MARY DONGOBVA
versus
PRIVILEDGE CHIVAURA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 13 July & 21 July 2022

**Opposed Matter**

Mr A *Masango*, for the applicant
Mr A *Mutyasira*, for the respondent

**MUCHAWA J**: This is a court application for a declaratory order and consequential relief in which the following order is sought:

"IT IS ORDERED THAT:

1. The applicant be and is hereby declared the rightful holder of cession rights, title and interest in stand number 2599 Phase 4 Caledonia Ruwa.
2. Consequent to the declaration in paragraph (1) above, the respondent and all those claiming occupation through her be and are hereby ejected from stand number 2599 Phase 4 Caledonia Ruwa.
3. Ist respondent to pay costs of suit on a legal practitioner client scale."

The brief background to this matter is that, the applicant claims that she was allocated Stand 2599 Phase 4 Caledonia, Ruwa through the Tashingirira Housing Cooperative in 2012. She says that she took occupation of the stand but was sick and went to stay in Bromley and then discovered that the respondent had invaded her stand and was residing there on the strength that the same stand had been allocated to her. In 2019 the applicant instituted eviction proceedings in the Goromonzi Magistrates Court under case MC 2/19. The respondent backed her claim with documents relating to Stand 23319 Phase 4 Caledonia, Ruwa. The claim for eviction was dismissed on the basis that the applicant had no evidence in the form of an offer letter to substantiate her rights to the stand. The court also found that Stand 2599 and 23319 were one and the same as 23319 was the old number which had been renumbered to 2599.

The current application is opposed and the respondent raised a point in *limine* that the application is flawed as it offends against the principle of *res judicata*. I heard the parties on this and reserved my ruling. This is it.

**Whether the principle of *res judicata* is applicable in this case**

***The Parties' Submissions***

Mr *Mutyasira* submitted that in the case before the court, the applicant seeks to be declared the rightful owner of Stand 2599 Phase 4 Caledonia, Ruwa yet in 2019, she approached the Magistrates Court Goromonzi seeking exactly the same relief. It was explained that though the matter was not one for a declaration of rights, eviction was sought on the basis that she was the owner. The difference was said to be only in the form and not the substance. The two matters, it was averred, are between the same parties, involving the same subject matter, which is Stand 2599 and premised on the same cause of action wherein she contends she is the rightful owner of the stand. A full trial was said to have been conducted by the magistrate culminating in the judgment handed down on 8 June 2021 which appears on page 30 of the record which dismissed applicant's claim on the basis that she had failed to prove that she was the owner of the stand.

It was contended that such judgment remains extant as it was never appealed against. The crux of the applicant's argument in this application is alleged to be that there are two separate stands involved being 2599 and 23319 and she is the holder of rights title and interest to Stand 2599 and there is no evidence that these two are one and the same. Such a submission is alleged to go against the extant finding of the Magistrates Court made after hearing evidence and that the applicant's recourse is to appeal rather than bring an appeal disguised as an application for a declaratory order.

Additionally, Mr *Mutyasira* submitted that an application for a declaratory order is meant to protect an applicant's interests. In *casu*, it was alleged that the applicant has no interests to be protected by this court as the question of her interest in the property has been determined by a competent court and cannot be reopened by way of a *declaratur*.

The court was referred to various case law authorities which deal with the principle of *res judicata* such as *POSB* v *Chimanikire & Ors* 2005 (1) ZLR 285 (H), *Munemo* v *Muswera* 1987 (1) ZLR 20 (S), *Banda & Ors* v *ZISCO* 1999 (1) ZLR 340 (S) and *Wolfenden* v *Jackson* 1985 (2)

ZLR 313 (S). It was prayed that the matter should be dismissed with costs on the attorney and client scale as this application is a clear abuse of court process.

Mr *Masango* submitted that the point in *limine* is without merit as the cause of action in the instant application is a declaratory order and the Magistrates Court Goromonzi was never seized with determining who was the rightful holder of rights in Stand 23319 as opposed to Stand 2599. The court is simply said to have found that the applicant had failed to prove her case and dismissed the eviction claim.

Furthermore, Mr *Masango* averred that it is a known fact that the Magistrates Court had no jurisdiction to issue a declaratory order as found in the case of *Mateure* v *Chidumwa* HB 156/16. Reference was also made to the case of *Dube* v *Murehwa & Anor* SC 68/21 wherein it was alleged that when the Supreme Court was confronted with facts similar to those in *casu*, it observed that the proceedings in the Magistrates Court had been for eviction whereas those before the High Court had been for a *declaratur*. The court was urged to dismiss the point in *limine* and proceed to determine the matter on the merits.

***The Law***

The rationale for the plea *res judicata* was given by GUBBAY JA (as he then was) in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316B-C as follows:

> "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. 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."

The factors to be considered are set out in *Banda & Ors* v *ZISCO* (*supra*) as follows; they are that (1) the action must be between the same parties, (2) concerning the same subject matter and (3) founded on the same cause of complaint as the action in which the defence is raised.

***Application of the Law to the Facts***

There appears to be no dispute that the same parties are involved in both the magistrates' court and before me. The contention is on whether the two matters concerned the same subject matter and were founded on the same cause of complaint. I have relied on the judgment by GARWE JA (as he then was), in *Shamrock Holdings Ltd t/a Inyathi Hunters* v *The Minister of Environment and Tourism N.O. and 2 Ors* SC 21/10 wherein it was held as follows:

> "The requisites for a valid defence of *res judicata* in Roman Dutch Law are that the matter adjudicated upon, on which the defence lies, must have been for the same cause between the same parties and the same thing must have been demanded. **The rule that the same thing must have been demanded in both actions has been held to mean that where a Court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings** – see *Horowitz v Brock & Ors* 1988(2) SA 160A, 178-179.
> In our law the principles of *res judicata* are almost analogous to those of issue estoppel. The only difference is that the doctrine of issue estoppel does not require for its application that the same thing must have been demanded – see *Galante* v *Galante* (1) 2002(1) ZLR 144H, 152." (My emphasis)

*Causa petendi*, a Latin term, is defined in the Oxford Reference to mean, the cause of the claims, the factual reason for or legal theory underlying a petitioner's cause of action.

In *casu*, what was demanded before the magistrates Court was eviction of the defendant whilst before this court the demand is for a declaration of the rightful holder of cession rights, title and interest in the stand. Ejectment of the respondent is prayed for as consequential relief to the *declaretur*.

It is instructive to look at what was before the Magistrates court. This is what was said in the judgment on page 30 to 31 of the record:

> "Plaintiff seeks the eviction of the 1st and 2nd defendants from stand number 2599 Phase 4 Caledonia. Both parties claim ownership to that stand. Both parties have erected structures on the stand.
> The parties belong to the same Co-operative Tashingirira Housing Co-operative. The stands were being allocated by the co-operative.
> 1st and 2nd defendant are a couple, and 2nd defendant, the wife was the one who defended the matter in court.
> Plaintiff said she was allocated the stand in question by the chairman of the co-operative, Mr Chikare. Plaintiff went on to register the stand with UDCORP and also at council.
> Plaintiff however has no offer letter, she said the chairman passed on in 2019 without having issued her one but had been promising to come and vouch for her in court.
> Defendant has an offer letter from that Co-operative. It is noted stand number 23319 and 2599 are one and the same. 23319 is the old number which was renumbered to 2599. Defendant has her offer letter with that stand in question. There are receipts of payments for the stand specifically indicated for that stand 23319. Defendant also has UDCORP card for that stand.
> Now plaintiff having no offer letter from the co-operative, how does she claim ownership? Offer letter is the starting point of acquisition of a stand. Defendant has. Plaintiff is saying the chairman had not yet given her, defendant was given offer letter 10 February 2013. It is baffling how she then managed to register with UDCORP and council. What is it she took to them to register to show she had been allocated that stand?
> That lack of offer letter coupled with what chairman of the co-operative wrote stating stand belongs to the defendant destroys her claim.
> Claim is dismissed with costs."

I propose to take the approach which was taken in the case of *Towers* v *Chitapa* 1996 (2) ZLR 261 (HC) @ 271 where GILLESPIE J stated:

> "Concerning the other two requirements for a plea of *res judicata*, those of identity of relief claimed and of cause of action asserted, it has long been debated whether these requirements are to be construed narrowly or more expansively so as to embrace a principle known to the English law as issue estoppel. If they are to be applied strictly, then only in a case where the same relief is sought by the same *causa petendi* can a party seek the protection of the doctrine of res judicata. The broader application of these requisites, however, has received much judicial approval in South Africa and Zimbabwe since it first found acceptance in our law in *Boshoff* v *Union Goverment*[1] where GREENBERG J accepted as correct the principle stated in Spencer Bower and Turner *Res Judicata* at para 162 that:
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> > "(w)here the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms."
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> This approach has been approved by the Supreme Court in Zimbabwe, although subsequent to that approval further doubt appeared to be cast on the issue by the same court. Any doubt must now, however, be regarded as having been dispelled by the decision in *Kommissaris van Binnelandse Inkomste* v *Absa Bank Bpk*.[2] In this case the elements of the defence of res judicata were explained as consisting of an identity of plaintiff, defendant, thing in contest and cause of action. It was held that the latter two requirements in particular ought in the appropriate case to be interpreted expansively so as to permit the possibility of a defence of res judicata being invoked in respect of an issue determined as part of the *ratio decidendi* of the earlier decision, a defence that may conveniently be termed issue estoppel, despite the fact strictly speaking, a different cause of action and different relief may be sued for in both cases. The defence ought only to be allowed, however, with caution, and only where the underlying requirement that the same question should arise in both cases is satisfied."

Strictly speaking, different relief is sued for in the two actions. A perusal of the judgment from the Magistrates Court which I have reproduced above shows that this is an appropriate case to interpret the defence of *res judicata* expansively so as to invoke *res judicata* in respect of an issue determined as part of the *ratio decidendi* of the earlier decision. The issue of who was the holder of rights title and interest in the stand was at the crux of the eviction matter and it was because the applicant failed to prove her rights in this respect that the claim for eviction was dismissed. It was the *ratio decidendi* of the matter. So was the question of whether or not stand 2599 and 23319 were one and the same stand.

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[1] 1932 TPD 345
[2] 1995 (1) SA 653 (A)

GARWE JA (as he then was), in *Shamrock Holdings Ltd t/a Inyathi Hunters* v *The Minister of Environment and Tourism N.O. and 2 Ors* (*supra*) stated that in our law the principles of *res judicata* are almost analogous to those of issue estoppel. The only difference is that the doctrine of issue estoppel does not require for its application that the same thing must have been demanded – see *Galante* v *Galante* (1) 2002(1) ZLR 144H, 152.

The case of *Dube* v *Murehwa & Anor* (*supra*) pointed to by the applicant is one in which the court was not seized with determining whether or not *res judicata* applied. The court merely noted that the appellant could not rely on what had happened in the magistrates' court in an eviction matter in the application for a *declaratur*. The court then delved into the merits of the matter and found that the High Court had correctly held, on the evidence before it, that the first respondent had real rights to the property.

It is therefore my finding that the defence of *res judicata* stands in this matter. The respondent prayed for dismissal of the matter with costs on a higher scale as the application is said to be a clear abuse of court process. I agree that the applicant should not have clogged this court with this case well knowing that the substance of this same matter had been determined already before the Magistrates Court and the judgment is extant.

**I accordingly order as follows:**

1. The defence of *res judicata* is upheld.
2. The application is dismissed with costs on a higher scale.

*Muronda Malinga Masango Legal Practice*, applicant's legal practitioners
*Mubangwa & Partners*, respondent's legal practitioners