

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2024/HP/0754

BETWEEN:

SOPHIE MBEWE AND 39 OTHERS

AND

**COUNCIL OF THE UNIVERSITY
OF ZAMBIA**



PLAINTIFFS

DEFENDANT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 7th day of May, 2025

For the Plaintiffs: Ms N. Chilumba, Messrs OMM Banda & Company

For the Defendant: Ms T. Nkhoma, In- house Counsel

RULING

Cases referred to:

1. *Chick Masters Limited and Dr. Mwilola Imakando vs Investrust Bank Plc*, Appeal No. 198/2014
2. *Hussein Safieddinne vs The Commissioner of Lands and Others* SCZ Selected Judgment No. 36 of 2017.
3. *Barclays Bank Zambia Plc vs ERZ and Others* Appeal No. 71/2007
4. *Sikatana vs Attorney General* [1982] ZMHC 5
5. *Letang vs Cooper* (1965) 1 QB 232
6. *Mutwena vs Attorney* (CCZ 38 OF 2021) [2022] ZMCC
7. *Bisalomo Mumba vs Michael Nsangu & Others* CAZ Appeal No. 31 of 2021
8. *Kashikoto Conservancy Limited vs Darrel Alexander Watt* CAZ Appeal No. 146 of 2019.
9. *William David Carlisle Wise vs E.F Hervey Limited* (1985) ZR 179
10. *Zambia National Building Society vs Ernest Mukwamataba Nayunda*
11. *Nasilele Namushi and 17 Others vs the Council of the University of Zambia* 2024/HP/0624
12. *Societe Nationale de Chemis de pur du Congo vs Joseph N. Kakonde* 12 SCZ Judgment No. 19 of 2013

Legislation referred to:

The Rules of the Supreme Court of England, 1999 Ed.

National Pension Scheme Act, Chapter 256 of the Laws of Zambia

Other works referred to:

10th edition of Black's Law Dictionary

1.0 Introduction

The plaintiffs, by a writ of summons and statement of claim filed on 31st May, 2024, commenced an action seeking, among others, the following reliefs:

1. Damages for breach of statutory duty owed to the plaintiffs by the defendant for its failure to make contributions pursuant to *Section 14 (1) of the National Pension Scheme Act, Chapter 256 of the Laws of Zambia;*
2. An order that the plaintiffs were permanent and pensionable effective from 1st May, 2016;
3. An order that the plaintiffs be paid the difference in salary arrears.
4. Damages for loss as pleaded.

The defendant has now raised the following preliminary issues:

1. Whether or not the current action is barred by the doctrine of res judicata;
2. Whether or not this court has jurisdiction to hear a matter that has finally been adjudicated by a court of equal jurisdiction;
3. Whether or not the plaintiffs have a cause of action;
4. If the questions are answered in the negative, then the action be dismissed and the plaintiffs pays the defendant costs thereof.

The defendant's issues are raised by way of a notice of motion filed pursuant to *Order 14A Rule 1* as read together with *Order 33 Rule 7* of the *Rules of the Supreme Court of England, 1999 edition.*

2.0 The Defendant's Affidavit in Support

The defendant's notice is supported by an affidavit of even date sworn by Theresa Chipulu Chalwe. The deponent swears that the plaintiffs were all employed by the university on different dates on short term contracts of six months, which contracts were not renewed on expiration. On 27th October, 2020, the plaintiffs herein commenced an action in the Industrial Relations Division of the High Court under cause number COMP/IRCLK/683/2020 claiming inter alia payment of the complainant's accrued benefits for the period that they were employed as casual workers, which matter was on

11th May, 2023 fully settled by way of consent judgment. The plaintiffs herein were the complainants in the matter under cause number COMP/IRCLK/683/2020, and the issues in contention in both matters relate to the permanent and pensionable conditions of service and benefits that arose from the employment.

The reliefs being sought herein were fully settled under the stated cause and thus this court has no jurisdiction to try issues already conclusively determined. The plaintiffs' action is an abuse of court process. The claim for the defendant's breach of duty for non-remittance of contributions can only be made by the National Pension Scheme Authority (NAPSA) who are mandated to penalize an employer for non-remittance. Damages are not recoverable by an employee for non-remittance of statutory contributions and hence the plaintiffs herein are not entitled to the damages claimed. That this action is res judicata.

2.1 The Defendant's Skeleton Arguments

The defendant filed skeleton arguments wherein counsel referred to *Orders 14A*, and 33 (7) of the *Rules of the Supreme Court* as the law on which the application is predicated. The said *Order 14A* provides as follows:

"The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:-

- (a) Such question is suitable for determination without a full trial of the action, and*
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."*

While *Order 33 Rule 7* of the said *Rules of the Supreme Court, 1999 edition* provides that;

"If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just".

Counsel argued that the doctrine of res judicata precludes the re-litigation of a case that has already been adjudicated upon by a court of competent jurisdiction. That the principle is enshrined to prevent the court system from being clogged with repetitive litigation which would undermine the finality of judicial decisions and lead to conflicting outcomes. For this argument, counsel has relied on the cases of **Chick Masters Limited and Dr. Mwilola Imakando vs Investrust Bank Plc**¹ and **Hussein Safieddinne vs The Commissioner of Lands and Others**.² Counsel argued further that the core issue in *casu* relates to the migration to permanent and pensionable conditions of service and the benefits paid to the plaintiffs. That the plaintiffs are trying to use a different forum to achieve the same outcome that was already achieved in the earlier case.

That the facts of the case remain the same and the reliefs identical. The elements of res judicata, being an earlier decision on the issue, a final judgment on the issue and the involvement of the same parties or parties in privity with the original parties are all present in this matter.

Counsel referred to the case of **Barclays Bank Zambia Plc vs ERZ and Others Appeal**³ for the argument that the doctrine of res judicata extends to claims arising from the same transaction or series of transactions that could have been but was not raised in the first suit. That the plaintiffs pursuing the same issues not only contravenes the doctrine of res judicata but wastes the court's time. Counsel referred to the case of **Sikatana vs Attorney General**⁴ wherein the court held that:

"It would be a mockery of justice if a judge of equal jurisdiction interfered with or commented upon a final decision made by a judge of equal jurisdiction on a matter based on the same facts and evidence."

Counsel argued, based on the above case, that this action by the plaintiffs seeks to undermine the authority of the judge under whom the consent judgment was delivered. On whether or not the plaintiffs have a cause of action, counsel referred to the case of **Letang vs Cooper**⁵ wherein it was held that:

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

Counsel referred this court to *Sections 14, 15 and 51 of the National Pensions Schemes Authority Act (NAPSA Act)* as the law that sets out clear steps to be taken where an employer does not remit contributions to NAPSA. Counsel argued that it is the sole responsibility of NAPSA to prosecute and recover any unremitted contributions from an erring employer. That the law further provides for penalties and interest to be levied against such employers where found in breach, but it makes no provision for employees to benefit from this omission by claiming damages. That granting the relief of damages would amount to individuals stripping NAPSA of its statutory duty to prosecute and recover from erring employees.

The plaintiffs would not have suffered loss leading to damages if they had followed the procedure under *Section 16 of the NAPSA Act*. Counsel referred to the case of **Mutwena vs Attorney**⁶ for the argument that the plaintiffs do not have a cause of action that entitles them to obtain a remedy for damages. On totality of the arguments presented, counsel prayed for the dismissal of the plaintiffs' action with costs for being statute barred and having no cause of action.

3.0 The Plaintiffs' Affidavit in Opposition

In opposing the application, the plaintiffs filed an affidavit on 9th December, 2024 deposed to by Sophie Mbeve. The deponent swears that the assertion that the plaintiffs herein were complainants under cause number COMP/IRCLK/683/2020 is not disputed but that the migration to permanent and pensionable is just but one of the issues in the statement of claim. That the plaintiffs are also claiming the payment of salary arrears from 1st May, 2016 to April, 2021 when the parties herein separated, which claim was never made under cause number COMP/IRCLK/683/2020. The claim for non-remittance of pension contributions is not one of the claims that arose from the complaint. The contentious nature of the claims in this matter require a full trial to determine the issues once and for all. The defendant has not denied non-remittance of the pension contributions.

3.1 The Plaintiffs' Skeleton Arguments

In support of the application, the plaintiffs filed skeleton arguments wherein counsel relied on the provisions of *Order 14A* of the *Rules of the Supreme Court* and the case of **Bisalomo Mumba vs Michael Nsangu & Others**⁷ for the argument that *Order 14A* is suitable for use where an action can be determined without a full trial. That the court will not in a contentious matter determine an action preliminarily using *Order 14A*. For this argument, counsel relied on the case of **Kashikoto Conservancy Limited vs Darrel Alexander Watt**.⁸ Counsel argued that the claim by the plaintiffs herein for payment of salary arrears and remission of their pension scheme contributions is triable and not suitable for disposal preliminarily.

As regards whether there exists a cause of action herein, counsel referred to *Order 15 Rule (1) and (2)* of the *Rules of the Supreme Court of England, 1999 edition* which states that:

"...every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court."

Counsel further referred to the case of **William David Carlisle Wise vs E.F Hervey Limited**⁹ wherein the Supreme Court stated that:

"a cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."

That the plaintiffs in *casu* are claiming the payment of salary arrears owed to them by the defendant. Counsel argued that the foregoing is a factual situation upon which liability can be attached and which can only be resolved after the full hearing of the case at trial. Counsel referred to *Article 187* of the *Constitution of Zambia, Chapter 1* of the *Laws of Zambia* which recognizes an employee's right to a pension benefit, which right counsel argues ought to be protected by this court. That the defendant has not denied

not remitting the plaintiffs' pension contributions which itself is an indirect admission on the defendant's part.

That failure by the defendant to remit the contributions did not only breach the defendant's statutory duty but was contrary to *Sections 14 and 15 (1)* of the *NAPSA Act* which makes it mandatory for institutions to make pension contributions to NAPSA. Counsel argued that there exists a cause of action in this matter.

As regards whether this action is barred by the doctrine of res judicata, counsel argued that for an action to be considered to be res judicata, the reliefs claimed herein must be the same as those claimed in the earlier matter. That the issue that appears to be caught by res judicata is the issue to do with an order to declare the plaintiffs as permanent and pensionable. Counsel argued that the other claims in this action are different from the claims under the earlier cause of action under cause no. COMP/IRCLK/683/2020. Counsel invited this court to take judicial notice of the fact that members who contribute to NAPSA can access 20% of their pension benefits. That the claim relating to the non-remittance of the pension benefits only arose when the plaintiffs discovered that the defendant was not remitting pension contributions on behalf of the plaintiffs and thus this claim is not caught up by res judicata. Counsel submitted that the plaintiffs' claims are not res judicata save for the one relating to the plaintiffs being permanent and pensionable employees. Counsel urged this court to dismiss the preliminary issues with costs.

4.0 The Defendant's Affidavit in Reply

In reply, the plaintiff filed an affidavit on 11th December, 2024 wherein Theresa Chipulu Chalwe, deposed that the complainants under COM/IRCLK/683/2020 claimed for payment of accrued benefits for the period they were employed as casual employees. The plaintiffs herein seek the payment of the difference in salary areas. The plaintiffs have simply recast their claims under this action when in fact the relief for accrued benefits encompassed the payment of salary arrears.

That the two originating processes all stem from one transaction which is the employment of the plaintiffs by the defendants and hence all matters pertaining to this employment were fully and conclusively determined as shown under exhibit "TCC" in the affidavit in support of this application. Litigation must have finality. That there is a

question before the court which is whether or not the plaintiff can be paid damages for breach of statutory duty. A comparison of claims in the two actions reveals that only one difference exists which is the claim for payment of damages for statutory breach.

4.1 The Defendant's Skeleton Arguments in Reply

The defendant filed skeleton arguments wherein counsel relied on the definitions of cause of actions as defined under *Order 15/1/2* of the *Rules of the Supreme Court of England* and the **William David Carlisle** case for the argument that there exists no cause of action herein. Counsel relied on the case **Zambia National Building Society vs Ernest Mukwamataba Nayunda**,¹⁰ and *Paragraph 1102* of the *Halsbury Laws of England, 4th Edition, Re-issue, Vol 12* for the argument that in some cases even though a person claims to have suffered loss, damages are not recoverable.

Counsel referred to *sections 14, 15 and 16* of the *NAPSA Act* and the case of **Nasilele Namushi and 17 Others vs the Council of the University of Zambia**¹¹ for the argument that claiming damages for breach of statutory duty amounts to usurping the powers of NAPSA and hence no such relief can lie with an employee.

Counsel submitted that this is a proper case for determination by way of preliminary issue and prayed for the dismissal of this action with costs.

5.0 At the Hearing

At the hearing of the application, counsel for the defendant relied entirely on the documents filed in support of the application.

Counsel for the plaintiffs equally relied of the documents filed in opposing the application.

5.0 Decision of the Court

I am indebted to counsel for the arguments which I have taken into consideration.

The law pursuant to which this application has been made is *Order 14A* of the *Rules of the Supreme Court of England, 1999 edition* which has been reproduced earlier in this ruling. In *casu*, the questions raised by the defendant are capable of finally determining this action if successfully argued and hence this application has been brought under the correct law. I will now ponder the issues raised to determine whether the same have been rightly raised.

**Whether or not the current action is barred by the doctrine of res judicata; and
Whether or not this court has jurisdiction to hear a matter that has finally been
adjudicated by a court of equal jurisdiction.**

The 1st and 2nd issues are connected and hence will be considered collectively. As regards the said two issues, the defendant is alleging that this court has no jurisdiction to determine this action on the basis that it is res judicata, and that the issues herein have already been adjudicated upon by another court of equal jurisdiction. The term 'res judicata' is defined by the **10th edition of Black's Law Dictionary** as:

"An issue that has been definitely settled by judicial decision. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit. The three essential elements are;

- 1) An earlier decision on the issue*
- 2) A final judgment on the merits*
- 3) The involvement of the same parties or parties in privity with the original parties"*

To substantiate the assertion that the reliefs sought in this action are res judicata, the elements highlighted above must all exist. The plaintiffs have in the affidavit opposing this application conceded to being the complainants in the matter under cause number COMP/IRCLK/683/2020, and hence it is only the first two elements of the elements listed above that must be proved for this matter to be res judicata. I will start off by examining the reliefs claimed herein and those granted under cause number COMP/IRCLK/683/2020 to determine whether there exists an earlier decision on the issues and whether there is a judgment on the merit. To establish the foretold, it is imperative to reproduce the reliefs claimed herein and those granted in the other matter. In *casu*, the plaintiffs are claiming the following reliefs:

- 1) Damages for breach of statutory duty owed to the plaintiffs by the defendant for its failure to make contributions pursuant to *Section 14 (1) of the National Pension Scheme Act, Chapter 256 of the Laws of Zambia;*

- 2) An order that the plaintiffs were permanent and pensionable effective from 1st May, 2016;
- 3) An order that the plaintiffs be paid the difference in salary arrears.
- 4) Damages for loss as pleaded.

Under COMP/IRCLK/683/2020, the plaintiffs herein were granted the following reliefs:

- 1) The employment relationship between the Complainants and Respondents ended on the 30th of April 2021 when the final contract of employment between the parties expired.
- 2) The Respondent shall pay the Complainants' respective benefits at the rate of three month pay for each year actually served at the salary scale of PTS 15 (basic salary of ZMW 5,776)
- 3) The Respondent undertakes to conclude the computation of the number of years actually served by each Complainant, within two weeks of the execution of this Judgement.
- 4) In the event of any disagreement as to the computation of the number of years actually served by any particular Complainant, such disagreement shall be resolved by production by either party, of copies of contracts of employment for the period actually served.
- 5) The Respondent shall pay the said Complainants' respective benefits in 12 consecutive monthly instalments commencing month end of May 2023.
- 6) The Respondents shall settle the Complainants Advocates agreed costs in the sum of K350,000 to be paid in 3 consecutive monthly instalments commencing month end of May, 2023.
- 7) This Consent Judgment is a full and final settlement of all the Complainants claims as contained in the Notice of Complaint filed into Court on the 27th of October 2020.

The defendants having conceded that the issue relating to the declaration that the plaintiffs were permanent and pensionable employees is res judicata, I will not belabour the issue. As regards the claim that the plaintiffs be paid the difference in salary arrears for the period 1st May, to April 2021 which claim the plaintiff's counsel alleges was never made under COMP/IRCLK/683/2020, it is clear from the definition of the term res

judicata that the same is not limited to issues already adjudicated on but extends to issues a litigant ought to have raised but opted not to due to his or her own negligence or omission. The court in the case of **Societe Nationale de Chemis de pur du Congo vs Joseph N. Kakonde**¹² guided that the rationale for res judicata is that there must be an end to litigation, and that res judicata is not confined to similarity or otherwise of the claims in the matter but extends to the opportunity to claim matters which existed at the time of instituting the first action. The consent judgment under cause COMP/IRCLK/683/2020 was signed on 11th May, 2023 by the court. The plaintiffs had an opportunity to litigate the claim relating to salary arrears under COMP/IRCLK/683/2020 but failed to. The same is therefore res judicata.

Whether or not the plaintiffs can claim breach of a statutory duty.

As regards the claim for damages for breach of statutory duty owed to the plaintiffs by the defendant for its failure to make contributions pursuant to *Section 14(1)* of the *National Pension Scheme Act, Chapter 256 of the Laws of Zambia*, it is undisputed between the parties that the said claim was not made under cause no. COMP/IRCLK/683/2020. The defendant however argues that the claimed damages for non-remittance of statutory contributions are not recoverable in this cause as the plaintiffs cannot sue for the same. That it is NAPSA with the mandate to sue a defaulting employee for non-remittance of statutory contributions. On that basis, the defendant asserts that the plaintiffs have no cause of action. In support of the assertion, the defendant has referred to *Sections 14, 15 and 16 of the NAPSA Act*. The said provisions state as follows:

“14. (1) A contributing employer shall pay to the Scheme a contribution in respect of an employee in his employment consisting of the employer's contribution and the employee's contribution at the prescribed percentage.

(2) A contributing employer shall be entitled to recover from his employee who is a member of the Scheme, the amount of the employer's contribution by deduction from his earnings to which the contribution relates

15. (1) A contributing employer shall pay contributions to the Authority at the end of each month and such employer shall submit, with such payment,

all prescribed supporting particulars concerning his identity, period of employment and earnings of the member to whom the contributions relate.

(2) If any contribution is not paid within the time stated under subsection (1) a sum equal to twenty per centum of the amount unpaid shall be added as a penalty for each month or part thereof after the date the payment is due and the amount of the penalty shall be recoverable as a debt owing to the Scheme by the employer.

16. Where the Director-General is satisfied that an employee's contribution has been deducted from his earnings, but the employer has failed to pay this contribution together with the employer's contributions to the Authority, he may treat the unpaid contributions as wholly or partially paid for the purpose of any claim to the payment or benefits, provided that this shall be without prejudice to any action to recover the amount due from the employer.”

A prudent perusal of the reproduced law shows that Sections 15 (2) and 16 of the NAPSA Act provides a remedy for failure by an employer to remit deducted statutory contributions to NAPSA on behalf of an employee. My learned sister, Madam Justice Newa in considering a similar issue in the **Nasilele Namushi** case, cited by the defendant, stated that:

“.....there being a remedy that is provided by statute for the breach, damages would not be recoverable in a claim for failure to pay statutory contributions, as the same is remedied by the National Pension Scheme Authority instituting actions against erring employers, and recovering the amounts payable to the employees which puts the employee in a position that they would have been had the breach not occurred.”

I completely agree with the statement by my learned sister. The intention of Section 16 of the NAPSA Act is to prevent an employee from being inconvenienced by an employer's failure to remit a properly deducted statutory contribution. The proper way to proceed where an employee discovers that an employee has not remitted statutory contributions is by providing evidence of the deductions of the statutory contributions to the Director

General of NAPSA. This evidence can be in form of monthly pay slips which should depict the effected deductions. The Director General, on being satisfied that a deduction was effected but not remitted, will remedy the default by the employer in line with the provisions of *Section 16* of the *NAPSA Act*.

The net result of this application is that:

1. The claim relating to whether the plaintiffs were permanent and pensionable employees effective from 1st May, 2016, and the claim for payment of salary arrears is res judicata.
2. The claim for damages for breach of statutory duty owed to the plaintiffs by the defendant for its failure to make contributions pursuant to *Section 14 (1)* of the *National Pension Scheme Act, Chapter 256* of the *Laws of Zambia* is untenable.
3. This action is dismissed in its entirety.
4. Looking at the nature of the case, each party will bear their own costs.

Leave to appeal is hereby granted

Dated at Lusaka this..... day of.....2025



R.H Chibbabbuka

HIGH COURT JUDGE