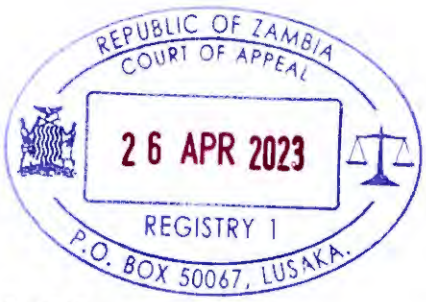
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 95 OF 2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:



ANNIE KAPUTULA **APPELLANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

CORAM: SIAVWAPA JP, CHASHI AND SICHINGA, JJA

ON: 21st March and 26th April 2023

For the Appellant: *M.D Lungu, Messrs GDC Chambers*

For the Respondent: *N/A*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. ***Daniel Mwale v Njolomole Mtonga – SCZ Judgment No. 25 of 2015***
2. ***William Carlisle Wise v EF Hervey Limited (1985) ZR, 179***
3. ***Muvi TV Limited v Killian Phiri and Kennedy Musweu – SCZ Judgment No. 13 of 2015***
4. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1983) ZR, 1***
5. ***Maila Rodger Chilele v Patson Mbao and Another- CAZ Appeal No 95 of 2021***
6. ***Philip KR Pascall and Others v ZCCM Investments Holdings Plc – CAZ Appeal No. 92 of 2018***

Legislation referred to:

1. ***The Limitation Act, 1939***

Rules referred to:

1. ***The Supreme Court Practice (White Book) 1999***

Other Works referred to:

1. ***Blacks Law Dictionary, Eighth Edition, Bryan A. Garner***

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Mr. Justice C. Zulu delivered on 14th May, 2020

1.2 In the said Judgment, the learned Judge wholly dismissed the Appellant's action, who was the plaintiff in the court below, on account of it being statute barred

2.0 BACKGROUND

2.1 The Appellant was employed by Zambia National Service (ZNS) as a Non-Commissioned Service Woman in 1996 and posted to Mumbwa. In June 1998, she got married to Martin Kaputula (husband) who at the time was also an employee of ZNS but subsequently resigned from the service. In the same year, she gave birth to a son who fell seriously ill and died in 2000. According to her

evidence, she also thereafter fell sick and never returned to Mumbwa for work.

2.2 On 2nd March, 2013, the Appellant by way of writ of summons and statement of claim commenced an action challenging her purported dismissal, alleging that it was unfair, illegal and wrongful and therefore null and void. In the reliefs sought, was an Order for reinstatement, payment of salaries and payment of exemplary and substantial compensatory damages

2.3 On 3rd October, 2017, the Respondent raised a preliminary issue by notice pursuant to Order 14A and 33 of **The Rules of The Supreme Court[1] (RSC)**, alleging that the action by the Appellant was commenced thirteen (13) years after she was discharged from the service and that therefore, the matter was statute barred. On 9th May, 2018, N.A Sharpe-Phiri, J as she then was, in her ruling, deferred the issue to be determined at the full trial as she opined that the question raised was contentious and formed an integral part of the issues that could only fully and justly be determined at full hearing upon considering all relevant

evidence. The matter then proceeded to trial before Honourable Mr. Justice Charles Zulu at which witnesses adduced evidence and thereafter, the parties made their submissions.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the submissions, the learned Judge opined that the preliminary issue went to the root of the matter as to whether the court had jurisdiction to hear and determine the main matter. After reviewing the Appellant's case and that of the defence and the parties' respective arguments, the learned Judge made a finding that the Appellant was discharged from employment in September 2000 for being absent without official leave (AWOL) and the discharge was with effect from 11th August, 1999, which coincided with the Appellant's testimony as to when she was removed from the pay roll and a Board of inquiry constituted. That the discharge was widely published in 2000 within ZNS fraternity *vide* Unit Part II Orders.

3.2 According to the learned Judge, the Appellant never went back to report for work and her last salary was

paid in August, 1999. That despite her removal from the pay roll and the discharge, there was no evidence that the Appellant, within six (6) years from the time she was removed from the pay roll, made any internal attempts to challenge the same.

3.3 The learned Judge also noted that, according to the Appellant, she became aware of her dismissal in 2003 through her friend who informed her that she had been discharged. That even then, she did nothing within six years to challenge the dismissal.

3.4 The learned Judge further noted that paradoxically, the Appellant claimed that she only became aware of her dismissal upon receipt of the letter dated 16th October 2009 written by ZNS to Legal Aid Board, her lawyers. The Judge observed that the Appellant was being elusive but unsurprisingly, the motive was to manipulate the facts by attempting to escape the fetters of **The Limitation Act**[1]. The learned Judge agreed with the Respondent that the letter of 16th October 2009 was not a letter of dismissal but, a recount of events that

had transpired from the time the Appellant allegedly went AWOL in 1999 and her subsequent discharge.

3.5 The learned Judge came to the conclusion that the whole action was evidently statute barred as the claims were stale.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellant appealed to this Court advancing the following five (5) grounds as per memorandum of appeal;

(i) The learned trial Judge misdirected himself in both law and fact when he held that the Appellant's cause of action arose as far back as 2003 and that the Appellant's action which was commenced in 2013 was statute barred when in actual fact the alleged period of limitation, if any, commenced in or about October 2009 upon receipt of the letter dated 16th October 2009, when the Appellant's cause of action became active and not in 2003 as alleged or at all, contrary to the learned trial Judge's Judgment.

(ii) The learned trial Judge misdirected himself in both law and fact when he held that the letter dated 16th October 2009 was not a letter of dismissal but a recount of events that had transpired from the time the Appellant allegedly went AWOL in 1999 and her subsequent discharge when in fact, the Appellant became aware of her dismissal upon receipt of the letter dated 16th October 2009, when the Appellant's cause of action became active and not in 2003 as alleged or at all, contrary to the learned trial Judge's Judgment.

(iii) The trial court below erred in both law and fact when it gave an unbalanced evaluation of evidence on record whereby only the flaws or weaknesses of the Appellant's case, but not the Respondent were considered and highlighted

(iv) The court below misdirected itself in both law and fact by dismissing the Appellant's action and claims without hearing and adjudicating upon all the issues in controversy between the

parties in the lower court as strictly required by law and spirit of justice

(v) The lower court erred in both law and fact when it delivered its Judgment dated the 14th day of May 2020 without reviewing, assessing analysing and examining the evidence and claims on record in the court below in relation to the courts finding of facts applying the law and authorities to the facts, evidence and pleadings before the lower court as strictly required at law.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant in its heads of argument filed on 11th May 2021 argued the first, second, third and fifth grounds together. The Appellant attacked the holding by the learned Judge that the Appellant's cause of action arose as far back as 2003 and was therefore statute barred, when in actual fact the period of limitation commenced in or about October 2009 upon receipt of the letter of 16th October, 2009

5.2 According to the Appellant, it is quite clear that she fell critically sick in 2000 and accordingly informed ZNS. That in 2003, she was verbally informed by a colleague that she had purportedly been dismissed. That upon getting better, she frantically pursued ZNS on her employment to no avail, until 16th October, 2009 when ZNS wrote to Legal Aid Board, her lawyers. That, she only knew of her employment status *vide* that letter as no prior communication or notification whatsoever or at all was ever made to her by ZNS. That therefore the cause of action only arose on 16th October, 2009.

5.3 Reference was made to the learned authors of **Black's Law Dictionary**[1], where a cause of action is defined as:

> **"A group of operative facts giving rise to one or more basis for suing; a factual situation that entitled one person to obtain a remedy in court from another person."**

5.4 On when time begins to run, the case of **Daniel Mwale v Njolomole Mtonga**[1] was cited where the Supreme Court held that:

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

5.5 Further reliance was placed on the case of **William Carlisle Wise v EF Hervey Limited**[2] where it was stated as follows:

"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 or upon which he can establish a right or entitlement to a Judgment in his favour against the other."

5.6 It was the Appellant's contention that the cause of action only arose when the Appellant was communicated to through the letter of 16th October, 2009, which according to her was the letter of dismissal. That prior to that letter there was no cause of action.

5.7 The Appellant then proceeded to attack the sustaining of the preliminary issue when it was not pleaded and the evaluation of the evidence by the court that it was

biased and leaned more on the Respondent's evidence as it glossed over and completely ignored the detailed evidence presented by the Respondent. According to the Appellant, this is a proper case where as an appellate court we ought to interfere with the findings of the court below and set aside the whole Judgment.

5.8 In respect to the fourth ground, it was submitted that this matter ought to have been determined on its merits by the court in finality and not dismissing the matter based on the preliminary issue.

6.0 ARGUMENTS IN OPPOSITION

6.1 Although the Respondent was not available at the hearing, we took into consideration its heads of argument which were filed into Court on 14th June, 2021. In response to the first and second grounds of appeal, the Respondent noted that the Appellant's argument is that the learned Judge misdirected himself in holding that the Appellants separation from employment was not communicated by way of the letter from Legal Aid Board dated 16th October, 2009.

6.2 It was submitted that the finding of fact by the learned Judge cannot be faulted as it was based on the evidence the learned Judge heard. The court addressed its mind to the letter and the oral evidence before arriving at its finding. The cases of **Muvi TV Limited v Killian Phiri and Kennedy Musweu**[3] and **Wilson Masauso Zulu v *Avondale Housing Project Limited***[4] were cited as to when an appellate Court can reverse a finding of fact of a lower court. According to the Respondent, the trial court had the primary benefit to hear the evidence of the witnesses and their cross examination. It was submitted that the finding of fact should not be reversed as it was not perverse or made in the absence of any relevant evidence or upon a misapprehension of facts.

6.3 In response to the third ground, it was submitted that, the learned Judge made a balanced analysis of the evidence on record. That the learned Judge analysed the Appellants evidence from pages J2 to J7 of the Judgment.

6.4 In response to the fourth ground, it was submitted that, not only did the court below resolve the issues but

deferred the determination of the preliminary issue regarding the limitation of time to the main trial. That the matter was dismissed after hearing evidence from both parties and it is upon that, that the court found that the matter was statute barred. It was further submitted that the defence of limitation of statute is a point of law that is allowed to be raised at any time.

6.5 As regards the fifth ground, it was submitted that the Appellant has not demonstrated the basis upon which this Court may overturn a finding of fact made by a trial court. That the trial Judge was on firm ground in arriving at his decision. According to the Respondent the court below correctly found that the Appellant was dismissed in 2000 and not 2009 and that therefore, the matter was statute barred.

7.0 OUR CONSIDERATION AND DECISION

7.1 We have considered the arguments by the parties and the record of appeal. Before venturing into consideration of the grounds of appeal, we should state from the onset that the issue of a matter being statute barred, is a

statutory defence which goes to jurisdiction and it can be raised at any time even if it had not been pleaded.

7.2 We note that the issue was raised at an early stage before Sharpe-Phiri J, as earlier alluded to and the Appellant did not raise an objection on account of it not having been pleaded. The learned Judge considered the preliminary issue and opined that evidence needed to be adduced in order to determine when the cause of action accrued as the date of accrual was contentious.

7.3 As the parties did not agree on the date the right of action accrued, therefore making it a triable issue, that needed further interrogation, there was need for further evidence to be adduced at the trial to prove the date of accrual before concluding that the matter was statute barred. We endorsed this approach in the cases of **Maila Rodger Chilele v Patson Mbao and Another**[5] and **Philip KR Pascall and Others v ZCCM Investments Holdings Plc**[6]. In view of the aforestated, we are of the view that the objection being raised now, of the defence not having been pleaded, is being raised too late in the day.

7.4 Reverting to the grounds of appeal, we will consider grounds three and five first, then grounds one and two and end with ground four. In respect to grounds three and five, a perusal of the Judgment shows that the evaluation of the evidence was not biased at all. In determining whether the action was an abuse of the court process on account of it being statute barred, the learned Judge considered the Appellant's case as plaintiff, from pages J4 to J7 of the Judgment. The learned Judge equally considered the Respondent's case from pages J7 to J10. The learned Judge then went on to apply the law to the facts and took a deep analysis of the matter before arriving at the conclusion that the whole action was statute barred. We see no basis on which to fault the learned Judge.

7.5 As regards grounds one and two, in respect to finding of fact that the cause of action was statute barred, we agree with the Respondent's arguments that at the earliest, the cause of action arose in 2000, when the Appellant was discharged *vide* ZNS Unit Part II Orders, which were widely published within the ZNS fraternity

and was immediately followed by the removal of the Appellant from the pay roll.

7.6 Even assuming at the latest that the cause of action accrued in 2003, when the Appellant came to learn of the dismissal through her colleague, the Appellant would still be out of time. At that time the factual situation had arisen to challenge the dismissal which attached liability to ZNS, upon which the Appellant could establish her right.

7.7 The allegation by the Appellant that the letter of 16th October 2009, written by Legal Aid Board, was the letter of dismissal and that the cause of action arose from the said date is a fallacy, which should not be entertained in view of the overwhelming evidence as to when the cause of action arose.

7.8 In respect to the fourth ground of appeal, the learned Judge, having made a finding that the matter was statute barred, disposed of the whole matter on a point of law. The learned Judge did not need to resolve the issues in controversy in the main matter as he had no jurisdiction to do so.

8.0 CONCLUSION

8.1 All the five grounds of appeal having failed, the appeal is dismissed for lack of merit. Costs to the Respondent and to be restricted to out of pocket expenses. Same to be taxed in default of agreement

M.J SIAVWAPA
JUDGE PRESIDENT

J. CHASHI
COURT OF APPEAL JUDGE

D.L.Y SICHINGA, SC
COURT OF APPEAL JUDGE