

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 81 OF 1994

BETWEEN:

W M GONDWE PLAINTIFF

- and -

ATTORNEY GENERAL DEFENDANT

CORAM:

TEMBO, J

Msiska, Counsel for the Plaintiff

Chigawa, Counsel for the Defendant

Ngulube, Official Interpreter



R U L I N G

The plaintiff, by a writ of summons is, inter alia, claiming from the defendant:

- (a) three months pay;
- (b) gratuity and pension;
- (c) damages for wrongful dismissal; and
- (d) damages for false imprisonment and unlawful detention for 9 months and costs of this action.

The statement of claim reveals that the defendant was employed by the Malawi Government in the Police Force at rank of full Inspector on 1st April, 1969 until January, 1976 when he was summarily dismissed at the rank of Assistant Superintendent of Police. The reasons for his dismissal are alleged to have been based on fabricated accusations that the plaintiff's mother was a rebel based in Dar-es-Salaam in Tanzania who had been detained when she came to Malawi to condole the death of her late brother in 1976; that the plaintiff was arrested on March 6th, 1976, by the police who then took the plaintiff to Chichiri prison and later unlawfully detained him at Mikuyu Prison until 10th December 1976, when he was released without charge; and that neither the plaintiff nor the plaintiff's mother was a rebel, and that as a matter of fact the plaintiff has expressly stated in his statement of claim that he was and is a law abiding citizen of the Republic of Malawi.

In accordance with paragraph 5 of the defence, counsel for the defendant has raised a preliminary objection to the cause of action of the plaintiff, namely that the same is statute barred by the operation of section 4 (1) (a) of the Limitation Act, Cap 6:02. Consequent thereupon, both parties have agreed that I should first determine that issue as a preliminary matter. It is understood by both parties that if, in my determination thereof,

I find that indeed the action of the plaintiff is statute barred such a finding will mark the end of the proceedings in this court in respect of that action.

In making his submission, in the main, counsel for the defendant stated that in accordance with the plaintiff's statement of claim, the plaintiff had been dismissed from his employment and taken into custody in 1976, in particular, from 6th March to 10th December, 1976; that since then at least eighteen years had elapsed; that in such a case the cause of action of the plaintiff was definitely statute barred under section 4 (1) (a) of the Limitation Act; which provides as follows:-

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose, that is to say actions founded on contract or tort".

And in the view of Counsel for the defendant, the plaintiff's cause of action is founded on tort.

On his part, counsel for the plaintiff urged me to find that the Limitation Act was not applicable to the plaintiff's action and that I should, therefore determine to hear the action. He gave a number of reasons therefor which I intend to consider one by one hereinbelow. But before I do so, let me offer a comment on the propriety or lack of same, of the defendant's submission of the statute of limitation in this case. To begin with, I find that the defendant has rightly made that submission in that the cause of action, in the instant case, arose some eighteen years ago; namely the date on or about 10th December, 1976, when there was in respect of this action a person in existence capable of suing and another person in existence who could have been sued then. (Please see the case of R.B. Policies at Lloyd's -V- Buttler (1949) 2 ALL E.R. at p. 228). Thus, the cause of action in this case arose on or about 10th December 1976 when the plaintiff had been dismissed from his employment with the defendant and also at the time when he was released from the detention without being charged.

It is also expedient that I, at this stage, take a look at the policy of the Limitation Act. Justice Tambala had this to say thereon in the case of Ali Mahomed Waka -V- The Attorney General Civil Cause No. 1855 of 1993 (unreported):

"Perhaps it would be pertinent to bear in mind the essential purpose of statutes of limitation. Regarding such statute, Best, C.J., in the case of A' Court -V- Gross (a) E.R. Vol. 130 at page 541, said -

'It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge'.

It is also the aim of such statute to protect defendants who have since lost evidence to dispose a stale claim and to encourage persons with good claims to pursue them with reasonable speed".

In the case of Board of Trade -V- Cayzer Irvine and Company (1927) A.C. at page 628, Lord Atkinson had this to say thereon -

"With regard to the Statute of Limitation... the whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use".

In demonstrating that his client's action is not statute barred as submitted by counsel for the defendant, Mr Msiska has urged me to take judicial notice of the prevailing political and legal climate in the country on or about December, 1976 when the plaintiff was released from detention and also dismissed from employment; in particular that, then, the plaintiff could not have readily sued the defendant in that the Government of the day was very oppressive; and further that upon his release from detention agents of the defendant had cautioned the plaintiff against the taking of any action at all; that in such a case the plaintiff's action should, therefore, not be held to be statute barred. In effect, Mr Msiska is asking me to afford to his client an extension or suspension of the limitation period on the ground that the plaintiff had suffered from disability. With respect to counsel for the plaintiff, the law on this point is quite clear and is in a state which would not enable me grant to the plaintiff the extension or the suspension prayed for. Section 21 (1) of the Limitation Act as read together with section 2 (3) (a) thereof provide as follows thereon -

"21 (1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired".

"2 (3) (a) For the purposes of this Act, a person shall be deemed to be under a disability while he is a minor or of unsound mind".

The plaintiff did not suffer from any disability in the context of the legislative provisions quoted above, in that the plaintiff was neither a minor nor a person of unsound mind. Consequently, the limitation period under section 4 (1) (a) of the Limitation Act cannot be extended or suspended so as to run from a date that would save the action of the plaintiff from being statute barred. As I have already noted above, the cause of action in the instant case arose on or about 10th December, 1976, to-date some eighteen years ago.

Mr Msiska has further submitted that I should hold that at common law the court can extend the circumstances in which a person would be entitled to an extension or suspension of the limitation period to cover the situation in respect of which the plaintiff in the instant case was prior to the holding of the referendum in the country, in 1992. He also submitted that such must be the position as Common Law was received law in Malawi under the Order in Council of 1902. With respect, I would not accept the submission of counsel in that regard as the provisions of the statute in question are very clear regarding the question of disability. Besides that counsel has not satisfied me that the statutory provisions quoted above regarding the extension or suspension of the limitation period were merely a codification of the position at Common Law. For this and indeed also the earlier point, see the decision of Justice Tambala in Ali Mahomed Waka case cited above.

Mr Msiska further urged me to hold that under equity the defendant cannot raise the statute of limitation as, he alleged, it was the act of the defendant which had rendered the plaintiff not to sue within the limitation period. In that respect Mr Msiska referred me to the remarks made by Justice Tambala in the Ali Mahomed Waka's case, as follows -

"I would, however, accept the view that having created conditions which made it impossible for the plaintiff to commence an action against them within the limitation period, it would be improper for the defendants to turn round and use the Limitation Act as a defence. It is therefore the plaintiff's argument that the application of the Limitation Act to the facts of this case would be tantamount to using a statute as an instrument of Fraud".

With respect to counsel, even on the facts of that case, Justice Tambala did not accept the submission of the plaintiff to the effect that the defendant had been guilty of fraud whereupon the operation of the Limitation Act had to be suspended. These were the words of Tambala, J -

"It would seem that not every act of fraud would suspend the operation of a statute of limitation. To achieve that result the action must be based on the defendant's fraud or the right of action must be concealed by the fraud of the defendant. See section 25 (a) and (b) of the Limitation Act. In the instant case the plaintiff's action is not based on fraud. Again it is not being claimed that the right of action was concealed from the plaintiff by the defendant's fraudulent conduct. I am of the view that the plaintiff has not established the kind of fraud which would suspend the operation of the Limitation Act".


I fully adopt the reasoning of Tambala, J on this point and I indeed reject the submission of the plaintiff in that regard. Besides that let me observe that I find, in the instant case, that the cause of action of the plaintiff was founded on tort. As such, had he done so, the plaintiff would have been perfectly entitled in law to have instituted within the limitation period

an action against the defendants pursuant to the provisions of the Civil Procedure (Suits by or Against the Government or Public Officers) Act, Cap 6:01 of the Laws of Malawi. In Osborn's Concise Law Dictionary Sixth Ed by John Burke, a tort, at page 327, is defined as follows -

"a wrong. An act which causes harm to a determinate person, whether intentionally or not, not being the breach of a duty arising out of a personal relation or contract, and which is either contrary to law, as an omission or a violation of an absolute right. A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation".

Having so found, that the plaintiff's cause of action arose some eighteen years ago and that it was one founded on tort, and also that the defendant did not suffer from any disability I further find that it is clearly caught by the provisions of section 4 (1) (a) of the Limitation Act. It is, therefore, statute barred.

Made in Chambers this 10th day of May, 1995, at Blantyre.


A.K. TEMBO
JUDGE

