

**A COMPARATIVE STUDY OF THE APPLICATION OF LIMITATION PERIODS
IN THE ZAMBIAN COURTS AND SOUTH AFRICA**

By Chisanga Lenka Kasonde

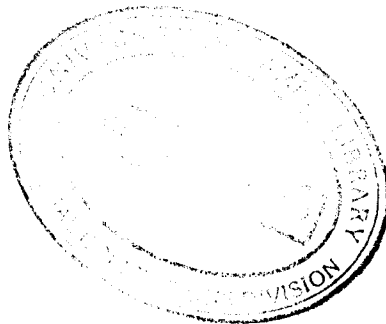
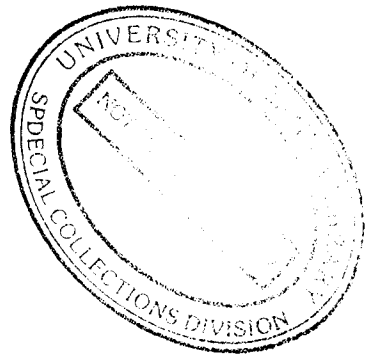
Student Number: 102360/10/1

A Dissertation submitted to the University of Zambia in partial fulfilment of the requirements
of the degree of Law (LLB), May 2012

The University of Zambia

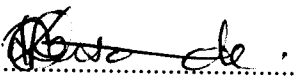
Lusaka

2012



DECLARATION

I Chisanga Lenka Kasande do hereby declare that this dissertation represents my own original work and that it has not been submitted for a degree at the University of Zambia or any other University.

Signed:.....

RECOMMENDATION FOR EXAMINATION

I recommend that the obligatory essay prepared under my supervision by Chisanga Lenka Kasonde of student number 102360/10/1 entitled:

A COMPARATIVE STUDY OF THE APPLICATION OF LIMITATION PERIODS IN
THE ZAMBIAN COURTS AND SOUTH AFRICA

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the requirements governing obligatory essays.

Ms Tinenenji Banda

DATE: _____



SIGN: _____

14/05/2022

ABSTRACT

The Limitation Act 1939 was adopted for application in the Republic of Zambia by the English Acts (Extent of Application) Act Chapter 11 of the Laws of Zambia. Research on this topic has been initiated based upon a reported case and how the courts handled the provisions of the Act. It becomes evident that the application of the Limitation Act in the Zambian courts brings forward three main problems. Firstly, the fact that no condonation of claims filed late is afforded to the court irrespective of the circumstances of the case, whereas the said condonation is in practise allowed in the lower courts causing inconsistencies in the legal system as the same is not applicable in the higher courts. Secondly, the commencement of the running of limitation periods provided in the Act does not take into consideration the fact that certain damages or injuries suffered are only discoverable after a long period of time usually outside the limitation period stipulated. Such a provision is out-dated and other countries such as South Africa recognise the discoverability principle and limitation periods only begin to run from the date on which the damages were discovered or when one could upon reasonable exercise have discovered the damages. Finally, it is argued that the continued application of the Limitation Act in Zambia is not justified as it does not reflect the spirit of the Zambian society in light of the character of its members. Factors such as culture, poverty and illiteracy that make the law generally incomprehensible to the lay man are further amplified with respect to the comprehension of the existence and operation of limitation periods.

The purpose for which limitation periods apply is of great importance and relevance as it promotes the prompt resolution of cases, certainty of the law and public policy reasons. However this ought to be balanced against the background of society in Zambia. By not affording the courts with the inherent authority to condone claims filed late, potential claimants with genuine claims and meritorious reasons for the delay would be unfairly denied justice.

In light of the issues raised above, this paper suggests the following for reform:-

- a) An instruction delivered to the Zambia Law Development Commission directing it to carry out further research into the operation of the Limitation Act with a view to reform the law. This should be carried out by acquiring the opinions of the general public and other relevant stakeholders so as to reflect the spirit of the Zambian society.
- b) The reformation of the Limitation Act should specifically reflect the need for condonation to be allowed as well as the recognition of the discoverability principle these being the main issues raised by this paper.
- c) The burden of proof in claims concerned with the application of the Limitation Act should remain vested upon the individual alleging that it does not apply.
- d) Government should make deliberate efforts in order to raise awareness of the operation of the Limitation Act as its effects once in operation leave the plaintiff without any recourse to other remedies by the courts of law. This is because the Limitation Act affects an array of subjects and is essentially the starting point for litigants once served with a Writ.

ACKNOWLEDGEMENTS

First of foremost I would like to thank God Almighty for giving me the grace to do this work especially in moments when it felt like too much. I thank my family; my lovely mother and brother for all the support and understanding they have shown me. My supervisor Ms Tinenanji Banda for the supervision and help she has rendered from the inception of this idea to the final product, for the patience shown when dealing with me and for setting out different deadlines which has helped me tremendously in having the work ready on time. I acknowledge the moral support of all my friends and colleagues. Finally I would like to recognise my faithful pets Chowder and Bob who showed their support by always staying up with me when need arose.

We did it!

LIST OF CASES

1. Agricultural Finance Company Limited v Paul HamuwoMweemba& Aaron Hangoma
(1977) Z.R. 138
2. Cartledge v E Joplings& Sons Ltd [1963] 1 All ER 341
3. City Express Service Limited v Southern Cross Motors Limited (2007) ZR 263
4. C M Low v BP Southern Africa Pension Fund and BP Southern Africa (Pty) Ltd Case
No: PFA/WE/9/98
5. Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) 532B-E
6. Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC) 1568D-E
7. Prinsloo v Van der Linde 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC)
8. Rodgers Kasoma v The Attorney General 2009/HN/35
9. Society of Lloyds v Owen John Price TPD Case No. 17040/03
10. Society of Lloyds v Paul Lee TPD Case No. 20764/03
11. Thompson v Eastwood [1877] 2 App Cases 215 at 248
12. United Engineering Group Limited v MacksonMungalu and Others SCZ Judgment
No.4 of 2007

LIST OF STATUTES

1. England. Limitation Act 1939
2. England. Limitation Act 1980
3. South Africa. Customs and Excise Act. No. 91 of 1964
4. South Africa. *Institution of Legal Proceedings Against Certain Organs of the State* Act. 2002
5. South Africa. Labour Relation Act. 66 of 1995
6. South Africa. Pension Funds Act. 1956
7. South Africa. Prescription Act No. 68 of 1969
8. Zambia. British Acts Extension Act. Chapter 10, Laws of Zambia
9. Zambia. Customs and Excise Act. No. 4 of 1999
10. Zambia Development Agency Act. No.11 of 2006
11. Zambia. English Law (Extent of Application) Act. Chapter 11, Laws of Zambia
12. Zambia. High Court Act. Chapter 71, Laws of Zambia
13. Zambia. Industrial and Labour Relations Act. Chapter 269, Laws of Zambia
14. Zambia. Landlord and Tenant (Business Premises) Act. Chapter 193, Laws of Zambia
15. Zambia. Law Reform (Limitation of Actions) Act Chapter 72, Laws of Zambia
16. Zambia. Zambia Law Development Commission. Act No.11 of 1996.

TABLE OF CONTENTS

<i>Abstract</i>	iv
<i>Acknowledgments</i>	vi
<i>List of cases</i>	vii
<i>List of Statutes</i>	viii
CHAPTER ONE	
1.1 Introduction.....	1
1.2 Problem Statement.....	3
1.3 Specific Research Questions.....	5
1.4 Objectives.....	5
1.5 Significance.....	6
1.6 Methodology.....	7
1.7 Outline.....	7
CHAPTER TWO	
2.1 Background on Statutes of Limitation.....	9
2.1.1 Fairness.....	9
2.1.2 Certainty of the Law.....	10
2.1.3 Public Policy.....	11
2.2 Application of Limitation Act 1939 in the Zambian Courts.....	11

2.3 Opinions of relevant stakeholders.....	13
--	----

2.4 Findings.....	19
-------------------	----

CHAPTER THREE

3.1 Introduction.....	22
-----------------------	----

3.2 South African Limitation Legislation.....	22
---	----

3.3 Background on Prescription Act.....	23
---	----

3.4 Factors influencing the development of law on prescriptions in South Africa.....	25
---	----

3.5 Condonation in the South African Courts.....	25
--	----

3.6 Procedure of Institution of claim against the State.....	28
--	----

3.6.1 Fairness.....	29
---------------------	----

3.6.2 Justification for Notice.....	29
-------------------------------------	----

3.6.3 Operation leading to Inequalities.....	30
--	----

3.7 Lessons learned from comparative study.....	30
---	----

3.8 Comment on findings.....	31
------------------------------	----

CHAPTER FOUR

4.1 Comparative analysis of findings.....	32
---	----

4.1.1 Condonation of claims filed out of time.....	32
--	----

4.1.2 Challenges faced as a developing country.....	33
---	----

4.1.3 Recognition of the discoverability Rule.....	35
--	----

4.1.4 Development of the Law on Limitation Periods.....	35
---	----

4.2 Findings.....	36
-------------------	----

CHAPTER FIVE

5.1 Conclusion..... 38

5.1.1 Summary..... 38

5.1.2 Challenges of research..... 41

5.2 Suggestions..... 41

5.2.1 Condonation of Claims..... 42

5.2.2 Localising the Act..... 42

5.2.3 Discoverability principle..... 43

5.3 Recommendations..... 43

Appendices..... 45

 Appendix 1..... 46

 Appendix 2..... 47

BIBLIOGRAPHY..... 48

CHAPTER 1

1.1 Introduction

Time periods within which to commence litigation are usually governed by limitation periods. The Limitation Act 1939 was enacted with an overall view of bringing finality to the prospects of litigation in civil cases. According to McGee, Andrew 2002¹ these limitation periods are generally regarded as any time-limit within which legal proceedings of a particular kind must be brought or, exceptionally, within which notice of a claim or dispute must be given to another party. The purposes of the limitation of claims are generally discoverable in threefold, that is to bring about certainty in the law, to achieve fairness amongst parties and for public policy reasons.

Nonetheless, it is generally accepted that such a provision should be balanced against the need to allow potential claimants to have their claims decided in the courts of law. This is especially the case where there appears to have been compelling reasons such as negotiations to allow such a claim to be heard out of time. It is this requirement to strike a balance between conflicting interests that the law is generally recognised as being vital at.² Philosophers such as Jeremy Bentham have stressed the need for the law to play the role of striking a balance between the conflicting needs of individuals inter se and against the State.³ Therefore the conflicting needs in the case of the application of limitation periods would arise where the individuals wishing to have their case determined in the courts of law have meritorious reasons notwithstanding the fact that suit has been brought out of time. It is arguable in such a case, as the one briefly discussed below, that the courts should take up this role of striking a balance between conflicting interests for the attainment of justice.

¹ McGee, Andrew. *Limitation Periods*. 4th Edition. (London, Sweet & Maxwell 2002)

² South Africa. South African Law Review Commission. 2011. *Limitation of Actions Consultation* http://lawcommission.justice.gov.uk/docs/cp151_Limitation_of_Actions_Consultation.pdf (accessed February 19, 2012)

³ Anyangwe, Carlson. *An Outline of the Study of Jurisprudence*. Lusaka: University of Zambia Press, 2005

The case of *Rodgers Kasoma v The Attorney General*⁴ was decided on the basis of the operation of the provisions of the Limitation Act in placing a limitation period of six (6) years on claims based on contract with time beginning to run after the event upon which the cause of action arose. Facts of the aforementioned case are:-

Mr Kasoma was employed by the Zambia Army and was later dismissed. Following his dismissal, he was neither formally charged nor tried for any offence by the Commanding Officer as required by Army policy. In light of this, his suitability to be re-instated in the Army was not convened upon by the Board of Officers in accordance with his employment service requirements. Upon the occurrence of these events, his immediate response was to appeal through the set channels in the Army by requesting the Army Commander to review the decision to dismiss him. He did not receive any response and wrote two more subsequent letters to the same effect. In so doing, Mr Kasoma did not institute legal proceedings against the State on the basis that the negotiations would bring to fruition the remedy sought. It is for this reason that his claim was time-barred by operation of the Limitation Act. At the hearing of this case, his application out of time was not condoned by the judge in the case therein.

It is following this decision that the need to study the application of the Limitation Act in the Zambian courts emanates as strict application thereof may as in the circumstances of the aforementioned case led to injustice. Specifically the fact that the courts in the aforementioned case did not condone the late filing of suit out of time regardless of the circumstances surrounding the case. This causes alarm and calls for the need of the application of the law of limitations to be reviewed.

It is arguable that the Act should not be upheld as it is due to reasons later outlined in this paper; however, if the Act can continue to exist without any apparent curable injustices

⁴2009/HN/35

present and still serve a legitimate and necessary purpose there is no reason why it should not be kept.

The English Limitation Act of 1939 is extended to the Zambian jurisdiction by the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia and the British Acts Extension Act, Chapter 10 of the Laws of Zambia which specifically provides for the legislation listed therein to be applicable to the Republic of Zambia. Mentioned within Chapter 10 is applicability of the Limitation Act to Zambia. It is generally the norm in any given State to have laws that give a time frame within which to institute claims against the person from whom relief is sought in order to create certainty in the law and bring finality to the possible threat of litigation against a person.⁵For the purposes of this research, the discussion of the application of limitation periods will be carried out on a comparative basis with similar legislation in South Africa. The reason for selecting South Africa is because it is a developing country like Zambia thus it is likely to face similar challenges as to the application of such laws in its courts. It will focus on the role that limitation legislation plays as to any discretion allowed to the courts in considering claims brought out of time, aspects of limitation legislation that bring about an inherent inequality between parties and whose role it would be to advocate for development in the field of limitations.

1.2 Problem Statement

It is common ground that the Limitation Act was enacted in order to create some certainty in the liability of the individual for acts done in the past. However, there might be problems faced where the courts appear to apply the provisions of the Act strictly thus causing injustice to the claimants. Such injustice would be caused; for instance by the courts turning a ‘blind-eye’ towards the consideration of certain evidence that would vehemently call for such a case

⁵ English Limitation Act 1980, South African Prescription Act No.68 of 1996 and The Federation of Nigeria’s Limitation Act Chapter 522

to be heard regardless of the fact that the period for limitation as outlined in the Act has elapsed.

A key factor to be discussed is the viability of still having in place an old Act when the country from which we adopted the said Act has moved on with considerable development on the law relating to limitations whilst discarding completely some of the elements present in the old Act. It is the general view in the jurisprudence of the law that laws governing the conduct of society should move accordingly with that society.⁶ The question then would be whether there have been justifiable reasons to carry on with the application of an old law without consideration of the changing needs of society.

Stemming from the above argument is the proposition that being a developing country, it is an accepted fact that members of the public are highly likely not to appreciate or understand the basic legal concepts that apply in the normal course of daily living. In fact, the law in general is like a mystical creature to the layman on the street! Thus it is arguable that the strict application of limitation periods in light of the aforementioned without consideration of the needs of society who are by and large affected by the operation of limitation periods would be harsh.

Another short coming relates to the non-application of equity with regards to the condonation of claims filed out of time. The common law principle of equity is required to be administered at the same time as the law and this was reiterated in *Agricultural Finance Company Limited v Paul HamuwoMweemba & Aaron Hangoma*⁷ where it was stated that “equity has been fused [with Common Law and Statute general] in the administration of justice in courts”. Thus the refusal to grant the courts with discretion to consider the

⁶ Joachim Ruckert. 2006. *Friedrich Carl von Savigny: The Legal Method and the Modernity of Law*. <http://www.juridicainternational.eu/index/2006/vol-xi/friedrich-carl-von-savigny-the-legal-method-and-the-modernity-of-law/> (accessed February 19, 2012)

⁷(1977) Z.R. 138

condonation of claims filed late based on the operation of equity in such a case would be condemned. This is because the very essence of the operation of equity is such that it is able to take a less rigid view of the strict application of the law in a given case such that it is able to provide remedies where it would be unconscionable to permit a contrary position.⁸ Following this reasoning then, judges in court should be able to administer equity in a given case in terms of condonation of late claims where it is deemed necessary.

Still, it is generally agreed that in as much as the courts are obliged to enforce the provisions of statutes, there should also be discretion afforded to the judges in order to navigate the diverse scenarios they are faced with.

1.3 Specific Research Questions

- a) Is the application of the Limitation Act 1939 an adequate reflection of the needs of the
Zambian Society today?
- b) Are there any problems or potential problems arising out of the application of the
Limitation Act 1939 in the Zambian courts?
- c) How is South Africa dealing with the issue of Limitation periods?
- d) Are any changes necessary to the law as it is in order to serve the needs of the
Zambian legal system today?

1.4 Objectives

The following are the objectives of this research paper:-

- To establish the purpose for which the Limitation Act was enacted- what is the mischief that the legislation set out to remedy

⁸Cheshire, C Geoffrey and Fifoot H S Cecil, 'Cheshire and Fifoot's Law of Contract'. London: Butterworths 1976, at Page. 435

- Review the manner in which the Limitation Act is applied in the Zambian Courts by obtaining information from those obligated with the responsibility of dispensing the provisions of the statute in court; that is magistrates or judges
- Obtain the perception of end users; such as legal practitioners and any other relevant parties, on the practicality of the application of the Limitation Act 1939 in the Zambian Courts
- Determine the manner in which the legislation governing limitations is applied in South Africa with the view to highlighting any lessons to be learned from their experiences and application of their Limitation Statute
- Discuss the role that philosophers that propose the realist school of thought may play in the application of Statutes
- Make a comparison of the application of the Limitation Act 1939 in the Zambian courts and that in the South African Courts highlighting any short comings or lessons to be learned so as to specifically aid in the better understanding of the purpose and application of limitation periods
- Give an account or make recommendations based on the findings of the research on the application of the Limitation Act in the Zambian courts.

1.5 Significance

The significance of this study comes in the following avenues:-

It seeks to enlighten the reader on the reasoning for the enactment of legislation seeking to place limitations on the time frame within which to commence lawsuits in court

The findings of this research may be used as an aid for judges in court faced with the question as to whether to allow a claim filed out of time by helping them understand and appreciate the potential circumstances in which to apply.

The Limitation Act affects an array of claims that may arise varying from tort and contract-based claims to personal property and claims against public bodies, thus the findings of this research would be widely beneficial to a great number of people.

It is hoped that the revelations of this research paper may pave the way for the development of the law on limitations in order to attain the justice required by this principle of limitations.

Finally, it will add to the general knowledge on the subject matter in theoretical form so as to add to the understanding of the operation of the provisions of the Limitation Act 1939.

1.6 Methodology

The research will be undertaken in three phases as listed below:-

Phase I- I will carry out field-based research in the form of interviews to be answered by relevant stakeholders namely judges and lawyers;

Phase II- Involves desk-based research carried out largely by internet research. This is the mode in which the material required to make a comparative analysis with another Commonwealth country in Southern Africa will be acquired. Review of related literature in the form of articles and text on Limitations with regard to the application of the same in a Commonwealth country in Southern Africa will be the secondary source.

Phase III- An analysis of the materials collated from Phase I and II above will be carried out in order to answer the proposition of whether the Limitation Act is properly applied in the Zambian courts.

1.7 Outline

This research paper will have five chapters.

The first chapter will be the introduction to the topic and reasons for research on the topic. An outline of the problem statement emanating from the case given, specific research questions to be answered or discovered and the objectives of the research paper will be included in this section.

The second chapter firstly gives a general background on statutes of limitations; it then discusses the application of the Limitation Act in the Zambian courts highlighting any problematic provisions (if any) that arise from the Act. It then considers the perception of end users on the application and attainability of Justice by operation of the said limitation periods. This is ascertained by analysing the outcome of interviews undertaken with the end users.

The third chapter is the comparative analysis based on South Africa on the application of limitation periods. South Africa being a developing nation as Zambia is, the comparative analysis seeks to discover any innovative ways in which to apply limitation periods or any lessons to be learnt from the experience of the South African courts.

The fourth chapter analyses the application of the Limitation Act in the Zambian courts against the application of limitation periods South Africa. This will be done by examining specific provisions or problems faced in the two countries with a view to better understand the role of limitation periods in different legal systems and lead to the development of the law on limitations.

The fifth and final chapter will make suggestions and recommendations based on the findings of the comparative analysis of the application of the Limitation Act in the Zambian courts and the corresponding Act in the South African courts.

CHAPTER 2

This Chapter seeks to establish the purpose for which the Limitation Act was enacted. It will also review the practicality of the application and manner in which the Limitation Act is applied in the Zambian Courts by giving account of the perception of end users and the institutions obligated to dispense the law and its end users.

2.1 Background to Statutes of Limitations

The purpose of this section is to ascertain the reasoning for which the limitation Act was enacted. This is achieved by considering the underlying reasoning given for the existence of such limitation periods.

Statutes of Limitation are, enactments of parliament that place a bar on the time frame within which to commence legal proceedings of a particular kind against an individual, corporation or public body for a prescribed period after the event upon which the legal proceedings would be based has elapsed.¹ These limitation periods apply for three major reasons; firstly to achieve fairness, secondly for certainty of the law and finally for reasons of public policy.

2.1.1 Fairness

This is a general reason for placing limitations on claims that encompasses evidential reasons. It is argued that it is not fair that a potential defendant should be subject to an indefinite threat of being sued.

It is generally accepted that over time, the scene of an alleged crime may be changed, evidence may be corrupted or destroyed and memories of the events complained of may fade

¹McGee A, *Limitation Periods*2002

away.²These changes would make it difficult or impossible for a true depiction of what had occurred to be given for example by witnesses. A witness may have died, moved away or lost the memory of the event called to question thus making it impossible for a court presiding over that matter to come to an informed decision with regard to all material facts and evidence. Thus the limitation placed on claims is done so with a view to have the evidence fresh in the memory of the parties so that the courts may have in consideration all material facts in order to come to a true and reasonably held decision on the matter.

The disadvantage of delays in bringing a claim are usually attributed to the plaintiff for evidential reasons, it can be argued however, that a potential defendant is in a more vulnerable position than a plaintiff. Mainly because it is the plaintiff who decides when to commence proceedings, and has the time before the claim is brought at his or her disposal to collect the necessary evidence. Meanwhile the defendant may not even be aware that he or she is at risk of being sued and is thus unlikely to take any steps to preserve the necessary evidential material he or she may need to support the case. Thus it would be unfair to allow such circumstances to fall through.

2.1.2 Certainty of the Law

The principle behind the limitation of claims is in place so as to encourage potential claimants to exercise their right to bring suit with due diligence.³The complainant has the responsibility of bringing the claim as soon as cause arises. This is because there needs to be certainty with the courts in knowing what cases are heard and it also works to the advantage of such a plaintiff. This also protects a potential defendant from being perpetually liable for

² Introduction to basic principles. n.d. <http://fds.oup.com/www.oup.co.uk/pdf/1-8417-186-8.pdf> (accessed February 23, 2012)

³ Lord Hatherly in *Thompson v Eastwood* 1877 2 App Cases 215 at 248

acts committed in the past. It is only reasonable for one to be culpable for offences committed for a specific duration and not to have those acts follow one forever.

2.1.3 Public Policy

The concept of the application of limitation periods has public policy reasons underpinning it as well.⁴ It is generally accepted that the public has an interest in resolving disputes as quickly as possible. Limitation periods help to maintain peace in society by ensuring that disputes do not drag on indefinitely and the maxim of *Interest reipublicae ut sit finis litium* states that the public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community.⁵ It is also recognised that limitation periods help improve the quality of justice administered.⁶ The difficulty for a court to achieve substantial justice in a case will be considerably more if the claim is brought late. This would result in poor and highly criticised judgments as the reliability of the evidence adduced has been affected by the passage of time.

Limitation periods are placed on varying claims such as matters arising from Tort, Contract and those dealing with public bodies or corporations. This wide range indicates the extent to which these barriers to the commencement of legal proceedings affect a large portion of society and so should not be allowed to be abused.

2.2 Application of the Limitation Act 1939 in Zambia

The Statute of Limitations applicable to the Republic of Zambia is the English Limitation Act of 1939. Generally, it is recognised that English Statutes are applicable to Zambia by operation of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia.

⁴McGee A, *Limitation Periods* 2002

⁵ Law Commission. n.d. *Limitation of Actions Consultation*.

http://lawcommission.justice.gov.uk/docs/cp151_Limitation_of_Actions_Consultation.pdf (accessed March 18, 2012)

⁶ South African Law Review Commission 'Discussion Paper 146- Prescription Periods' 2011 ISBN: 978-0-621-40078-6

It is provided in the aforementioned Act that English Statutes that were created on or before 17th August, 1911 would be applicable to Zambia in so far as they were consistent with the Constitution of Zambia. Though the Limitation Act is not encompassed in the requirement ascertained above, the British Acts Extension Act, Chapter 10 of the Laws of Zambia specifically provides in its schedule that the Limitation Act is applicable to Zambia.

Upon perusal of the Limitation Act, it becomes apparent that there are some provisions that currently apply that would not necessarily be a true reflection of the justice sought to be achieved by the principle of limitation of claims. The provisions being:-

- the fact that a cause of action arising out of tort is recognised as beginning from the time that the act complained of took place, this calls for a question of the application of the same to psychological injuries which are usually discoverable a long time after the 'cause of action' arose,
- the fact that the court is not given any discretion in the Act to allow for the filing of claims that are brought out of time as stipulated in the act; and
- the general position that the Limitation act is an old Act and the country from which we adopted the said Act has moved forward developing the law on limitations further by discarding certain elements in the Limitation Act 1939 in preference of new principles.

Another problem that is generally eminent from the application of English Statutes in Zambia is the fact that the requirement of cross-referencing with other Zambian Statutes would cause confusion on practising lawyers and the layman alike.⁷ The Limitation Act is such an example as one would have to know of the provisions of the Limitation Act as the point of first instance in light of subsequent legislation prescribing different limitation periods such as

⁷Such as the Customs and Excise Act No.4 of 1999 that has provisions that operate in the same manner as the Limitation Act operating as procedural bars to the institution of suit.

those present in the Law Reform (Limitation of Actions) Act Chapter 72 of the Laws of Zambia and the Zambia Development Agency Act No.11 of 2006. This position was also stated by the courts in *United Engineering Group Limited v Mackson Mungalu and Others*⁸ in which the court stated that “limitations of action are not only those that directly fall or are specifically mentioned in the Limitation Act of 1939” with reference to a stipulation as to the time period within which to bring a claim provided for in section 28 of the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia. Thus this illustrates the difficulty with which the ascertainment of a limitation period may be.

2.3 Opinions of Relevant Stakeholders

In order to establish the perception of end users on the applicability and justifiability of the Limitation Act, I embarked on obtaining the opinions of relevant stakeholders to ascertain their views on the application of the Limitation Act in the Zambian courts. These opinions were acquired in the form of structured interviews carried out on a one to one basis at an array of locations in Lusaka, Zambia.

In carrying out the interviews, I inquired generally on the operation of the Limitation Act as a whole with focus on ascertaining whether the courts are able to condone claims that are filed late and the effect of it, consider the challenges faced by Zambia being a developing country on the capacity of members of society to comprehend matters of the law which in most cases directly attributes to reason for the late filing of cases and the viability of having the Limitation Act in operation when the country from which we adopted the Act has itself developed and replaced the Limitation Act of 1939 with that of 1980.

⁸SCZ Judgment No.4 of 2007

The general consensus of the interviewees was that the application of the Limitation Act in Zambia was acceptable prima facie because we did not have any equivalent legislation of our own.

Injustice caused by 'strict' application of Act

The first question for consideration was the question whether the late filing of claims in court was condoned by the said judges. When posed to the magistrates in the Subordinate Courts, the general consensus was that the Limitation Act is binding on the courts and thus ought to be applied. This, it is said coupled with binding decisions of the Superior Courts⁹ dictate that the Limitation Act be applied as stipulated in its provisions. This then means that technically the courts are not allowed to condone claims that are filed out of the prescribed time period. However, in the opinion of Chief Resident Magistrate of the Subordinate Court¹⁰ the late filing of claims is allowed in certain circumstances in the Subordinate Courts; it is so based upon the notion that the Subordinate Courts are Courts of substantial justice established to dispense substantive justice coupled with the usual principles of justice and fairness. This is said to depend on the merits and circumstances surrounding the given case and the justifications for such actions on account of equity.

The same position is also recognisable in the Industrial Relations Court where the requirement that a complaint for unfair dismissal is required to be brought within thirty (30) days from the date on which the complainant was wrongly dismissed may be extended upon the discretion of the court.¹¹ This limitation period seems to be encompassed by the statement of the court in *United Engineering Group Limited v Mackson Mungaluand Others* above stipulating that the provisions in other Statutes providing for limitation periods applied with

⁹Through the Common Law principles of Stare Decisis

¹⁰Interview, Joshua Banda, interview by Chisanga Lenka Kasonde, March 2, 2012

¹¹According to section 85 (3) Industrial and Labour Relations Act, CAP 269

similar effect as the provisions of the Limitation Act. The question then would be whether this discretion allowed to extend such time limit is applied universally throughout the Zambian legal system.

This position was not shared by the District Registrar of the High Court¹² who unequivocally stated that the provisions of the Limitation Act in the Superior Courts were strictly applied and that no condonation was allowed whatsoever. A further enquiry as to whether such a claimant statutorily barred by the Limitation Act has any other recourse to their claim, this was answered in the negative with the only available option being to appeal to the ‘good nature’ of the person being claimed from for a compromise. Following this, it may be seen that the strict application of the provisions of the Limitation Act without discretion afforded to judges to condone late claims is an expensive price to pay for a litigant who may provide compelling reasons justifying their delay in commencing suit. This then highlights inconsistencies apparent in one legal system by the different application of authority to condone claims out of time on different levels in the hierarchy of the legal system.

The application of the specific provisions of the Limitation Act in the Zambian Courts according to the Magistrates and District Registrar are not often invoked though. It is arguable then to say that perhaps as it is not often invoked, then it may be described as ‘dead law’ that need not be in place. Conversely, the justification for the application of the Limitation Act is very much alive as it is one of the first elements that most learned legal counsel look to once served with the originating process even before providing a defence as the limitation may be raised as a preliminary issue and if decided in the affirmative would spell out the end of that case. Cases like that of *City Express Service Limited v Southern*

¹²Interview, District Registrar, interview by Chisanga Lenka Kasonde, March 6, 2012

*Cross Motors Limited*¹³ illustrate the importance of the application of the Limitation Act in bringing finality and preventing unmerited or unnecessary claims.

EQUITY

Another short coming relates to the non-application of equity with regards to the condonation of claims filed out of time. The importance of the application of equity in the courts of law cannot be stressed more and it has been the subject of various litigation cases. It is widely accepted that the common law principle of equity is required to be administered at the same time as the law and this was reiterated in *Agricultural Finance Company Limited v Paul Hamuwo Mweemba & Aaron Hangoma*¹⁴ where it was stated that “equity has been fused [with Common Law and Statute general] in the administration of justice in courts”. Thus the failure to grant the courts with discretion to consider the condonation of claims filed late based on the operation of equity in such a case would be condemned. This is because the very essence of the operation of equity is such that it is able to take a less rigid view of the strict application of the law in a given case such that it is able to provide remedies where it would be unconscionable to permit a contrary position.¹⁵ Following this reasoning then, judges in court should be able to administer equity in a given case in terms of condonation of late claims where it is deemed necessary according to the merits and justifiability of the reasons for the late filing of the claim.

Moreover, the usual reason given as to why these claims are brought late is because the parties were in the process of negotiating with the other party from whom relief is sought. In such a situation, regard ought to be had to the actions of the individual seeking to resolve the matter before bringing it to court. Whereas the Act is silent on how one ought to treat such

¹³(2007) ZR 263

¹⁴(1977) Z.R. 138

¹⁵ Joachim Ruckert. 2006. *Friedrich Carl von Savigny: The Legal Method and the Modernity of Law*. <http://www.juridicainternational.eu> (accessed February 19, 2012)

scenarios, surely equity would call for the courts to have regard to the conduct of the parties.

It is provided in Section 13 of the High Court Act Chapter 71 that;

“law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim”

This is one way in which the courts may circumvent the issue as to whether to condone the material facts in a given case. This reasoning however is not likely to be adopted by all courts thus the need to afford limited discretion to the Judges in court to condone claims depending on the circumstance, merits of success, reasons for the delay and the justifiability of the claim.

VIABILITY OF HAVING AN OLD ACT

On the question of whether the fact that the country (England) from which we adopted the Act has subsequently made developments and changed the law in relation to limitations, the response by all candidates was unanimous. It is widely accepted that the law should move with the times and reflect the needs of that particular society. According to Savigny one of the proponents of the Historical School of thought in Jurisprudence, the law ought to be a reflection of the basic national or tribal character. He further propounds that law is not of universal application but is particular to the society that produces it. This line of thought would therefore rebut the continued application of the English Limitation Act to the Zambian society as the said Act reflected the spirit of the English society at that time and not that of the Zambian society.

Accordingly, it is thought that efforts need to be made by the State to localise the Act to better suit the Zambian society and so should be either amended to reflect this or be repealed

in totality in favour of an all Zambian Act developed from scratch. This is in line with the challenges highlighted above faced by society by virtue of Zambia being a developing country.

This is one of the purposes for which the Zambia Law Development Commission was established by virtue of section 4 (1) (a) and (d) of the Zambia Law Development Commission Act No.11 of 1996.

Challenges Faced by Zambia as a Developing Nation

It is essential to obtain the opinion of end users in order to establish whether those that are affected by and usually deal with the Limitation Act are of the impression that its provisions attain justice when faced in cases before the courts.

It is thought that most people that file their claims out of time are unaware of the fact that such rights are enforceable by them or such individuals are unaware that there are mechanisms such as that of the Limitation Act that would operate to bar their claims upon the expiration of the prescribed period of time. The most common response would be that ignorance of the law is not an excuse to be condoned. However, it is my view that in consideration of the needs and people in the Zambian society, this lack of knowledge could be attributed to the failure by the State to take deliberate steps to disseminate information especially to those segments of the country where such information is not within their reach. This refers to rural areas where most people have only recently started attaining basic levels of education and so there is a genuine reason for the lack of knowledge and even more need for awareness to be raised. On this point, an interviewee who opted to remain anonymous was of the view that unfortunately as this would entail research based calls for consultation on the same followed by a wide spread awareness campaign, it would be highly likely that the State would refuse to take it up on account of inadequate funds.

The view expressed above was vehemently consented to by Honourable Banda who was of the view that the ignorance of the law was not only restricted to those in rural areas but also those in urban areas as knowledge of basic legal principles is in short supply. This, he said was attributed to the minimal awareness that members of society have on legal matters. Honourable Banda stated that education of such legal principles was of the utmost importance and proposed that they be introduced at an early stage during the basic education training of members of society.

