IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 187/2014**
HOLDEN AT LUSAKA **SCZ/8/233/2014**
(*Civil Jurisdiction*)

B E T W E E N :

ZAMBIA TEXTILES LIMITED (In Liquidation) **APPELLANT**

AND

PROGRESS KALEMBA AND 29 OTHERS **RESPONDENTS**

Coram: **Hamaundu, Malila and Mutuna, JJS**
on 11th July, 2017 and 10th August, 2017

For the Appellant: Mrs. Melody Nyendwa-Mayaka, Messrs Mulenga Mundashi Kasonde, Legal Practitioners

For the Respondent: Mr. M. Cheelo, Messrs Mak Partners

J U D G M E N T

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Bank of Zambia v. Jonas Tembo and Others [SCZ Judgment No. 24 of 2004]*
2. *BP. Zambia Plc v. Interland Motors Limited [SCZ Judgment No. 5 of 2001]*
3. *Mpongwe Farms Limited v. Dar Farms and Transport Limited [Selected judgment No. 38 of 2016]*
4. *Croppers v. Smith (1884) 26 Ch. D 700*
5. *Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Cooperative Union (Appeal No. 112 of 2013)*

Legislation referred to:

1. *Rules of the Supreme Court (White Book 1999 edition)*
2. *High Court Rules, chapter 27 of the Laws of Zambia*
3. *High Court Act, chapter 27 of the Laws of Zambia*
4. *Palmers' Company Law, Vol.2, 2009, Sweet & Maxwell*
5. *Halsbury's Laws of England Vol.7 para 516*
6. *Blacks Law Dictionary (8th ed.)*

This appeal challenges a ruling of the High Court given on 16th December, 2013. In terms of that ruling, the learned trial judge dismissed two applications by the appellant lodged before him, namely, one to stay execution of a judgment, and the other to set-aside the said judgment for irregularity.

As discernable from the record of appeal, the litigation background of this matter is anything but clear. The underlying facts leading to the present contest were these. The respondents, who were plaintiffs in the lower court, were former employees of the appellant. They obtained leave from the High Court to commence proceedings against the appellant which was at that time already in liquidation. That leave was obtained under cause number 2009/HL/98 and was signed on 15th March, 2011. We shall hereafter refer to that cause as the 'first action'. It is uncertain as to what the chief grievance in the first action was. It is also unclear from the record what the fate of that action was

save that it was under that cause that leave to commence proceedings against the appellant company was obtained. Anyhow, another action was commenced in March, 2011 cause numbered 2011/HL/25 (hereafter called 'the second action'). The claim under the second action was for, among other things, an order directing the liquidator of the appellant to account for proceeds of sale of the appellant's assets and for the liquidator to show the order of preference upon which he paid the appellant's creditors, if at all he had paid some of them. The respondents also sought an order that any surplus of the proceeds of sale of the appellant's assets be paid to them.

The appellants duly entered appearance and defence in the second action on 20th April, 2011. As plaintiffs in that action the respondents then decided to file an application to strike out pleadings for what they regarded as failure on the part of the appellant (then defendant) to disclose any reasonable defence under that action.

After hearing the respondents' application and the objection by the appellant, the learned High Court judge dismissed the action as being a nullity on grounds that the respondents had

not obtained the leave of court before they commenced the second action against the appellant company which was in liquidation.

Unrelenting, the respondents, on 28th September, 2011, commenced a fresh action under cause number 2011/HL/97 (hereafter called the third action), claiming essentially the same relief as the relief sought under the second action which, as we have already stated, was dismissed on a technical point.

On 4th April, 2012, a judgment in default of defence was entered against the appellant under the third action. That default judgment set out the relief prayed for in the writ and statement of claim filed by the respondents. The parties later reached agreement whereby the appellant's liquidator would give effect to the default judgment out of time. To this effect, the parties settled a consent order on 21st August, 2012. Subsequent to the settlement of the consent order, the liquidator of the appellant proceeded to render an account to the court on the 7th August, 2012, following which the respondents decided to file an amended writ and statement of claim on the 9th July, 2012 in the same cause, namely, the third action, being cause number

2011/HL/97. Under that amendment, the respondents sought to make the appellant's directors personally liable to settle the sum of K2,125,529,880.00 claimed in the amended writ and statement of claim.

The respondents filed conditional appearance pending an application to set-aside judgment on the premise that the third action was *re judicata.* An application was subsequently made for dismissal of the action on that basis and for allegedly being an abuse of court process. There was also an application to set-aside the default judgment obtained by the appellant for being irregular. Pending the setting aside of the default judgment and the dismissal of the respondents' action, the respondents also sought to stay execution of the judgment.

It was on these two applications that the ruling, which the appellant seeks to impeach in this appeal, was given by the learned High Court judge in December, 2013. He ruled that the respondents' application was not irregular for being *re judicata* nor was it an abuse of court process as claimed, reasoning that the claim for the sum of K2,125,529,880.00 which sum the respondents sought to recover from the appellant's directors

personally, had not been adjudicated upon. Unhappy with that ruling the appellant filed the current appeal raising a medley of issues contained in grounds structured as follows:

GROUND 1:

The honourable judge in the court below misdirected himself in law and fact when he failed to make an order dismissing the Respondent's case for being irregular and an abuse of the process of the court despite there being a similar claim already determined under case number 2011/HL/25 and 2011/HL/97.

GROUND 2:

The honourable judge in the court below misdirected himself in law and fact when he failed to make an order dismissing the Respondent's claim for terminal benefits on the premise that the matter is res judicata and hence should not be re-litigated between the parties without taking into account the following:

i) **There was on record initial process under cause number 2011/HL/97 where the Respondent sought an account from the liquidator of the proceeds of the sale of the assets of the company and thereafter if there be a surplus the sum of K2,125,529,880.00 be paid to the Respondent.**

ii) **The account was duly rendered by the liquidator and no surplus was found therefore no payout was made.**

iii) **The claims under cause number 2011/HL/97 where issues that where adjudicated on and resolved by the parties.**

GROUND 3:

The honourable judge in the court below misdirected himself in law and fact when he held that the grant of leave to the Respondents to amend the writ and statement of claim after judgement was competent.

GROUND 4:

The honourable judge in the court below misdirected himself in law and fact by finding that the claim by the Respondent of K2,125,529,880.00 against the Directors of the Appellant company was not adjudicated on without taking into account the following:

i) **The Appellant as a company is a separate legal entity distinct from its directors and shareholders.**

ii) **The facts of this case did not meet the criteria for when the court can pierce the corporate veil and hold the directors or shareholders of a company liable.**

iii) **The directors where at no time made parties to the proceedings.**

The appellants filed their heads of argument on 28th November, 2014. Before the hearing of the appeal the learned advocates for the respondent filed a notice of intention to adjourn. It was supported by an affidavit. At the hearing, Mr. Cheelo, learned counsel for the respondent, informed the court that counsel seized with the conduct of the matter on behalf of the respondent was out of jurisdiction and that no heads of argument had been

filed on behalf of the respondent. The learned counsel explained that the appellant's record of appeal was only seized a few days before the hearing while counsel served with the conduct of the matter on behalf of the respondent was already outside the country.

Mrs. Nyendwa-Mayaka, for her part attempted to convince us that there were two sets of records of appeal and heads of argument served on the respondent's advocates; one in 2014 and the other recently on the 28th June, 2017, and yet only an affidavit of service for the second service was available.

After considering the parties positions, we declined the application to adjourn and decided to proceed with the appeal. In so doing we directed that the appellant present its appeal and that the respondent had 14 days from the date of hearing to file its heads of argument. The appellant was given a further 7 days from that date to file its reply if any. We reserved judgment to be delivered thereafter.

Mrs. Nyendwa-Mayaka intimated that she would rely on the heads of argument filed. She also informed us that the appellant has abandoned ground four of the appeal. In those heads of argument, counsel for the appellant argued grounds one and two together. Three factors were presented as to why, in the appellant's view, the lower court misdirected itself when it failed to dismiss the respondents' claim for being irregular and an abuse of the process of the court and for being *res judicata*. The first was that there was, on record, the initial process (referring to the second action), wherein the respondents sought an account from the liquidator of the proceeds of sale of the appellant's assets and that if there was a surplus, the sum of K2,125,529,880.00 be paid to the respondent. The second point alluded to by counsel was that an account was duly rendered by the liquidator and no surplus was found and, therefore, no payment was made. The finial factor was that the claims under the third action had been adjudicated upon and resolved by the parties.

After citing our decision in **Bank of Zambia v. Jonas Tembo and Others**[1] the learned counsel for the appellant recounted the historical facts of this matter before submitting that the lower

court should have dismissed the action premised on the fact that the action was *res judicata*. Counsel also referred to section 13 of the High Court Act, chapter 27 of the Laws of Zambia, on the need for all matters in controversy between parties to litigation to be determined completely and in finality so that there is no multiplicity of proceedings. The case of **BP. Zambia Plc v. Interland Motors Limited**[2] was cited in support. We were urged to uphold ground one of the appeal.

In regard to ground three it was contended that it was a misdirection for the lower court to hold that the grant of leave to the respondents to amend the writ and statement of claim, was competent. The learned counsel quoted Order XV rule 3 of the High Court Rules, chapter 27 of the Laws of Zambia on amendment of particulars of claim. She also quoted Order 20/5 - 8/14 of the Rules of the Supreme Court (White Book 1999 edition) which provides that:

> **where there is no defence on the record ... and a default judgment entered for failure to comply with an order of the court for discovery under Order 24 rule 16, so that the defendant is strictly in contempt of court, the court's jurisdiction to permit the amendment of pleadings after judgment does not apply...**

Counsel then submitted that following a default judgment and a consent judgment, the court had no jurisdiction to permit the amendment of pleadings. In the alternative, counsel argued that amendment of pleadings under Order XV rule 3 of the High Court Rules is only permissible if such amendment would not result in prejudice to the defendant. In the present, case the amendment sought by the respondent whereby the sum of K2,125,529,880.00 was to be claimed against the directors personally, was materially different from the initial claim which only required payment if there was a surplus upon rendering an account. This was prejudicial to the appellant as, according to counsel for the appellant, the directors were never at any time party to the proceedings so as to make representations on the claim by the respondents; that the liability of a director is extinguished by the dissolution of a company unless the dissolution is set-aside by the court; and that the sum of K2,125,529,880.00 was one for terminal benefits arising out of a contract of employment with the appellant for which liability the directors were not accountable.

According to counsel for the appellant, notwithstanding the failure by the appellant to file an affidavit in opposition to the application to amend process, the court should have taken into account the clear provisions of the law on the point and rejected the application. We were urged to uphold the appellant's position on this issue, and to allow the appeal in its entirety.

The respondents' heads of argument were filed on the 25th July 2017. In those heads of argument counsel for the respondents sought to fill in the gaps that we have already alluded to relating to the litigation history of this case. As counsel for the appellant observed in her heads of argument in rebuttal, this was unprocedural and unacceptable.

In addressing the arguments raised under ground one and two, it was contended by counsel for the respondents that the issues raised in the third action, i.e. cause number 2011/HP/97 include a claim for K2,125,529,880 which the appellant denied; that the consent order concluded between the parties did not address the respondents' claim of K2,125,529,880 which the appellant denied in its defence. On the authority of **Wilson Masauso Zulu v. Avondale Housing Project Limited[6] (1992) ZR 172**,

counsel argued that the trial court was obliged to adjudicate every aspect of the suit between the parties so that all matters in dispute were determined in finality.

Regarding ground three of the appeal it was the submission of counsel for the respondents that Order 20/8/8 and order 20/8/9 of the rules of the Supreme Court (White Book 1999 edition) quoted by the appellant's counsel, did not apply in the present case since there was no default judgment at the time the respondent made the application to amend the pleadings as the parties had entered a consent order after the judgment.

Counsel also argued that the Supreme Court Rules (White Book 1999 edition) do give power to the court under order 20/8/9 to amend pleadings at any stage before or after trial or even after judgment or an appeal.

It is for the foregoing reasons that counsel urged us to dismiss the appeal.

On the 28th July 2017, the learned counsel for the appellants filed in their heads of argument in reply. These

essentially buttress the arguments already made in support of the appeal.

We have carefully considered the rival arguments of counsel for both parties together with all the documents in the record of appeal. Under grounds one and two which have been argued together the questions we have to determine are whether there was abuse of court process and whether the claim for terminal benefits was *res judicata* and should thus not have been entertained. We begin with the latter principle.

Res judicata is defined in **Blacks Law Dictionary (8th ed.)** by Bryan A. Gardner as:

> **1. An issue that has been definitely settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or a series of transaction and that could have – but was not raised in the first suit.**

Making our observations on this definition, we reiterated in **Mpongwe Farms Limited v. Dar Farms and Transport Limited**[3], that:

Our understanding of this authoritative definition [in Blacks Law Dictionary] is that *res judicata* puts to rest and entombs in eternal quiescence every justiciable issue and question actually adjudicated upon or should have been raised in the initial suit.

Res judicata has, according to **Halsbury's Laws of England, 5th ed. Vol II**, two limbs to it. In the first place, it prevents parties from having to relitigate issues that have already been determined by a competent court, and in the second, it prevents the raising of issues that 'could have, but were not raised in the first suit.'

The potential danger of endless litigation is the basis of the doctrine of *res judicata*. It is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided.

In regard to the first action, namely 2009/HL/98, we have already stated that leave to commence proceedings against a company in liquidation was obtained. We have also already pointed out that the action was, however, not pursued. That action is for all purposes and intents an abandoned cause. No decision in that action was, in any case, ever made by any court. It can thus not ground any plea of *res judicata*. This plea can

only be sustained where there is a decision of a competent court which is either final or not appealed against.

The second action was dismissed on grounds that no leave to commence proceedings against a company in liquidation was obtained. Here again, there was no judicial decision on the issues raised in the action and the doctrine of *res judicata* is inapplicable.

The question whether the third action brought up the same issues as were disposed of under the second action is largely moot given what we have stated about the need for a decision of a competent court having been made on the merits.

It has already been indicated, and there is no dispute, that the claims under the third action were substantially the same as those raised under the second action, namely the payment by the liquidator to the respondents of their terminal benefits. However, although the same issues were raised in both actions involving the same parties they were never determined in the second action as that action was dismissed on the technical point that no leave to commence proceedings against a company in liquidation had been sought when proceedings under that

cause were launched. The second action was, therefore, nipped in the bud and the issues that the action the respondents sought the court to determine never saw the light of day. In that sense, the fact that a subsequent action (third action) was brought forth on essentially the same grievances as those in the dismissed claim cannot justify a defence of *res judicata* in regard to the claims in the third action, as explained in the authorities we have cited. There was no decision in the second action upon which the plea of *res judicata* could anchor.

A relevant side question however remains whether, for this new cause (the third action), leave to commence proceedings against a company in liquidation was obtained by the respondents.

We lamented at the beginning of this judgment that there are discernable gaps in the history of this litigation. If indeed leave to commence the third action was obtained, it has not been produced in the record of appeal. If no such leave was obtained, the action would suffer no better fate than the second action, that is to say, it was bad for failure to satisfy the necessary condition of obtaining court leave before commencement.

We turn now to the submission that there was abuse of court process by the respondents when they commenced the third action. It has already been pointed out that the respondents obtained a default judgment in the third action, the enforcement of which judgment was facilitated by a consent order by the parties. Up to that stage the appellant did not raise the issue of abuse by the respondents of court process. By entering the consent order, the appellant was clearly privy to the continuation of the action. We do not therefore think that the commencement of the third action by the respondents was an abuse of court process. This is particularly so as the second action was dismissed on a legal technicality by the court. Grounds one and two are bound to fail and we dismiss them accordingly.

Ground three raises the issue of leave to amend the pleadings. The appellant argues that the application to amend the statement of claim was incompetent and should never have been granted. Counsel relies on Order 20/8/14 of the White Book which we already quoted. The respondents in the present case obtained a default judgment and sought to amend the writ of summons and statement of claim after that judgment had

been partially satisfied by the appellant. Whether an amendment was or was not properly sanctioned in those circumstances brings us back to the broader issue of the purpose of amendment of pleadings.

Amendment of pleadings serves the important purpose of allowing the real question in controversy between the parties to an action to be determined. In **Croppers v. Smith**[4] the court articulated the objective for amendment of pleadings thus:

> **It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or correcting any defeat or error in any proceedings.**

In the present case, we have to ask whether the amendment was given to achieve any of the two objectives identified in **Croppers v. Smith**[4]. We shall revert to this shortly. For the moment, it is significant to note that Order XVIII of the High Court Rules, chapter 27 of the laws of Zambia, sets out the circumstances in which a court may grant or refuse leave to amend pleadings. It provides as follows:

> **The court or a judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purposes of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.**

Although generally the pendulum weighs or tilts in favour of granting amendments, a court is entitled to refuse an amendment or should in fact not entertain an amendment in certain cases. It is incumbent upon a court considering an application for an amendment to assess the peculiar facts of the case. In the case of **Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Cooperative Union**[5], we identified a number of principles which such a court is enjoined to take into account. These are: (a) the attitude of the parties in relation to the amendment; (b) the nature of the amendment sought in relation to the suit before the court; (c) the question in controversy; and (d) the time when the amendment is sought.

The court must satisfy itself that the application is made in good faith and is not designed to abuse the process of the court. As far as the nature of the amendment sought is concerned, the court ought to examine closely the actual question in controversy in the litigation before it. Equally important is the time or stage at which such application for amendment is made.

In the present case, the application sought to be made came after the judgment of the court had been given and even acted upon. Under the guise of an amendment, the respondents were effectively commencing a totally new action against the directors of the company personally. They sought to have them held personally liable to settle the respondents' benefits due from the company, a separate entity from the directors. Yet it is settled law that judicial lifting of the corporate veil can only be done on well known grounds such as fraud or improper conduct; for the benefit of revenues of the Republic; to expose the enemy character of a company where the company is used as a sham to avoid legal obligations; and when it is in public interest to do so.

The application to amend the pleadings in the present case which had the effect of lifting the corporate veil was not inspired

by or predicated on any of the normal consideration that justify the lifting of the corporate veil. It seems to us on the evidence on record that it was motivated purely by an attempt on the part of the respondent to have another attempt to recover their benefits after the initial ordinary process deployed against the appellant company yielded nothing positive. We think this was an irregular attempt designed to achieve an objective that had not been attained by the original action as crafted. It clearly was an abuse of the process of court. The amendment should not have been granted in the first place for the reasons we have stated. Ground three therefore has merit and we allow it.

The net result is that this appeal succeeds. The appellant shall have its costs.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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Dr. M. MALILA, SC
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE