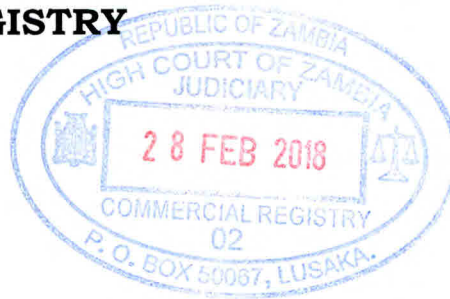


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

2016/HPC/0200



BETWEEN:

SWIFT CARGO SERVICES LIMITED

PLAINTIFF

AND

AFRICAN BANKING CORPORATION ZAMBIA DEFENDANT
LIMITED (T/A BancABC)

BEFORE HON. LADY JUSTICE IRENE. Z. MBEWE (In Chambers)

For the Plaintiff:

Mr. Mark Haimbe of Sinkamba Legal Practitioners

For the Defendant:

Mr. Roy Mwala of Messrs A.M wood & Company

RULING

Cases Referred to:

1. *Bank of Zambia v Jonas Tembo and Others SCZ Judgment No. 24 of 2002*
2. *Stanley Mwambazi v Morester Farm Ltd (1977) ZR 108*
3. *Hamalambo v Zambia National Building Society SCZ Appeal No. 64 of 2013*
4. *Access Bank Zambia Limited v Group 5 – ZCON Business Park Joint Venture SCZ /8/52/2014*
5. *Henry M. Kapoko v The People 2016/CC/0023*

Legislation Referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Constitution of Zambia (Amendment) Act No.2 of 2016*
3. *Rules of the Supreme Court of England (White Book) 1999 Edition*

This is the Defendant's Notice of Motion to raise a preliminary issue on a point of law made pursuant to **Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia, Order 33 Rule 3 and Order 14A Rule 1 and 2 of the Rules of the Supreme Court 1999 Edition**, for the determination of the following questions:

- 1) *Whether or not this action and all claims herein are Res Judicata and an abuse of Court process.*
- 2) *Whether or not the amended Writ of Summons and Statement of Claim are properly before this court in light of the fact that the Plaintiff did not seek leave of Court before effecting the amendment.*

In the supporting affidavit deposed by Chilufya Kaka the Country Credit Manager in the Defendant company, it was stated that the Plaintiff commenced this action by way of Writ of Summons on 5th May, 2016 and subsequently filed an Amended Writ of

Summons and Statement of Claims on 20th July, 2017 claiming inter alia:

- i. *Loss of earning*
 - a) *On Tata Trucks x 2 at K1, 000.00 per day each x 30 days x 24 months*
 - b) *On Atego Mercedes Trucks x 2 at K1, 000.00 per day x 24 months*
 - c) *Mark Truck x 1 at K14, 000.00 per trip x 3 trips per week*
 - d) *1 Truck Hiace Minibus x 1 at K300.00 per day x 365 days x 24 months*
- ii. *Replacement of vandalized vehicles as follows*
 - a) *Tata Trucks at US\$65, 000.00 each, total US\$130, 000.00*
 - b) *2 Atego Mercedes Trucks at US\$45, 000.00 total US\$90, 000.00*
 - c) *Mark Truck valued at US\$75, 000.00*
 - d) *1 Toyota Minibus valued at US\$10, 000.00*
- iii. *Compensation for lost assorted spare parts*
- iv. *Compensation for lost 5000 litres Diesel K42, 950.00*
- v. *Damages, exemplary and punitive*

It is deposed that the amended Writ of Summons and Statement of Claim ought to be dismissed on ground of res judicata for reasons that in a Ruling rendered on 12th January, 2017 the Court expunged the Plaintiff's claim's in the Writ of Summons dated 5th May 2016 particularly claims (i) – (xii). That being dissatisfied with the said Ruling, the Plaintiff filed an application for variation and interpretation which was dismissed in a Ruling dated 27th June, 2017 where the Court stated that *“based on the foregoing reasons I am of the considered view that the Ruling dated 12th January 2017 is very clear as to what claims relate to the Notice of claim and which are res judicata. As earlier stated, claims (i) – (xii) are related to the Notice of Claim which was determined on its merits and expunged from the evidence under cause No. 2014/HPC/0365 by my learned brother Hon. Judge W. Mweemba”*.

It is further deposed that the Plaintiff in disregard of the Court's Ruling dated 27th June, 2017 filed an amended Writ of Summons and Statement of Claim containing the same claims as those held to be res judicata. That the amended Writ of Summons is improperly

before Court as it was filed without leave therefore the Plaintiff's action is incompetent and ought to be dismissed.

In opposing the application, the Plaintiff filed an affidavit and skeleton arguments on 15th August, 2017. The affidavit was deposed by Oscar Twelasi the Management Accountant of the Plaintiff's company, who deposed that the Plaintiff filed an Amended Writ of Summons and Statement of Claim which contains clear and unambiguous paragraphs that establish the cause of action arising out of the loss and injury suffered occasioned to it by the wrongful seizure of its property by the Defendant. It was deposed that the amended pleadings do not refer to the Notice of Claim determined under Cause No.2014/HPC/0365 in relation to nine (9) trucks. The deponent went on to state that the Plaintiff has not acted in disregard of the Court's Ruling as the claims in the Amended Writ of Summons and Statement of Claim have not been adjudicated upon.

It is deposed that there was no need to seek leave as it was already granted and that an injustice would be occasioned if this application were granted. That this application is oppressive as it

seeks to deny the Plaintiff the right to be heard at trial for injury caused to it by the Defendant.

The Defendant in its affidavit in reply dated 18th September, 2017 deposed by Zelia Agnes Mwale averred that the Plaintiff in its affidavit in opposition has not shown how claims (i)-(xii) of its Writ of Summons and Statement of Claim are not res judicata as per Rulings dated 12th January, 2017 and 27th June, 2017. The deponent also deposed that the Plaintiff's amended pleadings is a ploy aimed at having a second bite at the cherry which is proscribed by the law. In relation to the issue of leave, the deponent averred that the Plaintiff was allowed to amend its pleadings within 14 days but that it opted to make an application for interpretation and variation as opposed to filing amended pleadings hence running out of time. Premised on this it was contended that the Plaintiff's action ought to be dismissed.

In the skeleton arguments, Counsel for the Defendant referred to **Order 3 Rule 2 of the High Court Chapter 27 of the Laws of Zambia**, which provides that:

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

My attention was also drawn to the provision of **Order 33 Rule 3 of the Rules of the Supreme Court 1999 Edition** which states that:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

It is submitted that the point of law raised herein is premised on the ground that the action and all claims are res judicata and an abuse of court process. To augment this position, the Defendant cited **Order 18 Rule 19/18 of the Rules of the Supreme Court 1999 Edition** which provides as follows:

“An abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will 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”

My attention was further drawn to the case of **Bank of Zambia v Jonas Tembo and Others SCZ Judgment No. 24 of 2002¹** where it was held that:

“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 put 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.”

It is submitted that irrespective of how the claims are couched in this action the Plaintiff is still seeking the same reliefs which the

Court found to be res judicata. It is contended that the Plaintiff should not be allowed to masquerade claims which have already been determined.

Secondly, the Defendant argued that the Plaintiff's amended Writ of Summons is improperly before this Court as leave to file the same was not obtained as per provisions of **Order 20 Rule 5 Rules of the Supreme Court 1999 Edition**. It is argued that the Plaintiff was granted leave to amend the Writ of Summons within 14 days of the Ruling dated 12th January, 2017 which right it did not exercise. That after expiration of the 14 days leave was required to allow the Plaintiff to file its amended Writ of Summons and Statement of Claim, and that in the present case this was not done. Based on the foregoing it was submitted that the Plaintiff's action herein is res judicata and an abuse of court process and as such it should be dismissed with costs.

The Plaintiff in the skeleton arguments submits that in the Ruling dated 12th January, 2017 this court granted it leave to Amend the Writ of Summons and Statement of Claim. It also contends that the issues raised in the amended Writ of Summons and Statement of

Claim have never been adjudicated upon or determined by the Court and the same have never been the subject of the notice of claim. In furtherance of the argument that the claims in the amended pleadings are not res judicata, my attention was drawn to the case of **Bank of Zambia v Jonas Tembo and Others SCZ Judgment No 24 of 2002**¹. In light of the foregoing, the Plaintiff submits that the Defendant herein has failed to show that the issues in the amended pleadings are res judicata as it has not adduced evidence to show that the same have been adjudicated on or that they were subject to the Notice of Claim under Cause No.2014/HPC/0365. Counsel contends that the amended pleadings contain meritorious and triable issues that cannot be dismissed on technicalities as espoused in the case of **Stanley Mwambazi v Morester Farm Ltd (1977) ZR 108**. Article 118(2) (e) of the **Constitution of Zambia** has also been referred to in arguing that this suit should be determined on the merits.

I have addressed my mind to the issues raised in this application. The facts leading to this application are that the Plaintiff herein commenced an action against the Defendant by way of Writ of

Summons dated 5th May, 2016. The Defendant raised a preliminary issue on the point of law on 20th June, 2016 of which I rendered a Ruling on 12th January, 2017 stating that claims (i) – (xii) relating to the Notice of Claim under Cause No. 2014/HPC/0365 are res judicata. In the Ruling I granted the Plaintiff leave to file an amended Writ of Summons within 14 days of the date of the Ruling. The Plaintiff filed its amended Writ of Summons on 20th July, 2017. It is against this background that the Defendant has raised a preliminary issue.

The first issue for determination is whether or not the Plaintiff's claims are res judicata and an abuse of court process. A perusal of the amended Writ of Summons and Statement of Claim reveals that the claims contained in paragraphs 9 to 11 are an expansion of the contents of paragraph 9 of the Statement of Claim dated 5th May 2015. The said claims in the amended Statement of Claim arise out of the same issues determined under Cause No.2014/HPC/0365 which were determined by my learned brother Judge Mweemba. The Supreme Court in the case of **Hamalambo v Zambia National Building Society SCZ Appeal No. 64 of 2013³**, stated that:

“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.”

I am in agreement with the Defendant that the claims in the amended Writ of Summons and Statement of Claim are res judicata as the same were already determined by this Court in my Ruling dated 12th January, 2017. The Plaintiff has repeatedly brought up the same issues coated in a different colour. I opine that this constitutes an abuse of court process, an act which is frowned upon by this Court. In fact, the Courts must at all times be vigilant to guard against litigants abusing the court process. The Plaintiff's actions are an infraction of **Order 18 Rule 18/19 Rules of the Supreme Court, 1999 Edition**. For this reason, I find that the Plaintiff's action is res judicata and an abuse of court process.

The second issue concerns leave to file an amended Writ of Summons and Statement of Claim. The Defendant contends that the amended pleadings filed by the Plaintiff were irregularly done as no leave was obtained prior to being filed. The Plaintiff on the other

hand argues that it was granted leave to file amended pleadings in the Ruling dated 12th January, 2017. The record shows that in my Ruling in question, I granted the Plaintiff leave to file amended pleadings within 14 days of the date of the Ruling. However, the Plaintiff did not adhere to my directive and instead opted to make an application for interpretation and variation. The amended pleadings were only filed on 20th July, 2017, being six (6) months after the Ruling and the same was done without leave of the Court to file out of time. In agreeing with the Defendant, I find that the amended pleadings are not properly before Court.

I further agree with the Plaintiff that the administration of justice should require that the substance of all disputes be investigated and decided on the merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. However, this does not mean that the rules of procedure should be ignored with impunity. The Plaintiff cites Article 118 (2) (e) of the **Constitution of Zambia** in arguing that its action should be determined on merit. I take cognisance of the guiding principle that every legal system must accord with the broader values of the

Constitution such as those set out in Article 118 (2) (e). I am guided by the case of **Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Venture**⁴ where the Supreme Court in dealing with Article 118 (2) (e) of the Constitution of Zambia succinctly stated as follows:

"Article 118 (2) (e) of the Constitution of Zambia never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts."

Similarly, in the case of **Henry M. Kapoko v The People 2016/CC/0023**⁵, the following observations were made:

"Article 118 (2) (e) of the Constitution is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality."

I adopt the above remarks as my own. I am further content to state that the said Article 118 (2) (e) of the **Constitution of Zambia** does not in any way whitewash every procedural failing and is certainly not meant to oust procedural rules. In respect to the issue at hand,

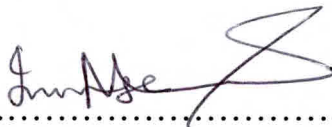
the requirement to obtain leave to file amended pleadings is a rule of procedure which is necessary for the disposition of matters. I opine that this does not in any way constitute undue regard. The said Article does not direct Courts to disregard technicalities, but it enjoins Courts not to pay undue regard to technicalities that obstruct the course of justice.

For the foregoing reasons, the Defendant's preliminary issue succeeds.

Costs to the Defendant to be taxed in default of agreement.

Leave to appeal is hereby granted

Delivered at Lusaka this 28th day of February, 2018.



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Hon. Justice. I. Z. Mbewe
HIGH COURT JUDGE