



MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 455 OF 2015



BETWEEN:

MRS EDNESS KANTUMBIZA

PLAINTIFF

and

NATIONAL BANK OF MALAWI LIMITED

DEFENDANT

CORAM: N USIWA USIWA, DEPUTY REGISTRAR

Mr T Lemucha of Counsel for the Plaintiff

Mr Dziwani Counsel for the Defendant

Mr M Kakhobwe Official Interpreter

R U L I N G O N P R E L I M I N A R Y O B J E C T I O N

This is the Defendant's application that raises a preliminary objection that this matter is statute-barred.

Some facts of the matter read as follows.

The plaintiff begun to suspect some mala-banking practices over her account she opened at the Defendant's banking institution at Victoria Avenue in **2002**.

from that moment, the plaintiff had been making inquiries with the Defendant with regards to her suspicion. Beside, the plaintiff had been visiting the Defendant's premises where she had been meeting the Defendant's Clerk who kept telling the plaintiff to wait for an internal inquiry regarding her account.



The said mala-banking practices have been happening throughout the years up until **2012** when the Defendant issued a bank statement for a period between **2002** and **2012** regarding the plaintiff's account.

It was from his statement issued in 2012 that the plaintiff's suspicion was put to light when she noted two dubious withdraws which happened on her account without her consent or authority

ISSUES

The only issue to be determined is whether the matter herein is time barred.

LAW AND ANALYSIS

Section 4(1)(a) of the Limitation Act provides that an action founded on contract or tort shall not be brought after the expiration of six years from the date on which the cause of action arose.

When does a cause of action arise?

The court, in an attempt to address the question what a cause of action is adopted the definition as stated in Jowitt's Dictionary of England law Volume 1 (2nd edition) which defined cause of action at 292 as 'The fact or *combination of facts* which give rise to sue' ***Gomani vs. City of Blantyre(1990) 13 MLR 120.***

The law provides that the cause of action will accrue at the moment there is breach of that contract and time will start running from this moment of breach of contract: ***Gomani vs. City of Blantyre(1990) 13NLR120.***

The law has developed a principle to the effect that whenever a party's claim is acknowledged, time starts running anew: ***Manica freight services vs. Chitunda 11 MLR225.***

In this case, Mr Chitanda was employed by THEBA and went to South Africa. At the end of his contract he was to return to Malawi on October 28th 1978, he delivered a suitcase containing photographic equipment and some clothing to freight services and Air Cargo in Johannesburg to forward to Malawi. Two weeks later, the respondent went to Air Malawi, to look for the suitcase, he was referred to Manica Freight Services and was told that the suitcase had not yet arrived. He went there several times and was later told to list all the contents in his suitcase. After several correspondences, he got fed up in March 1984 and sued them.

An issue on whether the matter was time- barred arose under section 9(1) of carriage by Air Act (now reported) which prescribed a time limit of two years within which to commence an action from the date on which to commence an action from the date on which the carriage ought to have been arrived. The court addressed this issue in the following words at 229.

'I do not hold the same view. As Mr Chatsika has submitted, the legal position is quite clear. When the facts of the case examined more carefully it is clear that the matter was not time –barred. The Respondent arrived in Malawi in October 1978. He started enquiring about his suitcase. Each time he went to the Appellant's offices, he was told it was looking into the matter. This process went on until he got fed up and commenced proceedings in 1982. Each time he went to see the Appellant or wrote to it, time started running. It would be inequitable if the Appellant, by its conduct, kept the Respondent believing that it was doing something while in fact it was waiting to have the stator time-limit as a defence. There was, in my view, an acknowledgement each time the Respondent went to the Appellant's office and the action was therefore not time –barred.

ANALYSIS OF LAW AND FACTS

From the affidavit, the plaintiff only observed some malabanking practices over her account in **2002**. She had been visiting the Defendant's premises and made inquiries and all she got was looking into the matter. At some point, she requested for a bank statement regarding her fixed account and the same was only issued in **2012**. It was from this statement that her suspicion regarding some dubious transactions on her account were brought to light, when she noted two withdraws she never consented an authorized.

It is from this point, in **2012** when the cause of action arose. What had been obtained in **2002** was just mere observation or suspicion. I therefore find that the time begun to run from 2012 and that matter is not time-barred as it was commenced within the prescribed time of **six years**.

Even if this court were to agree with the Defendant that the cause of action arose in **2002**, I think it is fair and just to find that time started running anew every time the plaintiff went to the Defendant to inquire into the matter, up until in **2012** when a statement was finally issued indicating the existence of some dubious transactions: **Manica freight Services Limited v Chitanda 11 MRL 225**. It would be inequitable and unjust if the Defendant, by their conduct, kept the plaintiff believing that they were doing something while in fact they were waiting to have the statutory time limit as defence. In effect, the matter was commenced within the time prescribed under the limitation.

From the foregoing, the cause of action in this matter arose in 2012 when the bank statement had revealed the said mala-banking practices. What has been transpiring since 2002 was just mere suspicion. This is to say that the cause of action herein was commenced within the prescribed period as is required under section 4 of the limitation Act Cap 6:01 of the Laws of Malawi.

Therefore this preliminary objection by the Defendant ought to be dismissed; and I dismiss it in its entirety with costs.

MADE in Chambers this **8th** day of **June, 2016**



Nyakwawa Usiwa Usiwa
DEPUTY REGISTRAR