

SHADRECK ZHANJE
versus
ZVIKOMBORERO GAMBE
and
ALLIANCE CARE PARTNERS (PVT) LTD T/A PARKTOWN HOSPITAL

HIGH COURT OF ZIMBABWE
DUBE JP & KATIYO J
HARARE, 14 February & 30 August 2024

Civil appeal

E Dondo, for the appellants
CT Kwinjo, for the respondent

DUBE JP:

INTRODUCTION

1. This appeal challenges the whole judgment handed down by the magistrates court on 24 October 2023. In its judgment, the court *a quo* deemed an application for summary judgment, initiated through the issuance of a summons for the recovery of sums awarded in a ruling on the basis that it is a liquid document upon which they could sue, *res judicata*. This determination was made on the basis that another magistrate had already adjudicated on a similar application concerning registration of the same ruling which involved the same parties and cause of action.

BACKGROUND FACTS

2. The appellants were employed by the respondent as security guards until their dismissal in 2021 when they instituted unfair dismissal claims with the National Employment Council for the Medical and Allied Industry. The appellants claimed that the respondent erred in directing them to join an outsourced company and terminating their contracts on notice. The dispute was presided over and determined by an N.E.C designated agent who ruled that the respondent pay to each appellant USD 11 084 or its equivalent in Zimbabwe currency plus costs. The ruling of the designated agent was not complied with.

3. Armed with the designated agent's ruling, the appellants filed a court application for its registration at the magistrates court which dismissed it for lack of jurisdiction based on the reasoning that the ruling was not registrable. Following this, the appellants instituted summons in the magistrates' court claiming amounts granted in terms of the designated agent's ruling which they relied on as an instrument of debt. The respondent entered appearance to defend after which the appellants filed for summary judgment.

PROCEEDINGS BEFORE THE COURT A QUO

4. At the hearing of the summary judgment application, the respondent took the point that the application was *res judicata*, it having been previously placed before another magistrate who dismissed it. The respondent contended that the appellants had no legal entitlement to approach the court with the same cause of action and seeking the same relief, that is, to register the same ruling for purposes of enforcement. The appellants insisted that they had an entitlement to place a new case before the court to enforce the designated agent's ruling as the ruling was not registrable. They insisted that they have an entitlement to issue summons to recover sums awarded to them by the designated agent based on the ruling, a liquid document.
5. The court *a quo* did not delve into the actual merits of the matter, upheld the point *in limine* and dismissed the claim for payment of a debt. The court *a quo*'s reasoning went as follows:

“It is not in dispute that the Applicants brought the same matter for registration of the same ruling for enforcement purposes and the application was dismissed by the court. After the matter had been dismissed, the Applicants brought the same matter again under action procedure that is through summons. They then made the present application for summary judgment. So, it means the same matter was heard before and dismissed....the matter involved the same parties and the relief sought was the same as the relief that the applicants currently seek. The cause of action is the same and the parties are the same. The matter was dismissed by the court and the applicants have decided to bring the same matter before this court now using summons. It would have been a different scenario if the applicant had withdrawn its initial application that was later dismissed, and then instituted summons claiming payment of the sums of money as per the ruling of the designated agent. So, once the matter has been heard on the merits and dismissed, it is not in dispute that it has been finalised”

GROUND OF APPEAL

6. Dissatisfied with the court *a quo*'s decision, the appellants filed the present appeal on the basis of the following grounds:

“Grounds of appeal and relief sought

- i. The court *a quo* erred at law and factually by holding that the matter before it was one for registration of the designated agent's ruling. The court erred in this regard because the matter before it was not one for registration but a general claim for payment of a debt based on a liquid document. Registration of a designated agent's ruling and a claim for payment of money based on an instrument of debt are two different causes of action altogether.
- ii. The court *a quo* erred at law by accepting the bar of *res judicata* in circumstances where the cause of action and relief sought in the present matter are different from the previously decided case even though the parties are the same. In this regard, the court accepted the bar of *res judicata* where essential elements had not been satisfied.
- iii. Assuming that the matter before the court *a quo* was the same as the one that was previously determined by it, the court made an error at law by accepting the bar of *res judicata* in circumstances where the previously determined matter was not disposed of on merits. The referenced matter was dismissed on the technicality of lack of jurisdiction and the parties were still entitled to come back to the same court.
- iv. The lower court erred at law in that it chose not to be guided by a decision of a superior court in (*Zimbabwe Rural District Council Workers Union v Nyanga Rural District Council & Ors* HH 118/22) which decision happens to be on all fours in all material respects with the present case. In this regard, the lower court dismissed the *point in limine* and failed to be guided by the principle of precedence */stare decisis*".

7. The appellants prayed for an order setting aside the order of the court *a quo* and substituting it with an order for payment of sums awarded in the designated agent's ruling.

PROCEEDINGS IN THIS COURT

Appellants' submissions

8. Mr *Dondo*, counsel for the appellants' position is that the court *a quo* erred in ruling that the matter was *res judicata*. He submitted that the court was factually incorrect because the previous matter was a court application for the registration of the award whilst the case

which is the subject of this appeal was a summons case for the enforcement of payment of a debt. He submitted that the court application for registration of a designated agent's ruling was dismissed on a technicality and that the merits of the matter were not dealt with and that therefore the plea of *res judicata* does not apply. He maintained that a litigant whose matter has been dismissed on a technicality is free to approach the same court on the same cause of action.

9. In addition, he submitted that an application for the registration of an award is distinct from a claim of money or debt based on a liquid document and that the appellants' cause of action was not registration of the Designated Agent's award. The appellants placed reliance on *Zimbabwe Rural District Council Workers Union vs Nyanga Rural District Council & Ors* (supra) for the proposition that a litigant can use a designated agent's ruling as a liquid document or some such instrument of debt in a claim for payment of debt. The appellants contended that an application for registration of the designated agent's ruling and a claim for payment of money based on an instrument of debt are two different causes of action

Respondent's submissions

10. In reply, Mr *Kwinjo* maintained that ground number one lacks merit and that the court was correct in finding that the first court application for registration of the designated agent's ruling was similar in every respect with the summons upon which the court application for summary judgment was premised. He contended that the appellants approached the court seeking registration of the award for purposes of enforcement, albeit disguised as a summons for a liquid claim. He contended that the cause of action in the two applications is the same since the registration process is to enforce a ruling. He submitted that the appellants were making the same submissions and re-litigating the same matter involving the same parties, and the same cause of action whilst seeking similar relief.
11. Mr *Kwinjo* further submitted that a ruling by a designated agent does not amount to a liquid document. He submitted that in employment-related matters, the liquid document must clearly show an acknowledgement of indebtedness where the debtor would have freely and willingly signed a document acknowledging indebtedness. He referred this court to the case of *Sibanda v Mashapaidze* HH 56-11 for this proposition.

ISSUES FOR DETERMINATION

The appellants' grounds of appeal dovetail into one issue which is, whether the court *a quo* correctly found that the matter before it was *res judicata*.

THE LAW

12. The defence of *res judicata* is successfully raised where a matter that has already been determined in prior proceedings is brought again. The parties are barred from relitigating the same issue in a lawsuit. Such a matter cannot be re-opened by the same parties on the basis of the same causes of action. The plea of *res judicata* promotes the principle of finality in litigation and curtails endless litigation. See: *Wolfenden v Jackson* 1985(2)ZLR 313, *Danisile Sibanda v Sheriff of Zimbabwe & 4 Ors* HB22-22, *Banda & ORS v ZISCO* 1991(1) ZLR 340 (S), *O'Shea v Chiunda* 1999(1)ZLR 334(S).2.

13. The following requirements must be met:

- a) the parties must be the same as in the prior matter.
- b) the cause of action must be the same.
- c) the prior case must have been decided on the merits.

All the requirements must be met and are to be considered cumulatively. Where any one requirement is not met, the defence fails. Once all the requirements are met, a plea of *res judicata* will be successful entitling the court to dismiss the subsequent matter.

14. A litigant whose claim is challenged on the basis that it is *res judicata* must demonstrate that his or her cause of action is sufficiently distinct and creates a new and different cause of action. The issues raised must not be the same as those raised in the prior matter. The claim must not be merely a restating and protraction of the previous claim. The cause of action must be new in the sense that it was not considered before another court. The claim must have a distinct factual basis and must not be barred even where the parties remain the same. The relief sought by must be different.

15. Key among the requirements of the plea of *res judicata* is that the prior matter must have been conclusively dealt with on the substance of the matter and not have been decided on

procedural issues. The plea of *res judicata* requires that a matter be shown to have been dealt with conclusively, on the merits. In *Toro v Vodge Investments (Pvt) Ltd & Ors* SC15-17 the court summarised the requirement as follows:

“For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and/or on fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.”

16. Another case in point is *Tobacco Sales Producers (Pvt)Ltd v Eternity Star Invs* 2006 (2) ZLR 239(H) where the court cited with approval sentiments expressed in *Wolfenden v Jackson* as follows:

“More recently GUBBAY JA (as he then was) commented on the plea of *res judicata* in *Wolfenden v Jackson* 1985(2) ZLR 313(S) at 316B-C as follows: “The *exceptio rei judicata* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en ’n Ander v Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness.”

17. A matter dismissed on technicalities where the court does not delve into the merits of the matter is not decided to finality and has no effect of rendering any subsequent proceedings *res judicata*, allowing the parties to bring back the matter for re-litigation. The dismissal of the matter on technicalities does not preclude the parties from pursuing the same matter again and for that matter on the basis of a new cause of action. A dismissal of a matter on the basis of lack of jurisdiction is a procedural decision and hence a technical dismissal. Where a matter is declined on the basis of lack of jurisdiction, the court is said to lack jurisdiction to entertain the specific cause of action. The matter cannot be said to have been decided on the merits entitling one to re-litigate the same issues.

APPLICATION OF THE LAW

Are the parties the same

18. It is common cause that the parties in the application for summary judgment are the same as those in the initial application for registration of the designated agent’s ruling.

Is the cause of action the same

19. The prior application was for registration of a ruling of the designated agent. Registration of a ruling where it is provided for by law, is a procedural step which has as its major objective the recognition and enforcement of the ruling. The application for registration was brought on the supposition that it was registrable in terms of the Labour Act, [Chapter 28:01]. In the summary judgment application, the appellants sought to rely on the ruling of the designated agent as an instrument of debt to recover sums awarded therein. The rationale for such a course was articulated in *Zimbabwe Rural District Council Workers Union vs Nyanga Rural District Council & Ors* HH118/22. The court is alive to the fact that the *Nyanga* case was overturned on appeal albeit on technicalities based upon a failure to cite the parties correctly. The issue regarding the propriety of using a designated agent's ruling as a liquid document or some such instrument of debt in a claim for payment of debt goes to the merits of the summary judgment application which was not argued and resolved in the prior application for registration. It is an enquiry for another day.
20. Suing on the basis of a ruling entails a party seeking to enforce substantive rights and obligations conferred in terms of the ruling. Such a matter is required to be dealt with on its merits with findings of fact and law being made whilst in an application for registration of the ruling, a party merely seeks recognition and enforcement of the ruling. The cause of action in the application for registration is different from that which forms the basis of the summary judgment application. What is apparent is that whilst the two causes of action are related and based on more or less the same facts, the proceedings are distinct and have different objectives. The legal basis for the applications is different and the remedies sought different. The one sought an order allowing for enforcement whilst the other sought an order awarding it amounts in the ruling and is therefore a different claim even if the appellants rely on the same ruling.
21. The cause of action in the summary judgment application arises from a separate and distinct factual basis that falls within the jurisdiction of the court and is not barred by the plea of *res judicata*. The appellants did not seek an order based on the liquid document in the first application. The court did not resolve the issue regarding the propriety of using a

designated agent's ruling as a cause of action in order to recover sums awarded in the ruling in the prior matter. Consequently, the causes of action in the two applications are different. The court *a quo* erred when it insinuated that the appellants brought the same matter for registration of the same ruling for enforcement purposes. It is not correct that relief sought was the same relief that the appellants sought in the summary judgment application. No doubt the appellants did not bring an application for registration of the ruling the second time round. The facts on which the new cause of action is based were not considered and determined in the previous proceedings. The court *a quo* erred when it held that the appellants had brought the same matter which had been heard, dismissed and finalised.

Was the prior application conclusively dealt with on its merits

22. The summary judgment application was disposed of on technicalities. In *Chimpondah and Another v Gerald Pasipamire Muvami* HH 81-07, the court said the following of matters decided on technicalities:

“A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved”.

A matter decided on procedural issues is disposed of on technicalities is not a final and definitive judgment on the subject matter in dispute. The decision has no effect of disposing of the matter on the merits. In an application for registration of a ruling, the focus is on making the ruling enforceable and hence the substantive issue to be resolved is the registration for purposes of enforcement thereof. An application for registration of a ruling dismissed for lack of jurisdiction is not resolved substantively or conclusively on its merits. An application for registration of a ruling becomes *res judicata* only when the ruling has either been registered or the registration declined on the merits.

23. The application for registration of the ruling was disposed of on the basis that the court had no jurisdiction for the reason that there was no provision in the law enabling registration of the ruling with the court. The dismissal of the prior application for

registration on the basis of lack of jurisdiction is a procedural decision and not one on the merits of the matter. No findings in law and/or on the facts were made against the respondent. There was no consideration of the merits of the proceedings of the designated agent with a view to either endorsing them for purposes of registration or declining registration and hence no pronouncement or decision on the actual merits of the actual application for registration was made. The dismissal was technical and is not a final and definitive judgment in the matter. The initial ruling did not put to rest the dispute between the parties as the court did not determine the substantive issues before the court. Having found that the application for registration of the ruling was not decided substantively by the court, a ruling of *res judicata* was misplaced in the circumstances.

24. All the requirements of the defence of *res judicata* were not met. The application for summary judgment is not barred by the defence of *res judicata* as it seeks a different remedy despite reliance by the appellants on the same ruling as a cause of action. The application has not been decided substantively on the merits. No bar lies against the appellants from bringing the case under the cause of action in the summons case or application for summary judgment. Consequently, the plea of *res judicata* was not correctly upheld by the court *a quo*. Having found that the later application is not *res judicata*, a basis for interfering with the findings of the court *a quo* has been found. The application must proceed and be determined on its merits.
25. As regards costs, the appellants motivated the court to grant them costs on a higher scale arguing that they have been put out of pocket trying to enforce the ruling of the designated agent. A punitive award of costs will be made only in exceptional circumstances such as where a court is desirous to penalise litigants such as in a case of persistent reprehensible conduct and where proceedings are brought merely to vex the other party and resulting in it being made to incur unnecessary costs. M Jacobs and N.E.F. Ehlers in *Law of Attorneys' Costs and Taxation* thereof, Juta & Co Ltd, 1979, at p59, state as follows regarding this scale of costs:

“An award of attorney and client costs ... will be made only in exceptional cases to mark the court's disapproval of ... reprehensible conduct usually persisted in, by a party to a suit. There is another basis upon which a court may award attorney and client costs and this is where people ... enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as

vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear”.

Costs on a higher scale are not there simply for the asking. The appellants have not shown the existence of reprehensible conduct on the part of the respondent that deserves to be penalised with a punitive scale of costs. The costs in this appeal shall follow the event.

In light of the foregoing, it is ordered as follows:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and is substituted with the following:
“The respondent’s *point in limine* on *res judicata* is dismissed with costs”.
3. The application is remitted to the trial court to be determined on the merits.

KATIYO J: I agree

Saunyama, Dondo, appellant’s legal practitioners
SDM Chatsama Law Chambers, respondents’ legal practitioners

