

**IN THE SUPREME COURT OF ZAMBIA**

**APPEAL NO. 183/2008**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**BETWEEN:**

**SOCIETE NATIONALE DES CHEMIS DE  
APPELLANT  
PUR DU CONGO (SNCC).**

**AND**

**JOSEPH NONDE KAKONDE**

**RESPONDENT**

**CORAM: Mambilima, Chitengi, and Mwanamwambwa, J.J.S.**

**On the 1<sup>st</sup> of September, 2009 and 27<sup>th</sup> November 2013.**

*For the Appellant: Mrs F. M. Chisanga of FMC and Associates.*

*For the Respondent: In Person.*

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## **JUDGMENT**

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**Mwanamwambwa, JS, delivered the Judgment of the Court.**

***Cases referred to:***

1. **Bank of Zambia v Tembo and Others (2002) Z.R. 103.**

2. **Henderson v Henderson (1843-1860) ALL E.R. 378.**

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3. **Greenhalgh v Mallard (1977) Z. ALL E.R. 255.**

4. **BP Zambia Plc v Interland Motors Ltd (2001) Z.R. 37.**

5. **SCF Finance Co. Ltd Co Ltd. V Masri and Another (1987) 1 ALL E.R. 194.**

6. **Development Bank of Zambia v Sunvest Ltd and Another (1995/1999), 187.**

**Other Works referred to:**

1. **Halsbury's Laws of England (4<sup>th</sup> Edition). Volume 16, page 861.**

The late Mr Justice Chitengi was part of the Court that heard the appeal. He retired and has since passed away. Therefore, this Judgment is by the majority. We regret the delay in delivering this Judgment. It is due to a heavy workload.

In this appeal, we shall refer to the Respondent as the Plaintiff and the Appellant as the Defendant, which is what they were in the High Court.

This is an appeal against the Ruling of the High Court of 28<sup>th</sup> March 2008, rejecting the Defendant's preliminary objection that the Plaintiff's claim is **Res judicata**.

The case for the Plaintiff is that he was an employee of the Defendant, from 8<sup>th</sup> February, 2002, to 7<sup>th</sup> February, 2005, when he resigned. He was paid a gratuity of K359,480.00 instead of K576,682,356.80. That the Defendant used the disputed monthly salary of K600=00; instead of the correct monthly salary of K825,600=00, to calculate his gratuity. By a letter dated 17<sup>th</sup> June, 2005, he informed the Defendant that he would claim the balance or difference on gratuity and one month's pay in lieu of Notice, once his monthly rate of pay was determined by the Industrial Relations Court. He filed a complaint No. 29/2005, against the Defendant in the Industrial Relations Court over the dispute. The complaint was referred to mediation. In a mediation sitting on 28<sup>th</sup> November, 2006, the Defendant accepted and consented to the mediation settlement that his monthly salary was K825,600. On 30<sup>th</sup> January, 2007, he wrote a letter of demand to the Defendant, for payment of the difference between what he was paid on the disputed monthly salary of K600=00 and what he was entitled to on the basis of the correct monthly salary of K825,600=00. The Defendant refused to pay. So on 1<sup>st</sup> March 2007, he instituted an action, by Writ of Summons, in the High court, against the Defendant, for the following:-

- (a) A declaration and order that the Defendant pays him Gratuity difference sum of K576,682,356.80.**

**(b) A declaration and order that the Defendant pays him one month's pay in lieu of Notice a difference sum of K225,600.**

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**(c) Interest on the sums in (a) and (b) above, at the Bank lending rate, from 10<sup>th</sup> June, 2005.**

The Defendant's case is that the Plaintiff sued it in the Industrial Relations Court under Complaint No. 29 of 2005, for all his dues arising from his employment with it. That claim was referred to Court annexed mediation. That the parties duly mediated the matter. A mediation package was agreed upon, a settlement reached and signed. It says that the Plaintiff is not entitled to gratuity in the sum claimed in any way or at all, as he has been paid in full under Complaint No. 29 of 2005, under a mediation settlement. On 26<sup>th</sup> July 2007, the Defendant filed a Notice raising a preliminary issue before trial, that the Plaintiff's claim is **res judicata** and should be dismissed.

After considering the parties' affidavit evidence and submissions, the learned Judge in the Court below refused the preliminary objection. He held that the Plaintiff's claim under "Cause No. 29 of 2005 and his Writ and accompanying statement of claim, were different. Therefore, the claim was not **res judicata**. That it had to be determined on its own merits. It is against this Ruling that the Defendant appeals, on 4 grounds.

We shall deal with ground one followed by ground three because they are interrelated.

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Ground one is that the Judge in the lower court erred in Law and in holding that the Plaintiff's claims were not **res judicata**, as they were different when in fact the claims were from the same Cause of Action and the Plaintiff could have recovered under the same claims what he was now claiming in the current case.

On ground one, Mrs Chisanga points that the Plaintiff was employed by the Defendant, from 8<sup>th</sup> February 2002 until 7<sup>th</sup> April 2005, when he resigned. That earlier, he had sued the Defendant in the Industrial Relations Court for what he considered his dues on termination. His claim in the Industrial Relations Court was for salary adjustment, arrears of housing allowance, fixed overtime, transport allowance, mission and hotel allowance as well as repatriation money. That the Defendant denied his claims and stated that the Plaintiff had been paid all his dues. That the Industrial Relations Court referred the matter to mediation. That there, the Plaintiff and the Defendant agreed on and signed a mediation-settlement. The Defendant fully paid him through his then Advocates. She submits, that the Plaintiff's present claims for gratuity and the earlier settled ones, arise from one and the

same cause of action – his terminal dues. The Plaintiff was required to litigate all claims arising therefrom in one action and not in several actions. She submits that the fact that the Plaintiff did not claim for gratuity is his own faulty. That he should not be allowed to

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claim for it, separately in the High Court. She argues that his move to claim again is an abuse of the Court process. She adds that the Plaintiff has sued the Defendant in the High Court in the capacity of former employer. That is the same capacity he had earlier sued it in the Industrial Relations Court. In support of her submissions she refers us to:

- (a) **Bank of Zambia v Tembo & Others**<sup>(1)</sup> and
- (b) **Henderson v Henderson**<sup>(2)</sup>
- (c) **Green v Mallard**<sup>(3)</sup>
- (d) **SCF Finance Company Ltd v Masri and Another**<sup>(5)</sup>

In response, on ground one the Plaintiff submits that what he claimed in the Industrial Relations Court was determination of his salary that was to be used to calculate his gratuity for the rest. He relied on his submissions in the Court below. In those submissions he advances five arguments.

Firstly, he submits that the principle of **res judicata** applies in situations where the claims handled by a Court of competent jurisdiction are truly the same in another action. And applies

where the whole legal rights and obligations of the parties are concluded. It is his argument that the claims in Complaint No. 29 of 2005 in the Industrial Relations Court, are totally different from those raised in this case. And therefore, his case is not **res judicata**. In support of his submission he refers to **Stephen v**

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**Garnet**. (He does not give it's citation). He quotes from that case as follows: **“An action brought in respect of a question identical with one which has already been determined between the parties will be dismissed as an abuse of the process of the Court, provided that there issues are truly the same.”**

Secondly, he argues that this litigation is not an afterthought as he had intimated to the Defendant that an action on matters not raised in the Industrial Relations Court Complaint would be raised after determination of the Complaint.

Thirdly, he submits that where a defence has been filed, the matter should proceed to trial. That the Defendant should have entered a conditional appearance if it had an objection to raise to the claim.

Fourthly, he argues that the Defendant has not adduced any concrete evidence to prove the sameness of this suit's action with that in the Industrial Relations Court, to render this case **res judicata**.

Fifthly, he argues that his case is not an appeal but an initial claim filed before it got statute barred.

In answer to our question, the Plaintiff confirmed that he was earlier paid leave pay of K1,520,000.00 and gratuity of K2,479,4880=00 as per page 33 of the Record of Appeal and the

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mediation-settlement dues as per pages 41-42 of the Record of Appeal. He urges us to grant him the claimed reliefs.

We have examined the Ruling appealed against and the Appeal-record. We have considered the submissions on both sides and have looked at the authorities cited. In the **Bank of Zambia v Tembo and Others**<sup>(1)</sup>, This Court dealt with res judicata. And we held 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.”**

Volume 16 of **Halsbury Laws of England** (4<sup>th</sup> Edition), page 861, further illustrates it this way:



**“The doctrine applies to all matters which existed at the time of giving the Judgment and which the party had an opportunity of bringing before the Court. If, however, there are matters subsequent to which could not be brought before the Court at the time, the party is not estopped from raising it”**

The rationale for **res judicata** is that there must be an end to litigation (see page 973 of the same volume).

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**Henderson v Henderson**<sup>(2)</sup> is to the same effect. It held as follows:

**“where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires that the parties to that litigation to bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”**

In the instant case, we agree with Mrs Chisanga that the issue between the Plaintiff and the Defendant, in the Industrial Relations Court, was one of his terminal dues. Terminal dues included gratuity and the monthly salary used to calculate it. The Plaintiff had an opportunity, in the Industrial Relations Court, to litigate, at once, both on the monthly salary and the amount of gratuity. The two are closely inter-related. Gratuity is based on monthly salary. Since both were in dispute, they could have been dealt with

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together in the Industrial Relations Court. Therefore, in the cause of action, terminal dues, was one and the same. Accordingly we hold that this matter is **res judicata**. The learned trial Judge erred in Law in holding that it is not **res judicata** because the claims in this matter are different from those in the complaint in the Industrial Relations court. He did so because he took a narrow view of **res judicata**. **Res judicata** is not only confined to similarity or otherwise of the claims in the 1<sup>st</sup> case and the 2<sup>nd</sup> one. It extends to the opportunity to claim matters which existed at the time of instituting the 1<sup>st</sup> action and giving the Judgment. The shortfall on gratuity, the main subject matter of this action, existed at the time the Plaintiff lodged his complaint in the Industrial Relations Court and at the time, the complaint was mediated upon and settled. The fact that the Plaintiff intimated to the Defendant, that he would later claim the shortfall on gratuity is irrelevant. It does not oust **res judicata** in this case. If

anything, it showed that he intended to embark on multiplicity of actions and piecemeal litigation. And this brings us to ground three.

Ground three faults the lower Court for allowing the Plaintiff to run piecemeal litigation and hauling the same party before Courts, when the complaint in the Industrial Relations Court, should have concluded and did conclude all disputes. On this ground, on behalf of the Defendant, Mrs Chisanga submits that there should be an end to litigation. That a party should not be allowed to raise claims

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against an opponent as and when it suits them. That litigant should, out of one case of action between the same parties, make all

their claims in one action. They should not be allowed to have a second bite at the cherry. In support of her submissions she cites **BP Zambia Plc v Interland Motors**<sup>(4)</sup> she adds that the Ruling of the Court below has the effect of allowing the Appellant to run piece litigation against the Respondent. She submits that, that was an error. All matters between the parties were effectively sorted by one action in the Industrial Relations Court.

**BP Zambia Plc v Interland Motors**<sup>(4)</sup> cited by Mrs Chisanga, decides against piecemeal litigation and multiplicity of actions and proceedings. In that case, this Court held that:

- “(iv) A party in dispute with another over particular subject should not be allowed to deploy his grievance piecemeal in scattered litigation and Keep hauling the same opponent over the same matter before Courts.**
- (v) The administration of Justice would be brought into Disrepute if a party managed to get conflicting decisions which undermined each other, from two or more different Judges, over the same subject matter”**

**Development Bank of Zambia v Sunrest Ltd and Another<sup>(6)</sup>**

is to the same effect.

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It was improper for the Plaintiff to sue in the Industrial Relations Court, for one part of his terminal dues and later sue the Defendant in the High court, for another part of the same dues.

This was unnecessary multiplicity of actions and piecemeal litigation.

For the foregoing reasons, we allow grounds one and three of the appeal.

For convenience, we move on to ground four. This ground is that the Respondent’s claim should be dismissed as it is *res judicata*. We have already dealt with **res judicata** in ground one.

What we said in ground one equally applies to this ground. We uphold this ground.

Finally, we move one to ground two. It states that the learned Judge erred in Law in overlooking the fact that the matter commenced by the Plaintiff in the Industrial Relations Court, for terminal benefits was settled by ways of mediation and that this was fully and final settlement of the Plaintiff's action.

Having regard to what we have said in grounds one, three and four above, we do not find it necessary to consider this ground. In total, we find merit in this appeal. We hereby allow it. The Ruling by the learned Judge in the lower Court, is hereby reserved and set

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aside. The Plaintiff's case in the High Court is hereby dismissed, for being res judicata. We award costs to the Defendant, to be taxed in default of agreement.

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I. C. Mambilima  
**DEPUTY CHIEF JUSTICE**

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M. S. Mwanamwambwa  
**SUPREME COURT JUDGE**