IN THE COURT OF APPEAL FOR ZAMBIA APPEAL No.110/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:

SOUTHERN AFRICA TRADE LTD APPELLANT

AND

HAWKWOOD PROPERTY INVESTMENT LTD RESPONDENT

CORAM: MCHENGA DJP, MULONGOTI and LENGALENGA JJA

On 23rd January 2018 and 28th March 2018

For the appellant: *Mr. M.J Katolo of Milner and Paul Legal Practitioners*
For the respondent: *Mrs. D. Findlay of Mmes D. Findlay and Associates*

JUDGMENT

MULONGOTI,JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Jamas Milling Company Limited v Amex International Limited (2002) ZR 79 (SC)***
2. ***Setrec Steel and Wood Processing Limited and others v Zambia National Commercial Bank SCZ Appeal No.39/2007***
3. ***Bobolas and another v Economist Newspaper Limited (1987) 3 ALL ER 121***
4. ***Egger v Viscount Chelmsford (1964) 2 ALL ER 406 at 408***
5. ***Hussein Safiedinne v the Commissioner of Lands and others SCZ Appeal No.36/2017***
6. ***Henderson v Henderson (1848-1860) ALL ER 378***

7. ***Rosemary Bwalya v Zambia National Commercial Bank SCZ/8/160/2005***
8. ***B.P Zambia Plc v Interland Motors Limited (2001) ZR 37***
9. ***Greenhalgh v Mollard (1947) 2 ALL ER 255***
10. ***Yat Tung v Dao Heng Bank (1975) 2 W.L.R 690***
11. ***Societe National Des Chemis De Pur Du Congo v Joseph NondeKasonde (2013) 3 ZR 51***
12. ***Arnold v National Westminster Bank Plc (1991) 3 ALL ER 41***
13. ***Swift Cargo Services Limited v Lake Petroleum Limited SCZ Appeal No.32/2016***
14. ***Patrick Chilambwe v Attorney General SCZ Appeal No.82/2015***
15. ***Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and Attorney General SCZ S.J No.42/2017***
16. ***Standard Chartered Bank Zambia Plc v KasoteSingogo SCZ Appeal No.21/2016***
17. ***Thyne v Thyne (1955) 3 ALL ER 129 at 145-146***
18. ***Meir v Meir (1948) 1 ALL ER 161***
19. ***Lewamika and others v Chiluba (1998) ZR 172***
20. ***Kangwa Simpasa and Yu Huizhen v Lackson Mwabi SCZ/13/21/2012***
21. ***Chick Masters Limited and Dr. Mwilola Imakando v Investrust Bank Plc SCZ Appeal No.74/2014***
22. ***Bank of Zambia v Jonas Tembo SCZ Judgment No.24/2002***
23. ***Development Bank of Zambia and KPMG Peat Marwick v Sunvest Ltd and Sun Pharmaceuticals (1995-1997) ZR 197 (SC)***

Legislation and other works referred to:

1. ***Rules of the Supreme Court (White Book) 1999 edition***
2. ***High Court Rules Cap. 27 of the Laws of Zambia***
3. ***Landlord and Tenant Business Premises Act Cap.193 of the Laws of Zambia***
4. ***Court of Appeal Rules (CAR) S.I No 65 of 2016***
5. ***Supreme Court Rules Cap. 25 of the Laws of Zambia***

The appellant, Southern Africa Trade Limited has raised two grounds of appeal against the ruling of the High Court Commercial List, dated 26th June 2017, which dismissed its case (cause number 2016/HPC/0313) for being an abuse of court process. The ruling was made after the Judge reviewed his earlier ruling of 3rd October, 2016. At this stage it is necessary to give the background of the matter between the parties who have quite a long history. We called for and read the case record of 2008/HPC/311 to put matters in proper prospective.

The appellant initially sued the respondent under cause number 2008/HPC/311 for specific performance of a verbal lease agreement. The appellant was renting the respondent's shop No.11b Chindo Road in Kabulonga, Lusaka. The respondent asked the appellant to vacate the shop but the latter resisted, hence the commencement of proceedings in the High Court via No. 2008/HPC/311 by way of originating notice of motion supported by an affidavit.

When the matter came up for hearing, the appellant's Managing Director appeared in person and sought an adjournment. He informed the Court that his lawyer was bereaved and that he wanted to get a new lawyer. The respondent's counsel objected. The Judge agreed with the respondent's counsel and refused to adjourn. He proceeded to hear the case. The case was dismissed after the Judge found that there was no contract between the parties which he could order the respondent to specifically perform.

The appellant appealed to the Supreme Court against the dismissal of its case under Appeal No. 14 of 2009 and obtained a stay of execution of the Judgment pending the appeal from that Court. Meanwhile, the respondent issued a writ of possession/fifa and evicted the appellant from the shop. The respondent also took the appellant's stock and furniture which was in the shop. This prompted the appellant to apply before the High Court to set aside the writ of possession/fifa for irregularity as it had been issued in the face of a stay. The Judge agreed with the appellant and in setting it aside observed that the respondent did not obtain leave from him to issue the writ of possession/fifa. The Judge went on to state that the setting aside of the writ of possession did not entail that the appellant was at liberty to go back in the shop because he had no right to do so.

Instead of appealing against this decision which was clearly wrong as the writ of possession/fifa was set aside but he was not allowed to go back in the shop, the appellant decided to commence a fresh action. Accordingly, on 4th May 2009, he issued a writ of summons and statement of claim under cause No. 2009/HP/0546 seeking damages for wrongful eviction and conversion of its chattels by the respondent. The respondent applied to strike it out on grounds that it did not disclose an action and was a multiplicity of actions. The Judge found the application meritorious and dismissed the cause No. 2009/HP/0546. The Judge opined that at the time he heard the application to set aside the writ of possession for irregularity, the appellant should have informed him of the damages it had suffered as

a result of the irregularly issued writ of possession instead of commencing a fresh action.

The appellant appealed to the Supreme Court against the dismissal of the second action under Appeal No. 179 of 2009.

On the 28th June 2011, the Supreme Court decided appeal No. 14 of 2009 which related to the dismissal of the first or earlier cause 2008/HPC/0311. The Supreme Court held that the Judge should have allowed the adjournment as the reasons advanced were reasonable and that he was wrong to proceed without hearing the appellant. The Court then set aside the ruling of the High Court and sent the matter (2008/HPC/0311) back to the High Court for retrial before a different Judge. As a result, the matter was allocated to a second Judge before whom the Respondent applied to dismiss the action on the basis that the building which housed shop 11b Chindo Road, Kabulonga had been sold. Thus, the case had been overtaken by events. Consequently, the matter was dismissed by the High Court for a second time on 12th November 2012. We should state here that there was no appeal against this decision.

On 29th May, 2013, the Supreme Court delivered its judgment in Appeal No. 179 of 2009 which was dealing with the dismissal of the second cause 2009/HP/0546 for multiplicity. The Supreme Court held that the learned High Court Judge did not misdirect himself in finding that the second action amounted to multiplicity of actions. The Court stated thus;

"We entirely agree that the appellant ought to have applied to amend the earlier cause (2008/HPC/0311) once the cause of action in the later cause arose. Order 20 Rule 8 (8) of the Rules of the Supreme Court is specific on this and allows a party in similar circumstances as the appellant found itself in to apply to amend the earlier case so that the claim that arose later is dealt with in the earlier cause".

The matter was accordingly dismissed for being multiplicity of actions.

Undeterred, the appellant commenced a fresh action (third action) under cause No. 2013/HP/1939 claiming the same reliefs as in the dismissed cause No.2009/HP/0546 though new reliefs were added like loss of business and delivery of stock and furniture. However, the originating process was never served on the defendants. In the year 2016, the appellant through its Managing Director applied for renewal of the writ on grounds that his previous counsel was insufficiently instructed and could not serve the process on the defendant. This application was granted. Later, the appellant applied to transfer the matter to the Commercial Registry, surprisingly, this was also allowed by the Deputy Registrar. Accordingly, cause 2013/HP/1939 was transferred to the Commercial Registry as cause 2016/HPC/0313, the subject of this appeal.

The writ of summons was amended to simply expand on the claim for delivery of stock by claiming specifically for 46,856 assorted wines, spirits and soft drinks in their consumable state or their money value. There was also a claim for delivery up of furniture, equipment and

fixtures and fittings or payment of their replacement value and damages for loss of value in the said goods due to their irregular seizure.

The process was served on the defendant (respondent) who immediately filed a conditional memorandum of appearance. The defendant proceeded to file summons to dismiss action on a point of law. According to the affidavit in support the matter was *res judicata* and proceeding with it would amount to re-litigation of the issues dealt with in cause 2008/HPC/0311 and therefore an abuse of court process. The appellant opposed the application, contending that the claims under cause No. 2016/HPC/0313 had never been adjudicated upon by any court of competent jurisdiction in Zambia and could not have been a subject of adjudication under cause 2008/HPC/0311 which were subject of a strict legal application of the Landlord and Tenant Business Premises Act, which provides for proceedings to be by originating notice of motion.

The High Court by its ruling of 3rd October 2016 held *inter alia* that on the basis that there was no final judgment in cause 2008/HPC/0311, the question of *res judicata* could not arise.

Dissatisfied with this ruling, the respondent applied for special leave for review out of time pursuant to Order 39 Rule 2 of the High Court Rules. The respondent contended that it inadvertently did not inform the Court below that cause 2009/HP/0546 arising from the same facts in the current cause 2016/HPC/0313 had been dismissed by the Supreme Court for multiplicity of actions (to cause 2008/HPC/0311).

The appellant opposed the application on grounds that the respondent had failed to meet the threshold set in Order 39. It amplified that the Supreme Court judgment in cause 2009/HP/0546 was not fresh evidence for the court to invoke Order 39.

The Judge considered the provisions of Order 39 Rules 1 and 2 as interpreted by the Supreme Court in the case of **Jamas Milling Company Limited v Amex International Limited**[2], in the classic words that:

> ***"For review under Order 39, Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not, with reasonable due diligence, have been discovered before."***

The Judge stated that he fully appreciated the argument that the Supreme Court Judgment was not fresh evidence as envisaged in Order 39 Rule 2 but he opined that:

> ***"The peculiar circumstances of this case rendered the argument unhelpful. This is because, if indeed, the ruling of 3rd October 2016 is substantially affected by the Supreme Court Judgment in cause number 2009/HP/0546, which judgment this Court was unaware of and not brought to the attention of the Court, either by the plaintiff or the defendant before the ruling, then this Court, using its inherent jurisdiction to control proceedings before it and avoid the Court process being abused, can review the ruling."***

The Judge proceeded to review his ruling of 3rd October 2016, by invoking his inherent jurisdiction and quoted in *extensio* the Supreme Court Judgment in Appeal 179 of 2009 relating to whether cause 2009/HP/0546 was a multiplicity of actions. The Judge, observed, *inter alia* that the Supreme Court held that:

> ***"The question before us is, did the learned Judge misdirect himself in finding that the second action amounted to multiplicity of actions? The answer is "no". We entirely agree that the appellant ought to have applied to amend the earlier cause once the cause of action in the later cause arose."***

The Judge concluded that he was bound by the Supreme Court decision and had no jurisdiction to entertain the application in the third cause (2016/HPC/0313). He set aside the ruling (of 3rd October 2016) and proceeded to dismiss the whole action *"for being otherwise an abuse of court process."* This is the Ruling that is the subject of the appeal before us. The appellant filed the memorandum of appeal with the grounds stated as follows:

1. **"The learned trial Judge misdirected himself in law when he reviewed the ruling delivered of 3rd October 2016 and proceeded to dismiss the appellant's case on the basis of the Supreme Court judgment dated 20th June 2013, notwithstanding the fact that the reliefs sought under cause number 2016/HPC/0313 have never been adjudicated upon and that the appellant had no opportunity to be heard on the cause of action which arose as a result of irregular execution of the writ of possession/fifa.**

2. **Any further grounds that the appellant may subsequently file."**

The appellant also filed heads of argument in which it added a second ground of appeal as follows:

2. **"The learned trial Judge in the Court below erred in law and fact when he reviewed his ruling dated 3rd October 2016 and dismissed the appellant's action when he stated that cause No. 2016/HPC/0313 was an abuse of Court process when neither cause No. 2008/HPC/0311 and or cause No. 2009/HP/0546 has ever been the subject of a final judgment."**

Mr. Katolo who appeared for the appellant argued the two grounds together. It is argued that at the time cause number 2016/HPC/0313 was commenced, there was no other matter pending determination before any court and neither cause 2008/HPC/0311 nor cause 2009/HP/0546 ever went to trial and were adjudicated upon. There was therefore no opportunity for the appellant to have claimed the reliefs of a cause of action that arose on 11th March 2009 as at that date cause 2008/HPC/0311 was subject of appeal number 14 of 2009 which was lodged on 2nd February 2009. Additionally, that the Supreme Court did not hold that cause 2009/HP/0546 was *res judicata*. The case of **Setrec Steel and Wood Processing Limited and others v Zambia National Commercial Bank**[3]was cited as authority that estoppels or *res judicata* cannot arise where there has been no determination on the merits.

The case of **Bobolas and another v Economist Newspaper Limited**[4] was relied upon to the effect that rulings made and issues decided in

the course of a trial where no decision has been reached and a retrial has been ordered are not *res judicata*. This case followed the decision in **Egger v Viscount Chelmsford**[5] in which Lord Denning stated:

> ***"It makes no difference whether the retrial takes place as a result of a ruling of the Court of Appeal or because the jury has failed to agree. An order or ruling made, whether in interlocutory proceedings or in the course of proceedings at trial, which is a final decision maybe described as res judicata. But if it is raised in proceedings which have come to no final conclusion it is not res judicata. It is as if it were "writ in water. In any event, I see no reason why a party should not re-amend their pleadings to circumvent the effect of such a ruling, whether res judicata or not. The retrial is a new trial. It is wholly independent of the first. The parties are not fettered by anything that took place in the previous proceedings."***

It was argued, therefore, that the appellant is not fettered by what transpired in cause 2009/HP/0546 and is at liberty to circumvent the ruling of the court which stated that cause 2009/HP/0546 was a multiplicity of actions as the same was an interlocutory objection. And that Article 118 (2) (e) of the Constitution of Zambia enjoins this Court with jurisdiction to ensure that the dispensation of justice is not bogged down and unfettered by undue regard to procedural technicalities and urged this Court to disregard procedural technicalities being raised by the respondent in order to spell doom to the appellant's case.

The cases of **Hussein Safiedinne v the Commissioner of Lands and others**[6]and **Henderson v Henderson**[7] were cited as authority that:

> "***Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole cases, and will not except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable due diligence, might have brought forward at the time.***"

It is the appellant's contention, while not admitting that the case is *res judicata*, that the circumstances of the present case meet the threshold for it to be considered as a special case warranting this Court to invoke its inherent discretion to allow the appeal, especially that the respondent has not returned the appellant's chattels thus being unjustly enriched.

Learned counsel for the respondent, Mrs. Findlay, filed the respondent's heads of argument in response. She submitted that we should disregard the purported second ground of appeal which is

contained in the heads of argument and which was filed without prior leave of the Court as it offends Order X Rule 9 (2), (3) and (4) of the Court of Appeal Rules (CAR). The Supreme Court decision in **Rosemary Bwalya v Zambia National Commercial Bank**[8] was also cited in support of the argument. In that case the Court stated, in relation to Rule 58 (2) and (3) of the Supreme Court Rules, which is similar to Order X Rule 9 (2), (3) and (4) of the CAR that:

> ***"..it is clear from the rule cited above (rule 58 (2) and (3)) that the plaintiff in this appeal was precluded from putting forward additional grounds of appeal other than those set out in her memorandum of appeal... we cannot entertain this ground of appeal that is sneaked in through the back door because that would have the effect of not only ambushing the defendant in this appeal, but the Court as well. The purpose of filing grounds of appeal, in a prescribed manner through a memorandum of appeal, is to ensure that the other side is not taken by surprise and may be notified of any objection or issue the appellant would be raising in the hearing of the appeal. Having said this we shall not allow the plaintiff's fourth ground of appeal to stand, because she did not obtain leave of the Court to add it. And since it breaches the rules, we will inevitably dismiss it together with arguments supporting it..."***

With regard to ground one, the respondent invited us to consider its skeleton arguments in the court below when it applied for special leave for review, where it contended that the appellant's action in the court below was an abuse of court process. The court agreed and dismissed the action for being abuse of court process.

According to the respondent, its understanding is that the basis upon which the Judge in the court below, dismissed the appellant's action, was by reason of the fact that the Supreme Court in the earlier action, based on the same circumstances, had already determined that the action under cause 2009/HP/0546 was multiplicity of actions and abuse of court process, therefore it was not open for the Judge to depart from this holding in the circumstances identical to those in the Supreme Court.

The Supreme Court decision in **B.P Zambia Plc v Interland Motors Limited**[10] was also referred to where it was observed that:

> ***"For our part, we are satisfied that, as a general rule, it will be regarded as an abuse of process if the same parties relitigate the same subject matter from one action to another or from judge to judge. This would be so especially when the issue would have become res judicata or when they are issues which should have been resolved once and for all by the first court enjoined by section 13 of the High Court Act....In terms of this section and in conformity with the court's inherent power to prevent abuses of processes, a party in dispute with another over a particular subject should not be allowed to deploy its grievances piecemeal in scattered litigation and keep howling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions that undermine each other from two or more judges over the same subject matter..."***

Thus, determination of issues of whether or not the appellant ought to have commenced a new action or proceeded under the first action, would be an abuse of court process, and seeking to determine anew the same issues already determined by the Supreme Court between the parties, which would potentially bring the administration of justice into disrepute.

The respondent, argued, on the issue whether or not there can be *res judicata* by reason of the fact that the reliefs sought had never been adjudicated upon, by relying on the decisions in the cases of **Greenhalgh v Mollard**[11] and **Yat Tung v Dao Heng Bank**[12] to the effect that *res judicata* covers issues which are raised in subsequent proceedings and which could have been litigated in earlier proceedings. Accordingly, that cause No. 2016/HPC/0313; particularly claims for damages arising out from the wrongful seizure and conversion of the appellant's property, are issues which could and should have been raised and adjudicated upon in the earlier cause 2008/HPC/0311 where the writ of possession/fifa was dealt with. It is the respondent's contention that the commencement of a fresh action particularly following the dismissal of 2009/HP/0546 subject of the Supreme Court judgment of 29th May 2013, is what amounts to multiplicity of actions and therefore an abuse of court process. As stated in the said Supreme Court judgment (of 29th May 2013):

> ***"...The learned judge was therefore, on firm ground when he ruled that the appellant should have along with applying to set aside the writ of possession/fifa indicated to the Court under cause 2008/HPC/0311, the damages it had suffered***

arising from the alleged wrongful execution..we also find that the learned trial Judge was on firm ground when he held that the later action was multiplicity of actions.."

She amplified that whether or not the reliefs sought by the appellant had been fully adjudicated upon, the appellant had an opportunity to claim in the first action that which it now seeks in the new action. The case of **Societe National Des Chemis De Pur Du Congo v Joseph Nonde Kasonde**[13] was cited to support the argument.

It is also the respondent's contention that whether or not the commencement of another action is multiplicity of actions and abuse of court process is an issue estoppel. The case of **Arnold v National Westminster Bank Plc**[14] was cited as authority that issue estoppel covers not only the case where a particular point has been raised and subsequently determined in the earlier proceedings, but also where in the subsequent proceedings a point is sought to be raised, which could have been raised earlier but was not.

The issue of multiplicity of actions, having been determined by the Supreme Court cannot be determined again as it is an issue settled between the parties even though there was no final judgment. The respondent submitted that the issue of the existence of special circumstances so as to allow an issue estoppel to be heard, was never raised by the appellant in the court below and cannot be raised anew on appeal.

The respondent further argued that the case of **Setrec Steel and Wood Processing Limited and others v Zambia National Commercial Bank**[3]relied upon by the appellant to the effect that dismissal of an action is not a bar to a subsequent action, is inaccurately attempted to be resorted to, as the circumstances in that case are entirely dissimilar to this case.

Furthermore, that the case of **Bobolas and another v Economist Newspaper**[4] can be differentiated from the present case in that in that case there were no proceedings in the first case as the jury had disagreed and the case was to be retried, meaning proceedings had to start all over again, as if they had never began. Learned counsel submitted, orally, that infact the Supreme Court did not order retrial of the first cause (2008/HP/0311).

The appellant's filed its heads of argument in reply. It is argued that there is nothing at law to stop one from raising a generic ground of appeal in the memorandum and then later frame the actual ground in the heads of argument. The Supreme Court decision in **Swift Cargo Services Limited v Lake Petroleum Limited**[15]was cited as authority. It is argued that in that case the Supreme Court determined the generic anticipatory ground eight which was not in the memorandum of appeal. It is contended that this being the most recent case on the issue, which has not been overturned, the decision is binding until its upset by the Supreme Court itself.

In relation to ground one, it is the appellant's contention that the dismissal of cause 2008/HPC/0311 was not an estoppel to commencing fresh action by the appellant as the matters in controversy were not determined on the merits. In addition that cause 2016/HPC/0313 is an offspring of cause 2008/HPC/0311 and not 2009/HP/0546 as erroneously contended by the respondent.

We have considered the submissions of counsel and the ruling appealed against. The issue this appeal raises is whether the learned Judge properly reviewed his ruling of 3rd October, 2016 and thereby dismissed the appellant's case for being an abuse of court process. Key to this issue is the question whether the case was equally res judicata.

Before we delve into the issues raised, we shall deal first with the issue of ground two which is in the heads of argument and not in the memorandum of appeal. We are alive to the spirited arguments by both counsel on this score. We came across the case of **Patrick Chilambwe v Attorney General**[16], in which the Supreme Court in its judgment of 12th December 2017, per Kaoma JS, dealing with a purported ground six which read, "*the appellant shall, if necessary add more grounds of appeal upon perusal of the entire record*", the Court held:

> "***We hasten to point out that we met a similar challenge, at this same sitting, in the case of*** **Patmat Legal Practitioners (sued as a firm) and Chipo Zyamwaika Mudenda Ndele, Cramos Makanda, Sally Jarielle Trollip v Kenny H. Makala (sued as**

Joint Administrators of the Estate of the late Horace Makala), ***where the appellant raised two grounds of appeal in its memorandum of appeal but added three more grounds in the heads of argument without first obtaining leave of this Court. This was done pursuant to a paragraph in the memorandum of appeal which stated*: "Such further grounds as may be filed later upon perusal of the case record".** ***We have said in that case that such a statement cannot be used to circumvent the requirements of the rules of the Court to seek leave before filing grounds of appeal that are not stated in the memorandum of appeal and that the statement relied on by the appellant's counsel was not a ground of appeal but merely an indication that the appellant may file further grounds of appeal later. Yet again, we expressed our disdain at the practice by advocates and parties to attempt to introduce new grounds of appeal through such kind of statements...***

The Court further referred to its earlier decisions in **Emmanuel Mponda v Mwansa Christopher Mulenga, Christopher Mungoya and Attorney General**[17] that:

> ***"a statement 'such as further grounds to follow upon perusal of the record of appeal' or such other grounds as may be furnished upon further perusal of the record' which mindlessly find their way in memoranda of appeal do not constitute a valid ground.."***

And in **Standard Chartered Bank Zambia Plc v Kasote Singogo**[18] where it stated as follows:

"We shall at the outset, dismiss the purported ground of appeal which was numbered 'fourth' in the memorandum of appeal. This purported 'fourth' ground of appeal is not a ground known to the rules of the Court. Our rules [relating to] filing of memoranda of appeal do not make provision for...'such other grounds..' as a ground of appeal. Grounds of appeal must be specific and succinct and in the event that an amendment is desired, an application to that effect should be made. We hope that practitioners and litigants will now refrain from the practice of future grounds of appeal as this practice serves no useful purpose."

Guided by the foregoing we find merit in Mrs Findlay's arguments on this ground. The case of **Patrick Chilambwe and Attorney General**[16] and other cases cited therein were decided later than the **Swift Cargo Services Limited v Lake Petroleum Limited**[15] case relied upon by the appellant. It is trite law that the later decision takes precedence over the earlier one, where there is a variance. We also agree with Mrs. Findlay that the Supreme Court in the Swift Cargo case was not asked to comment on the generic ground. In the net result we will not consider the purported ground two stated in the heads of argument. It is dismissed for not being in conformity with the rules of the court and so is the generic ground two in the memorandum of appeal.

We will therefore consider the sole ground of appeal in the memorandum. However, we should state that the sole ground is in two parts and encompasses issues and arguments raised in relation to the dismissed ground two. The dismissed ground two

was actually an extension of ground one. We will therefore, consider the arguments as they relate to ground one.

It is imperative for us to first determine the first part of ground one that *'the learned Judge misdirected himself when he reviewed his ruling of 3rd October 2016.'* The Judge held that he had inherent jurisdiction to review his ruling and proceeded to do so. We note though, that the Judge erroneously held that review under Order 39 rule 1 of the High Court Rules is only available when there is fresh evidence. According to the Judge the Supreme Court judgment did not constitute fresh evidence and therefore he reviewed by invoking his inherent jurisdiction. To put matters in proper perspective, we reproduce Order 39 rule1:

> ***"Any Judge may, upon such grounds as he shall consider sufficient review any Judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and, to reverse, vary or confirm his previous judgment or decision."***

It is our considered view that the words **'upon such grounds as he shall consider sufficient'** cover the situation the trial Judge found himself in, where he had to review his decision in light of the Supreme Court judgment which was not brought to his attention earlier when he delivered his ruling of 3rd October 2016. We opine Order 39 rule 1 does not only envisage review when there is fresh evidence only.

In the English case of **Thyne v Thyne**[19] which followed **Meir v Meir**[20], which were dealing with the powers of review by a Judge, when construing the same words '**upon such grounds as he shall consider sufficient**' Morris LJ stated:

> ***"I prefer not to attempt a definition of the extent of the Court's inherent jurisdiction to vary, modify or extend its own orders if; in its view, the purposes of justice require that it should do so."***

Furthermore, that the following were circumstances when the powers of review can be exercised although not exhaustive:

a. ***"If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by RSC O.28***

b. ***If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under O.28 r11 and under the court's inherent powers.***

c. ***If the meaning and intention of the court is not expressed in its judgment or order then there may be variation.***

d. ***If it is suggested that the court has come to some erroneous decision either in regard to fact or law then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available***

e. ***If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured,***

then likewise amendment of a judgment cannot be sought. There might be an appeal on endeavor to come within the rules and the well settled principles relating to applications in such circumstances to adduce fresh evidence.

f. If a party is wrongly named or described, amendment may in certain circumstances be sought, pointing out the distinction between seeking to get rid of the operative and substantive part of a judgment and the correction of a misnomer or misdescription

g. A court may in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment, e.g a person named as a judgment debtor was at all material times non existent.

h. Even if a judgment has been obtained by some fraud or false evidence the court cannot amend the judgment; there must be either an appeal or there must be an action to set aside the judgment: the particular circumstances may denote what procedure is appropriate; but a power to amend cannot be involved."

In *casu,* no fresh evidence was discovered but as aforementioned the Supreme Court judgment constituted grounds upon which a judge could review his earlier decision. This was ground which could and had material effect on the outcome of the case had it been brought to the attention of the judge on time. We therefore, cannot interfere with the Judge's exercise of his inherent powers to review his ruling of 3rd October, 2016. He was on firm ground. He was entitled to review his decision to put matters right in light of

the Supreme Court judgment which bound him as it dealt with same parties and same issues. See **Lewanika and others v Chiluba**[21].

The only issue we can comment on in this regard, is that the Judge did not consider the application for special leave to review out of time. The Judge simply proceeded to review as if it had been made within time. This was a misdirection. However, this is not fatal as by his conduct he is taken to have granted the special leave to review out of time by implication. Furthermore, in the case of **Kangwa Simpasa and Yu Huizhen v Lackson Mwabi**[22], in which a similar situation arose, the Supreme Court held that time factor was not the issue, the main issue was whether review was available. Accordingly, the first part of ground one that *'the learned trial judge misdirected himself when he reviewed the ruling of 3rd October 2016'* is dismissed.

Regarding the second part that *'the Judge misdirected himself when he dismissed the appellant's case on the basis of the Supreme Court judgment of 20th June 2013, notwithstanding the fact that the reliefs sought under cause 2016/HPC/0313 have never been adjudicated upon and that the appellant had no opportunity to be heard on the cause of action which arose as a result of irregular execution of the writ of possession/fifa'*, we wish to state from the onset that this raises the issue whether or not the case was properly dismissed for being an abuse of court process and or is *res judicata.*

In the case of **Chick Masters Limited and Dr. Mwilola Imakando v Investrust Bank Plc**[23] which dealt with whether the second action by the appellant was properly dismissed as an abuse of court process, the Supreme Court noted as follows:

> "***We also agree with the authors of Civil Procedure cited by Mr. Mutemwa that abuse of court process can arise where the claim is vexatious, scurrilous or obviously ill founded....we further agree with the learned authors of A Practical Approach to Civil Procedure again that the underlying public interest is that there must be finality in litigation and that a party should not be vexed twice in the same matter. That when considering whether the second claim is an abuse of the court process, it is necessary to decide not only that the second claim could have been brought in the earlier claim, but whether it should have been brought in the first claim...***"

The Court also observed that the right forum to challenge the legality of a writ was to apply for an order under the first action; and that the appellants had an opportunity to do so under that action (first action). The appellants' second action was accordingly dismissed for being an abuse of court process.

We are guided by what the Supreme Court stated in that case and are inclined to find that the trial Judge was on firm ground in dismissing the appellant's case for abuse. As argued by Mrs. Findlay, in dismissing the second cause (2009/HP/0546) for multiplicity the Supreme Court held that the appellant ought to

have applied to amend the first cause once the cause of action for the later cause arose.

It is clear to us that the cause of action pertaining to damages for loss of business and conversion as a result of the irregularly issued writ of fifa arose on or about 11th March 2009, it was then that the appellant should have applied to amend cause 2008/HPC/0311 especially, as rightly observed by Imasiku J; at the time of setting aside the writ of possession instead of commencing the second action. Be that as it may, we are alive to the fact that at that time that earlier cause stood dismissed in the High Court, pending appeal. The Supreme Court judgment was eventually delivered on the 28th June 2011 directing that the matter be retried before a different judge (Chishimba J). At page J6 of its judgment, the Supreme Court clearly ordered a retrial, contrary to Mrs Findlay's assertions.

Before Chishimba J, the respondent applied to have the matter dismissed on grounds that the matter had been overtaken by events. At that stage the appellant simply argued that there was no evidence to support the allegation that the property is no longer owned by the respondent. After analyzing the evidence, the Judge agreed with the respondent and dismissed the matter on 12th November 2012.

We are of the firm view that the appellant should have applied to amend and brought to the attention of the second Judge (Chishimba J) that another cause of action had arisen between the

parties following the execution of the irregularly issued writ of fifa. Then the case would have been amended to include the new claims. As such the appellant lost an opportunity to amend the first action. They waited until cause 2009/HP/0546 was dismissed for multiplicity and the Supreme Court advising them to amend the earlier cause which was, at that time dismissed for a second time by Chishimba J.

This brings us to the issue of *res judicata* as canvassed by the respondent. We note the appellant's arguments relying on the case of **Bobolas and another v Economist Newspaper**[4]. It was held in that case that rulings made and issues decided by a Judge in the course of a trial where no decision has been reached and a retrial has been ordered are not *res judicata* and are not binding at the retrial, whether by way of issue estoppels or otherwise. In *casu* a retrial was ordered of cause 2008/HPC/0311. This entailed that issues which had been decided by Imasiku J were not *res judicata* and could be raised before Chishimba J at the retrial which never took off as the matter was dismissed due to the appellant's own fault.

This case is therefore not helpful to the appellant in respect of the subsequent cause 2016/HPC/0313. As already alluded to, the appellant lost an opportunity to amend the proceedings before Chishimba J to include new claims raised in the second and even the third case (2016/HPC/0313). This, in our considered view, is a classic case of abuse of court process and *res judicata.* In the case

of **Societe Nationale Chemis De Pur Du Congo v Joseph Nonde Kasonde**[13] cited by Mrs Findlay, the Supreme Court held that:

> ***"Res judicata is not only confined to similarity or otherwise of the claims in the 1st case and 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving judgment."***

The Supreme Court also observed that the rationale for *res judicata* is that there must be an end to litigation. The purpose is to support the good administration of justice in the interests of both the public and the litigants, by preventing abusive and duplicative litigation.

In its earlier decision in **Bank of Zambia v Jonas Tembo**[24], that Court held thus:

> ***"In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff 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 point had been actually decided between the same parties."***

The point of multiplicity of actions which is an abuse of Court process has been decided between the parties herein by the Supreme Court and the High Court and is therefore *res judicata* and issue estoppel as correctly argued by Mrs. Findlay.

The cases we have referred to above, show that *res judicata* like abuse of court process is also about opportunity to bring the claims in the later cause in the earlier one. The appellant had the opportunity to do so but for its own fault did not and the matter was dismissed.

In **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Ltd and Sun Pharmaceuticals**[25], the Supreme Court disapproved of the commencement of multiplicity of actions over the same matter like in this case.

We note that the appellant commenced the action 2016/HPC/0313 after the Supreme Court dismissed the action 2009/HP/0546 on grounds of multiplicity. These two causes are essentially the same cause. Both are an offspring of the earlier cause 2008/HPC/0313 and not only the 2016 cause as contended by Mr. Katolo. The Supreme Court found that the case was a multiplicity of actions and was dismissed. Allowing this appeal would be tantamount to us going against the Supreme Court decision, which is preposterous in the extreme.

We are also not persuaded by the appellant's counsel's argument relying on the **Setrec Steel and Wood Processing Limited and others v Zambia National Commercial Bank**[3] case that since the case was not determined on its merits it is not *res judicata* and the plaintiff is free to commence a fresh action. We are of the considered view that the circumstances of that case are different from the circumstances here. The key word, and we emphasise, in

that decision is 'default'. It was stated clearly that dismissal of an action or counter claim for default is not a bar to a fresh action on the same or substantially the same facts and does not operate as an estoppel or *res judicata* even where the plaintiff had consented to the dismissal order since the Court had not determined or adjudicated upon the case on its merits.

Issues of default do not arise in the circumstances of the appeal before us. The Supreme Court in that case even considered the meaning of default according to Atkins Court Forms and the Commercial Actions Rules and Practice Direction pursuant to which the matter was dismissed for want of prosecution, as follows:

> ***"...therefore, the meaning of default in Atkins Court Forms is the same as that under the Commercial Actions Rules and Direction, that is, it is a failure to pursue the case according to the procedure of the court process up to completion stage and where a judgment or decision is delivered."***

The appellant here was actively pursuing the case. The appellant has been heard by several High Court Judges and twice in the Supreme Court over the same issues. It commenced multiple actions instead of applying to amend. The appellant simply lost the opportunity to amend his first case (2008/HPC/0311) to include claims in the later cases. The cases 2009/HP/0546 and 2016/HPC/0313 were dismissed for multiplicity and abuse of court process; not default on the appellant's part. Failure to take the correct steps and making the wrong moves, is not equal to default.

The case (2016/HP/0313) is an abuse of court process and is *res judicata*. There must be finality to litigation. This is a proper case where the respondent has been vexed more than twice over the same issues. If anything the case is now even statute barred.

In light of the foregoing, the second part of ground one is equally dismissed.

In the result the appeal lacks merit and is dismissed, with costs to the respondent, to be taxed failing agreement.

Delivered at Lusaka the 28th day of March 2018

C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z MULONGOTI
COURT OF APPEAL JUDGE

F.M LENGALENGA
COURT OF APPEAL JUDGE