

SLICE DISTRIBUTORS (Pvt) Ltd
versus
INNSCOR AFRICA LTD
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE 11, November 2024 and 04 April 2025

Stated Case: Special Plea

T T Musarurwa, for the plaintiff
Adv T Zhuwarara for the first defendant
Mr P Chibanda for the for the second defendant

MHURI J: Before the hearing of this matter, parties had engaged each other and on the date of hearing 11 November 2024, they submitted that an order by consent be issued covering the following:-

1. that the exception succeeds with the plaintiff being granted 5 (five) days to amend its summons.
2. that the parties engage and conclude on statement of agreed facts addressing the special plea of *res judicata*.
3. that either plaintiff or first Defendant may file supplementary heads of argument addressing *res judicata*.
4. that the court determines the matter on the special plea, on the papers filed and if need be the matter may be set down for clarification of any issues.
5. that costs be in the cause.

The Parties duly filed their statement of agreed facts, heads of arguments as such I therefore proceed to determine the special plea on the papers filed.

Plaintiff duly filed its amended summons. Its claim against Defendant is now for the payment of the sum of

- (a) US\$ 8 208 13-23 being the value of goods unlawfully seized and removed from plaintiffs custody by second Defendant on the instructions of the first Defendant.
- (b) Interest calculated at the prescribed rate from the date of summons to the date of full payment.
- (c) Costs of suit.

The statement of agreed facts reads as follows:

- (a) On the 18th of October 2023 the first Defendant obtained a judgment in the Supreme Court in SC 43/23 wherein the said Court held *inter alia* that Plaintiff had infringed on the Defendant's Trade Mark. (annexure A)
- (b) Without the obtainment of a Writ of execution the first Defendant instructed the second defendant to give effect to the Supreme Court Order in SC 43//23.
- (c) It is common cause that on the 31st of October the second Defendant acting on the aforesaid removed from the first Defendant's possession 2 871 656, 2 slicer boxes, 153 600 plastic carrier bags, 630 200 G2 Chips printed packs, 758 000 G3 printed packs, 34 063 Hamburger boxes, 71857 SO 12487 66 Chicken Slice Crown Boxes, 63 410 small Chips boxes, 73 547 Nugget boxes 189 400, Twist Wrap boxes 179 000 504, 2245 000 just 2 boxes, 15800G. Half and 244 300 branded serviettes (valued at US\$ 2 443-00). The purpose of such removal was to effectuate the distinction of the removed goods in accordance with the Order issued in SC 43/23.
- (d) Aggrieved by the removal the Plaintiff instituted proceedings against the first and second Defendants under HCHC 674/23 which *lis* culminated in the issuance of a Court Order requiring the return of all goods removed which did not infringe on the first defendant's Trademark. (annexure B)

Consequently the Court is called on to determine:

- i) Whether the current claim by the plaintiff is *res judicata* on account of the obtainment of the Court Order HCHC 674/23.

As agreed by the Parties, this matter is proceeding as a special case in terms of Rule 52 of this Court's rules SI 202/2021. GOWORA JA (as she then was) had this to say:

"It is trite that a statement in a special case must set forth the facts agreed upon, the question of law surrounding the dispute and the issue for determination by the Court."

Leathout Investments (private) Ltd vs Future Chirangano Muvirimi and Petronella Muvirimi SC 60/21

See also *Dr Norbet Kunonga vs The Church of the Province of Central Africa SC 25/17* in which GARWE JA (as he was) set out the requisites of a special case as follows:-

“What is a stated case?
.....

But what is a stated case? It is a case that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversarial positions as to the legal ramifications of the facts, thereby requiring a judge to decide the questions of law presented (.....). Put another way, it is a formal written statement of the facts in a case, which is submitted to the court by the parties, jointly, so that a decision may be rendered without trial. The facts being thus ascertained, it is left for the court to decide the question of law presented.”

In casu, the parties have filed their statement of agreed facts in which they state the question of law to be determined by the Court as: -

Whether the current claim by plaintiff is *res judicata* on account of the obtainment of the Court Order in HCHC 674/23.

In casu, Plaintiff’s main claim is for US\$ 820 813-23 being the value of goods unlawfully seized and removed from the plaintiff’s custody by second Defendant on the instructions of the first Defendant.

In case number HCHC 674/23 an Order by consent was issued to the effect that

1. The first respondent having commenced execution of Supreme Court Order no SC101 /23 without a writ of execution signed by the Registrar of the High Court, the execution is hereby stayed.
2. The second Respondent be and is hereby ordered to return to the possession to the Applicant, all seized materials which do not bear the word “luv” or similar combination or bearing any mark identical to or resembling the applicant’s registered trademark no 1070/2006
3. Each party to bear its own costs.

The above Order was borne out of an urgent chamber application at the instance of *Slice Distributors (private) Limited against the Sherriff for Zimbabwe and Innscor Africa Limited* in which applicant therein was seeking stay of execution by the Sherriff of an order by the Supreme Court issued under SC judgment number SC101/23 which reads as follows:-

“1 The appeal be and is hereby allowed in part, in that the appeal against the claim for passing off is dismissed.

2 The judgment of the court *a quo* is set aside and substituted with the following:

“(i) the first Respondent has infringed appellant’s registered trademark under certificate number 1070/2006.

- (ii) the first respondent or any other person acting through it is interdicted from using a mark containing the term “luv” whether singularly or as part of any other mark used in any promotional material, marketing, fliers, billboards, advertisements of whatsoever kind, container branding or similar mark in the course of trade of its products under the chicken slice mark in Zimbabwe.
- (iii) the first respondent or any person acting through it be and is hereby directed to cease to publish, spread, distribute or circulate any material flier, notices containers, billboards and advertisements of whatever nature containing the offending mark or any mark resembling or similar to the appellant’s registered trademark as to likely deceive or cause confusion amongst customers.
- (iv) the Sherriff of Zimbabwe and or his lawful deputies be and are hereby authorized to search for and remove to a storage facility and for purposes of destruction all fliers notices stickers, labels, packaging material or other material of whatsoever nature beginning the word “luv” or similar combination, or bearing any mark identical to or resembling the applicant’s registered trademark no. 1070/2006 and being used in respect of products under The Chicken Slice mark, from first Respondent’s premises at number 49 Borrowdale Road, Harare or any of its warehouses respectively where such goods are located.
- (v) the first defendant shall pay plaintiff’s costs.”

First Defendant’s heads of argument which were later supplemented were to this effect that on 3 November 2023 plaintiff obtained judgment under HCH 674/23 to the effect that:

“second Respondent be and is hereby ordered to return to the possession of the applicant, all seized materials which do not bear the word “luv” or resembling the applicant’s registered trademark number 1070/2006.”

The judgment is extant and constitutes a competent remedy from a competent Court of law. Instead of enforcing it to get back the goods, the Plaintiff has elected to claim US\$820, 813 -23 as the value of the goods.

It submitted in the heads of argument that Plaintiff cannot simply ignore the judgment in favour of other remedies.

Reference was made to the case of *Magauzi and anor vs Jedera SC 54/22* in which the Court stated:

“when a court grants an order, all subsequent acts affecting the dispute between the parties rely on the court’s order and not the facts the court based its judgment on. Therefore, a party or parties cannot disregard a court order as they are bound by it”.

First Respondent’s argument that Plaintiff is therefore enjoined first to enforce HCH 674/23 and if it is of the view that there is refusal to obey the judgment, then contempt proceedings can be resorted to. HCH 674 /23 renders the claim by Plaintiff *res judicata* and therefore the special plea of *res judicata* must be upheld.

In its supplementary heads of argument, first Respondent argued that the Parties in the present case and those under HCH 674/23 are the same, the facts are the same and the Order therein binds the Parties and this brings finality to the dispute. The Plaintiff cannot repurpose its unlawful execution claim and seek damages when there is an extant Order mandating the return of all the seized materials which did not bear the word “Luv” or bearing any mark identical or resembling first Defendant’s trade mark 1070/2006.

Further it was argued that the “once and for all Rule” applies in this matter, that it is not permissible at law for Plaintiff to now seek damages instead of the seized material as ordered by the Court in HCH 674/23.

If Plaintiff was minded to claim damages arising out the execution, it ought to have done so under HCH 674/23 and not in a separate matter. His claim for damages now offends the once and for all rule. Reliance was made on the case of *Dube v Banana* 1998 (2) ZLR 92 (HC).

It was further argued that Plaintiff cannot therefore reopen the dispute and claim damages it did not seek in its settlement of HCH 674/23 which order was by consent and that the same facts cannot be used to occasion a different cause of action.

The claim is *res judicata* and the parties are bound by the Order under HCH 674/23. First Defendant’s prayer was that the special plea of *res judicata* be upheld.

In its heads of argument Plaintiff argues that the special plea is ill advised as it is neither based in fact nor in law. Its claim is not *res judicata*. Its action is based on the loss caused by the unlawful removal of its goods and the way they were handled which violated food safety protocols and made the goods unusable. As a result Plaintiff was forced to replace the goods thereby incurring unnecessary expense. The Order by consent under HCH 674/23 ordered the return of Plaintiff’s goods which the first Defendant has not complied with and as long as Defendants have not returned the goods, Plaintiff suffers prejudice and is entitled to damages.

It argued further that the cause of action is completely different from the previous one. In the previous case, plaintiff sought the return of its goods a claim *in rem and in casu* its aquillian action in delict for damages for the unlawful deprivation of its goods through Defendants actions who refused or failed to return the goods when ordered to by the court.

It argued further that Plaintiff has enforced the previous judgment to the fullest extent possible in law. The return of goods was sought and finalised. The damages suffered by plaintiff

is by reason that the goods were unlawfully seized, unlawfully retained while being exposed to possible contamination, thereby giving rise to an entirely new cause of action.

Plaintiff's other contention is that the "once and for all rule" does not apply. The rule requires all types of damages to be included in the same action. It prohibits a claim for damages to be made piecemeal. In the instance there has been no prior claim for damages as such the "once and for all rule" does not apply, the special plea has been improperly raised and costs to be granted against first defendant on the higher scale, so argued Plaintiff.

The legal issue the Court is to determine in this matter as stated earlier is whether Plaintiff's claim is *res judicata* in view of the Order issued under HCHC 674/23.

What is *res judicata*?

"It is an established legal principle that establishes that where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject matter and based upon the same cause of action is not permissible...."

Evins vs Shield insurance Co. Ltd 1980 (2) SA 814 (A) at page 835 F-G

Where the special plea of *res judicata* has been raised, the essential requirements which must exercise the Court's mind and be considered are whether:-

1. The two actions are between the same parties.
2. The two actions concern the same subject matter.
3. The same case cause of action was raised in both actions.
4. The judgment in the first action is extant.

As enunciated by GUBBAY JA (as he then was) in the case of *Wolfendon v Jackson* 1985 (2) ZLR 313 SC.

"The exceptio *rei judicatae* 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. 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..."

In *casu*, it is common cause that the parties in both actions are the same. The subject matter in both actions is the same, being the property which was removed from Plaintiff by the first Defendant. The Order under HCHC 674/23 and the SC Order related to the same property. It is the same property, first Defendant was ordered to return to Plaintiff. The Plaintiff's claim however though based on the return of the same property is not the same as the first claim. Its current claim as

stated earlier is for damages arising from the way the goods were handled upon removal which handling violated food safety protocols resulting in the goods becoming contaminated and hence unusable. This as argued by the Plaintiff, gives rise to a new cause of action. I agree with this argument.

Further, I am not persuaded by first Defendant's argument that the "once and for all rule" applies in this case. The rule precludes a Plaintiff from bringing piece meal claims for damages on the same cause of action. Clear is Plaintiff's earlier claim that it was not for damages. The current one is the only one for damages. The rule will apply in the event that Plaintiff institutes another claim for damages arising from the same cause of action which it ought to have brought in this claim for damages.

The rule entails the requirement to bring in at once claims of all species arising out of a single cause of action. This is not the position *in casu*.

In the result therefore I find that the special plea of a res judicata does not apply. It is therefore dismissed with costs.

MHURI J.....

Donsa Nkomo & Mutangi, plaintiff's legal practitioners.

Lunga Mazikana Commercial Attorneys, first defendant's legal practitioners.

Civil Division of the Attorney General's Office, second respondent's legal practitioners.