It then follows that if the State cannot provide these awareness platforms, that the courts should in certain instances be afforded with the discretion to allow for the late filing of a claim depending on the reasoning considered on a case to case basis. However response to this proposition was unequivocally by one of the interviewees.¹⁶ He was of the view that in a circumstance when a claim is brought out of time under the Limitation Act, the higher courts have no authority to condone the claim unless the claim is envisaged in the exception to the applicability of the Limitation Act contained in Part II of the said Act. However, he said if the matter was before the Subordinate courts, being courts of substantial justice they might allow the claim, which view is also shared by the senior State Advocate at the Ministry of Justice.¹⁷

2.4 Findings

It is generally agreed that the application of the Limitation Act in the Zambian courts is acceptable prima facie for the fact that there is no corresponding or equivalent Statute in Zambia governing limitation periods as encompassed in the said Act. I undertook the interviews with the intention to ascertain the perception of end users on whether the Limitation Act did achieve the justice it sought to achieve with the provisions as appearing in the Act. Thus the questions were structured in such a way as to allow for a general discussion

¹⁶Interview, Mr Geah Madaika, interview by Chisanga Lenka Kasonde, March 14, 2012

¹⁷Interview, Mr Martin Lukwasa, interview by Chisanga Lenka Kasonde, February 18, 2012

on the topic with specific focus on the provisions that were likely to be problematic or which were questionable on the attainment of justice.

It became evident after the interviews that though the operation of the Limitation Act was in such a way as to be a procedural bar to a claim, in essence the claim of such litigant captured by the provisions of the Act is that no other recourse is available. This is mainly because the courts have not been afforded the discretion to allow the condonation of claims even where compelling reasons may call for it. Such strict application of the provisions of an Act appears to be aloof to even the principle of judicial activism in the interpretation of Statutes as propounded by the Realist school of thought.

The key question discussed was the requirement for the Act to be changed in light of the fact that the country from which it was adopted has changed their Act. Many of the interviewees were of the view that the Act should be changed in order to adequately reflect the needs and interests of society at a given time. This theory coincides with the theory that was propounded by Savigny requiring the law to reflect the spirit of the society that it governs. It is argued by the individuals advocating for the change of the Act that Zambia has developed substantially and therefore the need to develop the laws to show the current situation should be shown. It is also believed that the Limitation Act as it is now reflects the spirit of the English society as it was then and so should be amended or repealed completely in order to align itself with the needs and interests of the Zambian society.

On the other hand, some of the interviewee's paid no regard to the fact that the country from which the Act was adopted has moved on and developed its laws on limitations. Regarding this reasoning based on the fact that the Act as it is works well and no problems were seen from it that could not be circumvented by operation of the exceptions within the Act and the

court's inherent jurisdiction to apply equity and consider the principles of natural justice in hearing the case.

Others not moved towards the requirement to change the current Act argued that the change in law in the country from which the current Limitation Act was adopted was by virtue of the fact that they face different problems and challenges in that particular country. Reference was made to the adoption of the White Book on Supreme Court procedure whereby Zambia moved at the same pace until the United Kingdom moved and Zambia remained with the White Book of 1999. It is said that as the United Kingdom is a developed nation, the problems, challenges and priorities that it faces are different from those encountered in Zambia.

It is apparent from the interviews conducted that claims relating in one way or another to any of the provisions of the Limitation Act do not come by as often as other areas of the law. Nonetheless, the importance of the purpose for which the Limitation Act was enacted cannot be emphasised more. The legitimate purpose served by the Act is evident from the fact that when it is invoked, it illustrates the public policy and fairness reasons for having it in place.

CHAPTER 3

3.1 Introduction

The significance of undertaking a comparative study is important in learning the experiences of other countries. Comparative law has been on the increase in the present age of internationalism as it provides an avenue for intellectual exchange in terms of law and it promotes an enhanced understanding of law in a diverse world. Furthermore, a comparative study helps in broadening horizons for law reformers and legislators around the world.

In this investigation the comparative study based on South Africa is examined. South Africa was specifically targeted at by virtue of the fact that it is a developing country as is Zambia and as such is likely to face similar challenges in the dispensation of laws in light of the members of its society as well. It is hoped that at the end of this comparative study, we may learn of how limitation periods are dispensed in another Commonwealth country. This comparative study will specifically focus on limitation periods, powers of the court to condone statutory barred.

3.2 South African Limitation Legislation

In South Africa, the acquiring or losing rights, or of freeing oneself from obligations, by the passage of time under conditions prescribed by law is called Prescription.¹ These prescriptions are the equivalent of limitations as used in the Zambian legal system and will be referred to in the rest of this chapter to mean limitation. In South Africa, the statute governing limitations is the Prescription Act 68 of 1969.

¹South Africa. Prescription Act 68 of 1969

3.3 Background on Prescription Act

The law on prescriptions in South Africa is said to have derived from Roman and Justinian Law. These prescriptions have been Statute based and date as far back as 1861 in Cape and Natal.² It is noticeable that the different States in South Africa adopted different pieces of legislation applicable to them for example, the oldest being the Cape Prescription Act 6 of 1861, Natal having enacted theirs' in the same year (14 of 1861) and Transvaal having a Prescription Act 26 of 1904.³ These Acts were subsequently repealed and replaced by the Prescription Act 18 of 1943 which in turn was repealed and replaced with the currently applicable Prescription Act 68 of 1969. It is evident from the array of legislation that South Africa has been highly active in the voyage to the attainment of the ideal statute on prescriptions.

The South African Prescription Act is concerned with the effect of time on "debts". Before the complainant's claim can be extinguished in terms of the Prescription Act it would have to be a debt. The term debt is not defined in the Act, but the concept encompasses not only an obligation to pay money, but also an obligation to do something based on the relationship between a creditor and a debtor. This is outlined in Section 11 of the Prescription Act 68 of 1969 which outlines the circumstances in which a debt would be prescribed:-

(a) "thirty years in respect of any debts secured by mortgage bond, any judgment debt, any debt in respect of any taxation imposed or levied by or under any law and any debts owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

² South Africa. Prescription Act 68 of 1969

³ South Africa. Prescription Act 68 of 1969

(c) six years in respect of a debt arising from a bill of exchange other negotiable instruments of from a notarial contract, unless a longer period applies in respect of the debt in question is in terms of paragraph (a) or (b)

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debts”.

Another factor worth noting and expressly stated in Chapter III of the Prescription Act is that the right to a debt payable that has prescribed by law is extinguished according to section 10 which provides:-

“(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies; (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.”

It is not merely a procedural bar as to the attainment of a prescribed remedy but the debt in question is cleared by operation of the Prescription Act. This position was re-affirmed by the South African courts in *Society of Lloyds v Owen John Price*⁴ and *Society of Lloyds v Paul Lee*⁵ where it was held that the Prescription Act in South Africa unlike England (and Zambia for the purposes of this research) is of substantive rather than procedural nature operating by extinguishing the given right once the time limit expires.

3.4 Factors influencing the development of law on prescriptions in South Africa

Emanating from Roman law, the South African Law on prescriptions can be seen to have evolved over the past decades with several Acts repealed and replaced on numerous occasions. The Prescription Act was enacted by the South African parliament and it is widely agreed that such was necessary so as to be well suited to the people of South Africa who have different cultures and needs. It is a widely acclaimed fact that for a law to be deemed as being

⁴TPD Case No. 17040/03

⁵TPD Case No. 20764/03

efficacious, it ought to take into account the needs of the particular society in which it would apply in order to afford the members of that society with a piece of legislation that they would understand.⁶

The South African Law Review Commission has played a key role in the quest for the laws on prescription to be refined and reviewed to better suit South Africans. This is evidenced in the Commissions' calls for the reconsideration of biased or inequitable provisions of the Prescription Act. Being research oriented, opinions are sought from interested parties in the form of discussion papers such as Discussion Paper 126 on the Media Statement concerning the investigation on prescription periods.⁷ This is one of the ways that provides for the development of the law with the true reflections of the society. It is such legal activism that is admirable from our friends in the South.

3.5 Condonation in the South African Courts

As it is evident that the operation of the lapse of time with regards to limitation periods has the effect of extinguishing a right, it then follows that such an individual having their right lost has no other avenue for redress of that matter. It is this very characteristic of the operation of prescription periods that has been the subject of much debate mainly due to the fact that the courts in hearing such a matter are not afforded the discretion to condone matters that have been raised out of time. As discretion is not afforded to the courts on consideration of claims that are brought out of time, it was discussed in *Mohlomi v Minister of Defence*⁸ that the question as to whether or not condonation may be allowed depended on the interpretation of the statute in question by the courts.

⁶Anyangwe, Carlson. *An Outline of the Study of Jurisprudence*. Lusaka: University of Zambia Press, 2005

⁷ South African Law Review Commission 'Discussion Paper 126- Media Statement on Investigation of Prescription Periods' 2011

⁸1996 (12) BCLR 1559 (CC) 1568D-E

This strict approach with regards to the refusal to condone claims out of time with regards to the Prescription Act does not sit well with the discretion afforded to the courts with regard to other matters. For instance, John Murphy, a pension funds adjudicator in giving judgment in the case of *C M Low v BP Southern Africa Pension Fund and BP Southern Africa (Pty) Ltd*⁹ said:-

“...the provisions of section 30I(3) of the Pension Funds Act 1956 permit me to extend a time period or to condone non-compliance with a time limit provided there is good cause. This means, broadly speaking, that late complaints may be condoned depending on factors such as the degree of lateness, the explanation therefore, the importance of the case, the complainant's prospects of success, the possibility of prejudice to either party and the existence of good faith endeavours to settle the dispute”

This was in response to the operation of prescription periods in a claim against the discriminatory and unconstitutional exercise of power by the pension fund from which the complainant was seeking redress.

The power of the courts to condone late filling of a claim were also codified in certain statutes. For instance, Section 191 (2) of the Labour Relation Act 66 of 1995 provides that “If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.” Similarly, the Institution of Legal Proceedings Against Certain Organs of the State Act (IPACOS Act) 2002 with regards to the failure to comply with the requirement of giving notice to the State prior to commencement of suit against it, the courts may condone such a failure provided that this meets the requirements set out in section 3 (4) (a) and (b) which provide as follows:-

“Sec 3(4)

- (a) If an organ of State relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor; and

⁹Case No: PFA/WE/9/98

(iii) the organ of State was not unreasonably prejudiced by the failure.”

Although the aforementioned provision indicates that such a debt ought not to be extinguished by prescription, its importance is the recognition of the discretion afforded to the courts in order to condone the non-adherence with ‘strict’ provisions of statute.

Following this, it would seem that there is a move in statute to recognise the late filing of a claim to allow for condonation. This raises the question whether it would still be justifiable not to allow condonation for claims that are out of time.

In as much as the provisions stated above indicate that the courts may in certain instances condone the filing of late claims, this is not specifically to the provisions of the Prescription Act. It still remains that the courts have no authority to make such calls hence the suggestion by the South African Law Review Commission in Discussion Paper 126 to amend the current law by allowing judge’s discretion in hearing claims filed out of time. A court considering whether or not to grant condonation should consider the following factors:¹⁰

- a) the nature of the relief sought;
- b) the extent and cause of the delay;
- c) the effect of the delay on the administration of justice and other litigants;
- d) the prospects of success of the case; and
- e) on good cause shown.

It is said that this in view of the background of the circumstances that prevail in the South African society such as poverty, illiteracy and differences in language and culture all characteristics of that society.¹¹

3.6 Procedure of Institution of claim against the State

¹⁰South African Law Review Commission ‘Discussion Paper 126- Media Statement on Investigation of Prescription Periods’ 2011

¹¹South African Law Review Commission ‘Discussion Paper 146- Prescription Periods’ 2011 ISBN: 978-0-621-40078-6

Historically it was not possible to sue the State, and this principle finds its roots in the principle of sovereign immunity. When instituting proceedings against a State organ for the recovery of debt, this may either be done by the consent in writing of that organ of the State without notice or by a creditor giving an organ of State notice in writing of such intention.

This is encompassed in Section 3 of the IPACOS Act 2002 which States:

“(1) No legal proceedings for the recovery of a debt may be instituted against an organ of State unless-

(a) a creditor has given the organ of State in question notice in writing of his or her intention to institute the legal proceedings in question; or

(b) the organ of State in question has consented in writing to the institution of that legal proceedings-

(i) without notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection 2

(2) A notice must —

(a) within six months from the date on which the debt became due, be served on the organ of State in accordance with section 4(1)”

It is the requirement of giving notice to that State that has been the subject of much criticism in South Africa. This attribute was highly condemned by the South African Law Review Commission in their discussion paper 146 in which they contended that such a distinction afforded to the State was firstly unfair, secondly the justification for such stringent notice requirements were doubtful and finally it operated to cause inequalities amongst people with claims against the State who are treated differently as opposed to those pursuing a claim against private persons.¹²

3.6.1 Fairness

It would be unfair to afford such special legal privileges protecting the State from suit as it would go against the widely accepted maxim of the law that there should be equal protection

¹²South African Law Review Commission ‘Discussion Paper 146- Prescription Periods’ 2011 ISBN: 978-0-621-40078-6

and benefit of the law. Requiring the State to receive notice within 6 months from the date on which the claim accrued is arguable as being biased towards affording the State more benefit from the law and depriving the individual with the claim against the law, from its protection. The commission goes on further to argue that such inequality is unconstitutional as equality is recognised as being a guaranteed and justiciable right in the South African Bill of Rights. Equality is also thought to be a core and foundational value upon and against which all law must be tested for constitutional adherence thus it is arguable that such provision affording the State different treatment from private individuals would be unconstitutional.

3.6.2 Justification for Notice

The question raised under this ground is whether such differentiation is rationally connected to the purpose which it seeks to achieve. To illustrate that no such preference is extant and to be deemed as rational the law, according to Ackermann J in giving judgment in *Prinsloo v Van der Linde*¹³ ought not be indiscriminate “or manifest naked preferences that serve no legitimate governmental purpose”. Following the arguments advanced by the South African Law Commission in Discussion Paper 126 the requirement of giving notice to the State prior to commencement of suit has not been justified and appears to be disproportionate to the need it seeks to serve.¹⁴

Additionally, the effect of giving notice to the State is not clear with regards to whether it has a bearing on the running of the prescription period.

3.6.3 Operation leading to Inequalities

Treating those with claims against the State in a different manner by requiring additional processes to be adhered to is said to lead to inequalities. This is because the claims of other persons with claims against private individuals are not required to adhere to such additional

¹³1997 (6) BCLR 759; 1997 (3) SA 1012 (CC)

¹⁴South African Law Review Commission ‘Discussion Paper 126- Media Statement on Investigation of Prescription Periods’ 2011

requirements. Under the maxim of ‘all are equal under the law’ this is thought to include the State, why then would the State have these extra protections afforded to it? A legitimate claim ought to be afforded a platform in the courts of law as are all other cases based upon the merits and the State may then bring forward defences where they allege a claim has either been improperly brought or the State is not liable

3.7 Lessons learned from the Comparative Study

It has been illustrated that South Africa has a Statute governing limitation periods in the form of the Prescription Act. Some of the effects of the Prescription Act differ from the operation of the Limitation Act in Zambia such as the fact that prescription extinguishes a right rather than merely being a procedural bar to the claim and the preferential treatment of the State. Still, the main problem faced in Zambia with regards to the comprehension of the embers of society to the law is also faced in South Africa as envisaged when I embarked on this comparative study. This stems from the fact that the two countries are developing countries and the recognition of this by the SALRC together with suggestions of reviewing the law in light of this is a critical lesson learned.

Notably, the State is still afforded preferential treatment with regards to the commencement of suit against it in South Africa. This has been frowned upon and led to the SALRC propose an Amendment Bill in which the provisions in the IPASOC Act with regard to the requirement of giving notice to be repealed. There are no persuasive reasons why the State as a party to a dispute must not be treated equally with the other parties.

3.8 Comment on Findings

One key feature that is discoverable from the comparative analysis with South Africa is that it has been innovative and active through the SALRC which advocates for the development of the law in relation to prescriptions. This is evident from their research based approach in which the Commission employs the opinion of interested parties and the general public on

issues that they seek to change. This being the strength of their works in ensuring that the laws are localised as the public would have had an opportunity to peruse the proposed development and respond to the recommendations.

The second feature eminent from the operation of the Prescription Act in South Africa is that the courts are allowed to condone the late filing of claims with particular reference to those brought against the State; IPASOC section 4 (a) and (b). This trend is likely to reflect the need to move to the condonation of claims brought after the prescribed time.

CHAPTER 4

4.1 Comparative analysis of findings

It has been revealed in the preceding chapters that there are limitation periods in operation in both Zambia and South Africa within which one ought to commence proceedings. The reasoning behind these policies which has been thoroughly discussed in the previous chapters highlights the purpose and importance of having the said limitations in operation. In Zambia, the Limitation Act an adopted English Act applies whilst in South Africa the Prescription Act 68 of 1969 is in operation. The focus of the comparative study is based upon the elements divulged above which are:-

- The condonation of claims filed upon expiration of limitation periods
- Challenges faced as a developing country
- Recognition of the discoverability principle
- Development of the law on limitation periods

4.1.1 Condonation of claims filed out of time

It has been revealed in the previous chapters that one of the challenges faced by Zambia and South Africa is the fact that no discretion or authority is granted to the courts in order to condone the hearing of claims that have been brought out of time in certain circumstances.

Though this is the current position in relation to the law in Zambia, it appears that in practise the inverse is the norm. This is with regard to the lower courts such as the Subordinate and Industrial Relations Court which allow for the hearing of claims brought out of time without strictly adhering to the limitation periods governing the particular claim. There is a proposition that this is done so as the aforementioned courts are courts of substantial justice however, it may be put forward that the differential treatment of limitation periods in these courts would cause inconsistencies in the legal system. This is because the legal system is one

body and thus the decisions of all the courts should be consistent therefore the condonation of claims filed late in one section of the legal system but not the other is not ideal. Moreover, the differential treatment of limitation provisions indicates anomalies as to the statutory declaration and what is actually in place in practise. This therefore calls for the need to harmonise the law so as to prevent inconsistent pronouncements in the legal system on the operation of limitation periods and to clarify the anomalies of the statute provisions and how the said provisions are actually handled in practise.

Similarly in South Africa, there have been calls for the courts to be granted an inherent power to condone non adherence to the time limits laid down in statute.¹ The arguments advanced in support of this are that condonation should be allowed in circumstances where there is a valid claim based on the merits of the case. This would involve the courts “exercising discretion judicially upon consideration of all facts of the case such as the degree of lateness, explanation thereof, prospects of success and the importance of the case.”² Additionally, it appears that there have been moves in South African legislation to recognise and allow the condonation of late filing with regard to certain prescription periods such as the Custom and Excise Act³ and the IPACOS Act which allows for condonation where ‘good cause is shown. In light of the above, it would therefore be questionable whether the strict adherence to time limits set out would still be justifiable.⁴

4.1.2 Challenges faced as a developing country

Zambia and South Africa both being developing countries, it was anticipated that the challenges faced might be similar and that was why South Africa was chosen. The anticipation was rightly held as it was discovered that the problems faced and highlighted in this paper by South Africa are similar to those in Zambia.

¹South African Law Review Commission ‘Discussion Paper 126- Media Statement on Investigation of Prescription Periods’ 2011

²Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) 532B-E

³Section 96 (1)(c)(ii) of the Customs and Excise Act 91 of 1964

⁴IPACOS Act section

Cultural differences and illiteracy are common to developing countries like Zambia and South Africa, as a result of which comprehension and understanding of the law and particularly the limitation periods discussed in this paper are mystified. This reflects a large portion of society and as condonation is not provided for by law for claims filed late, it would mean that illiteracy which is no fault of the members of society equates the downfall of many a claim by this segment of society. The fact that limitation periods are present in various laws as highlighted in the previous chapters makes it even more complex a system. At a general level, to have so many different reference points can present a trap for the unwary and would render the law further unintelligible to lay people.⁵

For Zambia, it is thought that the Limitation Act is not a reflection of society as the history and context in which it was crafted was for the English society. Therefore according to Friedrich Karl von Savigny such legislation would not be best placed for application in Zambia as the law is of application to the specific society within which it emanates.⁶ Such imposition on the people of Zambia cannot be generally viewed as being fair or continuously viable. It follows then that Zambia needs to have the interests of its people at heart and change the law in order to localise it in accordance with the spirit of the Zambian people.

Conversely, the Prescription Act of South Africa is not an adopted Act but one created by South Africa. Nonetheless, there are calls to reform the law with a view to reflect the characteristics of the South African society in view of the illiteracy levels that hinder prompt commencement of suit.

⁵Law Commission.n.d.*Limitation of Actions Consultation*.
http://lawcommission.justice.gov.uk/docs/cp151_Limitation_of_Actions_Consultation.pdf (accessed March 18, 2012)

⁶Joachim Ruckert. 2006. *Friedrich Carl von Savigny: The Legal Method and the Modernity of Law*.
<http://www.juridicainternational.eu/index/2006/vol-xi/friedrich-carl-von-savigny-the-legal-method-and-the-modernity-of-law/> (accessed February 19, 2012)

4.1.3 Recognition of the discoverability Rule

Essential to the operation of limitation periods is the time at which the limitation period begins to run with reference to Tort or personal injury claims. In Zambia, the Limitation Act provides that the limitation begins to run from the time at which the cause of action accrued. *Cartledge v E Joplings & Sons Ltd*⁷ is an English case that was decided on application of the aforementioned statutory provision. In that case, steel workers brought suit against the Defendant employers for suffering pneumoconiosis an industrial disease that was acquired due to the inhalation of noxious particles into the lungs in the course of their employment over a period of many years. However, the disease was only discovered several years after the cause of action for the said injury could have accrued. The defendant was able to successfully plead the defence of statutory limitation and this decision sparked criticism. The criticisms led to the reform of limitation periods following recommendations of the Tucker committee.⁸ The said reforms led to the recognition of the said principle in the section 14 of the Limitation Act 1980.

Moreover, the discoverability principle is also recognised in section 12(3) and (4) of the South African Prescription Act. This illustrates the importance and fairness attributed to the calculation of the commencement of the running of limitation periods.

4.1.4 Development of the Law on Limitation Periods

In a modern society, it is essential that the law should undergo reforms in order to stay relevant and reflect the characteristics of society at any given time. In Zambia, the institution mandated with the review and reform of legislation is the Zambia Law Development Commission.⁹ An interview with a senior researcher at the ZLDC revealed that the Commission had neither come across nor has it done any research as to the operation of the

⁷[1963] 1 All ER 341

⁸Report of the Committee on The Limitation of Actions (1949) Cmd 7740, para 22 (chaired by Tucker LJ)

⁹As established by The Zambia Law Development Commission Act No.11 of 1996, hereinafter called ZLDC

application of the Limitation Act in the Zambian courts.¹⁰ This is so even when the Limitation Act potentially has a bearing on any suit commenced in all subjects of law especially the common ones being Tort and Contract. The apathy related to the treatment of limitation periods extends to some of the interviewees referred to in Chapter Two and the lack academic research in general as well as no work has been done to study the application of this very vital legislation.

South Africa on the other hand, has demonstrated a lot of activism in relation to the development and research into the operation of their Prescription Act. The South African Law Review Commission, the equivalent of the ZLDC has played an instrumental role in the development of the law by issuing discussion papers and media statements addressing how to harmonise and localise the Prescription Act so as to reflect the interests of the diverse South African society. The SALRC went a step further in their discussion paper No 146 by proposing a draft bill in which their recommendations were adopted for the amendment and repeal of certain provisions present in the previous Act.

4.2 Findings

The comparative source shows that other jurisdictions employ the operation of limitation periods as they recognise the importance that such legislation plays. It reveals that the choice of South Africa as a basis for comparison in anticipation of the fact that it is a developing country and so will face similar challenges was rightly held. Generally, there appears to be no inherent power residing in a court to condone a failure to comply with the limits laid down in statute and this is a concern of both Zambia and South Africa.

The fact that the Limitation Act was adopted in Zambia upon independence from the colonial rule of the British does not outweigh the function that it plays. What is evident from the

¹⁰Interview, Sharon Williams, interview by Chisanga Lenka Kasonde, April 4, 2012

research is that reforms need to be in place as the purpose for which it was adopted; to act as a guide, has been achieved therefore a modification ought to be carried out.

An admirable and act to be followed from South Africa is that their Prescription Act has been localised, being created by themselves and not simply adopted from another country and applied in South Africa. This is the key question that has been raised and is implored by many for change. Not only has the country from which we adopted moved on and developed a view more acceptable by the society in which it governs, but the law currently applicable in Zambia did not take into consideration whatsoever the interests, needs or abilities of the Zambian people as discussed earlier.

Other factors not directly related to limitation periods have been outlined as having an effect on the ability of an average person to appreciate the operation of limitation periods. This entails the fact that legal activism should be practised in Zambia in order to raise awareness of the standard of the legal system.

CHAPTER 5

5.1 Conclusion

This paper set out to determine the application of the Limitation Act in the Zambian courts with a view to understand and appreciate the application of the Limitation Act and ascertain the practicality of the application of the Act in the Zambian courts. The paper was to further make comparison to the operation and application of limitation periods in South Africa which being a developing country in Southern Africa would be likely to face similar challenges as Zambia and so consider any lessons to be learned from the experiences in South Africa.

The Limitation Act 1939 serves a legitimate purpose post-colonial era namely to prescribe the period within which one ought to commence proceedings to achieve fairness, certainty and for public policy reasons. The specific research questions and objectives have been thoroughly discussed and a summary is given below.

5.1.1 Summary

Initially the main issues to be discussed were the viability of continuing to have in operation an old English Act to legislate over the Zambian society and the challenges faced by Zambia as developing nation as to the comprehension of laws by members of society with specific reference to the Limitation Act. The former proposition was the subject of much discussion and the general consensus by a majority of the interviewees were of the view that the law should be repealed and replaced with a new Act. An Act that would localise and harmonise the anomalies currently present in the application of the Limitation Act in the Zambian courts as discussed in the foregoing chapters. The latter proposition referred to the reality of issues on the ground requiring the law in its creation, application and interpretation to incorporate

the characteristics of the Zambian society and take notice of issues of poverty, illiteracy and lack of basic legal knowledge in the dispensation of the law relating to limitations.

It was then revealed that once a claim by a litigant is captured by the provisions of the Limitation Act, there is no other recourse to the claim available for such litigant. As the law stands, there is no condonation of claims filed late and no regard is held to the challenges brought about by the character of members of society in their failure to understand and comprehend aspects of the law.

The history and context within which the Act was crafted has been considered and it has been discovered that the continued application of the Act is generally not justified in light of the arguments discussed in the preceding chapters on reflecting the spirit or character of society and the specific provisions that are no longer acceptable such as the unavailability of condonation of claims filed late and the recognition of the discoverability principle.

The key elements of the Zambian society that called for the review of the legislation were highlighted as illiteracy and the different cultural dispensation leading to incomprehension of the law and specifically limitation periods to the lay man. Additionally as espoused by Friedrich Savigny, legislation that is applicable to a particular society cannot be applicable in another society as laws are not of universal application. The underlying message of Savigny can be appreciated when considering the application of the Limitation Act of the English society in light of the Zambian society. It is common ground that the interests, abilities and priorities of the English society at the time of the Act cannot be equated to the position of the Zambian society as aspects such as customs, tradition, poverty and illiteracy are elements present and ought to be considered in the Zambian context. This is the very position raised by South Africa as well with regards to the importance of localising their Act even further.

It is because of the aforementioned inherent needs of the Zambian and South African societies that the need for the condonation of claims is advocated for. Usually those individuals with a compensable claim might not be aware that they have the right to pursue their claims let alone that there are limitation periods in operation that govern the duration within which such claims are to be instituted. The condonation of claims filed out of the limitation period is also supported by the fact that there are inconsistencies in condonation related to different legislation thus harmonisation of the law should be attained by affording the courts with authority to condone claims filed late.

Specific reference has been made to the provision in the Limitation Act that provides that the limitation periods begin to run from the time that the cause of action accrues. This in effect would operate with a bias towards the defendant in a given case regardless of the fact that the damage suffered, upon which the claim is based was only discoverable after the limitation period elapsed. Allowing such a position would be unfair and inconsistent with the principles of natural justice thus the reform of the law in England with reference to this specific provision as suggested by the Tucker committee and incorporated into law by the Limitation Act 1963. Similarly, it has been shown that the South African Prescription Act has an equivalent provision recognising that discoverability of claims should be considered.

The role of the ZLDC on the reform and development of the law was discussed and compared to that of the SALRC. It was discovered that unlike the SALRC, the ZLDC was not as active in advocating for reform of the law relating to limitation periods as the importance attached to the Limitation Act is minimal. This is evident from the apathy and lack of knowledge about limitation periods by the lay man and some legal practitioners alike.

Finally a comparison was made on the findings of the operation of limitation periods in Zambia and South Africa which revealed that the cause for concern in Zambia were similar to

South Africa. The courts were not applying the provisions relating to limitations strictly but as required by the enabling Acts thus calling for the need to reform the law to a more acceptable standard in light of the aspects mentioned above.

5.1.2 Challenges of research

In undertaking this research, there were a few challenges I was faced with. Firstly was the fact that there was no work previously done in this field of study, academic or otherwise. This meant that some of the opinions reflected in this paper were held from the information I acquired in the research and from the interviews with end users, relevant parties and considering with much attention the opinions given in the South African context.

Secondly, as obtaining the perception of those mandated with the responsibility of dispensing the provisions of the Limitation Act was essential to this paper it was imperative that I interviewed some judges. As anticipated prior to carrying out the interviews, securing an interview with the High Court judges was difficult to attain due to their busy schedules as a result of the bulk of work assigned to them. I did however manage to secure the said interviews with the help of the court officers though not as many in number as compared to the magistrates.

Notwithstanding the challenges faced, I was able to carry out the research with the sources acquired to produce this paper.

5.2 Suggestions

This sub-section will outline suggestions in response to the issues highlighted concerning the application of the Limitation Act in the Zambian courts.

5.2.1 Condonation of Claims

In response to the calls for the condonation of the late filing of claims, it is suggested that the law should be reviewed and reformed in order to empower the courts with the authority to condone the late filing of claims at the court's discretion. In so doing, the courts would be required to consider the following circumstances in deciding whether or not to grant condonation:¹

- the nature of the relief sought;
- the extent and cause of the delay;
- the effect of the delay on the administration of justice and other litigants;
- the prospects of success of the case; and
- on good cause shown.

The aforementioned list is not exhaustive and the court may consider other compelling reasons to allow condonation.

5.1.2 Localising the Act

The importance of localising the Act has been discussed in the preceding chapters and reiterated in the summary above. In order to achieve this, the law would have to undergo some reforms which entail the repeal and/or replacement of certain or all provisions of the Limitation Act as it appears now. The institutions mandated with the role of reforming the law would then have to come in so as to identify the issues affecting the application of the Limitation Act in the Zambian courts and carry out the relevant research in order to arrive at an informed and intelligible opinion. Thus the ZLDC would have to be instructed by relevant stakeholders or may on its own motion following the recommendations of this paper. This

¹Small PDF doc

would be following the South African example where the SALRC has been very active with regards to advocating for the reform of the law on limitations based on the aforementioned arguments.

5.1.3 Discoverability principle

A principle left out by the Limitation Act but of great importance as to the fairness achieved by it in favour of the potential plaintiff. Thus it is suggested that in the reforms of the law, an aspect that definitely be changed ought to be the provision stipulating that the calculation of time in commences upon the time that the cause of action accrues. The said provision should be replaced with one recognising the discoverability principle and award sufficient time in light of the characteristics of the *Zambian society*.

5.3 Recommendations

A general overview of the challenges and problems faced with the application of the Limitation Act in the *Zambian courts* may generally be resolved by reforming the law. Other elements recommended for the change in the law relating to limitation periods as evidenced in the research paper are as follows:-

- I. An instruction delivered to the ZLDC directing it to carry out further research into the operation of the Limitation Act with a view to reform the law. This should be carried out by acquiring the opinions of the general public and other relevant stakeholders so as to reflect the spirit of the *Zambian society*.
- II. The reformation of the Limitation Act should specifically reflect the need for condonation to be allowed as well as the recognition of the discoverability principle these being the main issues raised by this paper.

- III. The burden of proof in claims concerned with the application of the Limitation Act should remain vested upon the individual alleging that it does not apply.
- IV. Government should make deliberate efforts in order to raise awareness of the operation of the Limitation Act as its effects once in operation leave the plaintiff without any recourse to other remedies by the courts of law. This is because the Limitation Act affects an array of subjects and is essentially the starting point for litigants once served with a Writ.

The reason for which the Limitation Act was adopted may be justified as a model was required from which to base our own laws. The time has come at which we need to develop our own law reflective of the Zambian society but based upon the adopted Act. As no previous works prior to this paper have been undertaken on the subject of Limitations, it is a ripe subject to cover and surprisingly one that will have an effect on a wider scope of subjects.

APPENDICES

Attached herewith are the questions that were used in the interview with the end users of the Limitation Act. Similar questions were asked to lawyers and judges with the latter having specific questions in order to determine what aids, direction and circumstances that they would consider in the application of the Limitation Act in cases.

Appendix 1..... Lawyer’s Interview Questions

Appendix 2..... Judges’ Interview Questions

Lawyer's Structured Interview Questions

1. Have you ever come across a case that was time-barred by any of the provisions of the Limitation Act 1939?

Yes

No

(If yes, continue to questions 2 and 3, if no proceed to question 4)

If yes, under which provision was the claim barred?

2. Where such a claim is time-barred, how flexible are the courts in allowing such claims?

3. Where such a claim is dis-allowed by the courts, what alternative avenue do your clients have to settle the claim?

4. In your opinion, do you think any elements of the now applicable Limitation Act ought to be changed?

Yes

No

5. What changes if any would you like to see made to the Limitation Act applicable in the Zambian courts?

6. What reason do your clients give for bringing a claim late?

Judges' Structured Interview Questions

1. When cases are brought out of time do you apply the Limitation Act 1939?

Yes

No

2. How often do you have to apply the Limitation Act?

Always

Often

Rarely

Not at all

3. What is the common reason why these claims are brought out of time?

4. Do any of the claims limited by time fall under the exceptions in Part II of the Act?

Yes

Usually

Not at all

5. What aids do you use in ascertaining whether or not to allow a claim limited by time under the exceptions in Part II?

6. In your opinion, do you think that the Limitation Act as it is applied now is sufficient?

7. What changes if any, would you like to see made to the Limitation Act as it is now?

BIBLIOGRAPHY

Text Books

Anyangwe, Carlson. *An Outline of the Study of Jurisprudence*. Lusaka: University of Zambia Press, 2005

Cheshire, C Geoffrey and Fifoot H S Cecil. *Cheshire and Fifoot's Law of Contract*. 9th Edition. London: Butterworths 1976

Markesinis, Basil, et al. *Compensation for Personal Injury in English German and Italian Law: A Comparative Outline*. Cambridge: Cambridge University Press, 2005

McGee, Andrew. *Limitation Periods*. 4th Edition, London: Sweet & Maxwell 2002

Law Commission Reports

South Africa. South African Law Review Commission. *Discussion Paper 126- Media Statement on Investigation of Prescription Periods*. 2011

South Africa. South African Law Review Commission. *Discussion Paper 146- Prescription Periods*. 2011

United Kingdom. Law Commission. *Limitation of Actions Consultation*.

<http://lawcommission.justice.gov.uk>