

The background to this matter is that, by way of writ of summons under cause No. 2016/HPC/051, the Plaintiff, now the Respondent in this appeal, commenced proceedings on 28th October 2016 against (1) First Quantum Minerals Limited, (2) FQM Finance (3) Philip K. R. Pascall (4) Arthur Mathias

Pascall (5) Clive Newell, (6) Martin R. Rowley and (7) Kasanshi Mining Plc (the Defendants).

As shown at page 56 of the record, sixteen (16) claims were endorsed on the writ of summons.

According to the copious statement of claim which runs into forty-three pages, the Plaintiff was a shareholder in Kasanshi Holding Limited (KHL) and the holding company in the First Quantum Group of Companies. The 2nd defendant is wholly owned by the 1st defendant. The 3rd defendant is co-founder, shareholder and also director and proxy at shareholders meetings of KHL. He was also one of the key FQM executives nominated by the 1st defendant for purposes of fulfilling its duties under the Management Service Agreement (MSA) Kasanshi Project dated 18th March 2004.

The 4th defendant was a director and chief executive of KHL. The 5th defendant was president and director of the 1st defendant and director of the 7th defendant up to 2013 and one of the key FQM executives nominated by the 1st defendant for purposes of fulfilling its duties under the MSA.

The 6th defendant was co-founder and director of the 1st defendant, director of KHL and key executive nominated for duties under MSA.

The 7th defendant was originally known as Cyprus Amax Kasanshi Plc and owned by KHL (80%) and the plaintiff (20%) issued shares.

By a shareholder's agreement dated 14th March, 1997, made between the 7th defendant, KHL and the plaintiff, provision was made for the governance and administration of the 7th defendant. The shareholders agreement was on two occasions amended leading to the shareholders agreement of 28th August 2003 referred to as ASHA.

The entwined structure shows how the 1st, 2nd, 3rd, 4th, 5th and 6th defendants had control of KHL and through it, the 7th defendant.

lssues arose out of the alleged excessive monies involving billions of United States dollars which were paid by the 7th defendant to the 2nd defendant without prior board approvals and/or resolutions. It was averred that; the

payments were fraudulent and not in the interest of the 7th defendant; although it was claimed the monies were to provide working capital for the 7th defendant.

According to the Plaintiff, the money was being held on account with very little interest in return, when it should have been invested on higher returns.

In December 2014, Zambia Revenue Authority made tax demands on the 7th defendant, who is challenging the assessment, although the plaintiff is of the view that the challenge has no prospects of success.

The plaintiff has alleged that, by its control, the 2nd defendant owes the 7th defendant a fiduciary duty by its undertaking to provide a treasury function. That the same applied to the 3rd, 4th, 5th and 6th defendants. It is further alleged that the 1st defendant is in breach of the MSA. Further that, the 1st, 2nd, 3rd, 4th and 6th defendants induced breaches of the ASHA and the 7th defendant's articles of association.

The Plaintiff also alleged acts of deceit, breach of trust, conspiracy to injure, dishonest assistance, use of unlawful means and issuance of negligent statements.

According to the Plaintiff, it has as a result suffered loss and damage.

On 25th January 2017, Messrs Central Chambers, Advocates for the 1st defendant took out summons to set aside the writ of summons and statement of claim on the following grounds:

(1) That the action was irregular for indicating the wrong time in which to enter appearance.

(2) That the action is statute barred.

(3) That the action is incompetent for lack of a board resolution to commence and maintain it; and

(4) That the action is null and void for want of leave to issue process for service outside the jurisdiction.

It should here be noted that the 1st defendant's skeleton arguments did not contain any arguments on the matter being statute barred.

On 15th February 2017, Messrs Mvunga and Associates as advocates for the 3rd, 4th, 5th and 6th defendants also took out similar summons, advancing the same grounds. On the limitation of actions, reliance was placed on Section 2 of ***The Limitation of Actions Act***[1] (the Act) which provides for six years limitation on actions in contract and tort and alleged that the cause of action accrued in 2009 as alluded to in paragraph 14 of the statement of claim, when the deposit arrangements were made and the financial statement for the year having ended on 31st December 2007.

On 7th April, 2017, Messrs Corpus Legal Practitioners also took out summons based on the same grounds. In addition, they alleged that some of the claims were of a criminal nature and there was also no board resolution to appoint external Advocates.

In opposing the applications, Counsel for the Plaintiff exhibited extracts of the minutes of the board meeting which resolved for commencement of actions. Counsel conceded that leave to issue writ of summons was not obtained and sought to do so belatedly.

On the period within which to enter appearance, Counsel submitted that, it was a clerical mistake.

As regards the matter being statute barred, Counsel argued that the statement of claim does not state when the matter accrued. Further, that it is not only talking to contracts and torts, but also alleges breach of trust and many other claims.

In the ruling being impugned, the learned Judge acknowledged the claims endorsed on the writ of summons and categorized them as claims seeking accounts to be rendered for monies and/or assets, compensation and damages from breach of trust and an injunction against disposal of assets and damages for fraud.

The learned Judge also acknowledged that the Defendants entered conditional appearance before they made the applications which were the subject of the ruling.

After considering the affidavit evidence and submissions by Counsel, the learned Judge formulated the issues for consideration as follows:

(1) Whether the action is null and void for want of leave to issue process for service outside jurisdiction.

(2) Whether the action is irregular for indicating the wrong time in which to enter appearance.

(3) Whether the statement of claim is irregular for containing reference to criminal liability under the Penal Code.

(4) Whether the action is statute barred.

(5) Whether the appointment of external Counsel by the Plaintiff lacks the boards resolution.

At this juncture, the learned Judge left out the issue of commencement of action without the resolution of the board, although she later addressed the issue in her ruling.

The learned Judge then opined that, the first and most important question to consider was whether the action is statute barred.

That based on the outcome, other issues may or may not be necessary to address.

The learned Judge made reference to Section 2 of the Act in particular Section 2 (1) (a) which states as follows:

> *"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 contracts or torts..."*

The learned Judge then went on to refer to the proviso under subsection (7) which states that:

"This section shall not apply to any claim for specific performance of a contract or other equitable relief in so far as any provision thereof maybe applied by the Court by analogy in like manner as the corresponding enactment repealed by this act has heretofore been applied."

According to the learned Judge, those provisions were not absolute and did not apply automatically as long as the period of six years is exhausted from the date of accrual of actions. That, one must have regard to the nature of the relief being sought. Further, that subsection 7 excludes certain reliefs. According to the learned Judge, it creates for an exception where acquiescence and laches would ordinarily bar a claim to a relief. She came to the conclusion that the doctrine of acquiescence and laches was not an issue in *casu* and takes away nothing from the exclusion under subsection (7).

The learned Judge noted that there were three notable equitable remedies endorsed on the writ of summons and that those were catered for under the *proviso.*

As regards section 19 (1) which provides that there is no limitation to an action by a beneficiary under a trust, being an action in respect of fraud or fraudulent breach of trust to which the trustee was a party or privy or to recover trust property or the proceeds thereof and the limitation under Section 19 (2) and the relief concerning fraud or concealment of fraud; the learned Judge was of the view that looking at the affidavit evidence, there were contentious issues which could only be resolved at trial, since it was not clear from the parties as regards the accrual date. She was, of the further view that disallowing them to go to trial would not serve any justice.

Based on the aforestated reasoning, the learned Judge declined to grant the application to set aside the writ of summons and statement of claim on account of it being statute barred.

The learned Judge then went on to address the issue of failure to seek leave to issue the writ for service out of jurisdiction. Reference was made to the ex-parte Order at page 146 of the record and opined that leave was sought and dismissed the issue, though the said Order had nothing to do with the issue which was being raised. However, in view of her finding, the Judge was of the view that there was no need to apply for leave belatedly.

The court was also of the view that in any event, the matter had reached an advanced stage; the parties had filed voluminous documents containing details that speak to the merits of the Plaintiff's claim and the Defendants would not suffer any prejudice if the matter was allowed to go to trial.

In respect to the time required for appearance, the learned Judge referred to Article 118 (2) (e) of ***The Constitution of Zambia***[3], the case of **Leopold Walford (Z) Limited v Unifreight**[1] and the case of **Access Bank (Z) Limited v Group Five/Zcon Business Park Joint Venture**[2] and opined that, this was a procedural technicality which was curable and no party had suffered any prejudice as they all managed to enter conditional appearance and no default Judgment was obtained by the Plaintiff.

On the lack of board resolution, the learned Judge refused to rely on the newspaper cuttings to evidence that there was no board at the time of commencement of action and stated that there should have been better evidence, such as a printout from PACRA.

Further that, looking at the two board resolutions which were produced by the Plaintiff, the learned Judge was of the view that there was indeed authority given.

Lastly, on the issue of matters of criminal nature advanced in a civil matter, the court ordered that the words referring to the provisions of **The Penal Code**[2] be expunged.

Dissatisfied with the ruling, the Defendants appealed to this Court advancing the following grounds of appeal:

1. The learned Judge erred in law in her application of the exception to Section 2 (7) of the Act to the extent that the statement of claim was not only restricted to equitable claims but contained claims that are non-equitable and arise out of contract and tort and were specifically prayed for as damages. The ruling also ignores the exception of claims by analogy as specified by the second sentence of section 2 (7).
2. The learned Judge further erred in law by failing to apply Section 2 (2) of the Act in respect of the claim for an account of all monies received by First Quantum Minerals Limited and FQM Finance Limited
3. The learned Judge erred in law and fact when she;
   (i) Refused to determine the legal question of whether Section 19 of the Act applied to the claims for dishonest assistance in breach of trust or knowing recipients of trust property and instead referred this question to full trial; and
   (ii) Failed to rule that Section 19 of the Limitation Act did not apply to the claims for dishonest assistance in breach of trust or knowing recipients of trust property when the relevant facts were set out in document presented to the court and not the basis for dispute.
4. The learned Judge erred in law when she held that there is no requirement to obtain leave to issue court process out of jurisdiction and that the requirement is only to obtain leave to serve court process outside the jurisdiction.

At the hearing of the appeal, learned Counsel for the Appellants, State Counsel Mundashi, substantially relied on the consolidated Appellants heads of argument which he augmented with oral submissions.

In arguing the first ground of appeal, State Counsel submitted that Section 2 (7) of the Act as noted by the court below creates an exception for *"any claim for specific performance on a contract or for an injunction or other equitable relief."* That the Court further noted that there were only three notable equitable remedies.

According to State Counsel, the claims by the Respondent included several non-equitable claims for damages, which claims are either in tort or contract.

It was submitted that, despite the Respondent in its skeleton arguments in the court below accepting that the equitable claims exception in Section 2 (7) of the Act did not apply to all the claims, the court incorrectly extended the exception to each of the claims in the statement of claim including many that are not rooted in equitable remedies.

It was State Counsel's submission that the trial court had a duty to consider whether on the basis of the evidence or information before her, these claims were statute barred. That if she singled out some of the claims as being statute barred, she then had a duty and responsibility to consider whether each of the remaining claims were statute barred. It was contended that, a trial court must interrogate all issues in controversy between the parties. Reliance in that respect was placed on the cases of **Wilson Masauso Zulu v Avondale Housing Project Limited**[3] and **Savenda Management Services Limited V Stanbic Bank Zambia Limited**[4].

It was further submitted that, the effect of the court's refusal to consider the non-equitable claims, to determine if they were statute barred or not was that the learned Judge did not conclusively deal with the Appellant's plea that the claims were statute barred.

State Counsel further submitted that the ruling of the court ignored the exceptions of claims by analogy as specified by the second sentence of Section 2 (7) which is framed in language which suggests that even for claims that fall under the exception, the exception is not absolute. That although the court considered that the exception did not apply where claims are subject to equitable defences for laches and acquiescence, the court erred in finding that these defences were not applicable.

It was State Counsel's contention that the Respondent was well aware of the factual basis for its claims as early as 2007 and not later than 2010. That

its failure to bring its claims until 2016 supports the application of laches and acquiescence and demonstrates that the exception to the limitation period for equitable claims does not apply.

As regards the second ground, it was State Counsel's submission that the relief in paragraph (3) of the prayer for relief, requested an account of all the money of the 7th defendant which was received by the 1st and 2nd defendants or their related companies and the manner in which they applied the said monies. That this relief falls squarely within the second paragraph of Section 2 of the Act. That the learned Judge failed to consider the application of this provision to the request for an accounting and instead concluded that the claim fell within the general exception in Section 2 (7) of the Act for equitable claims.

It was State Counsel's contention that, whether the prayer for an action to account is seeking equitable relief or not, the express provision of Section 2 (2) of the Act is that it has a limitation period of six years. It is not just actions that are founded on contract or tort that are caught by the statute of limitation. That the subheading for Section 2 provides;

"Actions of contract and tort and certain other actions."

According to State Counsel the subsection deals with an action for an account. It is his argument that, to the extent that this may not be an action founded on contract or tort, it can be described as other actions. He further submitted that even if it was to be accepted that an action to account is an equitable relief, it is a relief that does not fall within the exception contemplated by subsection (7). That the language in subsection (2) is plain and unambiguous. The limitation period for an action to account is six years. In that respect State Counsel referred as to the Supreme Court case of **Francis Xavier Nkhoma v Godfrey Miyanda - National Secretary of the Movement for Multi-Party Democracy** *(Sued on his own behalf and on behalf of the Movement for Multi-Party Democracy)*[5] in construing statutory provisions. It was State Counsel's submission that the claim for an order to account is

subject to the six-year limitation and that the court erred in finding that the general exception for equitable claims overrode this express limitation period.

In arguing the third ground of appeal it was submitted that the learned Judge failed to address the question of whether Section 19 (1) of the Act applies to the claims pleaded by the Respondent. That the Learned Judge instead determined that, resolution of this legal question would require a full trial on the merits. That this was an error as the issue was capable of summary determination. According to State Counsel, the Respondent has never demonstrated that the 1st and 2nd defendants were trustees of any trust or that the Respondent (as minority shareholders) was a beneficiary. Nor did the Respondent demonstrate that there was fraud or fraudulent breach of the relationship for equity to create constructive trust. That the issue therefore that should have been considered is whether on the basis of the facts before the court the 1st and 2nd defendants could have assumed the role of trustees to the extent that Section 19 (1) can apply.

State Counsel then cited a plethora of cases which dealt with the issue and on the distinction, for limitation purposes, between a liability for breach of trust and ancillary liability.

State Counsel further submitted that, in addition to failing to determine the legal question, the learned Judge also erred by concluding that the question of when the Respondent discovered the alleged fraud for purposes of the running of the limitation period was too contentious to reach determination without a full trial, as the relevant facts demonstrating that the Respondent was aware of the fact upon which its claims were based were set out in documents presented to the court and not the basis for dispute. That the learned Judge ought to have considered the undisputed evidence that was before her and determine whether she could decide on the limitation issue.

State Counsel then proceeded to make reference to certain documents and submitted that the facts were in undisputed documents, many of which

were submitted by the Respondent. That it was an error for the court not to determine the limitations issue without a full trial on the merits. We were referred to the case of **Prisca Nyambe v Bank of Zambia**[6] where the court dealt with the issue of limitation as a preliminary issue on the basis of the pleadings and documents before it, well before trial. It was submitted that the court has an inherent jurisdiction to strike out a claim where it discloses no cause of action as an abuse of Court process and is also empowered to determine any issue of law suitable for determination without trial.

In respect to the fourth ground of appeal, our attention was drawn to Order 10/16 of the ***High Court Rules***[4] and the case of **Leopold Walford (Z) Limited v Unfreight**[1] where the Supreme Court held that;

> *"The rule as set out above is quite explicit and the procedure to be followed is that before a writ can be issued, leave of the Court must be obtained. The procedural steps to be taken, therefore are that a writ must be prepared, but that before it can be issued, an application must be made, with the writ attached thereto, for leave to issue the writ for service out of the Court's jurisdiction; but, even then, only after the Court's leave has been obtained, shall the writ be issued."*

State Counsel submitted that the position taken by the learned Judge was not consistent with the position and holding of the Supreme Court in the **Leopold Walford**[1] case.

State Counsel submitted that, having found that the defects were not fatal, the Supreme Court nevertheless concluded that the defect was curable. That although it is acknowledged that the court can order a defect to be cured, a litigant is not entitled to such a favorable outcome as a matter of right. The outcome is one of the court's discretion which is essentially, if not entirely, directed by the existence of prejudice suffered by the other party owing as a consequence of the irregularity.

It was submitted that, by avoiding the making of an application for leave to issue, the Plaintiff contrived, whether wittingly or not, to steal a march on the proper date of issue, prejudicing the limitation defences of the Defendants by procuring such an earlier date of issue.

In response, the Respondent's Counsel led by State Counsel Dr. Mulwila, also relied substantially on the Respondent's heads of argument which he augmented with brief oral submissions.

The first, second and third grounds of appeal were argued together.

State Counsel submitted that the Appellant's arguments are misconceived. That Section 2 of the Act sets out the general rule as to periods of limitation in respect of contract or tort, and certain other actions.

State Counsel hastened to point out that Section 2 falls under Part 1, and so does Section 19 of the Act.

It was submitted that the learned Judge did draw a distinction between the equitable and non-equitable claims of the Respondent. It was argued that the ruling of the court was premised on several grounds and not anchored on Section 2 (7) of the Act.

State Counsel further submitted that, the learned Judge should not be taken as to have held that the entire Respondent's claims are captured by Section 2 (7) of the Act. That in any event the record will show that the court below did not refuse the Appellants application on the basis of Section 2 (7) alone, but went on to consider the Respondent's argument that the whole matter was caught by the provisions of Section 26 of the Act which falls under Part II and provides as follows;

> *"Where, in the case of any action for which a period of limitation is prescribed by this act, either-*
>
> *(a) The action is based upon the ground of the defendant or his agent or of any person through whom he claims or his agent; or*

(b) The right of action is concealed by the fraud of any such person as aforesaid; or

(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 ground or mistake, as the case may be, or could with reasonable diligence have discovered it."

Reference was also made to Section 1 of the Act, which states as follows;

"The provisions of (Part 1) of this Act shall have effect subject to the provisions of Part II of this Act, which provide for extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud and mistake."

According to State Counsel, it follows, that all forms of action to which Part 1 relates are affected by the provisions of Section 26. That this includes actions grounded on tort or contract, including specialties, and actions for an account, regardless of whether the relief sought is equitable in nature.

It was State Counsel's submission that it cannot be doubted that the learned Judge considered the submissions of the parties in respect to Section 19 and 26 of the Act.

State Counsel then made reference to the guidance notes under Order 33/4/6, 33/3/2 and 18/11/12 of ***The Rules of the Supreme Court***[5] and a number of decided cases, on the danger of deciding cases on the basis of preliminary issues, instead of allowing the matter to be decided at trial especially where there is obscurity of the facts.

It was State Counsel's contention that the question of the status of the Defendants, in respect of which the statement of claim contains extensive descriptions of the connections among them and the corparate persons concerned, or whether the Plaintiff's equitable claims are affected by any acquiescence, are matters suitable for determination at trial upon close of pleadings.

In response to the fourth ground of appeal, it was conceded that there is a requirement to obtain leave as was decided in the **Leopold Walford**[1] case. However, our attention was drawn to Article 118(2) (e) of ***The Constitution of Zambia***[3] which states that justice shall be administered without undue regard to procedural technicalities and submitted that, the learned Judge was on firm ground when she refused to dismiss the action on the ground that the Plaintiff had not obtained leave to issue the process.

The Appellants did file a reply to the Respondent's heads of argument, which they also relied on. A perusal of the same shows that the Respondents in reply, merely reiterated their submissions in support of the appeal and we see no need to recapitulate the same.

We have considered the parties respective arguments and the ruling being impugned.

We shall consider the first, second and third grounds of appeal together as they are related.

The Appellants in these grounds are attacking the manner in which the learned Judge in the court below applied the provisions of the Act in dismissing their plea to have the matter dismissed on account of it being statute barred.

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..."*

Time starts to run on the first day on which the claimant cause of action accrued; meaning the date on which everything had occurred, which must occur in order to bring that particular claim.

It should however be noted that in relation to claims of which damage is an essential element, the Act provides for a secondary limitation period, which does not commence until the date on which the claimant ought reasonably to have discovered various facts; such as the occurrence of damage; knowledge of which would have made it reasonable to commence proceedings.

Also, in cases of fraud or deliberate concealment by defendants of facts relevant to the cause of action, time does not start to run until the claimant discovered or ought reasonably to have discovered the truth.

It should therefore be noted that the periods of limitation for different classes of action provided for under Part 1 of the Act are subject to provisions provided for under Part II of the Act.

Of interest for purposes of this appeal is Section 19 (1) of the Act which provides that there is no period of limitation applicable to an action by a beneficiary against a trustee in respect of the trustee's fraud or fraudulent breach of trust or to recover trust property in the possession of the trustee or converted by him. Also, Section 26 of the Act as earlier alluded to, where extension of the limitation period is provided for in cases where the action is based on fraud or the right of action was fraudulently concealed or the action is for relief from the consequences of a mistake.

In the case of **Riches v Director of Public Prosecutions**[7]. 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."*

The Court of Appeal opined that where the facts relied on show that the cause of action arose outside the current period of limitation and it is clear

that the defendant intends to rely on the relevant Limitation Act, and there is nothing before the court to suggest that the plaintiff could escape from the defence, it is open to the court to strike out the statement of claim.

However, like in cases where a preliminary issue is raised, the preliminary point must be on clear point of law based on undisputed facts, and not on complex questions of law.

Order 18/19/11 **RSC** 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 stuck out unless the case was one to which the Real Property Limitation Acts applied (see* **Price v Philips** *(1894) WN 213).*
>
> *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."*

In the case of **Ronex Properties Limited v John Laing Construction Limited**[8], Donaldson, LJ at page 398 had this to say:

> *"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."*

From the onset, it should be noted that the Defendants in the court below sought to set aside the whole writ of summons and statement of claim amongst other grounds, on the ground that the cause of action was statute barred, and not specific reliefs as endorsed on the writ of summons.

We however note that, the Appellants have now come to accept that amongst the claims, there are equitable ones and non-equitable, and are

now quick to try and turn the tables and put the burden and the blame on the learned Judge for not interrogating each and every relief and separating those which were caught up by limitation period from those which were not. We however note that the learned Judge took note of each of the sixteen claims endorsed on the writ of summons, acknowledged them and categorized them. She also took into consideration the provisions under the Act, in particular Section 2 (1) (a), 2 (7), 19 (1) and 19 (2) of the Act and related them to the claims. The learned Judge also addressed the reliefs affected by Section 26 of the Act, being reliefs concerning fraud or concealment of fraud.

Therefore, in our view, all the relevant provisions of the Act were taken into consideration by the learned Judge in arriving at the decision as she did.

The learned Judge, after considering the affidavit evidence and the parties' respective arguments, was of the view that there were contentious issues which could only be resolved at trial.

She was also of the view that the accrual dates of the claims were not clear. The learned Judge opined that the issues were so contentious, that disallowing them to go to trial would not be in the interest of justice.

As earlier alluded to, this was an "omnibus" cause of action consisting of sixteen claims and the statement of claim running into forty-three pages. Looking at the claims, the issues which were raised by the Defendants in the court below, the Plaintiff's arguments in response and the ruling of the court, we agree with the learned Judge that the issues were complex and therefore this was not a clear and appropriate case where the issues could be resolved on summons. The Defendants needed to plead the statutory defence and then raise the preliminary issue on the pleadings and seek the trial of the preliminary. In the absence of that, we see no basis to fault the learned Judge, in finding that the issues could only be resolved at the trial.

The learned Judge did not shut the door in the Appellant's faces. She was only giving them an opportunity to specifically and specially plead the

statutory defence in their defence and enable parties to adduce evidence at the trial to enable her make a proper determination.

In the view that we have taken, we see no merit in the first, second and third grounds of appeal and the same are accordingly dismissed.

We now turn to the fourth ground of appeal. We need not belabor on this issue, since the Respondent has conceded that the learned Judge misdirected herself by finding that there is no requirement to obtain leave to issue court process out of jurisdiction. This ground of appeal succeeds based on the **Leopold Walford**[1] case where the process was elaborated.

The process is two pronged. Firstly, one has to issue the writ of summons out of jurisdiction (exhibiting a copy of the writ) and once leave is granted, the writ is then filed and then the Plaintiff can apply to serve process out of jurisdiction.

Having found that the defect was curable, we cannot fault the learned Judge in refusing to dismiss the cause of action as rightly pointed out by the learned Judge, no default Judgment was obtained by the Plaintiff; the Defendants entered conditional appearance and then raised issues and as such no prejudice was suffered.

The net result of the appeal is that it has substantially failed.

We award the Respondent costs. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE