

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**

**APPEAL NO. 192/2012
SCZ/8/336/2012**

(CIVIL JURISDICTION)

BETWEEN:

**PETER MULAMBWA
MILLION MASENKE
KANGWA E
MAKASA E**



**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT**

AND

MAAMBA COLLIERIES LIMITED

RESPONDENT

Coram: Phiri, Malila and Kaoma, JJS

on 2nd June, 2015 and 1st October, 2020

For the Appellants: (In person, Mr. Peter Mulambwa and Mr. Million Masenke)

For the Respondent: Mr. J. Kalokoni, Messrs Kalokoni & Co.

JUDGMENT

Phiri JS delivered the Judgment of the Court

Cases referred to:

1. *Million Masenke and Others v. Maamba Collieries Ltd. and Zambia Privatisation Agency 2001/HP/0869.*
2. *Bank of Zambia v. Jonas Tembo and Others (2002) ZR 103.*
3. *Valentine Shula Musakanya and Edward Jack Shamwana v. Attorney General (1981) ZR 1.*
4. *Mpongwe Farms Limited v. Dar Farms and Transport Limited (Selected Judgment No. 38 of 2016).*

Legislation referred to:

1. *Supreme Court (White Book, 1999 ed.)*.

Other works referred to:

1. *Black's Law Dictionary (8th Ed.)* by Bryon A. Gardner.

The appellants, who are former employees of the respondent company, commenced legal action by Writ of Summons and Statement of Claim filed in the High Court on 8th December, 2010. They sought numerous relief including allowances from 1st April 1999 to their date of retirement, being 31st March, 2000. They additionally claimed the difference in allowances allegedly not incorporated into their salaries when their benefits were calculated.

The respondent promptly entered conditional appearance and proceeded to file a notice to raise preliminary issues pursuant to Order 14A of the Rules of the Supreme Court (White Book, 1999 ed.).

The issues raised were:

- (1) Whether these proceedings are not an abuse of process in view of the judgment of the Supreme Court in the case of *Maamba Collieries Ltd v. Million Masenke & Others*.**

(2) Whether these proceedings have been commenced within the limitation period.

The facts upon which the respondent relied in support of the preliminary issues were that in the year 2001, the appellants were all part of the group that commenced court action against the respondent in the case of **Million Masenke and Others v. Maamba Collieries Ltd. and Zambia Privatisation Agency**¹. This cause came on appeal to the Supreme Court where, in our judgment dated 31st October, 2007, we dismissed the appellants' claim on grounds that the appellants had been paid all their entitlements.

In those circumstances, according to the respondents, the appellants were seeking to re-litigate issues that had already been adjudicated upon by the Supreme Court. Additionally, the claims for allowances were premised on entitlements in the course of the appellants' employment with the respondent dating back to 1999. The action by the appellant was, in the respondent's view, both *res judicata* and statute barred and, therefore, an abuse of court process.

The appellants opposed the preliminary issues that the issues in cause No. 2001/HP/0869 was not the same as those

which went to the Supreme Court in SCZ Appeal No. 26/2005. Whereas the appellants' claim in that action was for terminal benefits and repatriation allowances in the sum of K12,340,693,979, 73 the issue in the current action centered around allowances withdrawn by the respondent from 1st April, 1999 till their retirement; the calculation of benefits based on salary and allowances and six months' salary inclusive of allowances in lieu of notice. According to the appellants, the claims being different, there can be no justiciable plea of *res judicata* and no abuse of process.

Chisanga J as she then was, heard the preliminary issues and upheld one of them. She examined the claims of the appellants in the two causes, that is to say, the High Court causes No. 2001/HP/0869 and that in cause No. 2010/HP/1318 from which the current appeal arises. She also carefully considered the identity of parties in the two matters.

She found that the parties in the two causes were essentially the same and the claims intricately related. The claim for six months' salary was part of the subject matter before the court matter that ended up in the Supreme Court and could have

been raised by the appellants in that action. In the absence of special circumstances advanced by the appellants for their failure to include these claims in that action rendered the new action an abuse of court process as it relitigated a matter that ought to have been litigated in cause No. 2001/HP/0869. On the basis of authorities that she reviewed, the judge held that the issues sought to be determined by the court in this case were *res judicata*.

The learned High Court judge, however, agreed with the learned counsel for the appellant that a statute of limitation defence ought to have been pleaded. She nonetheless dismissed the action on grounds that the claims were *res judicata*.

Arising from the ruling of the High Court, dismissing the action, the appellant has now appealed on one ground, namely, that:

The learned trial judge erred in law when she held that our action is an abuse of court process or *res judicata* when in fact our claims were never adjudicated upon in the previous action.

Heads of argument were field in support of the ground of appeal. At the hearing of the appeal, Mr. Mulambwe, who

represented the other appellants, told the court that he relied on the heads of argument.

In those very brief heads of argument, the appellants gave a factual background as to how they enjoyed ZIMCO conditions of service and that when computing the retirement packages for the appellants, the respondents used only the basic pay without considering the allowances as per directive of the ZIMCO Board of Directors issued in 1995. The appellants, it was submitted, did not benefit from the said directive while other former employees did.

The appellants argued that their fresh action was not an abuse of court process as their claim in these proceedings have not been adjudicated upon by the court. They prayed that the appeal be allowed with costs.

At the hearing of the appeal, Mr. Kalokoni sought leave to file the respondent's heads of argument. We allowed him 10 days within which to do so following which we would deliver our judgment. Counsel however implored us to examine our judgment in Appeal No. 26/2005 which was the respondent's

appeal, regarding the same parties and submitted that the present proceedings were clearly an abuse of process.

In the heads of argument which were filed on the 11th June 2015, the learned counsel gave a brief background regarding how this matter had earlier been settled. He in particular referred us to page 17 of the Supreme Court judgment in **Million Masenke & Others v. Maamba Colliers Limited and another**¹ where we stated as follows:

In as far as the second group is concerned – where the appellants fell as middle managers, there was evidence established at pages 256 – 262 that there were consent judgments reflecting that the employees belonging to category two (2) were paid, because they were paid K400,000,000.00 in final and total compensation after incorporating all allowances. Also there was evidence that Messrs Sunday Nkonde and Company received all the dues on behalf of their clients, that is to say, the payment due to them.

After taking us through particular findings of the lower court as regards the appellants' present claim and the previous claim that ended in the passage of the Supreme Court judgment to which we have referred, counsel submitted that the present action was indeed an abuse of court process. The lower court can thus not be faulted for dismissing it. We were urged to dismiss the appeal for lacking merit.

We have considered the arguments of the parties and examined the judgment of the High Court which has been appealed against. The sole question for determination is whether the lower court was right to hold that the issues raised by the appellant in these proceedings were *res judicata*, having been dealt with in a previous matter involving the same parties which matter eventually reached this court.

Res judicata is defined on page 1336 of **Black's Law Dictionary** (8th Ed.) by Bryon 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 transactions or series of transactions that could have been – but was not – raised in the first suit.**

Reflecting on this definition in the case of **Mpongwe Farms Limited v. Dar Farms and Transport Limited**⁴ we stated as follows:

Our understanding of this authoritative definition is that *res judicata* 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.

In the case of **Bank of Zambia v. Jonas Tembo and Others**², we referred to the conditions that must be satisfied by a party relying on the plea of *res judicata*. The learned lower court judge in this case properly articulated those conditions in her judgment.

As we stated in **Valentine Shula Musakanya and Edward Jack Shamwana v. Attorney General**³:

***Res judicata* is a strict rule of law and the parties are bound by any decision made by a competent court.**

A perusal of the lower court judgment now being assailed reveals (from R9 to R10) that the court meticulously considered the nature of the claims in the two causes before coming to the conclusion that she did. She stated in her ruling, among other things, the following:


The judgment of the Supreme Court reveals that the issue whether or not allowances were included in the terminal benefits paid to the plaintiffs was solemnly and with certainty determined against the plaintiffs. The decision was made in a final judgment of that court ... if the plaintiffs decided not to include allowances allegedly withdrawn by the defendant in 1999 when claiming their terminal benefits, that election must react against them. The reason being that inclusion of all allowances in the retirement benefits payable to the plaintiffs was a point which belonged to the subject that was litigated before the Court.

We are in no doubt whatsoever that the lower court judge properly directed her mind in the application of the doctrine of *res judicata* in the two senses in which the term is defined as we have explained it. The judge can thus not be faulted. We agree with the submissions of counsel for the respondent. This matter is indeed *res judicata*. The appeal has no merit and it is dismissed accordingly.

The High Court judge had awarded costs to the respondent to be taxed if not agreed. We equally award costs to the respondent.



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G. S. PHIRI
SUPREME COURT JUDGE



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M. MALILA
SUPREME COURT JUDGE



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R. M. C. KAOMA
SUPREME COURT JUDGE