

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)**

2010/HPC/0766

BETWEEN:

ALLAN MULEMWA KANDALA

PLAINTIFF

AND

**ZAMBIA NATIONAL COMMERCIAL BANK PLC
DEFENDANT**

**Before the Hon. Mr. Justice A.M. Wood in Chambers this 28th day of
February, 2011**

**For the Plaintiff: Mr. Milner Katolo of Messrs. Milner Katolo &
Company**

**For the Defendant: Mr. G. Pindani of Messrs. Lewis Nathan
Advocates**

RULING

Cases referred to:

- 1. ANZ Grindlays Bank (Z) Limited V. Chrispin Kaoma (1995) S.J.
SCZ Judgment No. 12 of 1995**
- 2. Musakanya and Anor V. Attorney General (1981) Z.R. 221**
- 3. Fidelitas Shipping v. VV/O Exportchles [1955] 2 ALL ER 4**
- 4. Bank of Zambia v. Tembo and Others (2002) Z.R. 103**
- 5. BP Zambia Plc v. Interland Motors (2001) Z.R. 37**
- 6. Aaron v. Shelton [2004] 3 ALL ER 560**

7. *Yat Tung Investment Company Limited v. Dao Heng Bank* [1975] A.C. 581

8. *Henderson v. Henderson ((1843) 3 Hare 100 page 115, [1843-60] ALL ER Rep. 378 - 382)*

This is an application by the Plaintiff for an injunction that the Defendant either by itself, its agents or servants or appointed receivers or by whomsoever acting on its behalf be restrained from in any way disposing off the property, namely, the brewery plant, equipment and the land on which the said plant is situate, namely, Plot No. 246, Umuzilikazi Road, Lusaka, being the property of Top Star Breweries Limited, a company which the Plaintiff is a shareholder and director pending the determination of this matter. There is also a further order for restoration and quiet enjoyment of the property.

The affidavit in support sworn by the Plaintiff states that he is a shareholder and managing director of Tope Star Breweries Limited which was purportedly placed into receivership by the Defendant.

On 17th July, 2008 he was granted an ex parte injunction similar to the current application but was discharged on 12th December, 2008 and the action was dismissed. On appeal to a single judge of the Supreme Court, the injunction was reinstated pending a hearing by the full bench of the Supreme Court.

A consent order was then filed in the Supreme Court remitting the matter to the High Court to be determined on the merits after trial. By then, unbeknown to the Plaintiff, the matter had been struck off the active cause list on 20th April, 2009 which meant that the High Court action stood dismissed at the time the consent order was filed on 6th October, 2009.

Although the case record shows that he was not represented when the matter was heard on 18th February, 2009 and adjourned to 20th April, 2009 at 09.30 hours for a scheduling conference, he stated that the order was not served on his advocates.

On or about 27th April, 2009, the Defendant's advocates sent two consent orders to his advocates for execution. One consent order related to the withdrawal of the appeal lodged under Cause No. SCZ/8/311/2008 and another consent order under Cause No. 2008/HPC/273 staying the ruling of the High Court dated 12th December, 2008.

Although both consent orders were executed by the advocates for the parties, only the consent order under Cause No. SCZ/8/311/2008 was executed and endorsed by the Supreme Court while the consent order under Cause No. 2008/HPC/273 was not executed by the High Court Judge on the premise that the matter in the High Court was struck off the cause list on 20th April, 2009 and since it was not restored within the period provided under Order 53 rule 7 of the Commercial Action Practice Directions, it stood dismissed.

The Defendant's advocates represented to his advocates by the said letter dated 27th April, 2009 that further discussions on the resolution of the matter under Cause No. 2008/HPC/0273 and SCZ/8/311/2008 would follow after the execution of the two consent orders.

After the refusal of the High Court to endorse the consent order under Cause No. 2008/HPC/273, the Defendant through its advocates, by letter dated 23rd April, 2010 ordered him to vacate Plot No. 346, Umuzilikazi Road, Lusaka and hand over the operation of the brewery plant belonging to Top Star Breweries Limited to the appointed receivers.

The Defendant had through the receivers advertised the brewery plant, equipment and Plot No. 346, Umuzilikazi Road, Lusaka for sale and the closing date of receipt of the bids was 18th December, 2011. If the application for an injunction was not granted, the property described above, namely, the brewery plant, equipment and Plot No. 346 Umuzilikazi Road, Lusaka, the main stay of Top Star Breweries Limited, a company in which the

Plaintiff was a director and majority shareholder would be sold and the Plaintiff would suffer irreparable damage.

An affidavit in opposition was sworn on 28th December, 2010 by Addie Lyempe and filed on the same day. According to the affidavit, the action emanated from a loan agreement entered into between Top Star Breweries Limited (In Receivership) and the Defendant. Top State Breweries Limited was availed an overdraft facility and three loans totaling K2,740,234,728.73. On or about 11th April, 2007, the Defendant registered a fixed charge on the assets of Top Star Breweries Limited (In Receivership). On or about 5th October, 2007, the outstanding balances on the above overdraft and existing loans were amalgamated and restructured into one loan.

After the amalgamation and restructuring of the credit facilities it came to the attention of the Defendant through the press and otherwise that some creditors of Top Star Breweries Limited (In Receivership) in order to recover funds owed to them were in the process of realizing or selling some of the assets of Top Star Breweries Limited (In Receivership) in which the Defendant had an interest.

In terms of Clause 7 of the restructured loan offer letter dated 5th October, 2007 the execution against the borrower's properties some of which the Defendant had financed and had an interest amounted to a default under the facility. It was the Defendant's reasonable belief that the restructured facility was at great risk of not being repaid in view of the several executions. As a result, the Defendant appointed receivers for Top Star Breweries Limited (In Receivership) on 22nd October, 2007. The Defendant paid K11.5 Million as bailiff's fees and has continued spending money on security to guard the charged assets.

On 14th March, 2008 Top Star Breweries Limited (In Receivership) commenced an action under Cause 2008/HPC/0111 in which the High Court granted the Plaintiff an injunction restraining Zambia National Commercial

Bank Plc and the receivers from among other things running Top Star Breweries Limited (In Receivership) or disposing off the Brewery plant. By virtue of the said injunction, the Plaintiff had possession of the company and was in total control of its operations. The injunction was discharged on 14th July, 2008 following the discontinuance of the proceedings by the Plaintiff under Cause 2008/HPC/0111.

On or about 17th July, 2008, the Plaintiff commenced Cause No. 2008/HPC/273 against the Defendant. An ex parte order of interim injunction was obtained on 18th July, 2008 but was discharged on 12th December, 2008. A further ex parte order was obtained in the Supreme Court on 12th February, 2009 and was later confirmed on 23rd March, 2009. During this period, the Plaintiff retained possession and control of the company. The Defendant's receivers only took possession of the charged property in November, 2010. This was the third time the Plaintiff was seeking an application for an injunction over the same subject matter before the High Court and she verily believed that this application was an abuse of court process as the matter was *res judicata* and it would cause chaos in the administration of justice.

Top Star Breweries Limited (In Receivership) had not serviced the restructured loan facility of K2,740,234,728.73 due as at 5th October, 2007 in spite of having injunction orders and stays in place restraining the receivers and the Defendant. The Plaintiff had not fully disclosed to the court all the facts relating to the matter and that since the matter arose out of a loan/credit agreement with stipulated figures in monetary terms, damages were an adequate remedy as they could be quantified.

In his affidavit in reply which was filed on 21st February, 2011, the Plaintiff stated that paragraph 6 (b) of the fixed charge made provision for the receiver to carry on and manage the business until the debt was repaid. He was ready to work with the receivers to manage the business. He disputed

the sum of K2,740,234,728.73 as being due because it was inclusive of K875,000,000.00 which had been charged twice in the bank statement.

The restructuring of the facility was subject to the execution of relevant security documents as provided by Clause 10.2 of the Credit Facility Letter. Since no security documents were ever executed, the provisions of the credit facility letter could not be implemented. The appointment of the receivers on 22nd October, 2007 was highly irregular as the appointment was effected pursuant to a debenture allegedly dated 28th June, 2005 which had neither been registered. He reasonably believed that the debenture did not exist and that was why the Defendant had failed to exhibit it. Further, the Credit Facility Letter provided in Clause 4 for a repayment period of 60 monthly instalments with a grace period of two months. The Defendant appointed receivers over the security before even the two months grace period expired.

In so far as the executions were concerned, there was no risk to the security as the Defendant was secured by way of a fixed charge and its interests took priority over all other creditors. He was extremely concerned that if the Defendant was allowed to proceed with the sale of the brewery plant, the sale would be premised on the wrong figure of K2,740,234,728.73 and also on the irregular and premature appointment of the receivers.

I am grateful to both Counsel for their submissions on whether or not the injunction should be granted, principles regarding injunctions and the authorities which are now legion. It is also now not uncommon as will be observed from the summary given above that there is a tendency to argue the merits of the case at the injunction stage. Although it is tempting to do so, the principles regarding injunctions do not allow the parties to do so. The parties therefore must confine themselves to the injunction.

Given the background relating to this application, I am of the view that I should first deal with the issue of *res judicata* which was raised by the

Defendant. The law relating to res judicata has been well explained by both the Supreme Court and the High Court in Zambia.

In **ANZ Grindlays Bank (Z) Limited V. Chrispin Kaoma (1)** the Supreme Court held that in order for the defence of *res judicata* to succeed, it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.

In **Musakanya and Anor V. Attorney General (2)**, Chirwa J. (as he then was) stated the law on res judicata in the following terms at page 225:

“the law on estoppels or res judicata is very clear as stated in Halsbury’s Laws of England Vol. 16, 4th Edition, at page 1027 and in fact Lord Denning M-R, put it this way in the case of Fidelitas Shipping v. VV/O Exportchles (3) at page 8:

“...The law as I understand it is this; If a party brings an action against another for a particular cause or and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in res judicatam. But within one cause of action there may be several issues raised which are necessary for the determination of the whole case, the rule is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them in the same or subsequent proceedings except in special circumstances.”

I agree with Denning M.R. in (1) quoted above that this res judicata is a strict rule of law and the parties are

bound by any decision made by a competent court. I do not agree that courts have discretion on these issues.”

In Bank of Zambia v. Tembo and Others (4) the Supreme Court put it as follows:

“In order that the defence of res judicata may succeed it is necessary to show that not only the cause of action was the same, but also the Plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same points had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to exclude the plaintiff are not less stringent. 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. It is necessary to show that it actually was so put in issue.”

In BP Zambia Plc v. Interland Motors (5) the Supreme Court stated as follows:

“for our part we are satisfied that, as a general rule, it will be regarded as an abuse of the process if the same parties relitigate the same subject matter from one action to another or from Judge to Judge... In conformity with the courts inherent power to prevent abuse of its process, a party in dispute with another over a particular subject should not be allowed to deploy his grievance piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various

courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more judges over the same subject matter.

In the case of Aaron v. Shelton (6) Mr. Justice Jack said the following at page 568:

“An analogy can be found in the principal that, if a party could properly have raised an issue in proceedings but does not, he will not be permitted to do so subsequently. I refer to Yat Tung Investment Company Limited v. Dao Heng Bank (7): “But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of the aspect of res judicata is the judgment of Wigram V-C in Henderson v. Henderson (8) where the Judge says “...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, 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 exceptional cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which the

parties, exercising reasonable diligence, might have brought forward at the time.”

The sequence of events in this matter was as follows:

1. On 14th March, 2008 Top Star Breweries Limited commenced an action against the Defendant under Cause No. 2008/HPC/0111 for inter alia an injunction restraining the Defendant and the receivers from running the brewery plant or disposing it. The injunction was discharged on 14th July, 2008 following a notice of discontinuance. I will ignore this cause of action because the Plaintiff was different even though the Plaintiff in the current matter was its alter ego.
2. On 17th July, 2008, the Plaintiff commenced another matter under Cause No. 2008/HPC/273. The claim in Cause No. 2008/HPC/273 is almost similar to the claim in the current action. The only difference to which I shall return to shortly is that the Plaintiff is seeking to set aside the consent order under Cause No. SCZ/8/311/2008 in the Supreme Court on grounds of misrepresentation.
3. On 20th December, 2010, the Plaintiff commenced this action claiming substantially the same relief he had claimed in Cause No. 2008/HPC/273.

So far as I can discern from the exhibits, the effect of the Supreme Court consent order was to withdraw the appeal and remit the cause or matter to the High Court to be determined on the merits after trial. The ruling of the Supreme Court granted a stay “to allow all these matters to be seriously considered by the Supreme Court”. Both the Supreme Court ruling and the consent order do not set aside the High Court order discharging the injunction nor can it be implied that they do. This in effect means that

although the discharge has been stayed, the discharge can either be confirmed or set aside on appeal. It also means, when considered against backdrop of the various authorities cited on *res judicata*, that the narrow issue of the injunction under Cause No. 2008/HPC/273 was decided between the same parties over the same subject matter and it is the same parties and the same subject matter in the present case.

There is no doubt that the Plaintiff is in a legal limbo as the appeal was withdrawn and the matter in the High Court was dismissed. If the Plaintiff succeeds with his main claim in the current action, he will return to the Supreme Court to pursue his appeal. In the meantime, there is no order setting aside the ruling made by the High Court on 12th December, 2008 discharging the injunction under Cause No. 2008/HPC/0273 and I have come to the conclusion that this matter in so far as the application for an injunction is concerned is *res judicata* and should not be relitigated upon.

Having come to the conclusion that the issue relating to the injunction is *res judicata*, it is not necessary to address the arguments raised on whether or not the injunction should be granted. Doing so would amount to embarking on an academic exercise. The application for an injunction is refused. Costs to the Defendant to be taxed in default of agreement.

DONE IN CHAMBERS AT LUSAKA THIS 28TH DAY OF FEBRUARY 2011

**A.M. WOOD
JUDGE**