

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

2017/HPA/2151

BETWEEN:

STANFORD KABWATA

1ST PLAINTIFF

MULENGA CHIPOMA

2ND PLAINTIFF

AND

DIVISION MUNG'AMBATA

ELIAS MUPONDELA

GODWIN CHENDA

MAUREEN NKOLMWE

MUTALE MPEPO

MOSES PHIRI

GETRUDE SIKALEFYA

KOMANI NG'AMBI

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

6TH DEFENDANT

7TH DEFENDANT

8TH DEFFENDANT



***Before The Hon. Justice M. D. Bowa in Chambers on 12th of
December 2023.***

For the Plaintiff: Mrs. R Nyirenda of Fred Jere and Company

For the Defendant: Miss S Musengwa of Ellis and Company

JUDGMENT

Case Referred to

1. *.Bank of Zambia v Jonas Tembo & others (2002) ZR 103,*

2. *Amber Louise Guest Milan Trbonic v Beatrice Mulako Mkainga & Attorney General*, 2010/HP/0344(unreported)
3. *Finance Bank Zambia Limited vs Nkhoma* (Appeal No 77/2015) (2016) ZMSC 27.
4. *Stephen v Garnett* 1898 1 QB 677,
5. *ANZ Grindlays Bank (Z) Limited Chrispin Kaoma* (1995) ZR No. 12.
6. *BP Zambia PLC v Interland Motors* (2001) ZR 37
7. *Mohammed A Omar vs Zambia Airways Corporation* (1986) ZR 23 SC

Other Authorities referred to

1. *Halsbury's Laws of England* 4th edition, volume 16 para 1528 &1529
2. *Black's Law Dictionary*

1. Introduction

1.0 By Notice of Appeal dated 09th January 2021, the Defendants appeal against a ruling of a Deputy Registrar dated 17th May 2018, in which their application to dismiss the matter for being res judicata was disallowed.

2.The Defendants arguments

2.0 In the skeleton arguments dated 23rd February 2022, the Defendants submit that reliance would be placed on the affidavit in support of summons for an order to dismiss matter for abuse of court process and res judicata filed on 22nd

February 2018 as well as the affidavit in reply filed on 26th April 2018 both sworn by Elias Ng'andu Mpondela.

- 2.1 It was submitted that the action herein is res judicata and thus an abuse of court process. That in terms of Order 18 rule 19 (1) (d) of the RSC of England 1999 edition (White Book):

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that:

(d) It is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case maybe.

- 2.2 Other authorities referred to in setting out the conditions to be satisfied when raising the defence of re judicata included the case of **Bank of Zambia v Jonas Tembo & others¹**, **Amber Louise Guest Milan Trbonic v Beatrice Mulako Mkainga & Attorney General²**, and **Finance Bank Zambia Limited vs Nkhoma³**.

2.3 Further, reliance was placed on the learned authors of **Halsbury's Laws of England 4th edition, volume 16 para 1528** who commenting on the subject of res judicata state that:

“In order that a defence or res judicata may succeed, it is necessary to show that not only the cause of action was the same, but also that 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.”

2.4 The Defendants contended that the issues raised in the present action were considered and determined in the matter of Samuel Matete and 4 others vs Yona Mwale (sued in his capacity as General Secretary of the Zambia Amateur Athletic Association - 2014/HP/2035, which case was not appealed against. Therefore that the Plaintiffs are litigating on determined and concluded issues. The Defendants prayed that the action be dismissed with costs.

3. The Plaintiffs submissions

3.0 The Plaintiffs filed into court skeleton arguments in support of their position dated 27th February 2020. It was argued that the Defendants claims on the alleged abuse of court process and res judicata is unfounded. That this is because cause 2014/HP/2035 relied upon by the Defendants dealt with the disqualification of the Plaintiffs to stand as President and Vice President respectively.

3.1 That in contrast, the present matter is dealing with the claim that the elections subsequently held was null and void. Therefore that the parties in the cause No. 2014/HP/2035 are different as is the cause of action. The Plaintiffs relied on **Blacks Law Dictionary** in defining what amounts to res judicata. Also cited in reliance of the conditions to be satisfied were the learned authors of **Halsbury's Law of England para 1529**, the case of **Stephen v Garnett** ⁴ **Bank of Zambia v Tembo and Others (supra)**, **ANZ Grindlays Bank (Z) Limited Chrispin Kaoma**⁵.

3.2 The matter of **BP Zambia PLC v Interland Motors**⁶ was relied on to emphasise the Supreme Court's distaste for abuse of court process and when it does not apply. The Court observed that:

“For our part we are satisfied that, as a general rule, it will be regarded as an abuse of court process if the same parties relitigate the same subject matter from one action one to the other however it would not amount to abuse of court process if the cause of action is different.”

3.3 The Plaintiffs implored the court to uphold the decision of the Deputy Registrar arguing that the matter does not meet the threshold for the defence of res-judicata to be sustained. Further that the sustenance of the matter does not amount to abuse of court process.

4.Hearing

4.0 At the hearing held on 16th February 2022 counsel for the Defendants was present. He informed the court that The Defendants had not filed their submissions .I then gave directions for the filing of the submissions and reserved the matter for judgment that I was to pronounce based on the filed

documents. Earlier directions given for filing of arguments had not been complied with which was the basis of my ruling that I would proceed in that fashion.

5. Determination

5.0 It is trite that an appeal to a judge in chamber against the decision of the DR essentially amounts to a fresh application. The High Court may therefore receive fresh evidence on an application. The case of **Mohammed A Omar vs Zambia Airways Corporation**⁷ is the authority for such preposition.

5.1 There has not been in this case, strictly speaking an invitation to consider fresh evidence. The Defendant however in his submissions invites the court to consider the affidavits in support and in reply of the application earlier filed to dismiss the matter for being res judicata dated 22nd February 2018 and 26th April 2018.

5.2 The first of the affidavit is really averments in support of the Defendants assertion that the matter was the subject of adjudication and resolved under cause No. 2014/HP/2035 as

per judgment by Judge Mchenga sitting as a High Court Judge as he was then.

5.3 I have anxiously considered the affidavits on record both in support and in opposition of the parties positions and the skeleton arguments on record. I have also read through the ruling of the court. I must immediately state for the record, that the Defendants in presenting their arguments do not inform the court the basis on which they believe the DR erred in arriving at her decision. They merely set out the law on res judicata and state that the matter was determined earlier by another court but do not specifically state what the DR failed to take into account or erroneously considered in arriving at her decision.

5.4 That said, both parties ably refer the court to the relevant authorities on the considerations the court should take into account for the defence to apply. The go to case is the Supreme Court decision in Bank of Zambia v Tembo and others (supra) in which the Supreme Court guided 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 recovery, 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."

- 5.5 All the authorities cited pretty must restate this settled position of the law that presents little debate. The question is did the learned Deputy Registrar not duly apply the law to the set of facts that she was faced with?
- 5.6 A perusal of the ruling will quickly reveal that the learned DR in dismissing the application, agreed with the position advanced by the Plaintiff that what was being challenged in the present case was the constitutionality of the elections held. That it did not dwell on the members of the association or issues to do with disqualification or standing of officers with the association. The court found that the earlier matter under cause 2014/HP/2035 specifically dealt with the disqualification of the Plaintiffs in that matter to stand as President and Vice President while the present matter is dealing with the elections that were eventually held:

5.7 The court concluded:

“The parties in the 2014/HP/2035 are different from those in this case, so is, the cause of action hence, cannot be said to be res judicata as held in the case of Bank of Zambia v Jonas Tembo and others (2002) ZR 103 that A plea of res judicata must show either an actual merger or that the same point had actually been decided between the same parties.”

5.8 I find no basis to interfere with the court’s conclusion. A perusal of the writ of summons and statement of claim under the present cause will show that the parties to the action are indeed different. It is also plain to see that the cause of action focusses on the Plaintiffs challenge of the constitutionality of the elections that were held post the judgment under cause 2014/HP/2035. The reliefs being sought are different and it hardly be contended that the Plaintiffs who were not even a party to the first action could have sought the reliefs prayed for in the present matter under that cause. There was no election that had taken place then and the cause of action arises out of the conduct of that election.

5.9 I find no merit in the appeal. I uphold the decision of the DR and dismiss the appeal with costs to the Plaintiffs to be taxed in default of agreement.

Dated at Lusaka this.....12th.....day ofDecember.....2023



HON. JUSTICE M.D BOWA