

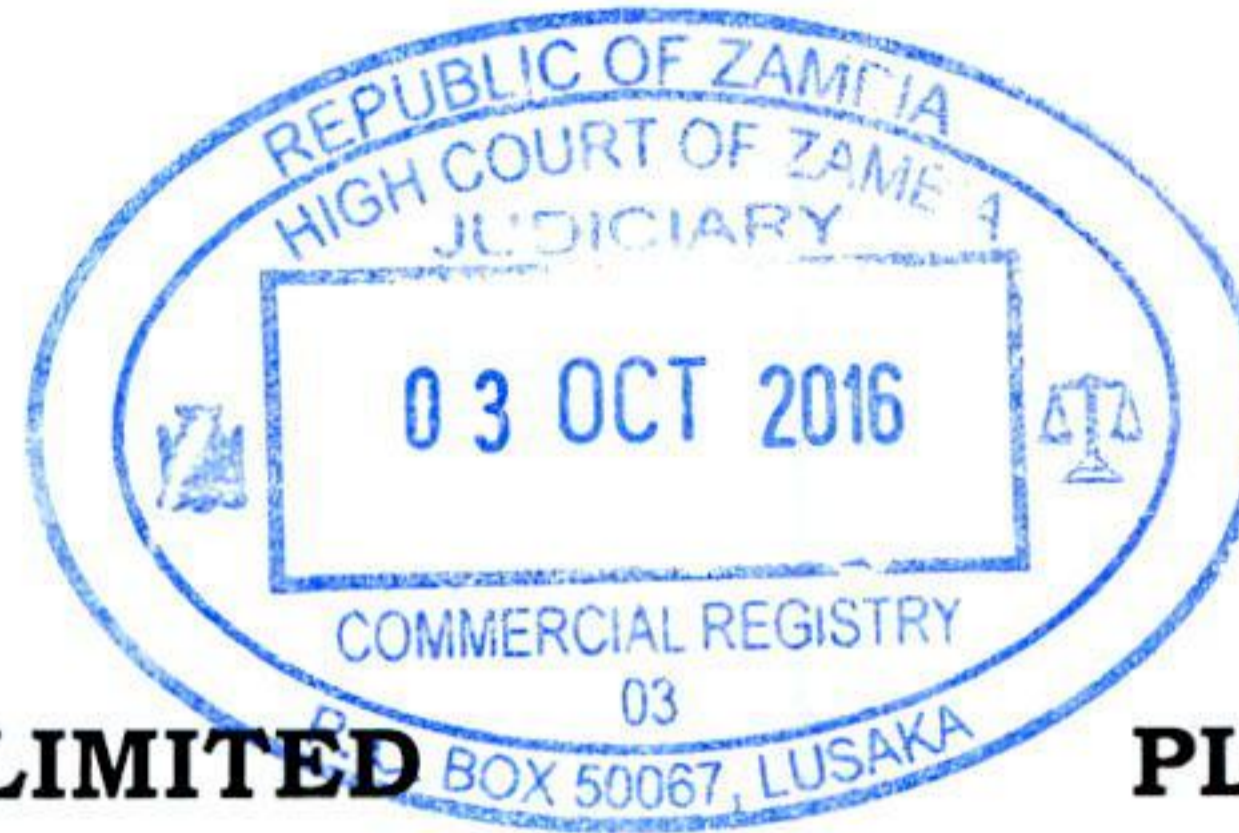
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**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2016/HPC/0313

(Commercial Jurisdiction)

BETWEEN:



SOUTHERN AFRICA TRADE LIMITED PLAINTIFF

AND

HAWKWOOD PROPERTY INVESTMENTS LIMITED DEFENDANT

Delivered in Chambers before Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 3rd day of October, 2016

For the Plaintiff : Mr. Milner Katolo of Messrs Milner & Paul
Legal Practitioners
For the Defendant : Mrs. D. Findlay of Messrs D. Findlay &
Associates

R U L I N G

CASES REFERRED TO:

- 1) *Ashmore vs British Coal Corporation (1990) 2 ALL ER 987*
- 2) *B.P. Zambia PLC vs Interland Motors Limited SCZ judgment No. 5 of 2001*
- 3) *Bank of Zambia vs Jonas Tembo and Others (2002) ZR 103*
- 4) *Societe Nationale Des Chemis De Par Du Congo (SNCC) vs Joseph Nonde Kasonde SCZ Judgment No. 19 of 2013*
- 5) *New Plast Industries Limited vs Commissioner of Lands and Attorney-General (2001) ZL51*

- 6) *Ally General and Bellamano v Ligure Lombarda Limited (1976)*
ZR 267(S.C)
- 7) *Setrec Steel and Wood Processing Limited & Others vs Zambia National Commercial Bank Appeal No. 39 of 2007 (unreported)*
- 8) *George Lenely Kalema vs Derick Mwila, Sezongo Muyunda and Dailes Zulu (Sued in their capacity as Trustees of the Zambia Union of Security Officers and Allied Workers) SCZ/8/80/2013*
- 9) *ANZ Grindlays Bank (Zambia) Limited vs Chrispine Kaona*

LEGISLATION REFERRED TO:

- 1) *Supreme Court Practice Rules, 1999 Edition, Volume 1*
- 2) *Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia*
- 3) *High Court Rules, Chapter 27 of the Laws of Zambia.*
- 4) *Landlord and Tenant (Business Premises) Rules, 31/1973 and 13/1994*

This is an application by the Defendant for an Order to dismiss an action on a point of law pursuant to **Order 14 A Rule 1** of the **Supreme Court Practice Rules**. It has been brought by way of Summons with Affidavit in Support sworn by ALFRED WILLIAM MORONELL, a Director in the Defendant Company, and filed into Court on 1st September, 2016.

It is deposed that the issues that the Plaintiff is raising in the amended Statement of Claim in this Cause should have been raised in Cause 2008/HPC/0311 in which the Plaintiff took out an action

claiming under a verbal lease relating to Shop Number 11B, Chindo Road, Kabulonga, Lusaka in which the Defendant did issue a writ of possession dated 16th December, 2008 which was subsequently dealt with by the Court. Thus, it is deposed that this matter is res-judicata and, therefore, an abuse of Court process as the issues being raised are between the same parties, arising out of the same circumstances that were before the earlier Court and which ought to have been determined in that earlier action, Cause 2008/HPC/0311.

The Defendant also filed Skeleton Arguments and List of Authorities citing the cases of **Ashmore vs British Coal Corporation**¹, **B.P. Zambia PLC vs Interland Motors Limited**², **Bank of Zambia vs Jonas Tembo and Others**³ and **Societe Nationale Des Chemis De Par Du Congo (SNCC) vs Joseph Nonde Kasonde**⁴ to support the argument on the doctrine of res-judicata.

The Plaintiff opposed the application and filed an Affidavit in opposition sworn by ELIAS TEMBO, the Plaintiff's Managing Director and filed into Court on 7th September, 2016. It is deposed that by filing a defence dated 23rd August, 2016, the Defendant has a settled intention to defend the matter on its merits. It is further deposed that while it is true that the Plaintiff commenced Cause No. 2008/HPC/0311, the same was filed under the provisions of the **Landlord and Tenant (Business Premises) Act** which strictly stipulates the nature and type of matters that can be commenced under that Act and the claims herein are not that type of matters.

The deponent further stated that Cause 2008/HPC/0311 did not fully determine any issues as there was no full trial but the matter was dismissed pursuant to a preliminary issue.

The Plaintiff filed Skeleton Arguments and List of Authorities referring to **Order 11 Rule 1 (5)** of the **High Court Rules** and the cases of **New Plast Industries Limited vs Commissioner of Lands and Attorney-General⁵** and **Ally General and Bellamano v Ligure Lombarda Limited⁶** on the need for the Defendant that wishes to challenge the regularity of the action to enter conditional appearance and the consequence of filing a defence as a further step in the action on the irregularity of the action being challenged.

Specifically addressing the plea of res-judicata, the Plaintiff states that by virtue of **Rule 3** of the **Landlord and Tenant (Business Premises) Rules**, the Plaintiff was precluded from including the reliefs contained in the present action in the Originating Notice of Motion as the **Landlord and Tenant (Business Premises) Act** is very explicit about matters that can be claimed through an Originating Notice of Motion.

Lastly, the Plaintiff asserts that dismissal of an action not determined on the merits is no bar to the commencement of the action. It is, therefore, contended that Cause 2008/HPC/0311 not having been determined on the merits, this action ought to be allowed to proceed. In support of the proposition the Plaintiff's Counsel cited the case of **Setrec Steel and Wood Processing Limited & Others vs. Zambia**

National Commercial Bank⁷. Counsel for both parties have also made brief oral submissions to emphasize the Skeleton Arguments. I am grateful to both Counsel for the arguments on case law put before me.

From the Affidavit evidence, it is common cause that the parties herein were also the parties in Cause 2008/HPC/0311 commenced by the Plaintiff against the Defendant with respect to the same premises, Shop No. 11B Chindo Road, Kabulonga, Lusaka. It is also common cause that Cause 2008/HPC/0311 was commenced by way of Originating Notice of Motion and further that the claims in this action flow from the Writ of Possession and subsequent setting aside of the same by the Court in Cause 2008/HPC/0311. It is further of common cause that Cause 2008/HPC/0311 terminated by way of dismissal on a point of law.

There are three (3) questions for determination:

1. *Whether the application having been brought pursuant to Order 14A of the Supreme Court Practice Rules is properly before me.*
2. *Whether by filing a defence, the Defendant waived any right it had to apply for determination of a matter on a point of law.*
3. *Whether this action should be dismissed on the*

doctrine of res-judicata

The first and second questions will be answered together.

Order 14 of the **Supreme Court Practice Rules** referred to provides as follows:

1. (1) *The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –*
 - (a) *Such question is suitable for determination without a full trial of the action, and*
 - (b) *Such determination will finally determine (subject only to any possible appeal) the entire cause or Matter or any claim or issue therein.*
- (2) *Upon such determination the Court may dismiss the cause or matter or make such order or Judgment as it thinks just.*
- (3) *The Court shall not determine any question under this Order unless the parties have either –*
 - (a) *Had an opportunity of being heard on the question, or*
 - (b) *Consented to an order or Judgment on such determination.*
- (4) *The jurisdiction of the Court under this Order may be exercised by a master.*
- (5) *Nothing in this Order shall limit the powers of the Court under*

*Order 18, rule 19 or any other provision of these rules.
(O.14A, r.2)*

2. *An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.”*

It is evident from **Order 14(1)** that the Court has the jurisdiction to determine any question of law arising in any cause or matter at any stage of the proceedings where it appears to the Court that such question falls within the requirements of **Order 14(1)(a)** and **(b)**. There is no pre-condition at law that the Defendant should have filed conditional appearance to apply for determination of a matter on a point of law.

The Defendant's action is, therefore, properly before me and the question of the Defendant waiving its right by entering a defence is not applicable herein.

The last question is whether the Plaintiff's action should be dismissed on the doctrine of res-judicata

The Supreme Court of Zambia has in various cases clearly outlined what requires to be shown for a plea of res-judicata to succeed. One such case is that of **George Lenely Kalema vs Derick Mwila, Sezongo Muyunda and Dailes Zulu (sued in**

their capacity as Trustees of the Zambia Union of Security Officers and Allied Workers)⁸ in which the Court also made reference to its earlier decisions in ANZ Grindlays Bank (Zambia) Limited vs Chrispine Kaona⁹, Bank of Zambia vs Jonas Tembo and Others³ and Societe Nationale Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kasonde⁴.

It is convenient to quote in *extensio* what the Supreme Court stated in the **Kalema⁸** case; that:

“In the case of ANZ Grindlays Bank (Zambia) Limited v Chrispine Kaona, it was held that ‘in order for a defence of res-judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the Plaintiff had had an opportunity of recovering in the first action that which he hopes to recover in the second action.’

In another case of Bank of Zambia v Jonas Tembo and Others, it was held that: -

‘ A plea of res-judicata must show either an actual merger or that the same point had been actually decided between the same parties.’

The learned authors of Halsbury’s Laws of England,

4th Edition, Volume 16, at paragraph 1528, explained that –

‘ In Order that a defence of res-judicata may succeed, it is necessary to show that not only the cause of action was the same, but also that the Plaintiff has had an opportunity of recovering, but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res-judicata must show either an actual merger, or that the same part had been actually decided between the same parties. Where the former Judgment has been for the Defendant, the conditions necessary to conclude the Plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was put in issue or claimed.’

Further, Peter Murphy in his book entitled *Murphy on Evidence*, 5th Edition at page 331 states that:

The operation of estoppel per re-judicatam of either kind is subject to the following conditions:

1. *Final of Judgment*
2. *Identity of parties*
3. *Identity of Company; and*
4. *Identity of Names*

We held in the case of Societe National des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kasonde that –

‘The rationale for res-judicata is that there must be an end to litigationRes judicata is not only confined to similarity or otherwise of the claims in the 1st case and the 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving the Judgment.’

From the above, it is clear that for a plea of res-judicata to succeed, it must be shown that the matter in question has been dealt with before and between the same parties. It should also be shown that the Plaintiff had an opportunity to recover in the first action, that which he hopes to recover in the second. In the case before us, the Appellant recovered outstanding Terminal Benefits and Gratuity in the first cause of action. He definitely had the opportunity to recover damages for wrongful

dismissal, Salaries and Allowances which he hoped to recover in the second Suit.”

The Court went on to state that -

“...there was a Final Judgment of the same issues in the two causes of action. Allowing this matter to proceed in the manner suggested by the Appellant would be an abuse of the Court process, forum shopping and multiplicity of actions.”

In the case before me, the Defendant's assertion is that the Plaintiff had the opportunity to recover in Cause 2008/HPC/0311 that which is being claimed in this action, namely

- (i) Delivery up of 46,856 assorted wines, spirits and soft drinks in their consumable state or their monetary value*
- (ii) Delivery up of furniture, equipment and fixtures and fittings or payment of their replacement value*
- (iii) Damages for loss of value in the goods comprised in reliefs sought under heads (i) and (ii) above due to the irregular seizure herein*
- (iv) Damages for wrongful execution.*
- (v) Damages for conversion of the Plaintiff's goods*
- (vi) Damages for loss of Business*

- (vii) Interest on the sums to be found due at the current bank lending rate.*
- (viii) Any other relief this Honourable Court may deem fit.*
- (ix) Costs of and incidental to these proceedings.*

The Plaintiff's reaction, as I see it, has been to first say yes, it could have been so recovered but for the fact that the above reliefs were not tenable under the originating process in Cause 2008/HPC/0311 because they were not among the reliefs specified in the **Landlord and Tenant (Business Premises) Act**. And further that in any case, Cause 2008/HPC/0311 was not determined on the merits.

The Plaintiff's Counsel also briefly submitted that the Defendant did not plead res-judicata as a defence and, therefore, it ought not be allowed to rely on in advancing the application.

I agree that the Defendant did not plead res-judicata by way of estoppel as a defence. But it should be borne in mind that this Court, has the inherent power to ensure that its process is not abused and may in an appropriate case dismiss a matter on its own motion for being an abuse of Court process. Therefore, I will proceed to determine the question whether this matter is res-judicata.

I have taken judicial notice of the proceedings in Cause 2008/HPC/0311 in which Chishimba J, as she then was, found no cause of action disclosed by the Plaintiff therein meriting a trial and, thus preliminarily dismissed the originating process for being an

abuse of the Court process. Therefore, the view I take is that whether the Plaintiff should have recovered in Cause 2008/HPC/0311 but for the provisions of the **Landlord and Tenant (Business Premises) Act** is neither here nor there when it is clear – and also of common cause – that in Cause 2008/HPC/0311 there was no Final Judgment. The case of **Kalema**⁸ is instructive that the question of res-judicata cannot arise where there has been no determination on the merits.

Therefore, on the basis that there was no Final Judgment in Cause 2008/HPC/0311, the Defendant's application to dismiss the Plaintiff's action on the ground that it is res-judicata fails and is accordingly dismissed with costs to the Plaintiff.

Leave to appeal is granted.

Dated at Lusaka this ^{3rd}.....day of ^{October}.....2016



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE