IN THE SUPREME COURT OF ZAMBIA **SCZ/8/14/2011**
HOLDEN AT LUSAKA **Appeal No. 37/2011**

(Civil Jurisdiction)

BETWEEN:

BANNERET DEVELOPMENT CORPORATION **APPELLANT**

AND

JORITUS ENTERPRISES LIMITED **RESPONDENT**

Coram: **Chibesakunda, Ag. CJ, Hamaundu and Malila, JJS on 4th November, 2014 and 26th August, 2016**

For the Appellant: Mr. James Banda, Messrs A. M. Wood and Co.

For the Respondent: Ms. M. Syulikwa, Messrs Linu, Eyaa and Co.

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Bank of Zambia v. Tembo and Others (2002) ZR 103.*
2. *BP Zambia PLC. v. Inter-land Motors (2001) ZR 37.*
3. *Henderson v. Henderson (1843) 3 Hare 100.*
4. *Muimui v. Chanda, SCZ No. 50 of 2000 (unreported).*
5. *Development Bank of Zambia and KPGM Peat Marwick v. Sunrest Limited and Sun Pharmaceuticals Limited (1995 – 1997) ZR 187.*
6. *Johnson v. Gore Wood & Co. (2000) UKHL 65.*
7. *Dawkins v. Prince Edward of Saxes Weimer, Earl Beauchamp (1886) 11.*
8. *Rural Development Corporation Ltd. v. Bank of Credit and Commerce (Z) Ltd. (1987) Z.R. 35 (S.C.).*
9. *Chikuta v. Chipata Rural Council (1974) Z.R. 241 (S.C.).*

Other authorities referred to:

1. *Halsbury's Laws of England, 5th Edition, Volume 11, paragraph 1166.*
2. *Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 1528.*
3. *Order 6, Rule 1 & 2 of the Rules of the High Court.*
4. *Order 30, Rule 11 of the Rules of the High Court.*

We regret the delay in delivering this appeal. It was caused by a combination of factors.

When the appeal was heard, Hon. Justice Chibesakunda was part of the panel. She has since proceeded on retirement. This judgment is therefore one by majority.

The appeal arises from a ruling of the High Court given on a preliminary point raised by the appellant's counsel, in which the appellant sought, before the lower court, an order to dismiss the matter commenced by the respondent, for abuse of court process. The application was dated 24th June, 2010 and was made pursuant to Order 33 Rule 3 of the Supreme Court (1999 Edition). It was supported by an affidavit sworn by Chungu Nelly Mwila.

The history of the appeal is that the Anti-Corruption Commission had issued restriction notices under section 24(1)

of the Anti-Corruption Commission Act No. 42 of 1996, over Plot number 6955 (hereinafter called 'the property') against the appellant company, on the basis that the property was the subject of the investigations in respect of some alleged offences under the Anti-Corruption Act. The first notice was to restrict the appellant from disposing of, or deriving any benefit from the said property, without the consent of the Director General of the Anti-Corruption Commission. The second notice directed that all income generated from the property be paid into an account controlled by the Anti-Corruption Commission.

The appellant then commenced an action by originating summons under cause 2003/HP/0055 against the Anti-Corruption Commission, seeking an order that the restriction notices issued be declared null and void *ab initio*. When the respondent became aware of those proceedings it applied to be joined as intervener on the basis of its interest in the property, and in order to avoid multiplicity of actions. However, the respondent subsequently realized that the matter did not relate to the ownership of the property in question, and it thus abandoned the order granting it leave to be joined to those proceedings. The High Court proceeded to hear the matter and

delivered its judgment on 21st November 2005, which judgment was subject of the appeal under cause SCZ Judgment No. 5 of 2008.

Subsequently, the respondent commenced proceedings before the High Court by way of writ of summons accompanied by a statement of claim under cause No. 2003/HP/1157, seeking an order for specific performance and damages for breach of the contract dated 12th December, 1999, and made between the respondent and INDECO Estates Development Company Limited, which was the 1st defendant in those proceedings. The respondent further sought damages for fraudulent transfer of property to the appellant; and as against the Anti-Corruption Commission, which was the 3rd defendant, damages for wrongful seizure of the property and an order to surrender the seized property back to the respondent. It is this action that the appellant sought the lower court's order to dismiss for abuse of process.

The learned judge made a ruling to the effect that the respondent was merely exercising its legal and constitutional right to sue the defendants in the new action and make its

claims as set out in the statement of claim dated 8th December, 2003. The court held that the issues which the respondent was seeking the court to resolve were related to a contract between itself and INDECO Estates Development Company Limited. The learned trial judge, therefore, found that the respondent did not abuse court process.

The appellant, unhappy with the ruling of the High Court, has appealed on the sole ground that-

> **"the learned trial judge in the court below misdirected herself in deciding that the action is not an abuse of the court process when there was sufficient evidence and law supporting that the action was indeed an abuse of court process."**(Sic!)

Both counsel filed in written heads of arguments and supplemented them with *viva voce* submissions.

In his arguments, Mr. Banda, learned counsel for the appellant, contended that the respondent had an opportunity to raise the issues it has raised under cause 2003/HP/1157, in the earlier cause 2003/HP/0055 and that at no point was an order to remove the respondent as party made after it was joined. He referred us to the passage in the **Halsbury's Laws of**

England paragraph 1166 Vol. 11 of the 5th Edition, where the learned authors stated that:

> **"the law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions..."**

The learned counsel submitted that when the respondent applied to be joined to the proceedings as interveners, it had a valid interest in the matter and was joined in order to avoid a multiplicity of actions. He relied on the case of **Bank of Zambia v. Tembo and Others**[1] in which we said:

> **"in order that the defence of *res judicata* to succeed, it is necessary to show that not only the course of action was the same, but also the plaintiff had an opportunity to 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 points had actually been decided between the same parties."**

He further added that where a case does not fall within the rules relating to *res judicata*, the court may still exercise its discretion under its inherent jurisdiction to prevent litigation that amounts to abuse of the court process so as to stop a party from raising an issue which was, or could have been

raised but was not whether through negligence, inadvertence or even accident. He stated that if one has an opportunity to raise an issue in a particular court action, the principle of *res judicata* can be raised notwithstanding that one was not heard on that point. He alleged that the respondent was negligent in not doing so and was now seeking for the High Court to overrule the Supreme Court judgment under cause 2003/HP/0055.

On the same point, counsel referred us to the case of **BP Zambia v. Inter-land Motors**[2], in arguing that it is an abuse of process if the same parties re-litigate the same subject matter as this would result in conflicting decisions from various courts, which would undermine each other.

He further submitted that the abuse in question need not include the reopening of a matter already decided in proceedings between the same parties but may cover issues or facts which are clearly part of the subject matter of the litigation and could have been raised. Relying on **Hendersons v. Hendersons**[3], he submitted that there were no special circumstances to permit the same parties to open the same

subject of litigation regarding a matter that should have been brought up in earlier proceedings. He emphasized that this court has in previous cases such as **Muimui v. Chanda**[4] and **DBZ v. KPMG, Peat Marwick v. Sunrest Limited and Sun Pharmaceuticals Limited**[5], disapproved abuse of court process. He concluded by citing the cases of **Johnson v. Core Wood & Co**[6]. and **Dawkins v. Prince Edward of Saxes Weimer, Earl Beaucamp**[7] to support the submission that the underlying public interest is that there should be finality in litigation and that a party should not be twice vexed in the same matter. Further, that the court will always prevent the improper use of its machinery and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

On the other hand, the learned counsel for the respondent, Ms. Syulikwa, endeavoured to clarify the issues underlying the two matters in question; that is, the claim under cause No. 2005/HP/1157 and the one under cause 2003/HP/0055. Counsel analysed the two causes of action and submitted that the claim under 2005/HP/1157 was in relation to an application for an order for specific performance, damages

for breach of contract, damages for fraudulent transfers of property and damages for wrongful seizure of Stand No. 6955, Long Acres, Lusaka, whereas, in cause 2003/HP/0055 the claims were in relation to the restriction notices and the renewals thereof. It was further contended that at no point did the lower court refer to the ownership of the property. She further submitted that infact no court of law has dealt with the issue of ownership of the property in issue.

The learned counsel for the respondent referred us to the judgment in respect of cause No. 2003/HP/0055 and stated that the reference in the judgment to the ownership of the property was to show that although the certificate of title was in the appellant's name, it could be cancelled if fraud was established. She submitted that the court, however, did not delve into the details of whether fraud was established or not. On this premises counsel submitted that the learned trial judge did not misdirect herself in considering that the judgment and the affidavit at pages 47 and 94 of the record of appeal did not show any grounds upon which the court could conclusively decide that the respondent was abusing court process by forum shopping.

Citing **BP Zambia PLC v. Inter-land Motors Limited**[2], which was referred to by the learned counsel for the appellant, Ms. Syulikwa accepted the principles therein and acknowledged that the subject matter being stand No. 6955 Long Acres, Lusaka, was the same in the two causes but contended that the matters brought before courts are different. She concluded by adopting the trial courts' finding that the respondent was merely exercising its legal and constitutional right to sue the defendants and make the claims as contained in the statement of claim.

We have paid attention to the spirited submissions by the learned counsel for both parties. We wish to begin by reiterating the position that this Court will always despise litigants who set out to abuse court process. It is an abuse of court process for the same parties to re-litigate the same subject matter either before the same court or indeed a different one, especially when the issues would have been adjudicated upon. In **BP Zambia PLC v. Inter-land Motors Limited**[2] we held that:

> **"the administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter.**

We ask ourselves in the instant case whether the decision in cause No. 2003/HP/5711 would result in a conflict with the decision that was rendered under SCZ Judgment No. 5 of 2008. In our esteemed view the issues raised in the causes are different, as learned counsel for the respondent has submitted. The record shows that under cause No. 2003/HP/0055, the appellant sought two orders, against the Anti-Corruption Commission; the first was to declare as null and void *ab initio* a notice dated 6th June, 2003, restricting the plaintiff's power to dispose of, or to otherwise deal with, the property known as Stand No. 5955, Long Acres, Lusaka, without the consent of the Anti-Corruption Commission Director General. The second was for a declaration that the restriction notice dated 2nd September, 2002, directing that the income generated from the property be paid into an Anti-Corruption Commission controlled account, was null and void *ab initio*. The court was called upon to determine whether the powers that the Commission exercised in relation to the stand No. 6955, Long Acres, Lusaka, a property which was a subject of investigations, were within section 24(1) of the Anti-Corruption Commission Act No. 42 of 1966. This application required the court to

interpret a statutory provision. On the other hand, cause No. 2003/HP/1157 was in relation to an application for an order for specific performance, damages for breach of contract, damages for fraudulent transfers of property and damages for wrongful seizure of stand No. 6955, Long Acres, by the Anti-Corruption Commission. This issue was quite different though it related to the same subject matter. We, therefore, hold that the resultant decisions in the two causes would not be in conflict with each other, unlike the case in **BP Zambia PLC. v. Inter-land Motors Limited**[2].

The learned counsel for the appellant, in pleading *res judicata*, submitted that when the respondent was added to the proceedings in cause No. 2003/HP/0055, it acquired sufficient interest in the proceedings and should have raised the issues that it has sought to raise now and that the plea of *res judicata* therefore applied.

In determining this argument, we refer to **volume 16 of the 4th edition of Halsbury Laws of England**. In particular, paragraph 1528 which deals with the essentials of *res judicata*. It 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 action. 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 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."**

We take note from the record that the respondent had been joined to the proceedings as intervener. The respondent however, did not raise the issue that it has now brought before the court under the cause 2003/HP/1157 and consequently, was not heard on that point. Counsel for the appellant has submitted that although the respondent was not heard on the point, the court had inherent jurisdiction to hear a matter that was not brought before it in order to prevent an abuse of the court process.

We agree with the argument by the learned counsel for the appellant to the extent that the principle of *res judicata* can be raised notwithstanding that one was not heard on a point which is raised in subsequent proceedings. However, we must state that where a party was not heard on a point and the

defence of *res judicata* is raised, the court must determine whether the party had an opportunity, and should have advanced that point in the earlier suit.

The questions then are: Was the issue that the respondent now seeks the court to determine on the same point as the one in the earlier claim? Was it already advanced or put in issue before the court and determined in the earlier cause? We have already stated that the two causes of action though over the same subject matter, were not on the same point, consequently, we hold that the issues were not advanced and determined in the earlier cause. Therefore, the lower court rightly found that there was no abuse of court process.

We now turn to consider the appellant's argument that the lower court had inherent jurisdiction to hear a matter that was not brought before it in order to prevent an abuse of the court process. In other words, would it have been proper for the issues regarding the alleged breach of contract to be determined under cause 2003/HP/0055.

Clearly, the evidence under cause 2003/HP/0055 was entirely contained in affidavits filed by the respective parties.

Conversely, in cause No. 2003/HP/1157, the statement of claim reveals that there are disputed facts related to the contract of sale of the property in question and allegations of fraud, which ultimately gives rise to the question of ownership. Additionally, a perusal of the affidavit evidence adduced by the parties in the lower court, in the application that is the subject of this appeal, support our finding that there are contentious matters between the parties. It is to us as clear as daylight that there are issues in the latter claim that required being resolved at trial. We are of the firm view that where the matters are particularly contentious, it is undesirable for those matters to be determined based on affidavit evidence alone. For the court to determine these contentious issues, a full trial must be conducted so as to enable the court have an opportunity to hear the witnesses and resolve the conflicting evidence.

The rules for commencement of proceedings are clear and distinct. **Order 6, rule 1** specifies that an action in the High Court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Whilst **Order 6, rule 2 of the Rules of the High Court,** states that any matter which, under any written law or the rules may be

disposed of in Chambers shall be commenced by an originating summons. **Order 30 Rule 11** clearly sets out the business to be disposed of in Chambers. The appropriate way of commencing an action for specific performance and to claim for damages for breach of contract is by writ of summons. In **Rural Development Corporation Ltd v. Bank of Credit and Commerce (Z) Ltd**[8], we stated, with reference to the case of **Chikuta v. Chipata Rural Council**[9] that:

> **"The facts of the case clearly showed that the action should have been commenced by writ as it necessitated the hearing of oral evidence in a proper trial. When usually in application by way of originating summons the evidence is by way of affidavits."**

Therefore, a party seeking for relief for a matter that ought to be commenced by a writ cannot bring forth those issues in a matter commenced by originating summons.

We therefore hold that the court did not misdirect itself by not making an order for specific performance and for damages under cause 2003/HP/0055, as the court did not have jurisdiction to do so, over matters that were not properly before it. We stated in **Chikuta v. Chipata Rural Council**[9] that:

> **"where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations."**

On the same point, in **Rural Development Corporation Ltd. V. Bank of Credit and Commerce (Z) Ltd**[8] which we have cited above, we further held:

> **"It is clear that these proceedings have been misconceived. As the matter was not properly before him the judge had no jurisdiction to make the declarations requested even if he had been so disposed."**

Thus even if the claim by the respondent had been put forward in the proceedings under cause No. 2003/HP/0055, the trial court was still restricted to consider only the application for interpretation of the statutory provisions before it; which it did. From the foregoing we do not fault the learned judge in her finding that the respondent was not abusing court process. We accordingly dismiss the appeal with costs.

(RETIRED)

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L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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M. MALILA, SC.
SUPREME COURT JUDGE