

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/0222

Between:

DICKSON MTONGA & 22 OTHERS

AND

AFRICAN LIFE FINANCIAL SERVICES ZAMBIA

PLAINTIFF

DEFENDANT



BEFORE: HON. G.C. CHAWATAMA - IN CHAMBERS

For the Plaintiff : Mr. Okware- Messrs Okware & Associates

For the Defendant : Mr. M. Haimbe- Messrs Malambo and Company

RULING

Cases referred to:

1. *Goodson Tembo and 49 others vs. African Life Financial Services Zambia Limited*
2. *Burdick vs. Garrick 1 Law Rep. 5 Ch 243*

Authorities Referred to:

1. *Volume 16, of the 4th edition of Halbury's Laws of England, paragraph 1528*
2. *Order 14A Rule 1 Rules of the Supreme Court (RSC) 1999 Edition*
3. *Order 16 High Court Rules, Cap 27 of the Laws of Zambia.*

This is a case commenced by writ of summons in which the Plaintiff claims;

1. *A declaration that they are entitled to their accrued benefits transferred from their former employers Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited and paid to the Defendant;*

2. *An Order directing the Defendant to pay the Plaintiffs **K1,282,755.45**, being benefits accrued from their employment with Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited and transferred to the Defendant;*
3. *An Order directing that **K1,282,755.45** be subjected to interest effective date of transfer to date of payment;*
4. *A declaration that the Plaintiffs tour of duty should be from the date of engagement with Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited to date of leaving employment with the Defendant*
5. *An order directing that the Plaintiffs' pension benefits be recalculated based on the date of engagement with Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited to date of leaving employment with the Defendant;*
6. *Any other relief the court may deem fit;*
7. *Interest;*
8. *Costs.*

Counsel for Defendant made an application to have the matter dismissed for being res judicata before the Deputy Registrar.

The Learned Deputy Registrar tabulated the reliefs sought by the Plaintiff in the respective matters as follows;

Under cause 2002/HP/0975 (Supreme Court Appeal No. 167/2006) the claims were:

1. *A declaration that the respondent had repudiated the appellant's contracts of employment.*
2. *An order that the appellants be deemed to have been declared redundant or placed on an early retirement and*
3. *Damages for breach of contract.*

The claims under the current action are as stated above.

It was the finding of the Deputy Registrar that the principle of res judicata was not tenable. The Deputy Registrar stated that notwithstanding that the parties are essentially the same in both the claims raised are different. He further stated that the claims in cause 2002/HP/0975 were raised at the time the plaintiffs were in employment and as such had no opportunity to raise the present claims for terminal benefits since at that time the claim had not arisen. The Honourable Deputy Registrar found that the application of res judicata was misconceived.

In his ruling, the Deputy Registrar noted that even though the applicant relied on to dismiss the action was res judicata, the affidavit in support of the summons (deposed to by Mr. Hantuba) irregularly raised two points of law challenging the present writ, firstly, that the suit in respect of some plaintiffs was incompetent because they were deceased at the time the writ was issued and secondly that the suit in respect of some plaintiffs is statute barred. It was his finding that these issues were not raised nor pleaded for in the summons and hence there was want of authority to adjudicate upon them. He further stated that even assuming the defendants were successful on these issues it would not result into having the whole suit or action dismissed. The application was dismissed.

The defendant has now appealed against the ruling of the Honourable Deputy Registrar dated 11th February, 2015 raising the following grounds:

1. *The Hon. Deputy Registrar erred in fact and law in not accepting that the cause of action herein is res judicata as it has already been adjudicated upon in the upon in the earlier matter in cause number 2002/HP/0975 and in Appeal No. 167/2006 in that in both the previous matter and the current one, the gist of the cause of action is the portion of benefits of the period of employment the Plaintiffs served under Anglo-American Corporation Limited.*
2. *The Hon. Deputy Registrar on the facts of this case was wrong in law in reasoning that the earlier matter (2002/HP/0975 and Appeal No. 167/2006) was not about terminal benefits because according to him the Plaintiffs at the time were still in employment and therefore claiming terminal benefits would have been premature. This reasoning is, with respect, flawed in that the claim to be declared redundant is in and of itself a claim for terminal payment or benefit for the entire period of service which at the time of the action in the year 2002 would have been mostly for the period served under Anglo-American Corporation. The claim for redundancy was aimed at accessing the accrued benefits for the period served under Anglo-American Corporation Limited.*
3. *The Hon. Deputy Registrar misapprehended the graveman of res judicata in that the Plaintiffs' earlier litigation and the current one both seek to isolate as standalone the period of service under Anglo-American Corporation to the Defendant, fixed terminal benefits had accrued and were payable regardless of the transfer of service which entailed continuing employment which excluded entitlement to terminal benefits as no termination of service had occurred; in point of fact and law, only the period of service was transferred such that on termination after such transfer, the total period of service will be*

reckoned to include the period under Anglo-American Corporation. In other words, the transfer means that there was no break in service to necessitate and justify splitting the terminal benefits payable at the failed contrived. The redundancy claim in 2002 and the same purported Anglo-American Corporation terminal benefits in the current claim. It is essentially the same claim stated differently. The Plaintiffs in the current action are seeking to recover the same benefits that they sought to recover in the earlier action, hence res judicata.

4. *The Hon. Deputy Registrar erred in law and fact when he declined to decide on the points of law namely the statute of limitation and the incapacity of some of the Plaintiff due to death prior to filing the suit which were raised by the Defendant in the affidavit in support filed on 18th July, 2014 to which the Plaintiffs filed an affidavit in opposition on 1st September, 2014 and the Defendant's affidavit in reply filed on 1st October, 2014.*

The Parties having spoken to those points of law in the affidavits and both Counsel having argued those points of law at the hearing on 3rd October, 2014 it was not open to the Hon. Deputy Registrar to refuse to decide on the points of law raised and argued by the parties on the mere technicality that those points of law were not specifically stated in the summons when the court at the hearing expressed no objection.

5. *The appeal being a re-hearing where the Appellant is at liberty to raise issues not raised before, the Plaintiffs having neglected or refused to pay the costs of the earlier matter (2002/HP/0975 and Appeal No. 167/2006) this current action should not be proceeded with until the costs of the earlier matter are settled by the Plaintiffs to the Defendant as provided by law.*

When the matter came up for hearing on 18th September, 2015, I asked the parties to make submissions from which I would make my ruling.

The Defendants advocates submitted that the Defendant took objection with the substantive cause on account of the proceedings in the case of **Goodson Tembo and 49 others vs. African Life Financial Services Zambia Limited, 2002/HP/0975 and Appeal No. 167/2006**. I am also called upon to determine whether the Learned Registrar was in order to refuse to rule on the preliminary issue that the matter was incompetent concerning some Plaintiffs who were deceased at the time this action was commenced and statute barred concerning others.

In determining the issue of res judicata, I am indebted to then Counsel for the Plaintiffs, Messrs Okware, who drew my attention to a number of cases on the subject matter. I am particularly guided by the case of **Bank of Zambia v. Tembo and Others (2002) Z.R. 103**, in that case the Supreme Court was referred to **Volume 16, of the 4th edition of Halbury's Laws of England, paragraph 1528** which provides that:

"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 which 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 put in issue.”

I have carefully gone through the claims in the two causes. My understanding is that in the current matter the Plaintiffs' claim is for payment of benefits accrued from the time they were employed by Anglo- American Corporation Limited right through the time they were with Zamanglo Industrial Corporation Limited before the Defendant took over. They allege that their terminal benefits did not take into account this period and hence they were just paid for what they had worked for with the Defendant. They have tabulated what they state was due to them under paragraphs 6 to 11 of the amended statement of claim filed on 20th March, 2014.

My reading of the Supreme Court appeal no. 167/2006 (SCZ/8/204/2005) makes me understand that the claim therein was that the Defendant had altered their conditions of service enjoyed under the former employers without their consent. In that matter the court found that the changes were minor and not fundamental and in addition the Plaintiffs had consented to the changes.

I will quote the judgment in part; the relevant portions of pages J10 to J12 read as follows:

“In the case at hand, no alteration, variation or breach of conditions of service to the detriment of the employees has been shown to have occurred. In any event, the Appellants in their transfer of contract letter and consent to transfer forms gave their consent to their new employer liberty to determine terms and conditions of service from time to time. So such changes as may have occurred were consented to by the Appellants and none can be said to be prejudicial in fact....

In sum, the learned trial judge cannot be faulted in holding that the Appellants consented to changes being made to their conditions of service by the Respondent. Therefore, grounds one and three must fail.

We also find that the learned trial judge did not misdirect himself when he held that the changes made to the Appellant’s conditions of employment were not fundamental but incidental or minor adjustments. Similarly, the learned trial judge cannot be faulted in holding that it was late in the day for the Appellants to seek reverse the transfers already consummated in preference to redundancy and unemployment. Ground two and four equally fail.”

To me these are very distinct actions and I do not see how they can be one and the same, save for the fact that the parties are the same.

Taking the other limb as enunciated by the learned authors of the Halbury’s; did the Plaintiffs have an opportunity to raise the current claims under the former cause? I think not and I agree with the learned Deputy Registrar that the current cause of action had not arisen. Therefore, the principle of res judicata

does not apply to this matter. It follows that grounds 1, 2, 3 and 5 of appeal fail.

I, however, do not agree with the learned Deputy Registrar when he declined to hear the Defendants on the points of the matter being statute barred and want of capacity for some Plaintiffs. The summons as well as the affidavit cited 'multiple irregularities' and I think the said multiple irregularities were sufficiently enumerated in the affidavit and were responded to by the Plaintiff. I should add that, as rightly pointed out by Counsel for the Defendants, the Plaintiff had an opportunity to respond to the issues and did actually respond. In any case **Order 14A Rule 1 Rules of the Supreme Court (RSC) 1999 Edition** pursuant to which the application provides that:

"The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

- (a) Such question is suitable for determination without a full trial of the action, and***
- (b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."***

The Defendants were therefore deserving of audience on these points of law.

Having said that, on the issue of the matter being statute barred, I agree with the Plaintiff that there matter is not one which can be statute barred, without suggesting that they are entitled to the claim. I also agree that it falls within actions envisaged under section 19(1)(b) of the Limitation Act 1939 and I am consequently guided by the case of **Barclays Bank Zambia Limited PLC Staff Pension Fund and Another v Augustine Mwanamuwila and 58 Others SCZ/8/5/2009** as corrected cited by Counsel. I also find the case of **Burdick v Garrick 1 Law Rep. 5 Ch 243** where Lord Justice Gifford held that:

“I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and keep it until it is called for they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.”

The Plaintiffs are claiming on a pension fund. According to the Plaintiffs the funds being claimed were calculated for each person transferred from Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited to the Defendant and that this amount was contained in the worksheet which the Defendant prepared and circulated to the Plaintiffs. It would be up to the Plaintiff to prove this assertion at trial and also prove whether they are entitled to such funds.

Concerning some Plaintiffs being deceased, assuming that there are, the learned Registrar should have ordered as I do now that any such Plaintiffs be substituted by their personal

representatives in accordance with *Order 16 High Court Rules, Cap 27 of the Laws of Zambia*. This is a curable defect which cannot defeat this matter. The appeal succeeds on ground 4 and I have endeavored to address the issue herein.

It is my considered view that this is not a re-hearing and consequently I order no security for costs.

The costs for this application are for the Plaintiff.

Leave to appeal against this ruling is hereby granted.

DELIVERED AT LUSAKA THIS 7TH DAY OF JUNE, 2016.


G.C. CHAWATAMA
JUDGE