IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 159/2001
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

B E T W E E N :

BANK OF ZAMBIA APPELLANT

AND

JONAS TEMBO AND OTHERS RESPONDENT

Coram: LEWANIKA, DCJ., SAKALA, MAMBILIMA JJS
On May 14, 2002 and 11th July, 2002.

For the Appellant: M.M. MUNDASHI of Mulenga, Mundashi with D.K. KASOTE of Mwanawasa & Co.
For the Respondent: L.M. MATIBINI of Matibini & Co.

RULING

LEWANIKA, DCJ., delivered the ruling of the court.

Counsel for the Respondent has raised a preliminary objection to the hearing of this appeal on the ground that it is res judicata. Counsel said that he would rely on the judgments of the court between the same parties made on 30th October, 1997 and 4th February, 2002 in SCZ. Appeal No. 32 of 1997.

Counsel said that the appeal is against the judgment of the Industrial Relations Court made on 28th July, 1995. He said that the issues which were

raised in those proceedings were the effective date of the retrenchment or early retirement and the salary structure or terminal benefits payable on retrenchment. Counsel then drew our attention to page 39 of the record where the trial court found as follows:-

> "what is the effect of this finding, that the retrenchment date is 10th August, 1997? It means the salaries and other conditions of service in force as at 10th August, 1994 apply to all the affected employees. This will include all allowances available as at 10th August, 1997 and as a corollary, the affected employees would be deemed to have been in employment up until 10th August, 1994 which in effect will entitle them to leave days so accrued and not 30th March let alone 29th July, 1994."

Counsel said that after the delivery of this judgment the parties could not agree on the amounts payable to the Respondents namely whether it was basic salary exclusive of allowances or salary with allowances. The parties went back to the Industrial Relations Court which delivered a ruling on 5th February, 1996 which appears on pages 41 to 44 of the record. The Respondents appealed against that ruling and was the subject of our judgment delivered on 30th September, 1997. There was no appeal against the judgment of the Industrial Relations Court delivered on 28th July, 1995. Counsel for the Respondent pointed out that at the hearing of the appeal before us counsel for the Appellant had conceded that there was no appeal against the judgment of the Industrial Relations Court delivered on 28th July, 1995 and that the Appellants were bound by that judgment. The Appellants

then changed advocates and applied to the Industrial Relations for leave to appeal against the decision of the court made on 28th July, 1995. These proceedings were heard on 16th October, 2000 when they were granted leave to appeal out of time. The order granting them leave to appeal was against the following decisions:-

(a) the decision of the Deputy Registrar of the court and of the full bench of the Industrial Relations Court made on 4th February, 1999 and 20th December, 1999 respectively;

(b) the decision of the Industrial Relations Court made on 28th July, 1995 which holds that the retrenchment date of the Respondents is 10th August, 1994 and not 29th July, 1994.

Counsel for the Respondents further drew our attention to the notice of motion that was filed by the Respondents and our judgment on the notice of motion which was delivered on 25th January, 2002. Counsel said that the issues that form the subject of the current appeal have already been determined in the previous judgments and are therefore res judicata.

In reply counsel for the Appellants referred us to volume 16 of the 4th edition of Halsbury's Laws of England in particular paragraph 1528 which deals with the essentials of res judicata. That paragraph reads as follows:-

> "in order that a defence of res judicata may succeed it is necessary to show not only that 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. A plea of res judicata must show either an actual merger, or that the same point had been actually decided

between the same parties. Where the former judgment has been for the Defendant, the conditions necessary to conclude 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 or claimed."

Counsel said that what was at issue in the present appeal was the interpretation of the document appearing on page 87 of the record, being the memorandum of settlement of a collective dispute between the Bank of Zambia and the Zambia Union of Financial Institutions and allied workers. He urged us to dismiss the preliminary objection.

We have considered the submissions by counsel for the Appellant and for the Respondent as well as the evidence on record. The dispute between the parties herein arose from the memorandum of settlement of a collective dispute between the Bank of Zambia and the Zambia Union of Financial Institutes and Allied Workers which was executed on 10th August, 1994. The points at issue or in dispute which led to this litigation were, firstly the effective date of the retrenchment or early retirement and whether in computing the terminal benefits "salary" was to be basic salary exclusive of allowances or salary inclusive of allowances. The judgment of the Industrial Relations Court which was delivered on 28th July, 1995, the relevant portion of which we have quoted above, decided that the effective date was 10th August, 1994 and that the Respondents were to be paid their terminal

benefits inclusive of allowances. The Ruling of the Industrial Relations Court delivered on 5th February, 1996 dealt with the issue again of whether or not the term "salary" meant basic salary without allowances or salary inclusive of allowances. The court in its ruling decided that the term "salary" meant basic salary exclusive of allowances. The Respondents appealed against this Ruling and the appeal was then the subject of our judgment of 30th October, 1997 where we directed that the judgment of the court delivered on 28th July, 1995 should be enforced. This directive was repeated in our judgment of 25th January, 2002 when we dismissed the Appellant's motion.

In the appeal which is now before us the notice of Appeal filed by the Appellants reads as follows:-

> "TAKE NOTICE that the Appellant being aggrieved by the decisions firstly of the Deputy Registrar of the Industrial Relations Court and of the full Bench of the said court made on 4th February and 20th December, 1999 respectively and secondly of the full bench of the said court of 28th July, 1995 on that part which holds that the retrenchment date of the Respondents is 10th August, 1994 and not 29th July, 1994 (App.No. 18/95) intends to appeal to the Supreme Court against the said decision."

This notice of appeal was filed after the Appellants were granted leave to appeal out of time by the Industrial Relations Court on 16th October, 2000, some five years after the judgment complained of. A perusal of these proceedings which appear on pages 128 to 131 of the record shows that this

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