

**CHARLES NDEBELE**

**Versus**

**MKHUNJULWA NKALA N.O.**

**And**

**UNGUZA RURAL DISTRICT COUNCIL**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 14 March 2023 & 23 March 2023

**Special plea**

*M.E.P. Moyo*, for the plaintiff  
*M. Dube*, for the first defendant

**DUBE-BANDA J:**

[1] This is a special plea of *res judicata*.

[2] The plaintiff sued out a summons claiming the following: an order declaring the sale of stand 19 Pansikwe Business Centre, Filabusi between the late Gladys Dungeni and plaintiff as valid and enforceable; an order directing 1<sup>st</sup> defendant to transfer stand 19 Pansikwe Business Centre, Filabusi to plaintiff within 7 days of granting of the order; failing paragraph b) above, an order directing the Sheriff of the High Court or his lawful assignees to sign any document necessary for the transfer of the property in the place of 1<sup>st</sup> defendant; and costs of suit against the 1<sup>st</sup> defendant on an attorney and client scale.

[3] This special plea will be better understood against the background that follows. Stand 19 Pansikwe Business Centre, Filabusi (the property) houses a shop. The property is registered in the name of the late Gladys Dungeni. The first defendant who is the executrix of the estate Gladys Dungeni discovered that the property was occupied by the plaintiff. The executrix reported the matter to the Additional Master, who convened a hearing to determine the

ownership of the property. The executrix testified that all the documentation in respect of the property showed that it was registered in the name of the late Gladys Dungeni. In turn the plaintiff testified that he bought the property from the late Gladys Dungeni in 2001. The Additional Master ruled that the property belonged to the estate Gladys Dungeni, and that whosoever has a claim against the estate must lodge such claim with the executrix. The plaintiff sued out a summons claiming the relief mentioned above.

[4] The first defendant filed a special plea of *res judicata* contending that:

- i. The plaintiff lodged a claim of ownership of stand no. 19 Pansikwe Business Centre, Insiza District in the estate of the late Gladys Dungeni registered with the Additional Master, Filabusi under F/L DR 07/22. He averred that he bought the property in issue from the late Gladys Dungeni in 2001.
- ii. Her Worship S.B. Nunu, in her capacity as the Additional Master, Filabusi, convened a special meeting to determine the claim for ownership of the above mentioned property raised by the plaintiff.
- iii. The said special meeting was convened on the 2<sup>nd</sup>, 9<sup>th</sup> and 14 of November 2022.
- iv. In her ruling dated 14 November 2022 the Additional Master held that the property in dispute belongs to the estate of the late Gladys Dungeni.
- v. The plaintiff has not challenged the Additional Master's decision referred to above.
- vi. In casu the plaintiff has instituted action proceedings claiming transfer of the property in dispute on the basis that he allegedly bought same from the late Gladys Dungeni sometime in 2001.
- vii. It is submitted that the plaintiff cannot institute fresh proceedings between the same parties on the same subject matter which a competent court has already pronounced judgment on. The matter is therefore *res judicata*.

[5] It is against this background that the first defendant has filed this special plea seeking the dismissal of the plaintiff claim.

[6] The parties filed a copy of the record of proceedings. The record of proceedings show the basis on which the matter was adjudicated by the Additional Master, the submissions by the parties and the determination.

[7] The first defendant contends that the plaintiff's claim is *res iudicata* in that it is for the same thing, on the same ground, and against the same party as the claim in respect of which the

Additional Master has already made a final and binding decision. The first defendant further contends that the plaintiff lodged a claim of ownership of the property with the Additional Master. The Additional Master determined the issue of ownership of the property, and the plaintiff brings the same matter and between the same parties for adjudication by this court as a court of first instance. The first defendant contends further that the plaintiff is attempting to have the determination of the Additional Master set aside without an appeal or review. It is argued that the matter is *res iudicata*.

[8] *Per contra* the plaintiff contends that its cause of action is not *res judicata* in that it has not been finally determined. The plaintiff contends further that the Additional Master did not address the real dispute between the parties and settled on form. It was argued that the Additional Master made it clear that her ruling was not a bar to a claim against the estate, and said anyone with a claim must lodge it with the executrix. It is argued further that in approaching the courts the plaintiff is seeking that the matter be resolved on the merits. Mr *Moyo* counsel for the plaintiff argued that the Additional Master did not determine the validity of the sale agreement between the plaintiff and the late Gladys Dungeni, and only said there was insufficient evidence to make a finding on the issue and said the plaintiff may lodge a claim against the estate with the executrix. Counsel further argued that the issue before this court is a declarator, and it was not raised before the Additional Master nor did she deal with such an issue, only this court has inherent jurisdiction to make declaratory orders. Counsel argued that the issue has accordingly not been finally determined between the parties and the special plea must be dismissed with costs.

[9] The defence of *res judicata* amounts to a plea that a judgment has already been given by a court in a matter between the parties in which the point in dispute was the same. *Res judicata* is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. In *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & 3 Ors* (CCZ 6 of 2018) the court said:

“The second preliminary point taken is that the cause of action is *res judicata*. The principle of *res judicata* precludes the court from re-opening a case that has been litigated to finality. The principle was aptly defined in the case of *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-B. The South African Appellate Division had this to say:

‘If a cause of action has been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*.’

The immediate question then is whether the same cause for the same relief between the same parties or their privies has been pursued by the applicant in *casu*, after the matter has been finally determined?

To be successful, where *res judicata* is raised, all the requisites for the plea must exist. These requisites were didactically stated in the case of *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G as follows:

‘There is nevertheless no room for this exception (of *res judicata*) unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking.’

[10] It is important to put into perspective the context in which the matter was argued before the Additional Master, and her findings. In summary the first defendant argued that the property belonged to the estate of Gladys Dungeni. On the other hand the plaintiff argued that he entered into a sale agreement with the late Gladys Dungeni in 2001. When he bought the property the shop was at foundation level, he subsequently completed the shop structure. The Additional Master ruled that the property belongs to the estate of the late Gladys Dungeni, and directed the executrix to submit a first and final liquidation account within thirty days of the ruling.

[11] In *casu* the plaintiff seeks an order declaring that the sale agreement between the late Gladys Dungeni and himself valid and enforceable, and that the property be transferred into his name. Cut to the borne, the plaintiff is claiming ownership of the property. In fact before the Additional Master he argued that he purchased the property from the late Gladys Dungeni and he was the owner thereof.

[12] It is trite that the expression *res judicata* means that the dispute raised for adjudication has already been finally decided. In terms of the common-law, the three requisites of *res judicata* are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause. It cannot be gainsaid that the dispute before the Additional

Master was related to the same parties i.e. the plaintiff and the first defendant. The parties wrangled over the ownership of the property, and each sought to be declared the owner thereof. The Additional Master determined the matter and ruled that the property belonged to the estate of the late Gladys Dungeni.

[13] The dispute raised for adjudication has already been finally decided by the Additional Master. The plaintiff cannot be permitted to recycle the same issue determined by the Additional Master, between the same parties, seeking the same relief before this court as a court of first instance. The first defendant contends that the plaintiff's claim is *res judicata* in that it is for the same thing, on the same ground, and against the same party as the claim in respect of which the Additional Master has already made a final and binding decision. I agree.

[14] In regard to *res judicata* the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment. See: Claassen Dictionary of Legal Words and Phrases (Butterworths, Durban 1977). Therefore, whether the additional Master was right or wrong in her ruling is of no moment. It has been held that the *res judicata* rule does not require that the prior determination should have been made by a court of law. The determination by the Additional Master qualifies for purposes of *res judicata*. The Additional Master made a ruling and determined that the property belongs to the estate late Gladys Dungeni. The issue of ownership of the property cannot be re-opened and debated before this court sitting as a court of first instance. It is for these reasons that the special plea of *res judicata* must succeed.

[15] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the plaintiff must bear the first defendant's costs.

In the result, it is ordered as follows:

- i. The special plea of *res judicata* be and is hereby upheld.
- ii. The plaintiff's claim be and is hereby dismissed with costs.

*Dube, Mguni & Dube*, first defendants 's legal practitioners