IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 206/2024**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MUTALE CHANDA **APPELLANT**

AND

IAN MUSWEU **RESPONDENT**

CORAM: Chashi, Makungu and Banda-Bobo, JJA

On 23rd April, 2025 and 13th January, 2026.

For the Appellant: **Ms. N. Adam of Messrs D. Findlay and Associates**

For the Respondent: **Mrs. S. K. Banda and Mr. K. Kumbuyo of Messrs J & M Advocates**

JUDGMENT

Banda-Bobo, JA, delivered the Judgment of the Court.

Cases referred to:

1. Mpongwe Farms Limited v. Dar Farms and Transport Limited (SCZ Selected Judgment No. 38/2016)
2. African Reinsurance Corporation v. JDP Construction (Nig) Limited (2003) 13 NWLR (pt. 838) 609
3. Bank of Zambia v. Tembo and Others (2002) ZR 103
4. Kabwe Kisembo v. Georgina Kisembo (Appeal No. 34 of 2010/SCZ/8/49/2010)
5. Mohandes Issardas v. A. N. Sattanathan Air Capital (1955) BOM 113.
6. Collet v. Van Zyl Brothers Limited (1966) ZR 65 (CA)
7. Hamalambo v Zambia National Building Society (SCZ Appeal 64/2013)

8. Guest & Another v Makinga & Another (2011) ZR, Vol 1, 370-389
9. Million Hamung'ande & Others v Mulopa (CAZ Appeal No. 84/2019)
10. Water Resources Management Authority v Chimsoro Farms Limited & 18 Others (CAZ Appeal No. 24/2021)
11. Zyambo v Ntharzy (SCZ Judgment No. 16 of 2024)
12. Henderson v Henderson (1843 – 1860) ALL E.R. 378
13. S. P. Mulenga & Associates International and Another v First Alliance Bank Zambia Limited (SCZ Appeal No. 123/2013)
14. Societe Nationale Des Chenus De Pur Du Congo v Joseph Nonde Kasonde (SCZ Appeal 183/2008)

Legislation, Regulation and Other Works referred to

- Black's Law Dictionary 9th Edition
- The Corpus Juris Secundum, Vol. 21

1.0 INTRODUCTION

1.1. This is a judgment on an appeal against the Judgment of Hon. Mrs. Justice T. S Musonda, rendered on 7th May, 2024, in the High Court at Lusaka. The Notice and Memorandum of Appeal were lodged in this Court on 6th June, 2024.

1.2. The parties will be referred to as they are in this appeal.

2.0 BACKGROUND

2.1 The parties had been husband and wife, but the marriage was later dissolved. An application for maintenance of the child of the family and property settlement was made and adjudicated

upon by the Registrar, and judgment was rendered on 1st March, 2022.

2.2 Dissatisfied with the verdict of the Deputy Registrar, the Appellant appealed the decision thereof, and the matter was heard in Chambers. After due process, and evaluation of the evidence adduced by the parties, the learned High Court Judge, by a Judgment dated 21st August, 2023, ordered the Respondent to pay the following:

(i) School fees – ZMW 72,000 annually;

(ii) Maintenance – ZMW 800 monthly;

(iii) Clothing for the child – ZMW 2,500 quarterly.

The Court declined to pay a lump sum in arrears.

2.3 On 13th October, 2023, the Appellant filed summons for an Order that the Respondent pay to the Appellant a lump sum for liabilities and or expenses reasonably incurred in the past by the Appellant towards maintenance of the child of the family.

2.4 In support of her case, the Appellant averred that after the dissolution of their marriage, the Respondent made sporadic and unilateral payments towards the child's school fees, and a

unilateral payment of ZMW3,000 towards the child's maintenance, from February, 2017. This sum was reduced to ZMW2,000.00. That this payment stopped completely in 2020. The Appellant lamented that she had borne the burden of maintaining the child for three years due to the Respondent's default.

2.5 She believed that she ought to be reimbursed for the expenses and or/liabilities reasonably incurred by herself towards the child's maintenance and payment of school fees before the judgment dated 21st August, 2023.

2.6 In opposition, the Respondent contended that the issues that the Appellant was raising had already been properly dealt with and adjudicated upon in the judgment rendered on 21st August, 2023. That the Appellant was seeking to relitigate these issues, that the application was frivolous, mischievous and an abuse of court process. That in fact, there is an appeal the Appellant launched against the Judgement of 21st August, 2023.

2.7 Further, that after delivery of Judgment, the Court became *functus officio* concerning maintenance and property

settlement. All in all the Respondent was of the view that the matter was *res judicata* and it ought to be dismissed.

2.8 In her Reply, the Appellant contended that the issues she raised in the application were not properly dealt with in the judgment of 21st August, 2023. That the Court had stated at page J99, that it was restricted to make pronouncements only on the reliefs pleaded before the Deputy Registrar. That she never pleaded the relief, the subject of these pleadings.

2.9 It was her view that the comments made by the Court in passing cannot be used by the Respondent to prevent her from seeking the relief the subject of her application.

3.0 **DECISION BY THE LOWER COURT**

3.1 In coming to her determination of the application, the learned High Court Judge formulated the following as the issue for resolution, vis:

Whether the Applicant's application is *res judicata*

In resolving this issue, the learned Judge considered the definition of *res judicata* as expounded in a number of cases,

one of which was **Mpongwe Farms Limited v. Dar Farms and Transport Limited**[1] where the Supreme Court stated that:-

> **"Our understanding of this authoritative definition is that *res judicata* puts to rest and *entombs quiescence* every justifiable issue and questions actually adjudicated upon or which should have been raised in the initial suit."**

3.2 The learned Judge also considered the issue of *obiter dicta*, and resorted to the definition as provided by Black's Law Dictionary 9th Edition and the Corpus Juris Secundum, Vol. 21, where the same concept was discussed.

3.3 The learned Judge referred to various pages of the Judgment of 21st August, 2023 where the issue of payment of a lump sum was alluded to by the learned Judge.

3.4 Ultimately the Court found that the Appellant had brought back the same issue that was already determined in the Judgment of 21st August, 2023. That therefore the application was *res judicata*. That the Appellant was attempting to relitigate an issue that had already been resolved.

3.5 The learned Judge also determined that on the facts of the application before her, the action by the Appellant was an abuse of court process. The Court relied on the case of **African Reinsurance Corporation v. JDP Construction (Nig) Limited[2],** which is to the effect that where the court concludes that its process is abused, the proper order is to dismiss the process. The Appellant's application was dismissed.

4.0 **THIS APPEAL**

4.1 It is that dismissal that triggered the current appeal, where three grounds were fronted, vis:

(i) The Court below erred in law and fact in holding that the Appellant's application for an order that the Respondent pay to the petitioner lump sum for liabilities and or/expenses reasonably incurred in the past by the petitioner towards maintenance and school fees for the period of June, 2019 to July, 2023, was *res judicata*, when the said reliefs have neither been pleaded before the court nor determined by the court previously;

(ii) The Court below erred in law and fact in holding that the remarks by the Court in the judgment dated 21st August, 2023, were not *obiter dictum*, but pronouncements on issues neither pleaded nor sought for determination, which issues the Court did not determine, therefore not *res judicata;*

(iii) The Court below erred in law and fact in condemning the Appellant in costs.

5.0 **ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 In the Heads of Argument filed on 6th August, 2024, the three grounds were each addressed separately and in the order presented.

5.2 In support of ground 1, the Appellant highlighted the lower Court's Ruling as appear at page R20, line 22, which Ruling is at page 27 record of appeal, where the Court stated that the Appellant had brought back the same application that had already been determined in the 21st August, 2023, Judgment. That the application was *res judicata*, and that the applicant was attempting to relitigate the issue of maintenance arrears.

That to determine the application would be tantamount to relitigating an issue that had already been resolved.

5.3 Counsel drew the Court's attention to the application for maintenance filed on 15th May, 2019, as appear at page 91 – 97 Record of Appeal. Counsel contended that a close scrutiny of the same would show that the Appellant sought payment of a monthly maintenance and contributions towards school fees for the child of the family from the Respondent. That however, a decision on the application was only rendered four (4) years later.

5.4 That it was only after the 21st August, 2023 Judgment that the Court ordered the Respondent to contribute towards the child's maintenance. That there was no order by Court, in that Judgement, that the Respondent should refund the Appellant the payments she made towards the child's maintenance in those four (4) years while the matter was pending adjudication. That the Appellant bore all the expenses during this period.

5.5 To support, we were referred to lines 4 to 14 of page 466 of the Record of Appeal; where the Respondent confirmed, when

testifying, that he stopped contributing towards the child of the family in 2020. That that is what prompted the Appellant, after the 21st August, 2023 Judgment to apply for payment of a lump sum to cover the portion that the Respondent did not pay, and which the Appellant shouldered by herself.

5.6 It was contended that, based on the above, the Court erred when it held that the application for maintenance arrears filed on 13th October, 2023 was the same as that filed on 15th May, 2019. That the Appellant in the application of 15th May, 2019 did not plead nor pray for backdated maintenance or for a lump sum payment for maintenance arrears.

5.7 Counsel argued that this would have been impossible in May, 2019, as the Appellant could not have predicted that the Court would take so long to determine the matter. That at that time, the Appellant could not have foreseen that the Respondent would neglect to pay. That, that is the reason the application for arrears was made after the judgment was rendered.

5.8 Counsel stressed that the two applications were different, as each sought different reliefs. That consequently, the

application, subject of this appeal was not *res judicata.* That the first application was for payment of maintenance going forward, while the second one was for refund of the Respondent's share of payments already made by the Appellant.

5.9 Counsel went on to state that it was clear from the record that there is no order for maintenance granted for the period June 2019 to July, 2023.

5.10 Submitting specifically on the issue of *res judicata,* counsel adverted to the case of **Bank of Zambia v. Tembo and Others[3] 103,** where the Court guided inter *alia,* that for a defence of *res judicata* to succeed, it must be shown that, not only that the cause of action was the same, but that also the plaintiff had an opportunity of recovering, and but for his own fault, might have recovered in the first action that which he seeks to recover in the second. That a plea of *res judicata* must show either an actual merger or that the same points had been actually decided between the same parties. That it was further guided that it is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been

claimed, but that it is necessary to show that it actually was so put in issue.

5.11 Counsel submitted that the Appellant had no opportunity to recover maintenance arrears in the May 2019 application, as this claim only arose after the 2023 Judgment.

5.12 Counsel submitted that the Court held as it did, by inferences made by the Judge in the August, 2023 Judgment, at page J97 and J98, appearing at page 367 of the Record of Appeal at lines 1 to 4 thereof. Counsel conceded that the findings and/or comments by the earlier Judge were prompted by the fact that the Appellant, in her final submissions dated 8th June, 2023, filed in the Court below, prior to the judgment, did erroneously address the Court on the payment of backdated maintenance despite the same not having been clearly pleaded before Court.

5.13 Counsel submitted that courts are restricted from making pronouncements on upleaded matters. That the issue of payment of lump sum arrears for the period 2019 to July 2023 not having been pleaded, the Court could not determine it.

5.14 That fact was duly acknowledge by the Judge in the August, 2023 Judgment at page J99 appearing at line 5 of page 369 of the Record of Appeal; and that he referenced the case of **Kabwe Kisembo v. Georgina Kisembo**[4], where the Supreme Court faulted the trial Court for awarding maintenance arrears from the date of filing the petition for divorce; as that was contrary to what the Respondent had requested for.

5.15 Counsel contended that the Court below refused to pronounce itself on the issue of backdated maintenance and/or maintenance arrears for the period June 2019 to July, 2023 despite the Appellant including the same in her submissions to the Court, as the Court's hands were tied due to the unpleaded matter.

5.16 That Hon. Mrs. T. S. Musonda fell into grave error when she held that the issues raised had already been adjudicated upon, by Judge Mulife. That the issue raised in the application not having been determined before, the Appellant was right to apply as she did.

5.17 Submitting under ground 2, counsel proffered the same arguments as in ground one, but stated that the learned Judge considered the Appellant's erroneous submissions in their final submissions. That the comments the Court made on this were *obiter dicta*; as he was restricted to pronounce a decision on the pleaded reliefs in the May 2019 application.

5.18 Counsel referred us to the authors of Black's Law Dictionary, 9th Edition for the definition of *obiter dicta*, as well as the case of **Mohandes Issardas v. A. N. Sattanathan Air Capital[5].**

5.19 That the comments of the Court are not binding and do not constitute a decision made on the relief for backdated maintenance, because the same was not pleaded.

5.20 Under ground three, the lower Court was faulted for condemning the Appellant in costs. To augment, our attention was called to the case of **Collet v. Van Zyl Brothers Limited[6]**, where the Court guided that costs are in the discretion of the Court, but such discretion should be exercised judicially.

5.21 We were urged to review the order for costs in view of the arguments that the matter is not *res judicata.*

5.22 Counsel prayed that we find for the Appellant.

6.0 **ARGUMENTS IN OPPOSITION**

6.1 The Respondent, with leave of the court, filed his Heads of Argument on 17th April, 2025.

6.2 The Respondent was of the view that, the lower Court was on firm ground in holding as it did.

6.3 In arguing ground one, Counsel averred that the plea for payment of a lump sum could not be heard by the lower Court as the same was *res judicata.*

6.4 Counsel went on to state what purpose *res judicata* serves, namely that it ensures finality in litigation, prevents the same parties from relitigating matters that have been consciously determined in proper proceedings. That Black's Law Dictionary 6th Edition, at page 1305 and 1306 defines the doctrine of *res judicata* as;

> *"***A matter adjudicated, a thing judiciously acted upon or decided, a thing settled by judgment. The sum and substance of the ... rule is that a matter once judiciously decided, is finally decided.***"*

6.5 That this rule was also pronounced in the case of **Hamalambo v Zambia National Building Society**[7]. To augment further, the Respondent adverted to Black's Law Dictionary, 11th edition on pages 1567, where it is stated that res judicata means:

> **"a thing adjudicated which includes**
>
> **i. An issue that has been definitely settled by judicial decision.**
>
> **ii. An affirmative defence barring the same parties from litigating a second law suit in the same claim, or any law claim arising from the same transaction or series of transactions and that could have been but not raised in the first suit".**

6.6 It was Counsel's assertion that to prove *res judicata*, as discerned from the cited authorities, three essential elements must be proved, vis, an existence of an earlier decision in the issue, a final Judgment on the issue, and finally the involvement of the same parties, or parties in privity with the original parties. That *in casu*, the three elements have been

satisfied, as the plea for a lump sum was adjudicated upon in the earlier Judgment of 21st August, 2023.

6.7 Counsel quoted from page J98, paragraph 61 of the Judgment of the lower Court, where the learned Judge dealt with this issue, and ultimately declined to grant the plea for payment of a lump sum in arrears and stated inter alia that:

> **"... it is the Court's view that this is not an appropriate case in which to award maintenance arrears. Therefore the maintenance order shall take effect from the date of this Judgment".**

6.8 Counsel contended that this is a direct Ruling on the precise issue the Appellant later attempted to re-litigate through her application for a lump sum. That what happened was an attempt to circumvent *res judicata* by merely recasting the claim in a different form on reeling in alternative remedies based on the same underlying facts, a situation that Courts have consistently been against. To buttress, our attention was called to the case of **Guest & Another v Makinga & Another**[8], where the Supreme Court stated:

"The phrase res judicata is used to include two separate state of things. One is where a Judgment has been pronounced between parties and findings of fact are involved as a basis of that Judgment. All the parties affected by the Judgment are then precluded from disputing these facts in any ... that litigation between them. The other aspect of the term arises where a party seeks to set up facts which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising an issue which has been adjudicated upon, but it is convenient to use the phrase res judicata, as relating to position".

6.9 It was argued that the Appellant's arguments that she could not have raised the issue of compensation for the 4 year period because she did not know that Judgment would likely be passed after 4 years is fundamentally misplaced, and legally irrelevant to the application of *res judicata.* That the doctrine does not require parties to anticipate all possible issues at the outset of

litigation but rather, it bans re-litigation of matters that were actually determined in a final Judgment.

6.10 Regarding the fact that Courts are restricted to adjudicate only on specifically pleaded issues, it was Counsel's contention that, while that is true, Courts possess inherent jurisdiction to address matters that arise naturally and necessarily from the issues before them. Reference was made to the case of **Million Hamung'ande & Others v Mulopa**[9] where the Court held that

> **"... the plea of res judicata applies except in special cases, not only to points in which the Court was actually required by the parties to form an opinion and produce a Judgment, but to every point which the parties, exercising reasonable diligence might have brought forward at the time.**

6.11 Based on the above, it was submitted that the Court was on firm ground when it upheld the Respondent's plea of *res judicata* and prayed that this ground be dismissed.

6.12 In opposing ground two, it was contended that the remarks by the learned Judge were not *obiter dictum*, but pronunciations on matters directly connected to the central dispute.

6.13 We were referred to the authors of Corpus Juris Secundum, Vol 21 where the concept of *obiter dictum* is discussed and was quoted extensively. Based on the quoted passage, Counsel contended that it was clear that the remarks made by the Judge were not *obiter dictum*, as they did not fall within the definition thereof.

6.14 That the determination was essential, to defining the scope of the Respondent's financial obligations and directly impacted the ultimate relief granted, as without such determination, the Judgment would have been incomplete.

6.15 The case of **Water Resources Management Authority v Chimsoro Farms Limited & 18 Others**[10] was cited where it was stated at page J10 that:

> **"we do not agree that the remarks were obiter dictum for the simple reason that reference to the Water Board as opposed to the Board of Authority is significant.**

The significance arises from what recourse the Respondent's would have. Therefore the Respondents cannot simply wish away the remarks of the Judge and consider them to be obiter dictum as they have a remarkable bearing on the process".

6.16 That the remarks of the lower Court at page J8 cannot be said to be *obiter dictum* as they had a bearing on the holding of the Court with respect to maintenance. That therefore the contention that the determination of the Court was merely *obiter dictum* is without merit.

6.17 That the Court's pronouncement regarding the four-year period was not a passing comment, or a judicial remark, but rather a substantive determination directly connected to the Appellant's maintenance application.

6.18 Regarding ground three, it was contended that the Court was on firm ground when it condemned the Appellant in costs. That the principle governing costs in a civil matter is that **"costs follow the event"** and it recognises that a successful party should not be left out of pocket for having to vindicate

their legal rights of defence against unmeritorious claims. The case of **Zyambo v Ntharzy**[11] was referenced in support.

6.19 That the award of costs by the Judge below fell within the range of reasonable outcomes and represented a proper exercise of judicial discretion. That the cost award was a logical and reasonable consequence of the Appellant's unsuccessful attempt to re-litigate a decided issue.

6.20 We were urged to affirm the lower Court's decision and dismiss the appeal with costs.

7.0 ARGUMENTS IN REPLY

7.1 The Appellant filed arguments in reply, with leave of Court. We have noted these arguments, which in our view are in no way a departure from the Heads of Argument filed earlier. We do not intend to reproduce them, suffice to state that we will refer to them as and when need arises.

8.0 HEARING

8.1 The matter was heard on 23rd April, 2025. Counsel for each party relied on the filed process with brief oral argumentation.

9.0 **ANALYSIS AND DECISION**

9.1 We have carefully considered the record of appeal, the grounds of appeal and the parties' Heads of Argument.

9.2 The Appellant contends that the words of the learned Judge in the August, 2023 decision were *obiter dicta*, as regards the issue of payment of the lump sum which was not pleaded.

9.3 It is our view that both grounds 1 and 2 ought to be determined together as they are inter linked. We will proceed thus, while ground 3 will be tackled on its own.

9.4 The issue for consideration is whether the matter that confronted the learned Judge in the lower Court was *res judicata.*

9.5 In ground one, the Appellant is riled by the lower Court's holding that the matter before her was *res judicata*, because in the Judgment of August, 2023, the issue of payment of a lump sum for the expenses incurred by the Appellant during the period 2019 to 2023 when the Respondent stopped paying school fees and maintenance for the child while the matter was in Court, was adjudicated upon.

9.6 The Appellant argues that the matter was not *res judicata*, as the issue of payment of the lump sum for unpaid maintenance and school fees was not pleaded in the lower Court. Further that even though the lower Court, in the August 2023 Judgment commented on this issue, his remarks were *obiter dicta*, and arise as a result of the Appellant having inadvertently made submissions on it in its written submissions to the Court, as it determined the matter, which culminated in the August 2023 Judgment.

9.7 The Respondent on the other hand agrees with the lower Court that the matter was indeed *res judicata*, as it fell within the definition thereof. That the Appellant merely recast her claims in a different form and was seeking alternative remedies based on the same underlying facts.

9.8 That the Appellant's attempts to characterise the subsequent application as distinct because it specially sought a "lump sum" is precisely such an impermissible recasting of a decided claim.

9.9 On the issue of *obiter dicta*, while agreeing on the issue of Courts being restricted to pleadings as they adjudicate, it was

contended that Courts possess jurisdiction to address matters that arise naturally from the issues before them.

9.10 That the remarks by the learned Judge in the August 2023 Judgment were not *obiter dicta*, but pronouncements on a matter that was directly connected to the central dispute.

9.11 The issue of *res judicata* has in a plethora of cases, been thoroughly interrogated. In the early case of **Henderson v Henderson**[12], cited by both parties, it was held that:

> **"... the plea. of res judicata applies except in special cases, not likely to points on which the Court was actually required by the parties to form an opinion, and pronounce Judgment, but to every point which properly belonged to the object of litigation and which the parties, exercising reasonable diligence might have brought at the time."**

9.12 As regards the rationale for the doctrine of *res judicata*, the case of **S. P. Mulenga & Associates International and Another v First Alliance Bank Zambia Limited**[13] provides insight, where the Court stated that:

"We wish to make it plain that res judicata means that an issue has been adjudicated upon. The rationale for res judicata is that there must be an end to litigation. Its purpose is to support the good administration of justice in the interest of both the public and litigants by preventing abusive and duplicative litigation. The twin principles of res judicata are often expressed as being:

(i) The public interest that Courts should not be clogged by re-determination of the same disputes and;

(ii) The private interest that it is unjust for a man to be vexed twice with litigation in the same subject matter.

It is critical therefore that the parties to litigation bring forward their whole case at once".

9.13 In the case of **Societe Nationale Des Chenus De Pur Du Congo v Joseph Nonde Kasonde**[14] the Supreme Court had this to say on this issue:

"in the instant case, we agree with Mrs. Chisanga that the issue between the Plaintiff and the Defendant in the Industrial Relations Court was one of his terminal dues. Terminal dues included gratuity and monthly salary used to calculate it. The Plaintiff had an

opportunity in the Industrial Relations Division to litigate at once, both on the monthly salary, and the amount of gratuity. The two are clearly related."

9.14 Reverting to the facts of this case, it is our view that the lower Court was on firm ground when it considered the matter before her to be *res judicata.* The Appellant, as on the cited authority had an opportunity to bring before the learned Judge, the issue of the lump sum payment, as the issue before the Registrar from which the appeal leading to the August 2023 Judgment emanated, was pleaded. This issue is closely related to what was pleaded.

9.15 We have not lost sight of the contention by the Appellant, that they could not have anticipated that the Respondent would default in paying maintenance during the period 2019 to 2023.

9.16 At paragraph 6.63, page J99 of the Judgment of August 2023, page 369 of the Record of Appeal, the learned Judge stated thus;

"In any case, though this appeal is a rehearing which allows parties to adduce additional evidence..."

9.17 As the learned Judge rightly observed, an appeal from a decision of the Deputy Registrar is a rehearing, and the parties are allowed to adduce additional evidence. At that time, when the parties appeared before the learned Judge, leading to the August 2023 Judgment, the Appellant had an opportunity to bring the issue of the lump sum payment, as at that time the Respondent had already defaulted.

9.18 Further, at page 374 of the Record of Appeal, Counsel for the Appellant informed the Court that the matter before Court was scheduled for hearing of the application for the maintenance of the child of the family. The issue of the payment of the lump sum arrears properly belonged to the subject of litigation, and had the Appellant exercised reasonable due diligence, she could have brought it at the same time.

9.20 Our view is that the lower Court was on firm ground in holding as she did, and we find no merit in this limb of the appeal.

9.21 As regards the issue of *obiter dictum*, we agree with both Counsel on the meaning thereof as expressed in their

submissions, and we do not intend to say anything further on it, as it is trite.

9.22 At paragraph 6.62 pages J98 to J99, at page 369 Record of Appeal, the learned Judge had the following to say:

> **"Looking at the circumstances that led to the Respondent to discontinue making contributions to the maintenance of the child of the family, it is this Court's view that this is not an appropriate case in which to award maintenance arrears. Therefore, the maintenance order shall take effect from the date of this Judgment."**

9.23 It is apparent from the above quotation that the learned Judge made a determination, and thus his remarks do not fall within the definition of *obiter dictum.* They cannot, by any stretch of the imagination, be said to be remarks or opinion uttered as a by the way. We agree that the determination was essential to defining the scope of the Respondent's financial obligations and directly impacted the ultimate relief granted.

9.24 We therefore, do not find merit in these two grounds and they are dismissed.

9.24 As regards ground three, the law is clear that the grant of costs is in the discretion of the Court. Costs would normally follow the event. In the cited case of **Collet v Van Zyl Brothers Limited**[6], it was made clear that the award of costs in an action is at the discretion of the trial Judge, though such discretion has to be exercised judiciously.

9.25 In the case before us, the lower Court had found for the Respondent, stating that the Applicant's case was *res judicata* and an abuse of Court process. The Respondent had to expend resources to defend the case in the lower Court, which ultimately turned out to be without merit. We thus find no merit in ground three.

10.0 **CONCLUSION**

10.1 In conclusion, it is our holding that the matter before the lower Court was:

(1) *res judicata*,

(2) that the holding or remarks of the Judge in the August 2023 Judgment were not *obiter dicta.*

10.2 Finally, that the grant of costs to the Respondent was appropriate in view of the final determination of the case.

10.3 All the grounds of appeal lack merit and are dismissed.

10.4 Costs in this Court and in the Court below are for the Respondent, to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL JUDGE

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE