

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 309/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

**EMERGENCY RESPONSE ZAMBIA LIMITED
ROSANNA MARY NYENDWA SAMMON
CONSTANTINE MALAMA**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

AND

**BETTERNOW FINANCE COMPANY LIMITED
INDE CREDIT COMPANY LIMITED**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.

On 27th March, 2024 and 9th April, 2024.

For the Appellants: Mrs. S. Kalima-Banda – Messrs. J & M Advocates

For the 1st Respondent: Mr. T. Chibeleka – Messrs. ECB Legal Practitioners

For the 2nd Respondent: Mr. Y. S. Simukonda – Messrs. Noel Simwanza Legal Practitioners

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kakonde SCZ Selected Judgment No. 19 of 2013*
2. *Henderson vs Henderson [1843-1860] All ER 378*
3. *Bank of Zambia vs Tembo & Others SCZ Judgment No. 24 of 2002*
4. *Hussein Safieddinne vs The Commissioner of Lands and Others – SCZ Selected Judgment No. 36 of 2017*
5. *Million Hamung'ande & Others (unreported) – Appeal No. 84/2019*
6. *Colgate Palmolive (Z) Limited vs Shemu & Others SCZ No. 11 of 2005*
7. *Salomon vs Salomon & Co. Limited [1897] AC 22*
8. *Macaura vs Northern Assurance Co. Limited [1925] AC 619*
9. *Adams vs Cape Industries Plc [1991] 1 All ER 929.*
10. *S.P. Mulenga Associates International & Another v First Alliance Bank Zambia Limited Appeal No. 244/2020*

Other works referred to:

1. *Halsbury's Laws of England, Volume 16 (4th Edition)*
2. Dr. P. Matibini, *Zambia Civil procedure: Commentary and Cases* Volume 1

1.0 INTRODUCTION

- 1.1 This is an appeal against the Ruling of the Honourable Mr. Justice K. Chenda, High Court Judge- Commercial Division in which he dismissed the appellants' case for being *res judicata*.

2.0 BACKGROUND TO THE DISPUTE IN THIS APPEAL

- 2.1 The brief background to the matter is that the appellants (the plaintiffs in the Court below) commenced a matter seeking among other reliefs: An order that the judgment obtained against them under cause number 2021/HKC/019 is in the name of the 1st respondent (the 1st defendant in the Court below) and the execution of the said judgment by the 2nd respondent was fraudulent and illegal; An order that the purported Restructured Financing Agreement executed between the 1st appellant and the 2nd respondent is null and void on account of fraud, misrepresentation and deceit; An order that the 2nd respondent had no *locus standi* or right at law by which it could enforce the judgment under 2021/HKC/019 or sell the 2nd appellant's property known as Stand 6543 Mumana Road, Olympia Lusaka.
- 2.2 The respondents made an application to dismiss the action for being a multiplicity of actions and abuse of court process. The basis of the application by the respondents was that there was a mortgage action in which the issues pleaded by appellants were settled by judgment dated 17th May, 2022 under cause number 2021/HKC/019. That the subject matter under that cause was a

Revolving Invoice Discounting Facility executed between the 1st respondent and the 1st appellant under which the appellants were indebted to the 2nd respondent in the sum of US\$111,997.64.

2.3 That the facility made in favour of the 1st appellant was secured by Stand 6543 Lusaka and guaranteed by the 2nd and 3rd appellants who are the company directors. The appellants failed to pay the outstanding amounts despite further extensions. That the Court under cause number 2021/HKC/019 entered judgment in favour of the respondents and ordered that the respondents were at liberty to foreclose on the secured property and had the right of sale.

2.4 It was contended that following the judgment in that action, the respondents, issued a writ of possession which was executed on 2nd September, 2022 and which effectively entitled them to a right of sale as mortgagee in possession.

2.5 Being dissatisfied with the Judgment in the mortgage action the appellants appealed to this Court but the appeal was dismissed when the application for extension of time within which to file the record of appeal was dismissed.

- 2.6 It was contended that the appellants could have raised the issues raised in the Court below in the mortgage action under cause 2021/HKC/019.
- 2.7 The appellants contended that the issues raised in the Court below were not settled in the judgment of the mortgage action under cause number 2021/HKC/019 because the issue of the respondents being two separate entities was not addressed. That in any event, the issues relating to fraudulent misrepresentation were also not settled. That in addition, the issue that needs to be adjudicated upon is how the 1st appellant became indebted to the 2nd respondent for a facility that was executed between the 1st appellant and the 1st respondent. That the appellants did not seek the lower Court to delve into the judgment in the mortgage action because the subject matter of the current action was the fraudulent misrepresentation made by the respondents in the first action. That the fraudulent misrepresentation arose because the 2nd respondent contended that it was a mortgagee in possession when in fact the appellants did not enter into the agreement with the 2nd respondent.

3.0 DECISION OF THE LOWER COURT

3.1 After considering the arguments from both sides, the lower Court dismissed the action for being *res judicata*. It was of the view that the matter was a desperate and ingenious attempt by the appellants to escape their undisputed liability for the secured facilities obtained by the 1st appellant. That it was clear that after the failed appeal process in the mortgage action, the action in the Court below was commenced as a plan against fulfillment of the judgment in the mortgage action. The Court below was further of the view that the appellants could have raised the issues in the mortgage action rather than raise them after receiving an unfavourable judgment.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling of the Court below, the appellants launched an appeal in this court advancing the following three grounds of appeal-

- 1. *The learned Puisne Judge erred in law and fact when he held that the matter before him under cause number 2022/HPC/0715 was res judicata and that the issues raised in the new matter should have been raised in cause 2021/HKC/019 without taking into account that the new matter pleads misrepresentation and fraud***

which were only discovered after the judgment in cause 2021/HKC/019;

2. *The learned Puisne Judge erred in law and fact in his application of res judicata as a basis for dismissing the action; and*
3. *The learned Puisne Judge erred in law and fact when he misconstrued the facts of this case and failed to appreciate that new facts had come to the appellants' knowledge only after the judgment in cause 2021/HKC/019.*

5.0 THE ARGUMENTS

5.1 Both sides filed Heads of Arguments into Court. In support of ground one of the appeal, Counsel for the appellants submitted that the Court below made blatant error by finding that the matter before him, that is, cause number 2022/HPC/0715 was *res judicata* because the facts upon which this matter was premised were not known to the appellants until after the Judgment in cause 2021/HKC/019.

5.2 In support of this argument, reference was made to the learned authors of ***Halsbury's Laws of England Volume 16 (4th Edition)***, **page 861** where the learned authors explain the application of the doctrine of *res judicata* that it applies to all

matters which existed at the time of rendering judgment, and which the party had an opportunity to bring before the Court.

5.3 Reference was also made to the case of ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kakonde***¹ in which the Supreme Court made the observation that *res judicata* extends to the opportunity to claim matters which existed at the time of instituting the first action and giving judgment.

5.4 It was submitted that the mortgage action under cause 2021/HKC/019 was commenced by a singular party, namely Betternow Finance Company Limited trading as Inde Credit Company Limited, which denoted a singular existence. That in their communication, the 1st respondent consistently represented to the appellants that they were a single entity which at times traded as Inde Credit Company.

5.5 It was submitted that since March 2021, the respondents have insisted that they are two separate entities and the 2nd respondent attempted to enforce the judgment in the first action. That this is despite the fact that the security agreement was signed on 5th January, 2020 before the 2nd respondent received authorization from the Bank of Zambia to act as a financial service provider.

- 5.6 Counsel invited the Court to take judicial notice of the fact that the Bank of Zambia took possession of the 1st respondent and declared it insolvent and in breach of the Banking and Financial Services Act.
- 5.7 In support of ground two of the appeal, it was submitted that the Court below erred in its application of the principles of *res judicata* and in dismissing the action. In making reference to the cases of ***Henderson vs Henderson***² and ***Bank of Zambia vs Tembo & Others***,³ Counsel argued that the respondent was cited differently in the mortgage action from the action which is subject of this appeal. That while in the mortgage action, the respondents appeared as a singular entity, they appeared as two separate entities in this matter. It was argued that the appellants could not have had an opportunity to raise the issues they raised in this matter as the issues only became apparent upon execution of the judgment.
- 5.8 In support of ground three, it was argued that the admission by the respondents on page 46 of the record of appeal that the respondents are two separate entities which operated under the 1st respondent's names, is inconsistent with the use of a trading name. That the use of a trading name is intended to apply to a

singular entity that conducts business under a name that is different to the one it is commonly associated with. Reference was made to the learned author of ***Zambian Civil Procedure: Commentary and Cases Volume 1*** where the learned author states that if a sole proprietor of a business is being sued, the claimant can either sue him in his own name with the words “trading as.”

5.9 It was argued that there was a clear inconsistency in the reasoning of the lower Court because the agreements in issue were executed when the 2nd respondent had no legal authority to do so, not having received its financial licence as provided for in Section 6 (2) of the Banking and Financial Services Act No. 7 of 2017.

5.10 Finally Counsel argued that had the appellants been aware of respondents’ position that the agreements were executed in favour of the 2nd respondent, as a separate entity, they would have raised the issue.

5.11 In response to the appeal, Counsel for the 1st respondent addressed the grounds of appeal collectively as they all bordered on the principle of *res judicata*.

5.12 Counsel referred to various cases on this principle which included: ***Hussein Safieddinne vs The Commissioner of Lands***

and Others,⁴ Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kakonde (supra) and **Henderson vs Henderson** (supra).

5.13 Counsel submitted that in order for the defence of *res judicata* to succeed, it is necessary to show that not only was the cause of action the same but the plaintiff had an opportunity of recovering that which he seeks to recover in the second action. That the lower Court, at pages 15 to 17 of the Ruling considered whether the alleged misrepresentation, fraud or deceit could have been raised in the mortgage action or not.

5.14 That the Court concluded that the appellants could have raised these issues in the mortgage action as the appellants were aware of the evidence they intended to raise in the action. Counsel argued that the appellants' argument that the issues raised only came to the fore at the time of execution of the judgment in the first action does not have merit and should be dismissed.

5.15 With regard to the argument that the parties under the two causes are cited differently, Counsel argued the claim in both causes stem from the Security Agreements and the Discounting Facility and is the same subject matter. That therefore the appellants ought to

have been aware that the respondents are two separate legal entities.

5.16 Lastly, it was submitted that this Court should uphold the Ruling of the lower Court.

5.17 Counsel for the 2nd respondent referred us to the cases of **Million Hamung'ande & Others**⁵ (unreported) and **Bank of Zambia vs Jonas Tembo & Others** (supra) where the term *res judicata* was defined. It was submitted that the subject matter of the two actions was the same because documents which the respondents relied on in the application to dismiss the action are the same documents that formed the basis of the mortgage and the action in the Court below. That these documents show that the appellants entered into an agreement with the 2nd respondent who disbursed the sum of US\$85,000.00. That further, the documents also show that the amount was disbursed by the 2nd respondent and the facility was secured by Stand No. 6543 and guaranteed by the 2nd and 3rd appellants.

5.18 In relying on the case of **Colgate Palmolive (Z) Limited vs Shemu & Others**⁶ it was argued that the documents produced were what formed the entire transaction between the parties and therefore

the appellants cannot be heard to have discovered new matters after the judgment.

5.19 It was argued that the appellants could have raised the issues of fraudulent misrepresentation which they raised in the Court below, in the mortgage action. That allowing the action in the Court below would be contrary to the principle in the case of ***Societe Nationale Des Chemis De Pur Congo (SNCC) vs Joseph Nonde Kakonde*** (supra) that it is unjust for a man to be vexed twice with litigation in the same subject matter.

5.20 Counsel for the appellants filed heads of argument in reply to the respondents' heads of argument. The contents were not substantially different from the heads of argument filed on behalf of appellants. Save to submit that that no matter the familiarity between two companies, they ought to be treated as individual entities. To support this argument, we were referred to the cases of ***Salomon vs Salomon & Co. Limited***,⁷ ***Macaura vs Northern Assurance Co. Limited***⁸ and ***Adams vs Cape Industries Plc***⁹. It was argued that there should be a justifiable reason as to why the liabilities and interests of one company should be applied to another separate entity.

5.21 It was argued that while the documents adduced in the two actions were the same, the appellants' knowledge of the respondents' business relationship was completely different.

6.0 THE HEARING

6.1 At the hearing of the appeal, both parties relied on the heads of argument filed into Court and augmented with brief oral arguments. Counsel for the appellants submitted that the basis of the finding that the matter is *res judicata* was that the documents in the current action were also adduced in the mortgage action. That however, the respondents were trading as a single entity, as having a trade name presupposes oneness. That the separateness of the two entities only became apparent at the time the judgment was executed. Counsel argued that it is for this reason that this issue could not have been raised in the mortgage action.

6.2 Counsel for the 1st respondent submitted that the appellants contracted a debt which they failed to pay and as such they cannot dispute the debt by questioning the *modus operandi* of the respondents. That in any event, the issue of the respondents operating contrary to the Banking and Financial Services Act was

not canvassed in the Court below and therefore cannot be raised in this Court.

- 6.3 Counsel for the 2nd respondent submitted that the appellants had an opportunity to interrogate the separateness of the respondents and their trading capacity but they did not do so.

7.0 DECISION OF THIS COURT

- 7.1 We have carefully considered the record of appeal, the grounds of appeal and the Judgment appealed against. The grounds of appeal advanced by the appellants all relate to the lower Court's finding that the action in the Court below was caught up by the principle of *res judicata*. We will deal with the grounds of appeal together as they are intertwined.

- 7.2 The principles of *res judicata* are well established. The Supreme Court of Zambia in the cited case of ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs. Joseph Nonde Kakonde*** made the following observation:

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

7.3 In the case of ***Henderson vs. Henderson*** (supra) the court discussed the principle of res judicata in the following terms:

“Where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires that the parties to that litigation 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 diligence, might have brought forward at the time.”

7.4 Therefore, the principle of *res judicata* is concerned with: (i) preventing a litigant from re-litigating issues; and (ii) preventing a litigant from hauling the same party to Court on issues which could or should have been raised in earlier proceedings.

- 7.5 The appellants have argued that in the first action which was the mortgage action, the respondents were singularly cited as ***“Better Finance Company Limited Trading as Inde Credit Company”*** while they are separately cited as the first and second respondents in the action which is subject of this appeal. The gist of Counsel’s argument was that the parties in the second action are different from the first action and that it is irregular for Inde Credit Company Limited to execute the Judgment in the first action because the agreement was between the appellants and the 1st respondent trading as the 2nd respondent.
- 7.6 We have perused the record and page 143 of the record of appeal shows that in the first action, the respondents appeared as ***“Better Finance Company Limited T/A Inde Credit Company Limited”***
- 7.7 However, Page 122 of the record of appeal shows a letter from the 1st appellant to the 2nd respondent in which the 1st appellant applied for a Revolving Invoice Discounting Facility from the 2nd respondent. Page 125 shows a restructured facility agreement between the 1st appellant and the 2nd respondent. On page 136 of the record of appeal is a letter from the 2nd respondent to the 1st appellant in which the 2nd respondent advised the 1st

appellant that it was prepared to restructure the 1st appellant's indebtedness. Page 142 of the record of appeal shows the 1st appellant's letter written by the 2nd appellant to the 2nd respondent requesting for an extension of payment of the outstanding amount.

- 7.8 The evidence highlighted above shows that the 2nd respondent was distinctly cited as "*Inde Credit Company Limited*" without a trade name. Therefore, the appellants knew or ought to have known that the respondents were two separate entities.
- 7.9 The question is whether the appellants had an opportunity to raise the issues in the mortgage action. Counsel for the appellants argued that the issues raised in the Court below could not have been raised in the first action because the appellants only became aware of the separateness of the two respondent companies after the judgment in the first action.
- 7.10 As already highlighted, the appellants ought to have known that the respondents were two separate entities, having entered into the agreement with the 2nd respondent in its own right. The appellants should therefore have raised misrepresentation and fraud in the first action, and having neglected to do so, they did it at their own peril.

7.11 Therefore, we are of the firm view that the lower Court was on firm ground when it found that the second action was caught up by *res judicata*.

7.12 In the case of **S.P. Mulenga Associates International & Another v First Alliance Bank Zambia Limited**¹⁰ we held that-

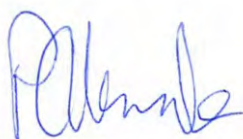
“We wish to make it plain that res judicata means that an issue has been adjudicated upon. The rationale for res judicata is that there must be an end to litigation. Its purpose is to support the good administration of justice in the interest of both the public and the litigants by preventing abusive 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 re-determinations 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.”

7.13 Therefore the rationale for *res judicata* is for the good administration of justice, to prevent abusive and duplicative litigation. It is in the interest of justice that parties should bring forward their whole cases at once to prevent hauling the same

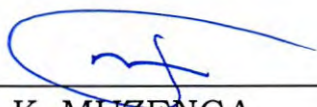
party over the same subject matter. The appellants should have addressed all their issues in the first action and having failed to do so, they cannot be given a second bite at the cherry.

8.0 CONCLUSION

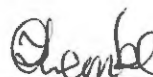
8.1 In view of the foregoing, the appeal lacks merit and it is accordingly dismissed. Costs shall be for the respondents, to be taxed in default of agreement.



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE