BANK OF ZAMBIA *v* JONAS TEMBO AND OTHERS.

Supreme Court
Lewanika, D.C.J., Sakala, and Mambilima, J.J.S.
14th May, 2000 and 11th July, 2002
(SCZ Judgment No. 24 of 2002).

Flynote

Civil Procedure – Res judicata – Conditions required to be satisfied.

Headnote

Counsel for the respondent raised a preliminary objection to the hearing 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 number 32 of 1997. Counsel for the respondents indicated that the appeal was against the judgment of the Industrial Relations Court made on 28th July, 1995. Counsel for the appellant 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. Counsel for the respondent pointed out that the issues that form the same subject of the current appeal had already been determined in the previous judgment and are therefore res judicata .

Held:

(i) 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 and but for his own fault might have recovered in the first action that which he seeks to recover in the second.

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

Work referred to:

Halsbury's Laws of England Volume 16 4th Edition, Paragraph 1528.

M.M Mundashi of Mulenga Mundashi and Company; D.K. Kasote of Mwangawa and Company for the appellant.

L. Matibini of L.M. Matibini and Company for the respondent.

Judgment

LEWANIKA, D.C.J., 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 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 to 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 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 appellant referred us to volume 16, of the 4th edition of Halbury's Laws of England. In particular paragraph 1528 which deals with the essentials of res judicata. The paragraph reads as follows:-

"In order that a defence of 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. 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 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 Institutions and Allied Workers which was executed on 10th August, 1994.

The points at issue in dispute which led to this litigation were, firstly the effective date of the retrenchment or early retirement and whether in computing their 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 respondent 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 appellant 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 respondent is 10th August, 1994 (App. No. 18/95) intends to appeal to the Supreme Court against the said decision".

This notice of appeal was filed after the appellant was 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 application was vigorously opposed by Counsel for the respondent but at the end of it, the court below granted leave to appeal out of time without giving any reasons for doing so. Whilst we appreciate that Section 97 of the Industrial and Labour Relations Act does not prescribe a time limit within which an aggrieved party can appeal, this must be done within reasonable time. Further, Part III of the Supreme Court Rules deals with civil appeals to this court. Rule 49 (2) prescribes a period of thirty days in which to file the notice of appeal from the judgment complained of. Admittedly, this rule refers to appeals to the court from the High Court, by analogy the same should apply to appeals from the Industrial Relations Court. Either way a delay of five years to appeal cannot by any stretch of the imagination be reasonable and we are at a loss to understand why the court below granted the appellant leave to appeal out of time. However, the question of granting leave to appeal is not the issue before us, but we felt constrained to comment on it for the purpose of providing guidance in the future for appeals to this court from decisions of the Industrial Relations Court.

Coming to the matter at hand, we have taken trouble to outline the history of the litigation between the appellant and the respondent in order to show that the matters in which we are being asked to adjudicate upon in this appeal are the same issues that we ruled upon in our judgment of 30th September, 1997, and 25th January, 2002, namely the effective date of the retrenchment and the "salary". We would uphold the preliminary objection raised by the counsel for the respondent and in conclusion we would invoke the legal maxim interest republican us sit finis litium, meaning that it is in the public interest that there should be an end of litigation. This appeal is incompetent and we dismiss it with costs, the costs are to be taxed in default of agreement.

Appeal dismissed.