

IN THE HIGH COURT FOR ZAMBIA

2010/HP/984

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

RICHARD SAKALA

PETITIONER

and

ATTORNEY GENERAL

RESPONDENT

Before the Hon. Mr. Justice Justin Chashi in Chambers on the 17th day of August, 2012.

For the Petitioner:

In Person

For the Respondent:

JH Simachela, Deputy Chief State Advocate and JS Kakondo, State Advocate.

R U L I N G

Cases referred to:

1. *Bank of Zambia v Jonas Tembo and Others* (2002) ZR 103
2. *United Breweries Co Ltd v Bath County Borough JJ* (1926) AC 586
3. *In Air* 1982 NOC 233 GAU

Legislation referred to:

4. *Faison v Hudson*, 243 va 413,419, 417, SE 2nd 302,305 (1992)
5. *Zambia National Broadcasting Corporation Act, Chapter 154 of the Laws of Zambia*
6. *The Supreme Court Practice 1999 (White Book)*

Other Works referred to:

7. *8B Michies Jurisprudence, Former adjudication or res judicata, Sec 13 (1994)*
8. *Halsbury's Laws of England (fourth edition) volume 16 paragraph 1529*
9. *Blacks Law Dictionary, Brian A Garner (eighth edition) Thomson and West.*

The Petitioner herein filed a Petition on the 19th day of September, 2010 pursuant to Article 28 of the Constitution of Zambia seeking the following reliefs:

- 1. A declaration that the President's decision to close down Omega Television without any due process on account of a political perception as being illegal, unconstitutional and a severe derogation from the principles of democracy, good governance, constitutionalism and the rule of law.**
- 2. That the Court imposes a punitive compensation package, to serve as a deterrent against future impunity and contribute towards the creation of a democratic environment in which the free flow of ideas will flourish.**
- 3. That the Court imposes compensation that will enable the station return to air at the earliest opportunity.**
- 4. That the Court awards compensation for the financial loss.**
- 5. Compensation for the mental anguish and stress for the abrupt closure of the station which created serious financial technical and commercial crisis.**
- 6. Compensation for the lost business and strategic business alliances.**
- 7. That the Court re-affirms the Petitioners right to have his Television Station re-opened so that he can freely enjoy his rights of communicating his views freely have been denied.**

In concluding the Petition, the Petitioner prays that the Court Orders the re-opening of the television station forthwith, that he be compensated for all the losses suffered as well as opportunity costs incurred as a result of the closure.

On the 22nd day of March 2011, the Respondent filed a motion to raise a preliminary issue which was supported by an affidavit deposed to by **Joe Hantebe Simachela**, the **Deputy Chief State Advocate** in the Respondents Chambers who has conduct of this matter on behalf of the Respondent. The salient issue being that the Petition herein is the same as that contained under **Cause Number 2003/HP/0073** in which the parties are **Africa Press Trust Limited (t/a Omega Television) v. The Attorney General** and that the Petitioner herein is a Director of Africa Press Trust Limited which owns Omega Television Station.

According to further averments in the aforestated affidavit **Cause Number 2003/HP/0073** was conclusively determined by Honourable Justice T Kakusa vide Judgement dated 12th day of August, 2003, which has been exhibited as "JHS1".

In that respect, it is the Respondents argument that the Petition herein is **res judicata** and an abuse of the Court process.

In opposing the preliminary issue, the Petitioner on the 5th day of April, 2011 filed an affidavit in opposition in which he deposed that the Petition herein **is not res judicata** in any form or manner as the substance and the parties to the two causes are different. That the Petition is premised on the instructions issued by President Mwanawasa to close down Omega Television and therefore deny his freedom of expression on account of his perceived negative political inclination.

According to the Petitioner the issue of the Presidents instructions and involvement was concealed from the Court as it was neither canvassed nor advanced by the State in **Cause number 2003/HP/0073**.

It is the Petitioners averment that the President targeted him in his personal capacity for his conscience and that on the contrary the Court and the Plaintiff in that Cause were all seriously misled into litigating and subsequently adjudicating the matter on the understanding that the minister had exercised his rightful authority under **Section 31, Subsection 1 of the Zambia National Broadcasting Corporation Act⁵**. The Petitioner goes further to assert that the reliefs sought in **Cause Number 2003/HP/0073** were in the context of an Order for Certiorari as against the Minister for exercising his authority unlawfully and or irrationally acting on the illegal and unconstitutional instructions of the President as evidenced by the letter written by the President to the then Vice President Enock Kavindele which disclosed that the President had closed the station on account of the Petitioners perceived political inclinations.

According to the Petitioner, the Petition herein is beyond administrative law, but concerns the violation of constitutional rights as enshrined under the constitution which were violated without due process as required by the law.

The Petitioner concludes by asserting that the deponent of the affidavit in support of the motion to raise a preliminary issue is not qualified to depose to the affidavit as he is not privy and cannot testify to the totality of the evidence that should have been adduced in **Cause Number 2003/HP/0073** for him to reach the conclusion that all issues which should have been canvassed were indeed canvassed to reach a conclusive, just and equitable finding.

At the hearing of the preliminary issue on the 2nd day of August, 2012, the parties indicated that they would both rely on their respective written submissions.

The Respondents according to the written submissions filed on the 11th day of April 2012 submitted that the Notice of Motion was filed pursuant to **Order 14A of the Supreme Court Practice**⁶ and urged the Court to dismiss the application on the grounds that the issues for adjudication were already attended to under **Cause Number 2003/HP/0073** and therefore the Petition is **res judicata** in that in that cause the Court in its Judgement held that the Minister of Information and Broadcasting Services acted within the purview of Section 31 of the **Zambia National Broadcasting Corporation Act**⁵ when he cancelled the permit for Omega Television and that there was no ground upon which it could interfere with the Ministers decision.

According to the Respondent, the Petitioner is a Director of Omega Television and he challenged the closure of Omega Television under **Cause Number 2003/HP/0073** with the only distinction being the issue of the letter by the late President Mwanawasa.

That however in the affidavit in reply to the affidavit in opposition filed by the Respondent on the 6th day of April, 2011, the Respondent asserts that the issue of the late President's letter was part of the adjudication process through a subsequent application for special leave to review the Courts Judgement and the said letter was even exhibited in the application and that the company had a pending application for leave to appeal to the Supreme Court out of time under **Cause Number 2003/HP/0073**.

Counsel for the Respondent referred to the case of **Bank of Zambia v Jonas Tembo and Others**¹ in which it was held as follows:

“ In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also the Plaintiff had an opportunity of recovering and but for his own faults might have recovered in the first action that which he seeks to recover in the second”.

Counsel for the Respondent submitted that the cause of action is the same as that in **Cause Number 2003/HP/0073** and the issue of the late President's letter ought to have been dealt with under **Cause Number 2003/HP/0073** but due to the fault of Omega Television they abandoned the application for special leave for review of the Courts Judgement.

Further that the Petition is an abuse of the Court process and Counsel urged the Court to take note of the legal **MAXIM INTEREST REIPUBLICAE UT SIT FINIS LITIUM** (it is in the public interest that there should be an end to litigation).

In conclusion Counsel for the Respondent urged the Court to dismiss the Petition with costs as it is an attempt to have a second bite at the cherry and that allowing it to proceed will render litigation interminable.

The Petitioners written submissions were filed on the 19th day of April, 2012. As elaborate and voluminous the Petitioners written submissions might be, I decline to capture all the issues raised therein except those relevant and related to the preliminary issue of **res judicata** raised by the Respondent in their motion.

The Petitioner submits that to establish the defence of **res judicata**, a party must show a prior final Judgement on the merits by a Court of competent Jurisdiction. According to the Petitioner in view of the application for the review of the Judgement in view of the late Presidents' letter, no final conclusive Judgement has been delivered. Further that the Judgement was

not on the merits of the matter but the “**fraudulent**” technical issue presented by the Ministry of Information and Broadcasting Services.

The Petitioner cited the case of **FAISON V HUDSON**⁴ as follows:

“(A) Judgement is not final for the purpose of res judicata..... when it is appealed or when the time limits fixed for perfecting the appeal has not expired”.

The Petitioner further relied on **8B MICHIE’S JURISPRUDENCE, FORMER ADJUDICATION OR RES JUDICATA**⁷ in that a Judgement is final for the purpose of **res judicata** when “**nothing more is necessary to settle the rights of the parties or the extent of those rights**”.

The Petitioner further submitted that the two Causes are different in substance and scope. Cause Number 2003/HP/0073 was an application for Judicial Review under **Order 53 of the Supreme Court Practice**⁶ whose scope is very limited.

The Petitioner also relied on the case of **Bank of Zambia v Jonas Tembo and Others**¹ where it was further held that:

“A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties”.

The Petitioner further relied on **HALSBURY’S LAW OF ENGLAND**⁸ paragraph 1529 as follows:

“In all cases where the cause of action is really the same and has been determined on the merits and not on some ground.....which has ceased to operate when the second action is brought, the plea of res judicata should succeed. The

doctrine applies to all matters which existed at the time of the giving the Judgement and which the party had an opportunity of bringing before the Court. If however, there is a matter subsequent which could not be brought before the Court that time, the party is not stopped from raising it”.

The Petitioner further submitted that there was fraud on the part of the Respondent by failing to disclose the fact that it was indeed President Mwanawasa who had issued the instruction on which they closed Omega Television and as such the fraud should act as a bar to **Res Judicata**. The Petitioner relied on the case of **UNITED BREWERIES CO LTD V BATH COUNTY BOROUGH JJ**² in the definition of fraud. He further relied on the case of **IN AIR 1982**³ where it was held that:

“A Judgement obtained by fraud or collusion does not operate as Res Judicata”.

In his further submissions, the Petitioner submits that he had interest in Omega Television which is now defunct because of Government closure.

The Petitioner concluded his submissions by urging the Court to dismiss the Plaintiff’s motion and determine the Petition on its merits.

I have carefully analysed the motion and the affidavit in support, the affidavit in opposition and reply, the submissions by Counsel for the Respondent and those of the Petitioner and the various authorities cited by the parties.

As earlier alluded to I have had to ignore certain submissions contained in the Petitions submissions, as I am of the view that they are not relevant at this stage and to the motion for the preliminary issue of **Res Judicata** which has been raised by the Petitioner.

As a starting point, although this issue has not been furthered by the Petitioner in his written submissions, however I am of the view that it is important to first address the objection which was raised by the Petitioner in the affidavit in opposition to the deponent of the affidavit in support of the notice of motion. The affidavit was deposed to by Joe Hantebe Simachela, State Advocate in the Respondents Chambers. The deponent being Counsel and raising a motion which is in respect of a point of law as opposed to facts he is ably qualified on the evidence on record in either of the causes in issue to depose to the affidavit in support of the motion.

I therefore do not find any credence in the objection to enable me expunge the affidavit from the record.

Coming to the objection of **Res Judicata**, I am indebted to both the Respondent and the Petitioner for the authorities cited, which gives a clear definition of **Res Judicata**. Suffice to add that a more subtle definition of **Res Judicata** is to be found in **Black's Law Dictionary** which has the following:

“Res Judicata: An issue that has been definitely settled by Judicial decision (Judgement). An affirmative defence barring the same parties from litigating a second law suit 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 Judgement on the issue.***
- (3) The involvement of the same parties or parties in privity with the original parties”.***

In addressing the aforesaid three essential elements I made an attempt to call for the entire record in respect of Cause Number 2003/HP/0073.

However, the same could not be located from the Archives. I therefore have had to depend on the affidavit evidence and the submissions before me and in particular the Judgement of T.Kakusa, J which was delivered on the 12th day of August, 2012. Hon. Kakusa J laid down the reliefs which were being sought by the Plaintiff in that cause, **AFRICA PRESS TRUST LIMITED** against the **ATTORNEY GENERAL** as follows:

1. *A declaration that the Minister's decision to cancel the Broadcasting Station Construction Permit and Licence under Section 31(1) of the Zambia National Broadcasting Corporation Act was unlawful and/or irrational.*
2. *An Order of certiorari to quash the decision, further or alternatively.*
3. *An Order of prohibition to restrain the Minister from acting arbitrary.*

In that Judgement, Kakusa J after restating the reliefs, considered the grounds upon which the relief was being sought, the available affidavit evidence and the relevant legislation and case law and thereafter arrived at the decision that the Court sees no ground upon which the action could succeed as the Minister acted within the purview of **Section 31 (1) of the Zambia National Broadcasting Corporation Act**⁵ when he cancelled the permit and there was no ground upon which the Court could Interfere with the decision. The Judge further considered whether the Plaintiff was entitled to compensation for expenses incurred and made a finding that there were no grounds for such compensation because after 18 months or after the completion of the construction phase, the Broadcasting licence would or would not have been granted.

It is therefore, and I accordingly find so, that the Cause in 2003/HP/0073 was heard and determined on its merits.

It is also evident from the aforestated Judgement as to what issues were before the Court for determination.

In the Petition before this Court after the Petitioner lays down the facts and the grounds for redress in paragraphs (5) to (17) which evidently and without doubt arises from the closure of the television station, the Petitioner ends with the prayer in paragraph (18) as follows:

“Your Petitioner, therefore prays that the Court Orders the re-opening of the television station forthwith, that he be compensation for all the losses suffered as well as opportunity costs incurred as a result of the closure”.

At the expense of being repetitive, this is the same issue on which Hon. Kakusa J made a determination that the Minister acted within his powers and dismissed the claim for compensation.

Perhaps, the most interesting and the gravamen of the Petitioners submission is that the Judgement of Kakusa J cannot be said to be final in view of the revelation of the letter from the late President Mwanawasa.

It must at this stage be emphasized that the choice of commencement of the Court process by the Plaintiff in Cause Number 2003/HP/0073 by way of Judicial Review with its limitations in scope as conceded by the Petitioner was entirely up to the Plaintiff's discretion. It is therefore not plausible for the Petitioner herein to raise the issue this late in the day.

It is not in dispute and in fact it is agreed by the parties, that after the Judgement by Kakusa J, the Plaintiff in Cause number 2003/HP/0073 applied for special leave for review of the Courts Judgement on the 24th day of March, 2004. Exhibited in the affidavit in support of the summons for special leave

for review of the Judgement was the letter from the late President LP Mwanawasa dated 5th July 2002. By the nature of the Plaintiffs application, this letter became part of the proceedings in Cause Number 2003/HP/0073 and formed the basis of the application for review of the Judgement.

Therefore, all the issues of non disclosure or fraud ought to have been heard and determined under that application and under Cause Number 2003/HP/0073.

There is evidence on record that the application for special leave for review of the Judgement was later abandoned and the Plaintiff opted to appeal against the Judgement, which was equally subsequently abandoned. The sum total of the abandonment of the application for review and the appeal is that the Judgement of Kakusa J of 12th August, 2003 now stands unchallenged and is therefore a final Judgement.

As regards the last ingredient of res judicata of the involvement of the same parties or parties in privity with the original parties, the assertion by the Respondent is that the Petitioner has interest in the Plaintiff company in Cause Number 2003/HP/0073 which applied for a licence for Omega Television, which fact is admitted by the Petitioner in his submissions. Therefore, the Petitioner is a party in privity with the Plaintiff in Cause Number 2003/HP/0073.

The commencement of the Petition by the Petitioner individually was pure ingenuity on his part to pursue what the Plaintiff in Cause Number 2003/HP/0073 can no longer do owing to its being defunct.

I am satisfied in view of the aforestated that all the three essential elements of res judicata have been met and **therefore the defence of Res**

Judicata succeeds and hereby foreclose the Petition and dismiss the same.

I ORDER THAT each party bears its own costs.

Leave to appeal is hereby granted.

Delivered at Lusaka this 17th day of August, 2012.

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Justin Chashi
HIGH COURT JUDGE