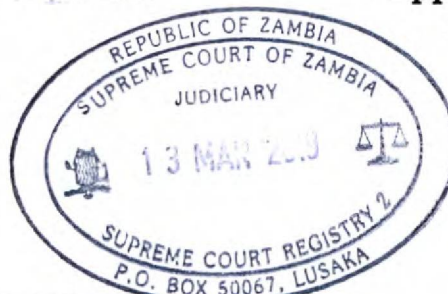


**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)**

**Appeal No. 163/2016
SCZ/8/114/2013**



B E T W E E N :

AFRICAN LIFE FINANCIAL SERVICES LIMITED

APPELLANT

AND

DICKSON MTONGA AND 22 OTHERS

RESPONDENTS

Coram: Hamaundu, Malila, Kaoma, JJS

On 5th March, 2019 and 13th March, 2019

For the Appellants: Mrs. M. K. Soko of Messrs Malambo & Company

For the Respondents: Mr. M. Lisimba of Messrs Mambwe, Siwila and Lisimba
with Mr. N. Okware of Messrs Okware & Associates

J U D G M E N T

MALILA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Goodson Tembo and 49 Others v. African Life Financial Services Limited*, 2002/HP/0975
2. *Dickson Mtonga and Others v. African Life Financial Services Limited*, 2014/HP/0222
3. *Valentine Shula Musakanya & Edward Jack Shamwana v. The Attorney General* (1981) ZR 211
4. *Bank of Zambia v. Jonas Tembo & Others* (2002) ZR 103
5. *Aaron v. Shelton* (2004) 3 All ER 560
6. *Henderson v. Henderson* (1943) 2 Hare 100 at 115

7. *Stanbic Bank v. Bentley Khumalo and 29 Others* (SCZ Appeal No. 182 of 2014)
8. *Mpongwe Farms Limited v. Dar Farms & Transport Limited* (Selected Judgment No. 38 of 2016)
9. *Muschinski v. Dodds* (1985) 160 CLR 583 at 614
10. *Williams v. Central Bank of Nigeria* (2014) UKSC 10

Legislations referred to:

1. *High Court Act, chapter 27 of the laws of Zambia*
2. *High Court Rules, chapter 27 of the laws of Zambia*
3. *Practice Direction No. 1 of 2002*
4. *RSC White Book (1999) edition*
5. *Limitation Act, 1939*
6. *RSC of England (1999) edition*
7. *Halsbury's Laws of England (5th edition)*
8. *Blacks' Law Dictionary (18th edition)*
9. *Limitation Act, 1980 (UK)*

At the heart of the present appeal is the issue whether or not the suit in the lower court which gave rise to this appeal was *res judicata*. This is in view of a court judgment given at an earlier time in a different matter involving the same parties.

Two other subsidiary questions were raised namely, first, whether the claims by the respondent in the lower court were statute barred and second, whether in view of the demise of some of the purported claimants in that suit before the proceedings in the lower court were instituted, the present action could competently proceed.

The learned High Court judge held that the action was not *res judicata*. She held further that the action was not statute barred as it fell under section 19(1)(b) of the Limitation Act 1939. On the question whether the claims of the deceased persons could be determined, the judge held that they could by merely substituting the parties with their personal representatives.

The appellant disputes that holding and hence this appeal.

The background material facts are brief and uncontroverted. The procedural history, however, reveals that the proceedings were beset by procedural glitches which were met with heightened vigilance and alertness on the part of the appellant's counsel and the lower court.

The twenty-three respondents were employed by Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited (hereafter collectively referred to as 'Anglo') and were subsequently transferred to the appellant. They sought the intervention of the High Court to determine and order that they were entitled to accrued benefits transferred from their former employers, Anglo, and paid to the appellant. They furthermore urged the court

to determine that their period of service ran from the date of their engagement with Anglo to their time of exit from the employ of the appellant.

It was the respondents' further prayer before the lower court that having made the determinations on the two issues as prodded, the court should proceed to order the appellant to pay to them the sum of K1,282,755.45, being the benefits accrued from their employment with Anglo and transferred to the appellant.

The first attempt to torpedo the proceedings in the lower court came when the appellant noted that the list of the plaintiffs was not annexed to the writ of summons, nor were the plaintiffs' names specified in the statement of claim. The appellant's learned counsel entered conditional appearance and applied before the Deputy Registrar to dismiss the writ for irregularity. Counsel for the respondents promptly furnished the list of plaintiffs and amended the statement of claim. That issue appeared to have been satisfactorily addressed. Matters regarding technicalities did, however, not end there.

On further reflection, the appellant was touched by the respondents' action, which it viewed as raising substantially the same issues of terminal benefits as did the earlier case by the respondent against the appellant cause named *Goodson Tembo and 49 Others v. African Life Financial Services Limited*⁽¹⁾. The appellant thus launched an application to dismiss action for multiple irregularities before the Deputy Registrar. The summons to dismiss was indicated as having been taken out under Order 30 of the High Court Act, chapter 27 of the laws of Zambia and Rules of the Supreme Court of England (1999) edition (RSC) Order 14A.

According to the appellant, the *Goodson Tembo*⁽¹⁾ case was adjudicated upon by Hon. Mr. Justice Nyangulu of the High Court before it was escalated by way of appeal, to the Supreme Court where it was cause numbered as Appeal No. 107 of 2006 (SCZ/8/204/2005). The Supreme Court rendered its judgment on 14th January 2009. The issues covered in the appeal were, according to the appellant, the same as those that were canvassed by the respondents in the proceedings from which stemmed the present appeal and were thus *res judicata*.

The appellant fingered two more issues it perceived as irregularities. The first was that the purported plaintiffs it referred to in its affidavit as, k, u, t, f and s, in the respondents' action in the lower court were deceased, and had in fact been so deceased at the time of commencement of the respondents' action on 14th February 2014. The action, as it related to those particular plaintiffs, was therefore incompetent.

The second alleged irregularity identified by the appellant as regards the respondents' action in the lower court, was with respect of plaintiffs r, g, e, x, l, c, b, d, y and o, who the appellant submitted exited the appellant's employment on identified and specified dates. Their respective causes of action, according to the appellant, occurred on those dates, which were all, without exception, more than six years prior to the 14th February 2014, and as such, their claims were statute barred and were accordingly incompetent.

The learned Deputy Registrar considered the application. In his brief ruling dated 11th July 2014, he declined to grant the application on grounds that it was brought under wrong rules of court. He pointed out that Order 30 of the High Court Rules, chapter 27 of the

laws of Zambia, deals with applications and proceedings in chambers and in court, particularly the form summons should take. Order 14A RSC, on the other hand, deals with final disposal of otherwise triable cases on points of law. The learned Deputy Registrar opined that the application by the appellant ought to have been made under Order 33 rule 3 RSC or/and indeed any other appropriate order and statute such as Order 18 or 19 RSC for abuse of the process of court. On this basis, he ruled the application as being technically incompetent. He, however, granted the appellant leave to amend the summons within seven days from the date of his order.

The appellant's counsel then returned to the drawing board and crafted summons "to stay or dismiss action on the grounds of *res judicata*." This time around there was no indication in the summons as to the order or rule pursuant to which the application was taken contrary to Practice Direction No. 1 of 2002. Reference was however made in the summons proper that the inherent jurisdiction of the court was being invoked.

The application was opposed. In the affidavit in opposition filed on behalf of the respondents, Dickson Mtonga deposed that while in employment with the appellant, and following the changes made to his and other employees' conditions of service in 2002, the employees sued the appellant under cause No. 2002/HP/0975 between *Goodson Tembo and 49 Others v. African Life Financial Services Limited*⁽¹⁾. The action was for an order to declare the employees redundant so that they could be paid their redundancy benefits which Anglo had computed and paid to the appellant for onward payment to the employees. All the employees have since left employment but have not been paid their benefits which were transferred.

In the present action which was titled in the lower court as *Dickson Mtonga and Others v. African Life Financial Services Limited*⁽²⁾ cause No. 2014/HP/0222, the claim by the former employees is for an order to compel the respondent to pay those former employees monies that accrued during their employment with Anglo and later paid to the appellant and are not seeking, as in the other action, an order to be declared redundant.

The deponent also averred that he was informed by his legal advisor that since the matter at hand involved monies left in trust with the appellant by the respondents' former employer, the exception to the law of limitations generally barring litigation, applied.

In reply to the respondent's opposition, the appellant, in an affidavit in reply filed on its behalf, reiterated that all the terminal benefits due to the respondents had been paid. The appellant denied that there was any trust relationship created between it and Anglo in favour of the respondent employees.

In his ruling on the application, the learned Deputy Registrar examined the claim of the respondents in the earlier cause against their claim in the latter cause, and concluded that the two claims were distinct although the parties were essentially the same in both cases. In one cause, the claims were raised when the respondents were in employment while in the latter cause the chief claim was for terminal benefits. He held that the plea of *res judicata* could not successfully be raised.

As regards the claim that some plaintiffs had died while the rest had raised their action after the limitation period, the learned Deputy Registrar once again adopted a highly legalistic, if not altogether technical approach. He held that the ground relied upon by the appellant in its summons to dismiss the action was that of *res judicata*. The other reasons were sneaked in through an affidavit. He therefore, claimed that he lacked jurisdiction to deal with those other matters. The net result was that the application was dismissed for lack of merit.

The appellant then appealed to a judge at chambers against the Deputy Registrar's ruling. The judge made the decision that we referred to in the opening paragraph, upholding the decision of the Deputy Registrar as far as it related to the issue of *res judicata*.

In regard to the latter part of the claim, the learned judge disagreed with the Deputy Registrar that he 'had no authority' to deal with the issue of limitation and that of deceased plaintiffs, holding that the fact that the summons spoke of multiple irregularities which were in fact elaborated upon in the affidavit, gave the learned Deputy Registrar sufficient authority to deal with them. The respondent had

the opportunity to respond to those issues but opted not to do so. She held that the claim was not statute barred as it fell under section 19(1)(b) of the Limitation Act, 1939.

As regard deceased plaintiffs, the learned High Court judge held that the Deputy Registrar should have ordered substitution of parties so that the personal representatives of the deceased employees should have stood as plaintiffs instead of the deceased plaintiffs. She ordered that such substitution be done. The appeal was thus allowed to the extent indicated.

The appellant is dissatisfied with that outcome. It has accordingly appealed to this court raising five grounds of appeal structured thus:

- 1. The learned judge in the court below erred in law and in fact when she held that the action the case of Goodson Tembo and 49 others v. African Life Financial Services Zambia Limited, 2002/HP/0975 ("the Goodson Tembo High Court Proceedings") and Appeal No. 167 of 2006 ("the Goodson Tembo Supreme Court Proceedings") and the action in substantive proceedings in the court below ("the Substantive Action") were distinct actions based on her interpretation of the judgment of Supreme Court in the Goodson Tembo Supreme Court Proceedings and without having regard to the issues raised in Goodson Tembo High Court Proceedings and their similarity to the claims in the Substantive Action.**

2. The court below erred in law and in fact when it held that under the Goodson Tembo case, the respondent did not have the opportunity to raise the claims put forward by the respondent in the Substantive Action.
3. The court below misdirected itself when it held that the cause of action in the Substantive Action had not arisen at the time the claims in the Goodson Tembo High Court Proceedings were raised and when the lower court subsequently upheld the Honourable Deputy Registrar's finding that the principle of *res judicata* did not apply in the proceedings before the court.
4. The court below fell into grave error when it held that the matter before it was not one which could be statute barred and that it was one that fell within the actions envisaged under section 19(1)(b) of the Limitation Act, 1939.
5. The court below erred in law and in fact when it held that the respondents were claiming on a pension fund without having regard to the pleadings, the affidavit evidence before it and to the nature of the claims disclosed thereby.

We note with interest that the respondents have not cross appealed on the decision of the High Court on the failure by the appellant to specify in the summons, the source of power for the Deputy Registrar to decide on limitation and substitution of parties.

Fairly detailed heads of argument were filed by the appellant. At the hearing, Mrs. M. K. Soko, learned counsel for the appellant, intimated that she would mainly rely on those heads of argument.

In the heads of argument grounds 1, 2 and 3 were argued compositely while grounds four and five were equally argued together. The main point taken against the lower court judgment in regard to the first three grounds of appeal was that the lower court adopted a rather narrow view of the issues that were brought before it as regards the availability of the plea of *res judicata*. According to counsel for the appellant, the full extent of the appellant's contention was explained to the lower court judge who decided to render her ruling on a very narrow view of *res judicata*, namely that it means that the actions must be one and the same.

According to counsel for the appellant, during the trial in the *Goodson Tembo*⁽¹⁾ case, substantive issues were raised which spoke to the nature of the respondent's claim. The issue of accrued benefits from Anglo as tabulated in a worksheet produced in evidence in the *Goodson Tembo*⁽¹⁾ case, which benefits were purportedly transferred to the appellant, was raised and discussed extensively. That

worksheet and the calculations it contained, formed the basis for the respondent's present claim.

As regards the respondent's claim for the sum of K1,282,755.45, counsel submitted that the respondent insisted that this sum represented terminal benefits due to them as accrued benefits which sum was transferred to the appellant. However, evidence was led during the trial in the *Goodson Tembo*⁽¹⁾ case based on the tabulation contained in the worksheet, which evidence revealed that no benefits were payable to the respondents in that cause. The respondents are thus barred from re-litigating the issue.

The learned counsel referred us to our judgment in the *Goodson Tembo*⁽¹⁾ case where we upheld the lower court's judgment and impugned the respondent's behavior of contriving allegations of non-existent redundancies or wishing to be paid terminal benefits when no termination of employment had occurred.

It was submitted that the High Court, having pronounced itself on the respondent's claims as were brought before it, including the claims in relation to the sums set out in the worksheet, and having dismissed the claims in their entirety, the respondents cannot bring

the same claims to be litigated in a different form in the action from which the current appeal arises. The case of *Valentine Shula Musakanya & Edward Jack Shamwana v. The Attorney General* ⁽³⁾ was cited as authority for the rule that once an issue has been raised and distinctly determined between the parties, neither party can be allowed to litigate that issue all over again.

As regards the claim that the distinction between the *Goodson Tembo*⁽¹⁾ case and the present one lies in the fact that in the *Goodson Tembo*⁽¹⁾ case the respondents were still in employment while in the proceedings leading to this appeal they no longer were in employment and were thus entitled to claim their accrued benefits, counsel for the appellant submitted that this too does not assist the respondent's case. The reason, according to counsel, is that notwithstanding the fact that the claim is being made after termination of their employment, the claim is historical in nature and assumed that at some point benefits that accrued from their employment with Anglo 'crystalised' pending their eventual payment on termination of employment.

The worksheet relied upon by the respondent contained historic salaries that were earned by the respondents at the time of their service with Anglo. Their claim for payment of the sum tabulated in the worksheet presupposed that a termination event occurred in the year 2000 upon the respondent's employment being transferred to the appellant from Anglo thereby causing their benefits from Anglo to accrue.

The learned counsel reiterated that the respondent's claim in the present proceedings are the same as those raised in the *Goodson Tembo*⁽¹⁾ case although they have been couched differently. Relying on the case of *Bank of Zambia v. Jonas Tembo & Others*⁽⁴⁾ we were urged to dismiss the present claim as being *res judicata*.

Counsel further argued that even assuming that the subject benefits had accrued at the time of tabulation of the figures set out in the worksheet, the respondents would still be barred from asserting their claim on the ground of *res judicata* because the respondents were aware of those benefits at the time they were prosecuting their claim in the *Goodson Tembo*⁽¹⁾ case. Counsel relied, as authority for this submission, on the case of *Aaron v. Shelton*⁽⁵⁾

where, citing Wigram V-C in *Henderson v. Henderson*⁽⁶⁾, the court stated that *res judicata* applies not only to the points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but on every point which the parties, exercising reasonable diligence, might have brought forward at the time.

On the claim by the respondents that their tour of duty be declared as being from their date of engagement by Anglo to the date of termination of employment, Mrs. Soko submitted that the High Court judge appeared not to have specifically addressed her mind to that aspect in the present proceedings although she concluded that this aspect too was incompetent. Counsel submitted that in the *Goodson Tembo*⁽¹⁾ case, the High court already upheld the transfer of contracts which clearly stated that the respondents would not lose their years of service under Anglo. The court held that no termination had occurred upon the respondents being transferred to the appellant. The net effect of these findings, according to the learned counsel, was that for purposes of calculating all benefits due, the 'tour of duty' is to be ascertained on the basis of service from Anglo

to the appellant. This issue was thus adjudicated upon already and is *res judicata*.

Regarding the respondents' claim that an order be made directing that pension benefits be recalculated, the learned counsel for the appellant drew our attention to the portions of the record of proceedings in the *Goodson Tembo⁽¹⁾* case recording an exchange between the court and a Ms. Fortune Ngatsha which, counsel submitted, was conclusive of the fact that the issue of benefits and how they are to be calculated was brought out in court in the *Goodson Tembo⁽¹⁾* proceedings. The issue of benefits was one of the several issues raised which should have been determined by the lower court.

Counsel contended that in order to have escaped being caught under the principle of *res judicata*, the respondents' pleading ought to have cited specific incidences of under payment based on a factual analysis of pension actually received by each respondent. Having not done so, their claims in the current action are not distinguishable from those raised in the *Goodson Tembo⁽¹⁾* case.

We were urged to uphold the appeal on the issue of *res judicata*.

Turning to grounds four and five of the appeal, it was contended that the lower court was wrong to hold that the facts of the case fitted within actions envisaged under section 19(1)(b) of the Limitation Act, 1939. Counsel submitted that the approach taken by the judge suggested that the whole action was founded on a claim made on a pension fund when the truth is that there are two distinct actions; one for a liquidated sum representing benefits and the other an unliquidated sum in respect of pension benefits allegedly underpaid. She pointed out that paragraphs 7 and 10 of the statement of claim do not allude to any pension or other trust fund being the subject of the claim, rather it is a claim for the payment of a debt in the liquidated amount stated in those paragraphs.

The High Court judge, according to the appellant's learned counsel, glossed over this very important issue and thus fell into error. Granted that the claim purportedly accrued in the year 2000, it was contended on behalf of the appellant that the claim was statute barred in terms of the Limitation Act, 1939.

At the hearing of the appeal, Mrs. Soko briefly augmented the heads of argument with oral submissions. In particular she urged us to take into account the case of *Stanbic Bank v. Bentley Khumalo and 29 Others*⁽⁷⁾ where it was held that the appellant bank being the employer, could not be a trustee of the employees as well.

In response, Mr. Lisimba, co-counsel for the respondents, informed us that he would rely on the heads of argument filed in support of the respondents' case on 11th November 2016. In those heads of argument, the respondents' submission were succinctly captured thus:

The plea of *res judicata* does not apply in this case because the conditions for its existence are not present. Even if the litigants are the same as in the *Goodson Tembo*⁽¹⁾ case, the claims or relief being sought in the present action are different. The relief being sought in the current action as per amended statement of claim are:

- (a) A declaration that they are entitled to their accrued benefits from their former employers' Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited which accrued benefits were transferred to the defendant (Appellant in this case).**

Counsel also located the claim for K1,282,755.45 in the context of the respondents' current claim.

The short point counsel made in the heads of argument was that the claims in the current action as well as the reliefs being claimed, were totally different from those sought in the *Goodson Tembo*⁽¹⁾ case, where the respondents were seeking a declaration that their contracts of employment be deemed repudiated upon the appellant's alteration of the employees' terms of service.

In the *Goodson Tembo*⁽¹⁾ case, according to counsel, the claim was for redundancy packages as the employees formed the view that the changes in their employment conditions had the effect of a redundancy, a position which this court did not accept given that the respondents had each willingly signed a transfer letter which allowed the appellant to vary terms of employment at any time. Counsel cited the case of *Bank of Zambia v. Tembo & Another*⁽⁴⁾ as authority for his submission that *res judicata* was not available where the reliefs sought in the two cases were different.

As regards the submission on the issue of limitation, counsel for the respondents submitted that the current case is not statute barred as it squarely falls within the ambit of section 19(1)(b) of the Limitation Act of 1939. Counsel quoted that provision.

In orally supplementing the heads of argument Mr. Lisimba submitted that there are issues that ought to be determined at trial. To curtail the respondents' case, counsel contended, would defeat the course of justice which in the present circumstances demands that the appellant should hand over money it was holding on behalf of the respondents.

Mr. Okware, co-counsel for the respondents, re-echoed the respondents' reliance on the heads of argument and adopted Mr. Lisimba's supplementary arguments.

We are grateful to counsel for both parties for their submissions.

As regards the first ground of appeal the question for determination is whether indeed the claims and reliefs sought were *res judicata*.

It is important to stress from the outset that relitigating the same issues is contrary to public policy. **Halsbury's Laws of England**, 5th edition Vol. II paragraph 1166 states as follows:

...the law discourages relitigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a retrial of a case which has already been decided by another court, leading to a possibility of conflicting judicial decisions or that there should be collateral challenge to judicial decisions...

Res judicata is defined on page 1336 of **Blacks' Law Dictionary** (18th edition) by Bryan A. Gardner thus:

(Latin 'a thing adjudicated') 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.

In *Valentine Shula Musakanya & Edward Jack Shamwana v. The Attorney General*⁽³⁾ we reiterated that *res judicata* is a strict rule of law which binds parties to decisions made by a competent court.

In *Mpongwe Farms Limited v. Dar Farms & Transport Limited*⁽⁸⁾, we set out a breakdown of the important facets of *res judicata* as a concept. We gave our understanding of *res judicata* which is that it:

Puts to rest and entombs in eternal quiescence every justiciable issue and question actually adjudicated upon or which should have been raised in the initial suit. And, the law is fairly settled and defined beyond peradventure in a plethora of cases decided by this court, that for a party relying on the defence of *res judicata* to succeed, he must

satisfy the following five conditions, namely (i) that the parties or their privies are the same in both the previous and the present proceedings; (ii) the claim or issue in dispute in both actions is the same; (iii) that the *res* (or the subject matter of the litigation) in the two cases are the same; (iv) that the decision relied upon to support the plea of estoppel is valid, subsisting and final and; (v) that the court that gave the previous decision to sustain the plea, is a court of competent jurisdiction.

In fact, in the case of *Bank of Zambia v. Jonas Tembo & Others*⁽⁴⁾, which has been widely alluded to by counsel, we referred to some of these factors.

Relating the foregoing position to the case before us, can it be said in earnest that the circumstances meet the factors prescribed for *res judicata* as we summarised them in the *Mpongwe Farms*⁽⁸⁾ case?

To answer this question, it is important to compare the reliefs sought in the two actions for us to appreciate the similarities and therefore their amenability to settlement at a single trial of the issues involved. In the *Goodson Tembo*⁽¹⁾ case the relief sought was:

- (1) A declaration that the respondent had repudiated the appellant's contracts of employment;

- (2) An order that the appellant be deemed to have been declared redundant or placed on an early retirement;
- (3) Damages for breach of contract.

On the other hand, in the present action the relief sought is:

- (a) A declaration that they are entitled to their accrued benefits transferred from their former employers' Anglo American Corporation Limited and Zamanglo Industrial Corporation and paid to the defendant.
- (b) An order directing the defendant to pay the Plaintiffs K1,282,755.45 being benefits accrued from their employment with Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited and transferred to the defendant.
- (c) An order directing that K1,282,755.45 be subject to interest effective date of transfer to date of payment.
- (d) A declaration that the plaintiffs' tour of duty should be from the date of engagement with Anglo American Corporation Limited and Zamanglo Industrial Corporation Limited to date of leaving employment with the defendant.
- (e) An order directing that the plaintiffs' pension benefits be recalculated based on the date of engagement with Anglo American Corporation Limited and Zamanglo Industrial Limited to date of leaving employment with the defendant.

- (f) Interest
- (g) Costs
- (h) Any other relief the court may deem fit.

Our view is that although the learned Deputy Registrar did adopt what was, on all accounts, a simplified approach to determining the distinction between the *Goodson Tembo*⁽¹⁾ case and the present, he was in all sincerity correct, and the High Court judge cannot thus be faulted for agreeing with him in that respect.

As has been submitted by counsel for the respondents, the nature of the claims that were put forth for determination by the lower court in the *Goodson Tembo*⁽¹⁾ case were akin to the situation those employees were in at that time, that is to say, employees who were concerned about their continued status as employees and who thus sought to secure their exit packages from their employer. In this current action, the claims are clearly different. They are akin to existing employees. They are premised on their employment benefits first with their earlier employer, and their later employer – the appellant.

While we well appreciate that there could be aspects of the claims of the respondents in this case which may have been touched upon in the *Goodson Tembo*⁽¹⁾ case, we also realise that some aspects of the claims could not be determined then. This makes the circumstances and nature of relief sought different. We are thus inclined to accept the respondents' claim that *res judicata* should not in the present circumstances be used as a device to shut out the respondents from putting forward their claims.

The natural effect of a trial is that the full extent to which some issues or aspects of them were already determined, will be revealed and become apparent to all parties. There is nothing that can stop the trial court from making decisions on whether or not an issue is spent by a previous decision as and when such issue is raised at the trial. As it is, we view this option as one which lends itself more readily to the dictates of the justice of the case.

As regards the second ground of appeal, the lower court judge is faulted for stating that under the *Goodson Tembo*⁽¹⁾ case the respondents did not have the opportunity to raise the claims put

forward by the respondents in this case. We think this ground is integrally linked to the first.

For our part, we are unable to see how the declarations sought in the present action could have been raised earlier without such claims being ahead of their time; being raised prematurely.

With respect to the third ground of appeal, can it be said that the cause of action in this case had already arisen at the time of the *Goodson Tembo*⁽¹⁾ proceedings? Again, this bears a close relationship with ground two.

Our perusal of the reliefs sought in the present case as we have tabulated them above would appear to confirm that items (b), (c) and (d) could only have crystallised when the respondents exited employment in finality with the appellant and could therefore not have arisen while they remained in employment. We are bound to dismiss ground three on this basis.

Under ground four of the appeal the question is whether there was any trust arising in the relationship between the appellant and the respondents when the appellant accepted to hold money on

behalf or for the benefit of the respondents from Anglo American Corporation.

Mrs. Soko argued that on the basis of the authority of *Bentley Khumalo & Others v. Stanbic Bank*⁽⁷⁾ no such trust arose as the appellant was the employer and remained so.

We must state that the trust envisioned here is an equitable one, that is so say, a remedy resembling a trust imposed for the benefit of a party. It is one imposed by the court on grounds of conscience without reference to the implied or presumed intention of any person. Dean J in *Muschinski v. Dodds*⁽⁹⁾ described a constructive trust in a manner which resonates with our thinking in this case. He stated that:

Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.

In *Williams v. Central Bank of Nigeria*⁽¹⁰⁾, the UK Supreme Court considered a constructive trust in relation to the Limitation Act, 1980 (UK) and concluded that trustee includes a 'constructive trust.' If we

take, as we should, the appellant in this case as constructive trustee (there not being an express trust) who might be made liable in equity to account for the money it received from Anglo for the benefit of the respondents, there would be no doubt that the right of the respondents to claim their benefits (money) held to that credit and for their benefit is secured by section 19(1)(b) of the Limitation Act, 1939.


At the beginning of this judgment we expressed our concern at the keenness that animated the attempts through technicalities to silence the respondents from proceeding with their claim. We think real justice in this case resides not in those technicalities and rules but in hearing the parties in full.

It is for all the reason that we have given that we believe the matter must proceed to trial. The appeal must fail and we so hold.

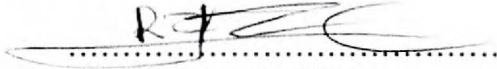
Costs shall abide the outcome in the lower court.



 E. M. Hamaundu
SUPREME COURT JUDGE



 M. Malila
SUPREME COURT JUDGE



 R. M. C. Kaoma
SUPREME COURT JUDGE