

COMMUNICATIONS AND ALLIED INDUSTRIES PENSION FUND
versus
NETONE CELLULAR (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 20 May 2021 and 6 February 2023

Civil Trial – Special Case

Adv T Zhuwarara, for the plaintiff
Mr R Matsikidze, for the defendant

CHINAMORA J:

Introduction:

During the pre-trial conference, the parties agreed that this matter be dealt with as a special case in terms of Order 29, r 199 of the High Court Rules, 1971. The facts in relation to the special case are contained in a document signed on 28 August 2020 by both parties, whose contents are captured below:

Statement of agreed facts & documents

1. The plaintiff and defendant are bound by the Communications & Allied Industries Pension Fund Rules (herein referred to as “Pension Fund Rules”).
2. The defendant entered into voluntary retrenchment with its employee, Mr. Willie Walter Munakiri (“Munakiri”), who instituted proceedings against the plaintiff and defendant for a calculation of his pension benefits in accordance with r 46 (1) and (2) of the Pension Fund Rules. The application succeeded and an order was issued under Case No. HC 4892/17, which order is part of the record and is marked Annexure “B”.
3. The court order did not specify who was supposed to pay the pension benefits. As such, the defendant requested a written judgment. See letter dated 15 November 2017 marked

Annexure “C”. The request was declined with reasons. See memo dated 28 December 2017 which is marked Annexure “D”.

4. A writ was issued by Munakiri against the plaintiff on 26 February 2018. The plaintiff paid \$300,820.82 between 16 March and 4 May 2018.
5. In addition, the plaintiff continued to pay \$4,063.00 every month to Munakiri as a monthly pension benefit from 1 May 2018 until June 2020 when the amount increased to \$8,938.00. Munakiri had not reached sixty-five (65) years of age at the time the court order was issued and has not reached that age to date.
6. The plaintiff demanded repayment of pension benefits from the defendant on the basis that r 47 as read with r 46 of the Pension Rules provides that payment of such benefits shall be charged out and paid from general revenues and assets of the employer organization, i.e. the defendant. See letter of demand 22 May 2018 as Annexure “E”.
7. The defendant submitted that it had paid Munakiri in full and final settlement and denied owing the plaintiff: See letter 23 May 2018 marked Annexure ‘F’.
8. In terms of the subsequent exchanges between the parties, the parties disagree on the issue whether the defendant is liable in terms of Pension Rules 46 and 47 to pay the plaintiff. There was further correspondence on this dispute in the following letters:
 - (a) Letter from the plaintiff dated 10 January 2019 – Annexure G;
 - (b) Letter from the defendant dated 21 January 2019 & Voluntary Retrenchment between the defendant and Munakiri – Annexure H;
 - (c) Letter from the plaintiff dated 25 September 2019 – Annexure I;
 - (d) Letter from the plaintiff dated 2 October 2019 – Annexure J;
 - (e) Letter from the Registrar dated 27 August 2019 – Annexure K;
 - (f) Record of proceedings in Case No. HC 4892/17 – Annexure L;
 - (g) Notice of opposition by Munakiri in Case No. HC 2311/18 – Annexure M;
 - (h) Personal details of Munakiri – Annexure N.
9. The plaintiff alleges that the defendant is liable in terms of rules 46 and 47 of the Pension Fund Rules to pay back pension benefits paid to Munakiri on its behalf, and to pay future

pension benefits out of its general revenue/assets until he turns sixty-five (65). Its refusal to honour its obligation constitutes a breach of the Pension Fund Rules.

10. The defendant alleges that the claim is *res judicata* having been determined in Case No. HC 4892/17 and that non-citation of Munakiri is fatal to proceedings. It also alleged that the duty to pay Munakiri rests on the plaintiff, and that it has already discharged its obligations in full and final settlement.
11. The plaintiff claims \$552,561.82 being money already paid to Munakiri together with monthly benefits of \$8,938.00 paid from June 2020 plus interest at 16% per annum calculated from 16 March 2018. The plaintiff also seeks an order declaring the defendant liable to pay Munakiri his monthly pension benefit in terms of r 46 and 47 of the Pension Fund Rules until he attains the age of sixty-five (65).
12. The quantum is not disputed. However, it is the interpretation of the Pension Fund Rules and liability which is in issue.

Issues for determination

The issues for determination were agreed to be the following:

1. Whether the matter is *res judicata* and whether the plaintiff was held by this court to be liable to pay Munakiri in terms Rules 46 and 47 of Pension Rules.
2. Whether the non-citation of Munakiri is fatal to the proceedings,
3. Whether the defendant is liable to recompense the plaintiff for payments made to Munakiri to date and whether defendant is liable to pay pension benefits until he attains the age of 65 in terms of r 46 and 47 of Pension Fund Rules, and
4. Which party is liable to pay costs and at what scale.

Before dealing with the issues in the special case, let me outline what appears to be non-contentious between the parties. The statement of agreed facts shows that there are a number of things which are common cause. For example, the parties are bound by the Communications and Allied Industries Pension Fund Rules. Also not in dispute is that, the defendant entered into a voluntary retrenchment with its employee, Munakiri, who instituted proceedings against the plaintiff and defendant for calculation of his pension benefits in accordance with r 46(1) and (2) of

the Pension Fund Rules. The application succeeded and an order was issued under case number HC 4892/17. In addition, the plaintiff paid \$4,063 every month to Munakiri as pension benefit from 1 May 2018 until June 2020 when the amount increased to \$8,938.00. The plaintiff is now demanding repayment of pension benefits from defendant on the basis the r 47 as read with r 46 of the Pension Rules provides that payment of such benefits shall be charged out and paid from general revenues and assets of the employer organization.

I will now turn to deal with the four issues which arise for determination in this matter. The issues are clearly stated in the special case document. These are:

1. Whether the matter is *res judicata*?
2. Whether the non-citation of Mr. Munakiri is fatal to the proceedings?
3. Whether the defendant is liable to recompense the plaintiff for payments made to Munakiri to date and whether defendant is liable to pay pension benefits until he attains the age of 65 in terms of r 46 and 46 of Pension Fund Rules?
4. Whether costs should be awarded and at what scale?

Whether the matter is *res judicata*

It is important to first understand what the concept *res judicata* entails. The law on this subject is settled in this jurisdiction. What emerges from the jurisprudence here and elsewhere is that, a key element of the defence of *res judicata* is that the previous order or judgment must have been final in nature. In this context, it is instructive to observe that in *Maparura v Maparura* 1988 (1) ZLR 234 (HC) at 236C-D, CHIDYAU SIKU J (as he then was) aptly said:

“The essence of the defence of *res judicata* is that the issues being raised have been previously raised and determined by a court of competent jurisdiction.”

The plea of *res judicata* was explained with more clarity by MAKARAU JP (as she then was) in *Chimponda & Anor v Muvami* 2007 ZLR (2) 326 at 329G-330 C in these words:

“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 in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or to defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment”.

Having stated the law, let me look at the facts appearing on record. As I have already observed, the order under HC 4892/17 ordered the plaintiff to pay Munakiri (the beneficiary) his monthly benefits. In *casu*, the defendant's assertion that the matter is *res judicata* is premised on the fact that the matter was determined under HC 4892/17. However, in those proceedings, the litigating parties were Munakiri, the plaintiff and defendant (as the first and second respondents, respectively). For the plaintiff to succeed, it must prove that the same parties herein were the same parties in HC 4892/17. I add that the parties must be the same or must be identified with those who were parties to the proceedings. See *Banda v ZISCO* 1999 (1) ZLR 340 (SC); *Towers v Chitapa* 1996 (2) ZLR 261 (H) and *Thembekile Molaudzi and The State* CCT 42-15. It is obvious from the papers before me that the parties under HC4892/17 are different from those in the present matter. A further pertinent question that requires an answer is whether the defendant has shown that the present *lis* is premised on the same cause of action as that in HC 4892/17. The dispute before the court under HC 4892/92 concerned the calculation of pension benefits. In contrast, the cause of action in the present application seeks to determine whether the defendant must repay the plaintiff the monies paid to Munakiri from the pension fund. Clearly, even on a cursory examination, the causes of action in the two matters are different. Therefore, the reliance on *res judicata* is misplaced on the facts of this case. Accordingly, the point in *limine* must fail for that reason.

Whether non-citation of Munakiri is fatal to the proceedings

The defendant contends that the non-citation of Munakiri renders the application fatally defective. In response, the plaintiff argue that it was not necessary to cite Munakiri as the action requires the defendant to repay plaintiff monies paid to Munakiri as pension benefits. It is the plaintiff's submission that the question is disposed by reference to r 87 (1) of the High Court Rules, 1971, which provides as follows:

“No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the parties to the cause or matter.”

The above provision is clear and permits no ambiguity. I notice that the same provision is replicated in r 32 (11) of the High Court Rules, 2021 (“the new rules”). Therefore, even assuming

that there had been non-joinder of Munakiri to the application in *casu*, that alone would not prevent the court from determining the dispute as it pertains to those parties that are before the court.

Additionally, the authorities are clear that, for a person (natural or juristic) to be considered an interested party, the interest must be such that the judgment cannot be carried into effect without affecting such person's rights. (See *Burdock Investments (Pvt) Ltd v Time Bank of Zimbabwe Ltd and Ors* 2003 (2) ZLR 437 at 442). Accordingly, this point *in limine* is dismissed.

Whether defendant is liable to recompense plaintiff

It is common cause that the plaintiff paid Munakiri his pension benefits pursuant to the order under HC 4892/17. I have to decide whether or not the defendant is liable to recompense the plaintiff the amount paid. The defendant's contention is that the order under HC 4892/17 directed the plaintiff to pay Munakiri's pension benefits, yet it was silent on who should pay the pension benefits. The order only provided that the pension benefits ought to be calculated and paid on the basis of plaintiff's pension rules. In particular, r 46 (1) and (2). Rule 46 (2) of the Rules provides as follows:

“If he is an established officer, who was a member as at 30 September 1992, his benefits will be enhanced:

- (a) if he has not attained the age of sixty – one years at the date of his discharge, to a pension equal to one-six-hundred-and sixtieth of his retiring pensionable emoluments for each complete month of his aggregate service;
- (b) if he has attained the age of sixty-one years at the date of his discharge, to a pension equal to the pension fraction specified in rule 40 of his retiring pensionable emoluments for each complete month of his aggregate service.”

The above rule provides for how pension benefits are to be calculated when an established officer has not attained the age of sixty-one and he has attained the age of sixty-one at the time of his discharge from service. Also relevant to consider is r 47 which provides that:

“Every pension to which a contributing member becomes entitled in terms of rule 43 shall be charged on and paid out of the general revenues and assets of the employer organizations, and every pension to which a contributing member becomes entitled in terms of rule 46 shall be charged on and paid out of the general revenues and assets of the employer organization until he attains the age of sixty-five years, after which it shall be paid by the Fund. A lump sum or a pension granted to the dependants of a contributing member in terms of rule 43 shall be charged and paid out of the general revenues and assets of the employer organizations.”

It is apparent from the above rule that pension benefits are paid out of the general revenues of the employer organization if the contributing member is entitled in terms of r 43. The rules also provide that, if entitled in terms of r 46, the pension benefits will be paid out of the general revenues and assets of the employer organization until the beneficiary reaches sixty five years. Thus, the rule obliges the defendant to pay Munakiri's benefits till he turns sixty-five years. Having reached this conclusion, it follows that the defendant should recompense the plaintiff the monies that it paid Munakiri.

Whether costs should be awarded and at what scale

Generally, costs are awarded on the ordinary scale, unless the unsuccessful party's conduct has been unreasonable amounts to an abuse of process. See *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H). There is nothing on record that justifies the award of costs on the punitive scale of attorney and client. In fact, the plaintiff did not prayer for costs on a higher scale or motivate for the same in its pleadings. I must say that such a stance is eminently reasonable, because the dispute in *casu* purely centred on the interpretation of rules 46 and 47 of the Communications and Allied Industries Pension Fund Rules.

Disposition

Consequently, I will grant the following order:

1. The points in *limine* raised by the defendant are hereby dismissed.
2. The defendant be and is hereby ordered to pay plaintiff the sum of \$552,561.82 together with monthly benefits of \$8,938.00 paid from June 2020 plus interest at 16% per annum calculated from 16 March 2018.
3. The defendant be and is hereby to pay Walter Munakiri's pension benefits in terms of r 46 and 47 of the Commercial and Allied Industries Pension Fund Rules until he attains the age of sixty-five years.
4. The defendant shall pay costs of this suit on an ordinary scale.

Mawere Sibanda Commercial Lawyers, plaintiff's legal practitioners
Matsikidze Attorneys-at-Law, defendant's legal practitioners