

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



**BETWEEN:**

**THOMAS PONGA AND 149 OTHERS**

**PLAINTIFFS**

**AND**

**BANK OF ZAMBIA**

**DEFENDANT**

***Before the Hon. Justice Mr. M.D. Bowa in Chambers this 14th day of April 2020.***

*For the Plaintiffs: Mr. Mulele of GM Legal Practitioners.*

*For the Defendant: Mr. Sikazwe in house Counsel.*

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## **RULING**

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Cases referred to:

1. *Hussein Safieddinne v. Commissioner of Lands, Okwudili Tony Anuluoha and Attorney General SCZ Selected Judgment No. 36 of 2017*
2. *Societe Nationale Des Chemis De Pur Du Congo (SNCC) v. Joseph Nonde Kakonde (2013) Vol. 3, ZR. 51.*
3. *Musakanga Valentine Stula and Edward Jack Shamwana vs. A.G (1981) ZR 221 (H.C)*
4. *Bank of Zambia v. Jonas Tembo and Others (2002) ZR. 103 (SC).*
5. *Meryiel Gail Melrose Marshall v. Rory McDougall (1988-1989) ZR. 206 (SC).*
6. *Caltex Oil Zambia v. Teresa Transport Limited SCZ Judgment No. 22 of 2002.*
7. *Ngimbu v. Kakoma and Electoral Commission of Zambia (2014) ZR. 39.*

On 5<sup>th</sup> July, 2018, the Defendant took out a Notice to raise a preliminary issue in which it sought to have the following question determined:

*Whether it is proper to proceed with the hearing of this matter when the Plaintiffs' claims are res judicata in that the Plaintiffs claimed the same reliefs in a prior action namely Ireen Dhiliwayo and 880 others v. the Defendant and 8 Others under Cause Number 2009/HP/524.*

The Notice was supported by an affidavit filed on 11<sup>th</sup> July 2018 sworn by Evans Mayuni, Assistant Director Human Resources in the Defendant Bank. He deposed that the Plaintiffs commenced an action against the Defendant in April 2009 under Cause Number 2009/HP/524. That the same list of 881 Plaintiffs have commenced the same claim the matter before this Court. He exhibited copies of the statement of claim under Cause Number 2009/HP/524 and the current matter under Cause Number 2018/HP/368 as “**EM1**” and “**EM3**” respectively.

He deposed further that the Plaintiffs' claims under Cause Number 2009/HP/524 were dismissed as evidenced by exhibit “**EM4**” a copy of the judgment of the High court. Further that the Plaintiffs

appealed against the judgment and the Supreme Court dismissed their appeal in a ruling marked as exhibit "**EM5**".

The Plaintiffs filed an affidavit in opposition dated 18<sup>th</sup> September, 2018 and sworn by Thomas Ponga, one of the Plaintiffs. He disputed the contents of the Defendant's Affidavit in support of the application for a preliminary issue. He deposed further that at the time that Mrs. Ireen Dhiliwayo commenced the action in 2009, there was already a judgment of the Supreme Court exhibited as "**TP1**" which ruled in their favour. That the 2009 action by Ireen Dhiliwayo wrongly included their names as their consent was not obtained. Further that the action currently before Court is for the execution of the Supreme Court judgment of 1997 which is still valid.

In effect, that the Supreme Court in its Judgment left open ended for execution purposes anticipated future pension payments. That in its declaration the court granted accrued rights to the 1991 retrenchees which are inviolable and unassailable until full execution of the order to pay is realized. He added that the Plaintiffs complaint before this court is meant to achieve full execution of that Supreme Court order because the Defendant has been evasive

in executing its full orders. He stressed that the inclusion of the 1991 retrenchees in cause 2009/HP/524 was both a mistake and illegal because the plaintiffs could not start prosecuting a case they had already won. In short that the Supreme Court judgment that granted them the relief they seek to enforce is still valid therefore their case seeking such enforcement is not res judicata.

In an affidavit in reply sworn by Evans Mayuni, Assistant Director – Shared Services and Employee Relations in the Defendant Bank and filed on 2<sup>nd</sup> October, 2018, the deponent echoed what was stated in the affidavit in support of the application to raise preliminary issue to the effect that the claims under the two causes being Cause Number 2009/HP/524 and 2018/HP/368 were identical and the claims therein were adequately dealt with by the High Court Judgment dated 10<sup>th</sup> July, 2014 and later in a Ruling of the Supreme Court dated 26<sup>th</sup> February 2016 when the matter went on appeal. That the said Judgment and Ruling are still binding and enforceable against all Plaintiffs and mere allegation by the 1<sup>st</sup> Plaintiff that his inclusion in those cases was without consent does not extricate him and the other Plaintiffs from the judgments. The deponent further stated that it is an abuse of court process for the

Plaintiffs to initiate fresh action to enforce an Order of Court in a matter that was already adjudicated upon.

When the application came up for hearing on 19<sup>th</sup> March, 2019, Mr. Sikazwe for the Defendant submitted that he would rely on the affidavit in support of the application and the affidavit in reply filed into court on 11<sup>th</sup> July, 2018 and 2<sup>nd</sup> October, 2018 respectively. He echoed what was stated in the affidavit in support of the application to raise preliminary issue and augmented the same by referencing the cases of **Hussein Safieddinne v. Commissioner of Lands, Okwudili Tony Anuluoha and Attorney General**<sup>1</sup> and **Societe Nationale Des Chemis De Pur Du Congo (SNCC) v. Joseph Nonde Kakonde**<sup>2</sup> which espoused on the principle of res judicata.

Counsel submitted that the Plaintiffs' affidavit in opposition to the application does not dispute the fact of the earlier action but rather confirms this fact in paragraphs 5, 9 and 10. It was Counsel's further submission that this Court should take full account of the import of the judgment of the High Court and the Supreme Court ruling. He emphasized that Lady Justice Banda Bobo pronounced herself over the issues of pension benefits as was claimed by the Plaintiffs.

Counsel submitted further that the assertion made by the Plaintiffs that they were mistakenly or illegally included in the earlier action does not absolve them from the effect of the judgment of the high court and confirmed by the Supreme Court hence binding on the parties. He urged the court to adopt a broad view of the principle of res judicata as held in the Safieddinne vs. Commissioner of lands and others case (supra) and find that the current action is substantially the same as the one that was concluded before Justice Banda Bobo. Counsel concluded with a prayer that the matter be dismissed with costs.

In opposing the application, Mr. Mulele submitted that the Plaintiffs would rely on the affidavit in opposition to the application to raise preliminary issue filed on 13<sup>th</sup> September, 2018. Counsel submitted that the claims in this action are different from those in the earlier action involving Ireen Dhiliwayo. That the affidavit in opposition will show that the Plaintiffs in this action are all a part of the 1991 retrenched group who had their redundancy litigated that resulted in the Supreme Court judgment of 1997.

He submitted further that it was the Plaintiffs position that at no time did they give any instructions or consent to join the case of

Irene Dilawowo in 2009 .That as such their inclusion in the case was illegal. It was Counsel's further submission that between 2012 and 2013, the Plaintiffs have been pursuing the Defendant away from the Diliwawo case and at no time did the bank raise the issue of res judicata when the demands were being made. Therefore that on the totality of the contents of the affidavit in opposition, the Court should dismiss the application and allow all the issues in contention to be determined at a full hearing.

In reply, Mr. Sikazwe submitted that the Plaintiffs confirmed that the matter has already been litigated upon and what the Plaintiffs are trying to do now is enforce what they perceive was a Supreme Court Judgment that made pronouncements of pension benefits in their favour by commencing a fresh action. This it was argued, was an abuse of court process as an examination of the originating process for both matters would show that the claims are the same. Further that the judgments referred to by the Defendant were made with the Plaintiffs in mind so they cannot avoid the effects of these decisions which are still subsisting. He prayed that the preliminary issue be upheld accordingly.

I have considered the parties affidavits and submissions. The Defendant's preliminary issue is to the effect that the matter is res judicata as the issues raised have already been adjudicated upon and involve the same parties . The Plaintiffs on the other hand submitted that the matter is not res judicata as the action now before court is for the enforcement of the Supreme Court judgment of 1997 which was in their favour. The issue for my determination is whether or not the Defendant's plea of res judicata is justified in the circumstances.

The learned authors of **Halsbury's Laws of England, 4<sup>th</sup> edition** **paragraph 1529** write that:

*"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 judgment 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 that time, the party is not stopped from raising it".*



In the case of **Musakanga Valentine Stula and Edward Jack Shamwana vs. A.G<sup>3</sup>** the court endorsed Lord Denning's sentiments when he said:

*“The law as I understand it is that if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule that he cannot bring another action against the same party for the same cause. Transit in re-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 then 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 the issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances.”*

The Supreme Court decisions of Hussein Safieddinne v. Commissioner of Lands and Others and Societe Nationale Des Chemis De Pur Du Congo (SNCC) v. Joseph Nonde Kakonde (supra) cited by the Defendant aptly set out when the plea of res judicata may successfully be raised. Both of these cases approved the Supreme Court decision of **Bank of Zambia v. Jonas Tembo and Others<sup>4</sup>** in which the Court stated 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 that the Plaintiff had an opportunity of recovering, but for his 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 point had been actually decided between the same parties.”***

The above settled, I have perused the claims under the 2009 Cause and those under the current Cause. For ease of reference, the claims under Cause No. **2009/HP/524** are as follows:

- i. Pension benefits accrued under the Non-contributory Scheme same to be determined by an independent actuary at the Defendants' expense;*
- ii. Pension benefits accrued under the Contributory – Pension Scheme same to be determined by an actuary at the Defendants' expense;*
- iii. Pension benefits accrued under the Staff Pension Scheme Ex-Gratia Payment Arrangement to be calculated in accordance with the formula contained therein;*
- iv. A refund of the contributions wrongfully deducted from the members of the Staff Pension Scheme Ex-Gratia Payment Arrangement by the 1<sup>st</sup> Defendant;*

- v. *Interest on the amounts found due from due date until payment;*
- vi. *Costs.*

Those under the current action, Cause No. **2018/HP/0368** are as follows:

- i. *A declaration that the Plaintiffs are entitled to payment of their accrued pensions under the conditions of service they served under prior to their separation from the Defendant in 1991;*
- ii. *An order directing the Defendant to pay the Plaintiffs their pension forthwith;*
- iii. *An order that the pensions in (ii) above be assessed by the Court;*
- iv. *Interest on the pension payments;*
- v. *Costs of the action; and*
- vi. *Any other relief the court may deem fit.*

From the claims reproduced above and perusal of the originating process, it can be argued in a sense that the Plaintiffs are seeking enforcement of a Supreme Court judgment in the current action. In **Meryiel Gail Melrose Marshal v. Rory McDougall**<sup>4</sup>, the Supreme Court gave guidance on jurisdictional power in the enforcement of


its judgments and orders. The Court held that the jurisdiction to enforce orders was reposed in the High Court and that it was proper for the machinery of the High Court to be used by the parties by the issue of writs such as fieri facias and others. The decision in the Meryiel case was affirmed in subsequent case of **Caltex Oil Zambia Limited v. Teresa Transport**<sup>5</sup> and quite recently in **Ngumbu v. Kakoma and Another**<sup>6</sup> in which the Supreme Court stated that section 9 of the Supreme Court Act, Chapter 25 of the Laws of Zambia places in the High Court the jurisdiction to enforce judgments and orders. In theory therefore there was nothing wrong with the Plaintiff seeking enforcement by commencing an action.

However, in agreeing with the Defendant's submission the Supreme court Judgment did not make any pronouncement on pension benefits. This was the subject of litigation under the 2009 which the Plaintiffs were are part of and now seek to distance themselves from. Lady Justice Banda Bobo dismissed the claims and the appeal to the Surpreme Court was unsuccessful. I cannot accept the plea that the Plaintiffs did not sanction their inclusion in the action as nothing stopped them from making an application to be disjoined from the proceedings when that case was still active. A simple

claim that they did not consent to being parties cannot detach them from the binding effect of the decisions of both the high court and Supreme court that in effect dismissed the claims on pensions they now seek to enforce.

I would thus agree that the Plaintiffs are through this action seeking to relitigate claims that were earlier adequately considered with the hope of obtaining a different result. There has been nothing new subsequent to the judgment of the High Court and the ruling of the Supreme Court to allow the Plaintiffs commence fresh action against the Defendant. The plea of res-judicata therefore succeeds and I dismiss the claims for also being an abuse of court process with costs to the Defendant to be taxed in default of agreement.

Dated at Lusaka this.....14<sup>th</sup>..... day of .....April.....2019.



**JUDGE.**