

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 279/ 2023
HOLDEN AT KABWE**

(Civil Jurisdiction)



B E T W E E N:

KANGWA MUSENGA (*Sued in his capacity as
National Secretary of Professional Teachers
Union of Zambia*) **1ST APPELLANT**

**PROFESSIONAL TEACHERS UNION OF
ZAMBIA TRUSTEES** **2ND APPELLANT**

**PROFESSIONAL TEACHERS UNION OF
ZAMBIA** **3RD APPELLANT**

AND

VICTOR MUYUMBA **1ST RESPONDENT**

ALBERT MUYUMBE **2ND RESPONDENT**

CHARITY KAMPAMBA TEMBO **3RD RESPONDENT**

MARY SIYANDA MUSONDA **4TH RESPONDENT**

CLIFFORD MALUTI **5TH RESPONDENT**

CORAM: Chashi, Makungu and Banda-Bobo, JJA

ON: 21st May 2025 and 11th February 2026

For the Appellant: L.M Chikuta, Messrs L.M Chikuta, Legal Practitioners

For the Respondent: M.S Musonda (Ms), Messrs Likando Kalaluka & Co, Legal Practitioners

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. *BP Zambia Pic v Interland Motors Limited (2001) ZR, 37*
2. *Henderson v Henderson (1843) 3 Hare 100, 67 ER, 313*
3. *Kelvin Hang'andu & Co. v Webby Mulubisha (2008) ZR, 82*
4. *Pettit v Dunkey (1971) 1 NSWLR, 376*
5. *Arnold v National Westminster Bank Plc (1975) 2 AC, 93*
6. *Zambia Seed Co. Ltd v West Co-up Haulage Ltd and Another - SCZ Appeal No. 112 of 2013*
7. *S.P. Mulenga Associates International & Another v First Alliance Bank Zambia Limited (SCZ Appeal No. 123 of 2013)*

Other works refereed to:

1. *Black's Law Dictionary, 10th Edition*

1.0 INTRODUCTION

- 1.1 This is an appeal against the Ruling of Hon. Mrs Justice Ruth Chibbabbuka, delivered on 13th February 2023. In the Ruling, the learned Judge dismissed the Appellant's

application to strike out the Respondent's action for being *res judicata* and an abuse of court process.

2.0 BACKGROUND

- 2.1 The Respondents, as plaintiffs in the court below, commenced an action by writ of summons on 6th July 2016, seeking various reliefs related to their former positions within the 2nd and 3rd Appellants. These included gratuity payments, vehicle entitlements and outstanding dues.
- 2.2 On 22nd June 2022, the Appellants applied to dismiss the action on the grounds of multiplicity of actions and abuse of court process. They argued that the Respondents had previously instituted proceedings under Cause No. 2016/HP/1338, in which they challenged the validity of the Quadrennial Elective Conference held on 22nd June 2016, which culminated in their removal from office.
- 2.3 In that regard, the Appellants submitted that in a ruling delivered on 4th October 2016, Bowa J, dismissed Cause No. 2016/HP/1338 for being an abuse of court process. It was contended that the present action arises from the

same set of facts as the earlier proceedings and that the Respondents ought to have raised all related claims therein. As such, it was argued that the present action was *res judicata* and constituted piecemeal litigation.

2.4 In response, the Respondents argued that the present claims are materially distinct from those in Cause No. 2016/HP/1338, which sought to nullify an election. They maintained that the current action relates to entitlements allegedly accrued during their tenure in office and do not challenge the validity of the election. They further submitted that the earlier action was dismissed on the basis that it sought to enforce a ruling of another court, rather than on the similarity of claims and that no concurrent proceedings existed so as to constitute an abuse of court process.

3.0 RULING OF THE COURT BELOW

3.1 Upon considering the application and the arguments from both parties, the learned Judge noted that while the Appellants acknowledged that the reliefs sought in the present action differed from those in Cause No.

2016/HP/1338, they argued that both actions arose from the same facts and that those facts had already been litigated, rendering the present action *res judicata*. In addressing this argument, the Judge relied on **Black's Law Dictionary**¹ definition of *res judicata* and the essential elements:

“An issue that has been definitely settled by judicial decision. An affirmative defense 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 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.”**

3.2 Applying the above principles, the learned Judge held that Cause No. 2016/HP/1338 was dismissed because it improperly sought to enforce a ruling of the Industrial Relations Court in Cause No. APP/IRC/KL 10/2016,

rather than on the substantive merits of the claims now being pursued.

- 3.3 The Judge further observed that while the claims in Cause No. 2016/HP/1338, were similar to those in Cause No. APP/IRC/KL 10/2016, the present claims relate to benefits allegedly accrued by the Respondents during their tenure in office, which were not determined in the earlier action. On that basis, she concluded that the doctrine of *res judicata* was inapplicable.
- 3.4 Regarding the Appellants' contention that the Respondents had slept on their rights, the learned Judge held that although *res judicata* may extend to matters that ought to have been raised, the Appellants had not shown that the present claims arose from the same cause of action as Cause No. 2016/HP/1338.
- 3.5 The learned Judge also found that the application to strike out had not been brought timeously. She observed that the action was commenced on 31st August 2017, with default judgment entered on 6th November 2017 and later set aside and that the Appellants filed their defence on 26th

December 2017, yet only sought dismissal of the action on 22nd June 2022. The learned Judge held that the delay contravened equitable principles, particularly the maxim “*he who comes to equity, must come with clean hands.*” She accordingly dismissed the application with costs to the Respondents.

4.0 THE APPEAL

4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court, advancing two grounds of appeal couched as follows:

- 1. The court erred in law and fact when she ruled that the matter was not res judicata otherwise an abuse of court process on the premise that the claims before her were not res judicata but that a judgment on merits as regards the claims is essential contrary to settled principles of res judicata and the evidence on record.**
- 2. The court erred in law and fact when she failed to adjudicate on the Appellant’s assertions that the Respondents neglected and/or failed to make the**

said claims in cause No. 2016/HP/1338 when the evidence on record showed that at all material times, the Respondents were aware of the said claims but chose not to pursue the said claims at their own peril.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 At the hearing on 21st May 2025, in Kabwe, Mr Chikuta, Counsel for the Appellants, relied on the heads of argument dated 28th August 2023, which he augmented with brief oral submissions. Counsel submitted that pages 205 – 215 of the record of appeal (the record) reveal that the present action stems from matters already adjudicated upon in 2016 before another court, involving the same parties, wherein the Respondents challenged elections conducted by the 3rd Appellant. It was argued that, notwithstanding the fact that any entitlement to separation benefits had already accrued at the time they ceased to hold office, the Respondents elected not to pursue such claims in those proceedings. According to

Counsel, the present action amounted to piecemeal litigation and an abuse of court process.

- 5.2 Relying on **Black's Law Dictionary**¹, **BP Zambia Plc v Interland Motors**¹, and **Henderson v Henderson**², Counsel contended that the doctrine of *res judicata* extends not only to matters actually determined, but also to matters which ought to have been raised in earlier proceedings but were not, whether through negligence or oversight. It was submitted that although the learned trial Judge correctly acknowledged this principle, she failed to apply it to the facts of the present case.
- 5.3 Counsel argued that the present action introduced no new issues and that the Respondents' right to claim separation benefits arose contemporaneously with their removal from office. The evidence, it was submitted, demonstrated that the Respondents were fully aware of these facts during the earlier proceedings. In those circumstances, the learned Judge erred in failing to give proper effect to the principle that all related claims arising from the same cause of action ought to be litigated in a single proceeding to avoid

forum shopping, as emphasized in **Kelvin Hang'andu & Co. v Webby Mulubisha**³.

5.4 Building on that submission, Counsel contended that the Respondents expressly admitted in their affidavit that they were aware of the claims they now seek to enforce but elected not to pursue them in the earlier proceedings. It was further submitted that this omission was repeated in both Cause No. 2016/HP/1338 and Cause No. APP/IRC/KL 10/2016, despite allegations that such entitlements had already accrued.

5.5 The learned Judge, it was argued, failed to adequately interrogate this admission when determining the application on abuse of court process. Had the court done so, it would have concluded that the Respondents' conduct amounted to piecemeal litigation. Reliance was placed on **Pettit v Dunkey**.⁴

5.6 Counsel further submitted that, contrary to standard practice, the Respondents did not plead separation benefits as an alternative remedy in the earlier proceedings. That their focus on challenging the elections

demonstrated an unwillingness to address all foreseeable legal outcomes and resulted in their failure in prior cases. According to Counsel, the present action was therefore an afterthought. Citing **Zambia Seed Co. Ltd v West Co-up Haulage Ltd**⁵, Counsel argued that the Respondents acted in bad faith by withholding part of their case and engaging in fragmented litigation, conduct which amounts to *res judicata* or at the very least, an abuse of court process.

5.7 Finally, Counsel invoked the equitable maxim that equity aids the vigilant and not those who sleep on their rights. It was submitted that the Respondents failed to act with due diligence by neglecting several opportunities to advance all their claims in the earlier proceedings and now unjustly seek a second bite at the cherry. On the basis of these submissions, this Court was urged to allow the appeal.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 At the time we heard the appeal, the Respondents had not filed their heads of argument. We therefore gave the following directive: “*The Respondents are to file and serve their heads of argument, within the next thirty (30) days*”

from the date hereof. The Appellants will be at liberty thereafter to file their arguments in reply. Judgment to be delivered on a date to be notified to the parties.”

6.2 At the time of writing this Judgment, our directives had not been adhered to.

7.0 ANALYSIS AND DECISION

7.1 We have carefully considered the record, the Ruling of the lower court and the arguments by the Appellants. The main issue for determination is whether the learned trial Judge erred in holding that the doctrine of *res judicata* and abuse of court process were inapplicable in the circumstances of this case.

7.2 The Appellants' primary contention is that the claims now advanced by the Respondents ought to have been raised in Cause No. 2016/HP/1338 and that their failure to do so rendered the present action *res judicata* or an abuse of the court process. The lower court found that, although there had been prior proceedings involving similar parties and events, the claims in that action were confined to the legality of an election and were dismissed as an abuse of

process for attempting to enforce a ruling of another court. More importantly, there was no final determination on the merits of the present claims, which relate to gratuity, vehicle entitlements and allowances.

7.3 We are inclined to agree with the reasoning and conclusion of the lower court. It is well established that *res judicata* operates to bar re-litigation of claims where the matter has already been adjudicated upon with finality on the merits. In **S.P. Mulenga Associates International & Another v First Alliance Bank Zambia Limited**⁶, the Supreme Court emphasised the rationale of the doctrine in the following terms:

"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 the litigants by preventing abusive and duplicative litigation. The twin principles of res judicata are often expressed as being: (1) the public

interest that courts should not be clogged by redeterminations of the same disputes and (2) the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is critical, therefore, that parties to litigation bring forward their whole cases at once."

7.4 Additionally, **Black's Law Dictionary**¹ defines *res judicata* as comprising three essential elements that ought to be satisfied: a prior decision on the same issue, a final judgment on the merits and the involvement of identical parties or those in privity.

7.5 While the principle discourages piecemeal litigation, it presupposes that the claims now being advanced arise from the same cause of action and that it could reasonably have been included in the earlier action. However, as the trial court rightly observed, Cause No. 2016/HP/1338, was not determined on its merits but was dismissed as an abuse of court process. It therefore failed to satisfy one of the essential elements of *res judicata*, a final judgment on the merits.

- 7.6 The Appellants' argument rests on a broad application of the doctrine of *res judicata*, suggesting that all claims arising from the same facts must be raised together, failing which the right to litigate is lost. However, courts must be cautious not to stretch the doctrine of *res judicata* to a point where it unjustly bars legitimate claims or undermines access to substantive justice, particularly where prior proceedings involved different legal issues or reliefs.
- 7.7 In **BP Zambia Plc²**, the Supreme Court reaffirmed the principle that:
- “A party with a dispute with another over a particular subject cannot be allowed to deploy his grievances in piecemeal in scattered litigation and keep on hauling the same opponent over the same matter.”**
- 7.8 In the present case, however, the claims pursued by the Respondents are distinct and arise from entitlements accruing from their tenure in office, rather than from the electoral dispute that formed the subject of the earlier

proceedings. The Appellants failed to demonstrate that the claims now advanced were founded on the same facts as those in the prior proceedings. Accordingly, the present action cannot properly be characterised as piecemeal litigation in the sense contemplated in the **BP Zambia Plc** case. Moreover, the mere delay in raising these claims does not, of itself, amount to an abuse of court process, particularly where the earlier matter was dismissed without consideration of the merits as the Respondents could not have obtained any of the remedies now sought in that case.

7.9 Furthermore, the timing of the Appellants' application is concerning. While they had ample opportunity to raise the objection following the setting aside of the default judgment in 2017, they waited for about 5 years until 2022 to do so. This delay undermines the seriousness and credibility of their claim and supports the trial court's reliance on equitable principles. This delay appears more strategic and an attempt to frustrate proceedings rather than assert a genuine jurisdictional issue. Accordingly, we find no fault in the trial court's determination that the doctrine of *res*

judicata did not apply and that the matter deserved to be heard on its merits.

8.0 CONCLUSION

8.1 The appeal lacks merit and is accordingly dismissed.

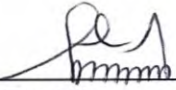
8.2 Costs to the Respondents. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



C.K. MAKUNGU
COURT OF APPEAL JUDGE



A.M BANDA - BOBO
COURT OF APPEAL JUDGE