

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0200

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SWIFT CARGO SERVICES LIMITED PLAINTIFF

AND

AFRICAN BANKING CORPORATION DEFENDANT

(ZAMBIA) LIMITED

BEFORE THE HON JUSTICE IRENE Z. MBEWE IN
CHAMBERS

For the Plaintiff : *Mr M Haimbe of Messrs Sinkamba
and Associates*

For the Defendant : *Mr James Banda of Messrs A M
Wood and Company*

RULING

Cases referred to:

1. *Barclays Bank Zambia PLC v ERZ Holdings Limited (In Liquidation) and others SCZ/8/291/2009*
2. *Johnson v Gore Wood and Co [2001] 1 ALL E R 481*

3. *Henderson v Henderson* [1843] 3 Hare 100
4. *Gaedonic Automotives Limited and Patrick Mundindu v Citizens Economic Empowerment Commission* SCZ No 39 of 2014
5. *Re Tarling* [1979] 1 ALL E R 981
6. *Clementina Banda, Emmanuel Njanje v Borniface Mudimba* (2011) ZR Vol 3
7. *Bank of Zambia v Jonas Tembo and Others* [2002] ZR 103
8. *ANZ Grindlays Bank (Zambia) Limited v Chrispine Kaona* [1995/1997] ZR 85
8. *Salaman v Warner* [1891] 1 Q.B 734
9. *Wilson Masauso Zulu v Avondale Housing Project* [1982] ZR 172

Legislation referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

Other Works Referred to:

1. *Halsbury's Laws of England Volume 12, 5th Edition*
2. *Black's Law Dictionary, 8th Edition pages 1336-1337*

This is a Ruling on the Defendant's Notice of Motion to raise a preliminary issue on a point of law made pursuant to **Order 3**

Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia Order 14A Rule 1 and 2, and Order 33 Rule 3 of the Rules of the Supreme Court.

According to the Notice filed on 20th June, 2016 the issue for determination is as follows:

1. *Whether or not the this action and all claims herein as they relate to the Notice of Claim issued in Cause No 2014/HPC/0365 are res judicata.*

The application is supported by an affidavit dated 20th June 2016 and deposed by Patricia Kalaba a Credit Administration Manager in the Defendant Company. The evidence as it is revealed is that on 3rd December 2015, the Plaintiff through their Lawyer Mark Haimbe filed a Notice of Claim in the High Court under Cause No 2014/HPC/0365 (**Exhibit "PK1"**) purportedly issued at the instruction of the Defendant when in fact not. The evidence revealed that the Notice was expunged from the record as it was irregularly issued and according to the deponent without instruction from the Defendant (**Exhibit "PK 2 - 4"**). According to the deponent, the action as it relates to the Notice of Claim is *res judicata*.

The Defendant filed skeleton arguments on 20th June 2016. It was argued that the point of law is premised on the ground that the action and all claims in so far as they relate to the Notice of claim issued in Cause No 2014/HPC/0365 are *res judicata* and an abuse of Court process. The Defendant relied on a number of authorities and were guided by **Barclays Bank**

Zambia PLC v ERZ Holdings Limited (In Liquidation) and Others (1), Johnson v Gore Word & Co (2), Henderson v Henderson (3), and Gaedonic Automotives Limited and Patrick Mundindu v Citizens Economic Empowerment Commission (4). The Defendant reiterated that the only claim in relation to the Notice of Claim is *res judicata* as the same was expunged from the record and was found to be irregular. The Defendant relied on the case of **Re Tarling (5)** wherein it was observed at page 987 that:

“There is however, a wider sense in which the doctrine of res judicta maybe applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings.”

The Defendant further relied on the Learned Authors of **Halsbury’s Laws of England Volume 12, 5th Edition** in paragraph 1166 where it was stated as follows:

“parties are expected to bring their whole case to the Court and will in general not be permitted to re-open the same litigation in respect of a matter which many might have brought forward but did not, whether from negligence, inadvertence or even accident. The Defendant’s argued that it is the learned author’s view that “..... the abuse in question need not to involve the re-opening of a matter already decided in proceedings between the same parties, but may cover

issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow new proceedings to be started in respect of the same.”

The Defendants prayed that this action be dismissed with costs as far as it relates to the Notice of Claim.

The Plaintiff opposed the application by way of affidavit dated 29 July 2016 deposed by Goodward Mulubwa the Chairman of the Plaintiff Company. The evidence revealed that a Notice of Claim was issued under Cause No 2014/HPC/0365 as there was a Debenture that was executed between the Plaintiff and Defendant which created an interest by way of security of all property owned by the Plaintiff (**Exhibit “GM1”**).

According to the Plaintiff, the Notice of Claim was not issued under the instructions of the Defendant but was merely issued as a means of notifying the Sheriff of Zambia of third party interest in property which were liable or potentially liable of being executed in favour of Cause No 2014/HPC/0365. That it was not a commencement of action as no Originating Summons has ever been filed by the Plaintiff in which the Defendant herein was a party. According to the evidence, the Defendant was never a party to Cause No 2014/HPC/0365 but merely a party with interest in the property of the Plaintiff by virtue of a Debenture.

In the skeleton arguments, the Plaintiff argued that the Defendant has failed to meet the criteria that ought to be met to warrant dismissal on the basis of *res judicata* and cited the cases of **Clementina Banda, Emmanuel Njanje v Boniface Mudimba (6), Bank of Zambia v Jonas Tembo and Others (7), Amber Louise Guest v Beatrice Mulako Mukinga and Attorney General (8)**.

The Plaintiff relied on the case of **A.S and C Enterprises Limited and Others v Stanbic (Zambia) Limited (9)** where it was held that -

"in order for a plea of res judicata to succeed it must be demonstrated that a Judgment should have earlier been pronounced between the parties".

It was argued that there was no final judgment between the Plaintiff and Defendant in relation to the Notice of Claim. Further that the Plaintiff had no opportunity of recovering or obtaining the relief sought in Cause No 2014/HPC/0365 which was between Lake Petroleum Limited and the Plaintiff herein, where the former sued the latter for payment of monies arising from the supply of fuel. That it is trite law that where there are triable issues, a matter ought to be allowed to be determined on its merit at trial. In support of this proposition, the Court's attention was drawn to the case of **Waterwells Limited v Jackson (10)**.

In conclusion, the Court was urged to determine the matter and that no prejudice will be suffered by the Defendant if the matter were to proceed.

At the hearing of this application, the parties made oral submission where Counsel for the Defendant submitted that their application was made to buttress paragraphs 17 to 20 of the Statement of Claim which made reference to a case involving Lake Petroleum Limited and the Plaintiff herein. Counsel submitted that there was a mention of the same Cause in paragraph 9 of the Plaintiff's affidavit in opposition and that the nine (9) trucks were the subject of the Notice of Claim in an action under Cause No.2014/HPC/0365. Counsel further submitted that the Notice of Claim (**Exhibit "PK1"**) was expunged following a Court Order as the said Notice was found to be irregular (**Exhibit "PK4"**).

Counsel for the Defendant argued that the issue of the Notice of Claim was already decided and found to be irregular, as such it could not be brought back in this case by the Plaintiff arguing that they had suffered loss. Counsel contended that the Defendant's argument was similar as in the old case, and given the above set of facts, the Defendant's application was that all claims in this action specifically the one in paragraph 9 of the affidavit in support, and any damages should be dismissed as they amount to *res judicata*. That the claims have been unfairly brought before this Court thereby effectively putting it on a collision course with another Court of similar jurisdiction.

Counsel for the Plaintiff in response submitted that the Notice of Claim was not an action, but was merely a Notice to the Sheriff notifying the Sheriff of the third party interest in the property taken in execution. It was further submitted that paragraph 9 in the Plaintiff's affidavit in opposition was premised on the interest in a debenture (**Exhibit "GM1"**).

It was also Counsel for the Plaintiff's contention that as a result of the Defendant's non-disclosure of its interest in the property, it suffered loss and that the argument by the Defendant that it had a right to dispose of the property it deemed fit had never been determined and it has to be determined before Court. In response to the allegation that the Defendant had no fiduciary duty towards the trucks, Counsel for the Plaintiff submitted that no determination had been made on that issue.

Based on the foregoing reasons the Plaintiff prayed that this application be dismissed so that the issues raised in particular in paragraph 9 of the Statement of Claim be determined on its merit.

Counsel for the Defendant in reply to the Plaintiff's argument that there was merely a Notice of Claim and not an action, submitted that there was an application under Cause No.2014/HPC/0365 followed by a Court Ruling. Further that the application was not opposed and the finding was that it was irregular, and that the option left with the Plaintiff was to

appeal or review, but not to commence a fresh application on a document which was found irregular.

In response to Counsel for the Plaintiff that there was no final determination, Counsel for the Defendant submitted that the question was whether the Plaintiff had the opportunity to raise the issues being raised now and it was submitted that the Plaintiff had an opportunity and did not take it.

Finally on the issue of fiduciary duties, Counsel for the Defendant submitted that the notice of motion before Court is about the Notice of Claim found to be irregular and the fact that it cannot be brought before Court. Counsel for the Defendant maintained that the motion be allowed and that all claims in this matter relating to the Notice of Claim be dismissed with costs to the Defendant.

I have considered the issues raised in this application together with arguments advanced by both Counsel in the respective skeleton arguments and authorities cited.

This application raises one question, which is whether or not the Plaintiff's claims in relation to the Notice of Claim is *res judicata*.

It is not in dispute that by an Order of the Court the Notice of Claim under Cause No 2014/HPC/0365 was expunged from the record for irregularity in a matter between Lake Petroleum Limited and the Plaintiff herein.

The thrust of the Defendant's argument is that the claims relating to the Notice of Claim should be dismissed as there exists a Court Order which rendered the said Notice irregular and the Notice was thereafter expunged, that bringing any issues relating to the same amounts to be *res judicata*. The Plaintiff on the other hand contends that the Notice of Claim was not an action as the issues raised need to be determined.

The genesis of the Notice of Claim arose from a decision of the Court in a matter between Lake Petroleum Limited and the Plaintiff herein, where Lake Petroleum Limited claimed for the unpaid supply of fuel by the Plaintiff. My Learned Brother Honourable Judge Mweemba by an Order dated 23rd December 2015 ordered as follows:

"....The Notice of Claim herein dated 2nd December 2015 purporting that the African Banking Corporation Limited has an interest in the seized trucks by the Sheriff of Zambia

BE AND IS HEREBY EXPUNGED/REMOVED from record for irregularity and

FURTHER THAT the costs be borne by the Defendant.

In order to determine whether or not the matter relating to the said Notice of Claim is *res judicata*, it is important to state the underlying principles of the doctrine of *res judicata*. A starting point is to define *res judicata*. According to **Black's Law Dictionary, 8th Edition pages 1336-1337**, is defined as -

“An issue that has been definitively settled by judicial decision”

According to the Learned Authors of **Halsbury Laws of England 4th Edition Volume 16** paragraph 1328 explains 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 and 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 the same point had been actually decided between the same parties. Where the further 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 so put in issue or claimed."

From the foregoing it can be noted that the doctrine of *res judicata* extends so as to bar the raising of points that have already been decided by the Court, or should have been raised and decided in the earlier proceedings.

Counsel for the Defendant has vehemently argued that the issue relating to the Notice of Claim is *res judicata*. In order for

the plea of *res judicata* to be successful, it should meet a certain criteria as illustrated in the case of **Bank of Zambia v Jonas Tembo and Others (7)** and cited by the Plaintiff where the Supreme Court 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"

In **ANZ Grindlays Bank (Zambia) Limited v Chrispine Kaona (10)**, it was held that -

"In order for a defence of res judicata to succeed, it is necessary to show not only the cause of action was the same but also that the Plaintiff has had no opportunity of recovering in the 1st action that which he hopes to recover in the second."

From the authorities cited aforesaid, for a plea of *res judicata* to succeed, it must be shown that the same point or matter in question has been dealt with before and between the same parties. That the Plaintiff had the opportunity to recover in the first action that which he hopes to recover in the second action. It is only where an issue has been determined in a proceeding between two parties, that the parties may not re-litigate that issue even in a proceeding on a different cause of action. Once there is a decision which is a judgment or formal Order, then such issues cannot be brought before Court again.

I have perused the record of Cause No 2014/HPC/0365, and find that the Defendant herein in as far as the Notice of Claim

is concerned, became a claimant to those earlier proceedings. The Court then proceeded to hear the Defendant herein by way of affidavit evidence, and subsequently made an Order dated 11 December, 2015. Prior to that date, on the 15th June, 2015, the issue of the Notice of Claim and third party interest was also argued by the Lake Petroleum Limited and the Plaintiff herein.

I therefore take the view that the Notice of Claim was expunged/removed from the record for irregularity, after it was heard on its merits. I do not agree with Counsel for the Plaintiff that the action relating to the Notice of Claim was never heard on its merits. There is a plethora of cases in support of the doctrine of *res judicata* as cited by both parties. I agree with the guidance by the Supreme Court in **Gaedonic Automotives Limited** and **Patrick Mundundu v Citizens Economic Empower Commission (4)** that there should be an end to litigation.

I am persuaded by the case of **Salaman v Warner (11)** where Lopes LJ in determining the finality of a matter stated as follows:

"I think a judgment or order would be final within the meaning of the rules, when whichever way it went, it would finally determine the matter in dispute."

I concur with Counsel for the Defendant that the Plaintiff should have appealed or had the matter reviewed which they

did not do. Further, allowing the Plaintiff to bring up the same issue in a subsequent matter amounts to abuse of process. As correctly observed in the **Re Tarling (5)** case, it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings.

I find that the Plaintiff should not be allowed to bring issues relating to the Notice of Claim before this Court as doing so would be tantamount to re-opening the matter which was heard in a court of similar jurisdiction which adjudicated upon the matter brought to it. I am fortified by Section 13 of the **High Court Act, Cap 27 of the Laws of Zambia**, which states as follows:

" In every civil cause or matter which shall come in dependence in the Court, 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 or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined,

and all multiplicity of legal proceedings concerning any of such matters avoided; and all names in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matters, the rules of equity shall prevail.

Section 13 of the **High Court Act** clearly places a responsibility on the High Court to completely and finally determine all matters in controversy between the parties. As aptly stated by the Supreme Court in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (12)**, that:

"the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter is determined in finality."

In my considered view, the trial Court adjudicated upon the matter and determined it, and its decision has earlier stated in the preceding paragraphs, has never been challenged by the Plaintiff. Therefore in my considered view, the Plaintiff should not be allowed to have a second bite at the cherry.

For the foregoing reasons, and based on the authorities cited above, the Defendant's preliminary issue succeeds, and all claims in the writ of summons herein in so far as they relate to the Notice of Claim issued in Cause No 2014/HPC/0365 are *res judicata*, that is, claims (i) - (xii) in the writ of summons.

For the avoidance of doubt, the Plaintiff is at liberty to amend the writ of summons and statement of claim pursuant to **Order 20 Rule 5 of the Rules of the Supreme Court**, and leave is hereby granted.

Any amendments by the Plaintiff shall be made within 14 days of this Ruling, and the Defendant shall file their amended defence and counterclaim if any, within 14 days of receipt of the amended writ of summons and statement of claim. In the event of default by the Plaintiff, the Plaintiff's claim shall stand dismissed.

Costs are awarded to the Defendant and in default of agreement, to be taxed.

Leave to appeal granted.

Delivered at Lusaka this 12th day of January, 2017



.....
HON. IRENE Z. MBEWE
HIGH COURT JUDGE