IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 77/2015**

HOLDEN AT LUSAKA **SCZ/8/78/2015**

(Civil Jurisdiction)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED APPELLANT

AND

NOEL NKHOMA RESPONDENT

CORAM: Mwanamwambwa, DCJ, Muyovwe, Hamaundu, JJS.

On the 1st March, 2016 and ....., 2016

For the Appellant: K. Chenda of Simeza Sangwa and Associates
For the Respondent: K. Hang'andu of Kelvin Hang'andu and Co.

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **Michael Kahula V. Finance Bank, Appeal No. 96/2012.**
2. **ANZ Grindlays Bank (Z) Limited V. Kaona (1995-97) ZR 85.**
3. **Bank of Zambia V. Jonas Tembo and others (2002) ZR,103.**
4. **Gibbs V. Guild (1881) 8 QBD 296**
5. **Nykred Mortgage Bank plc V. Edward Erdman Group Ltd (No 2) (1998) 1 ALL ER 305.**
6. **BP Zambia Plc V. Interland Motors Limited (2001) ZR 37**
7. **Virgin Atlantic Airways Ltd V. Zodiac Seats UK Ltd (2009) EWCA Civ 1062.**

8. **Arnold V. National Westminister Bank Plc (1975) 2 AC,93.**
9. **Haystead V. Federal Commissioner of Taxation (1921) 29 CLR 537.**
10. **Thoday V Thoday (1964) P. 181, 197-198**
11. **Fidelitas Shipping V. V/O Exportchles(1965)2 ALL ER 4.**
12. **Henderson V Henderson (1843)3 Hare, 100.**
13. **Development Bank of Zambia V Sunvest Ltd (1997-99) Z.R. 187.**
14. **Societe Nationale Des Chemis De Pur Du Congo (SNCC) and Joseph Nonde Kakonde, SCZ Judgment No. 19 of 2013.**

Other Work referred to:

1. **Halsbury's Law of England, vol 28, 4th Edition (Re-issue)**

This is an appeal from the decision of the High Court dismissing the Appellants preliminary objection.

The brief facts of the matter are that the Respondent was employed as a Bank Clerk on the 1st of December, 1987. He rose through the ranks to the position of Executive Director in charge of Corporate Banking. The Respondent held this position until his services were terminated by the Appellant on 10th December, 2010.

After the termination of his employment, the Respondent brought an action against the Appellant and the Bank of Zambia,

in the Industrial Relations Court, for wrongful termination of employment. The Respondent claimed the following reliefs:

(a) For a declaration that there was no notice given to the by the Appellant for the termination of the Contract of Employment dated 28th October, 2010 between the Respondent and the Appellant contrary to clause 3.3.2 of the contract. And an order for damages for breach of the Respondent's Contract of Employment with the Appellant;
(b) An order that the purported termination of the contract of Employment was unfair and or wrongful and amounted to unfair dismissal and was therefore null and void;
(c) In the alternative for an order that the Respondent be deemed to have been retrenched, retired or declared redundant by the Appellant;
(d) An order for damages for unlawful termination of employment amounting to 24 months salary, allowances and benefits on the basis of applicable precedent and case law;
(e) An order for payment of all contractual entitlements such as gratuity on pro-rata basis, leave days and all benefits and allowances payable to both in cash and in kind under the contract between the Respondent and the Appellant;
(f) An order for damages for loss of legitimate expectation of employment in the banking, financial and other sectors due to adverse media publicity the Respondent was subjected to by the Appellant and the Bank of Zambia;
(g) An order for damages for mental torture and anguish; and
(h) Interest from the 10th December, 2010 the date of termination to date of payment and costs.

After hearing the matter, the Industrial Relations Court found in favour of the Respondent. The Appellant and the Bank of

Zambia were unhappy with the decision of the Industrial Relations Court. Therefore, they appealed to this Court. On the 15th of August, 2012, the Respondent filed a cross appeal for variation of the Judgment by the Industrial Relations Court. However, before the appeal and cross appeal could be heard, the parties entered into a consent judgement, which read, in part, as follows:

> **"WHEREAS Appeal No. 108 of 2012 arose from a Judgment of the Industrial Relations Court delivered at Lusaka on 9th March, 2012, in respect of Complaint No. 73 of 2011, by Noel Nkhoma against Finance Bank Zambia Limited and the Bank of Zambia, arising from the decision by Bank of Zambia to terminate Noel Nkhoma's employment with Finance Bank Zambia on 10th December, 2010;**
>
> **WHEREAS the Industrial Relations Court upheld the Complaint by Noel Nkhoma and adjudged that Finance Bank Zambia Limited do pay Noel Nkhoma certain accrued contractual benefits and damages for wrongful dismissal...;**
>
> **The parties having agreed terms of settlement and consenting to an order being drawn up in such terms as hereinafter provided;**
>
> **BY CONSENT**
>
> **IT IS HEREBY ORDERED:**
>
> **(a) THAT the appeal intituled No. 108 of 2012, be and is hereby consolidated with the appeal intituled No. 118 of 2012 and that the said appeals do proceed as one appeal;**
>
> **(b) THAT Finance Bank Zambia Limited shall pay the contractual benefits of Noel Nkhoma and Miles**

Sampa that had accrued as at date of termination of their respective contracts of employment with Finance Bank by Bank of Zambia and interest thereon;

(c) THAT the Bank of Zambia shall pay to Noel Nkhoma and Miles Sampa the damages awarded in the respective Judgments of the Industrial Relations Court in Complaint No. 73 of 2011 and Complaint No. 253 of 2010 and interest thereon;

(d) THAT the Bank of Zambia shall pay to Noel Nkhoma and Miles Sampa legal costs of and occasioned by their respective actions;

(e) THAT upon payment as aforesaid, the parties shall have no further claims against each other in respect of Complaint No. 73 of 2011 and Complaint No. 253 of 2010 or this appeal and that this appeal shall thereupon stand irrevocably withdrawn save for purposes of enforcing this order."

On the 8th of April, 2014, the Supreme Court dismissed the cross appeal on grounds that the consent Judgment determined all the issues in contention.

On the 21st of October, 2014, the Respondent took out an action in the High Court claiming the following reliefs:

(a) K2,394,000.00 damages for unpaid accrued pension scheme benefits due to the Respondent from the Appellant between December 1, 1987 and December 10, 2010, and interest on the said sum at the highest commercial bank lending rate from December 10, 2010 until payment;

(b) Damages for breach of contract;

(c) Damages for conversion of the Respondent's said benefits;

(d) Costs; and

(e) Further or other relief as may seem fit.

On the 19th of November, 2014, the Appellant took out summons to dismiss action on grounds of *res judicata*. The application was supported by an affidavit. The Respondent also filed an affidavit in opposition.

The main argument by the Appellant was that the current claim for pension benefits was determined under claim (e) of the Industrial Relations Court complaint which sought an order for payment of "**all contractual entitlements such as gratuity on pro-rata basis, leave days and all benefits and allowances payable to the complainant both in cash and in kind under the contract between the Respondent and the Appellant.**"

The main argument by the Respondent on the other hand was that claim (e) above did not cover pension benefits because the Respondent only became aware of the pension benefits after this Court determined the case of **Michael Kahula V. Finance Bank**[1], in which the formula for payment of pension benefits was prescribed after noting the Appellant's failure to devise a formula.

After hearing the application, the learned Judge in the Court below was of the view that the Respondent's contract does not mention pension benefits in any of its clauses. That the Judgment of the Industrial Relations Court, memorandum of appeal and the Consent Order executed in the Supreme Court over the appeal all do no mention pension benefits. The lower Court found that the current claim for pension benefits was not actually decided or adjudicated upon between the parties in the Industrial Relations Court complaint and subsequent appeal.

The lower Court added that the Consent Order outlined that the Appellant was to pay the Respondent's contractual benefits and Bank of Zambia was to pay damages and costs. That the Consent Order added that parties shall have no further claims against each other as regards the Industrial Relations Court complaint and subsequent appeal. That these clearly showed that the claim for pension benefits was not adjudicated upon.

The lower Court held the view that the **Michael Kahula**[1] case showed that after the introduction of a pension scheme in 1999, the Appellant stopped paying accrued benefits to employees that left after that date. That the Supreme Court went on to determine that benefits accrued prior to 1999 be paid using the formula

applicable before the introduction of the pension scheme. That this supported the Respondent's argument that he was not aware that he was entitled to the same until the Supreme Court decision and could not therefore reasonably claim it before then. The court found that from the **Michael Kahula**[1] case, it was clearly stated that eligible employees who left the Appellant's employment between 1999 and the time of the decision, were not being paid pension benefits for the period prior to 1999 and it is thus reasonable the Respondent did not believe he was entitled to the same and therefore did not claim for them in the industrial Relations Court action. That it was apparent that the **Michael Kahula**[1] case triggered this action by the Respondent. That in such a case, one should ordinarily be allowed to claim so long as the claim is not statute barred. She added that the Respondent could not be said to be bringing the action piece meal. She held that the action was not *res judicata* nor was it an abuse of the court process.

Dissatisfied with the above Ruling by the court below, the appellant appealed to this court on four grounds. These are-

Ground one

That the Court below erred both in law and fact at page R8 of the Ruling by holding that the issues in Industrial Relations Court and the Consent Order executed in the Supreme Court were confined to the employment contract which was terminated and which had no provision on pension benefits.

Ground two

That the Court below erred both in law and fact at page R10 of the Ruling by holding that the Plaintiff did not believe that he was entitled to pension benefits for the period prior to 1999 and therefore did not claim for them before the Industrial Relations Court

Ground three

That the Court below erred both in law and fact at page R10 of the Ruling by holding that the action before it was not *res judicata.*

Ground four

That the court below erred both in law and fact at page R10 of the Ruling by holding that the action before it did not amount to an abuse of Court process.

Both parties filed written heads of argument.

On behalf of the Appellant, Mr Chenda submitted that the matter was *res judicata*. That there was no evidence of any impediment on the part of the Respondent which prevented him

from expressly claiming for 'pension benefits' in the same manner that he specified 'gratuity'. That the Respondent should have specified his claim instead of using the generic claim for 'all contractual entitlements'. That instead, the Respondent opted to commence a fresh action in the High Court, which renders the latter action caught up in the doctrine of *res judicata*. He relied on the case of **ANZ Grindlays Bank (Z) Limited V. Kaona**[2] and **Bank of Zambia V. Jonas Tembo and others**[3] to support his argument.

Counsel added that there was also a consent order entered in the resultant appeal before this Court. That the effect of the consent order was that it settled all the issues between the Respondent, the Appellant and the Bank of Zambia with respect to the Respondent's entitlements arising from his former employment with the Appellant.

Mr. Chenda argued that a cause of action accrues at the time of breach of Contract. In support of his argument he cited **Gibbs v Guild**[4] and **Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd**[5]. That in this case the pension benefit accrued to the Respondent, when he was dismissed in 2010 and received a severance pay which did not include pension benefits for the period 1989 to 1999, which he is now claiming.

He submitted that if the Respondent wanted his pension benefits to be considered alone, and separated from the blanket claim for: "*Contractual entitlement and benefits payable under the Contract with the Defendants*", then he should have expressly pleaded for it before the Industrial relations Court. He submitted that instead the Respondent elected to bring the issue in piece meal; with most components presented in the Industrial Relations Court and one Component in High Court. That what the Respondent did was abuse of the Court process, which must be prevented, as per our decision in **BP Zambia Plc v Interland Motors Ltd**[6].

On behalf of the Respondent, Mr Hang'andu made lengthy arguments. In summary, there were mainly four arguments.

Firstly, he argued that the action in the High Court for pension is not *res judicata* because pension was not claimed and not adjudicated upon in the first action in the Industrial Relations Court.

Secondly, he argued that the Respondent did not claim pension in the first action in the Industrial Relations Court because he was then not aware that he was entitled to it.

Thirdly, he argued that the Respondent's entitlement to pension accrued on 24th July 2014, when the Supreme Court delivered Judgment for payment of pension to **Michael Kahula, against Finance Bank Zambia Ltd**(1). That pension accrued to the Respondent when the Supreme Court devised a formula for the payment of the pension.

Fourthly, he argued that the Respondent did not claim pension in the Industrial Relations Court because he had not yet reached pensionable age. We hasten to point out that this argument contradicts the second one above.

In support of his arguments, he cited several cases on *res judicata* and *estoppel*. These include the following:

(a) Bank of Zambia V Tembo(3)

(b)Virgin Atlantic Airways Ltd V Zodia UK Ltd(7)

(c)Arnold V National Westmister Bank Plc(8)

(d)Haystead V Federal Commissioner of Taxation(9)

(e)Thoday V Thoday(10)

(f) Fidelitas Shipping V. V/O Exportchles(11)

(g)Henderson V Henderson(12)

We have examined the pleadings in the Industrial Relations Court and High Court. We have perused the Judgment in the Industrial Relations Court, the Ruling in the High Court and that of this Court of 24th July 2014. We have also looked at the authorities cited by both parties.

There are two main issues in the matter. One is whether there is multiplicity of actions or piece meal litigation. Secondly, is whether the matter is *res judicata*

Multiplicity of actions refers to commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of action. It is litigation split and instituted in chapters: See:-

(a) Development Bank of Zambia and Another V Sunvest Limited(13)

(b)BP Zambia Plc V Interland Motors Limited(6)

In the DBZ case, this court held as follows:

"(i) It was wrong for the plaintiff bank to commence an action in Court and then at the same time adopted some measure of self- redress

(ii) The injunction should be quashed because there is already an action on the same subject matter and the Court does not approve of the commencement of a multiplicity of procedures, proceedings and actions, in different Courts, which may result in the Courts making contradictory decisions on the same matter."

The **BP Zambia Plc** case followed the **DBZ case** and held as follows:

"(iv) A party in dispute with another over a particular subject should not be allowed to deploy his grievances piece meal in scattered litigation and keep on hauling the same opponent, over the same matter before various Courts

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

In the present case, paragraphs 3, 4, and 5 of the Statement of Claim accompanying the Respondent's Writ of Summons of 21st October 2014, reads as follows:

"3. by a contract covenanted on December 1, 1987 between the Defendant and the Plaintiff, the Defendant employed the Plaintiff as a bank clerk, from which he rose through various portfolios, the

highest of which was that of Executive Director in charge of Corporate Banking. The Plaintiff held the latter position until December 10, 2010 when his services were terminated by the Defendant.

4. **When the Defendant dismissed the Plaintiff from service, it wilfully refused and/or neglected to pay his accrued pension scheme benefits that were due to him for the period December 1, 1987 to 1999 when the Defendant inaugurated the Finance Bank in-house Pension Scheme. The said benefits ought to have been paid as accrued pension scheme benefits by the Defendant to the Plaintiff on or before December 10, 2010 when his services were terminated, and computed on the basis of his last basic salary or "exit salary" as of December 10, 2010, the date of the Plaintiff's dismissal from employment. By reason thereof, the Defendant unlawfully undervalued and therefore underpaid the Plaintiff's terminal benefits, and thus withheld, and ultimately converted to its own use his accrued pension scheme benefits.**

5. **By reason of the matters aforesaid, the defendant breached the conditions and/or terms of its contract of service with the Plaintiff, and thereby converted his said benefits and/or money to its own use."**

And the Plaintiff's claim is for:

> **"(i) K2,394,000.00 damages for unpaid accrued pension scheme benefits due to the Plaintiff from the defendant between December 1, 1987 and December 10, 2010, and interest on the said sum at the highest commercial bank lending rate from December 10, 2010 until payment;**
>
> **(ii) Damages for breach of contract;**
>
> **(iii) Damages for conversion of the Plaintiff's said benefits;**
>
> **(iv) Costs; and**
>
> **(v) Further or other relief as may seen fit.**

The two actions, as set out above, show that the Respondent sued the Appellant twice, on termination of his Contract of employment. In both actions he claim damages for breach of contract. In both actions, he claimed benefits arising from termination of the contract of employment.

We referred Mr Hang'andu to the actions in the Industrial Relations Court and High Court. We then asked him how many times the Respondent litigated on the termination of his contract of employment. In answer he said that it was only once. We must say that Counsel was being insincere in his answer.

In our view, the Respondent's move to sue Finance Bank Zambia Limited, twice over one and the same set of facts, constitutes multiplicity of actions and piece meal litigation, as per our decisions in:-

(a) **Development Bank of Zambia and Another V Sunvest Limited**[13] and

(b) **BP Zambia Ltd V Interland Motors Limited**[6]

We now move to *res judicata.*

Res judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The principle of *Res judicata* states that once a matter has been heard between the same parties, by a Court of any competent jurisdiction, the same matter should not be re-opened. The rationale is that there should be an end to litigation: See:-

(a) Bank of Zambia V Tembo[3]

(b) Societe Nationale Des Chemis De Pur Du Congo (SNCC) V. Joseph Nonde Kakonde, SCZ Judgment No. 19 of 2013[14].

(c) Henderson V Henderson[12]

(d) Arnold V National Westminister Bank Plc[8]

Society Nationale Du Congo V. Nkonde[14] is the latest decision of this Court on *res judicata*. It took the principle further than **Bank of Zambia V Tembo**[3]. In the **Societe Du Congo** case, following the British case of **Henderson V Henderson,**[12] we said as follows:

> "**Accordingly, we hold that the matter is *res judicata*. The Learned trial Judge erred in law in holding that it was 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 1st one and the 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving rise to the judgment"**
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> **Henderson V Henderson** held that: **"a party is precluded from raising in subsequent proceedings, matters which were not, but could and should have been raised in the earlier litigation. The *raison d'être* of the rule is that litigants are required to bring forward their whole case..... The same parties cannot litigate a new cause of action which might have been brought forward as part of the subject matter in contest, but which was not brought due to negligence, inadvertence, or even accident"**
>
> **Arnold V National Westimister**[8] cited by Mr Hang'andu is to the same effect. It states that **"in its wider sense, *res judicata* extended to "every point which belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time"**

In the present case, we consider K2,394,000.00 pension as part of the benefits arising from termination of the Respondent's contract of employment with Finance bank. We say so because pension is always paid at the end of the contract of employment, no matter how such contract ended. Indeed, **Micheal Kahula,** who resigned from Finance Bank (Z) Ltd, claimed, and was awarded, pension, as a terminal benefit. So, we hold that the Respondent had an opportunity to claim the K2,394,000,00 pension as a terminal benefit, in the first action in the Industrial Relations Court. Pension properly belonged to the subject of litigation of 2010, in the Industrial Relations Court. With reasonable diligence, it should have been claimed in the first case in the Industrial Relations Court in 2010. We agree with Mr Chenda that he could have specifically claimed it in the Industrial Court or under the wide head-claim:

> **"For an Order for payment of all contractual entitlements, such as gratuity, on prorata basis, leave days and all benefits and allowances payable, both in cash and kind under the Contract between the Responded and Finance banks Ltd."**

We do not accept the argument by Mr Hang'andu that the claim for pension accrued to the Respondent, on 24th July 2014, when this Court delivered judgment for pension benefits, to **Michael Kahula.** The pensions benefit accrued to the Respondent at the time of termination of the contract in December 2010, just like it did to Michael Kahula on termination of his contract in September 2010. It had already accrued when he instituted the 1st action in the Industrial Relations Court. The truth is that the Respondent did not claim for pension in the Industrial Relations Court because, as the learned trial Judge correctly found, he was not aware that it was due to him. That the Respondent was not aware of his entitlement to pension as acknowledged at page 2 of his heads of argument, thus: ..... "**One cannot possibly re-litigate a cause of action which was known**....." And we find it odd and startling that the Respondent, at his rank, was not aware of his entitlement to pension at the time of his dismissal. By contrast, Mr Michael Kahula who was junior in rank, was aware of his entitlement to the same pension and he claimed it any way. It was purely due to his fault and lack of diligence that he did not claim it in the Industrial Relations Court. Lack of diligence does not exclude application of *res judicata*

We do no accept the argument by Mr Hang'andu that the Respondent did not claim for pension in the first action because Finance Bank had not devised a formula for payment, for two reasons. One is that, as correctly pointed out by Mr Chenda, the formula was an issue that could have been dealt with at assessment of damages. Second, and most importantly, is that in fact the formula was already devised and in existence in 2010. This fact is stated at page J17 of the Judgment of the Industrial Relations Court between Michael Kahula and Finance Bank Zambia Limited. The relevant portion of that Judgment reads as follows:

> **"RW2, the Acting Director, Human Resources at the Respondent Bank, gave the only relevant evidence on the issue. He stated that prior to the coming of the Pension Scheme, the Bank used to pay terminal benefits on the basis of the Minimum Wages and Conditions of Service Act. He repeated in cross-examination that employees who had served for 10 years prior to the starting of the scheme were paid under the Act but that after the scheme came into place employees who had worked 10 years or more before 1999 had not been paid anything because there was no criteria for dealing with them. Upon being shown the guidance referred to above, contained in the e-mail, RW2 reversed himself and agreed that the Bank**

has been paying as advised in the e-mail and that the Complainant should be paid in the same manner."

On the law and the evidence on record, we hold that the Respondent's second action in the High Court was *res judicata.* The learned trial Judge erred in law when she held that the second action was not *res judicata* just because it was not adjudicated upon in the Industrial Relations Court. She adopted a narrow view of *res judicata.* As we said in **Societe Nationale Des Chemis Du Pur De Congo (SNCC) V. Joseph Nonde Kakonde**[14] *res judicata* is not only confined to similarity or otherwise of the claims in the first action and the subsequent one. It extends to the opportunity to claim matters which existed at the time the Respondent lodged his complaint in the Industrial Relations Court. The Respondent's entitlement to pension from the Appellant, existed at the time he lodged his complaint in the Industrial Relations Court. The mere fact that he did not pursue or claim in the Industrial Relations Court, and not adjudicated upon, does not make it escape *res judicata.*

To that must be added the Consent Order filed in this Court, in relation to the two appeals, therein mentioned, as set out above. Under clauses (b) and € of that Consent Order, the Respondent undertook not to have further claims against Finance Bank Zambia Limited, in respect of his contract of employment with the Bank. By that Consent Order, he is barred and estopped from re-litigating on all benefits arising from termination of his contract of employment with the Bank.

For the reasons given above, we hereby reverse and set aside the learned trial Judge's Ruling appealed against. We allow the appeal, quash and dismiss the Respondent's action in the High Court, for multiplicity of action, piece meal litigation and res judicata. We do so following our earlier decisions in the following cases:

(a) **Development Bank of Zambia and others V. Sunvest and others** (13)

(b) **BP Zambia PLC V. Interland Motors Ltd** (6) and

(c) **Societe Nationale Des Chemis De Pur Du Congo (SNCC) V. Joseph Nonde Kakonde** (14).

We award costs, both in this Court and in the Court below, to the Appellant. These will be taxed in default of agreement.

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M. S. Mwanamwambwa

DEPUTY CHIEF JUSTICE

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E. C. Muyovwe

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE