

DHARB INVESTMENTS  
versus  
PESKET TRADING (PVT) LTD  
and  
ZIMBABWE NATIONAL ROAD ADMINISTRATION

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 8 May 2019

**Opposed matter-special plea**

*C. Mandizvidza*, for the plaintiff  
*No apperance*, for the 1<sup>st</sup> defendant  
*I.Goto*, for the 2<sup>nd</sup> defendant

ZHOU J: This is a matter in which the special plea of *res judicata* had been raised in response to a claim by the plaintiff for payment of a sum of US\$19 462, together with interest thereon and costs on the attorney-client scale. The claim is against the first defendant, Pesket Trading (Pvt) Ltd, and the second defendant, Zimbabwe National Road Administration. It is based on alleged damage to the plaintiff's motor vehicle in the course of its being towed for the reason that it was not registered in accordance with the law. The second defendant took the objection on the basis that in Case No. HC 7801/17 this court upheld its special plea to the same claim. The special plea in Case No. HC 7801/17 which ought to have been by way of exception was that the plaintiff had no cause of action against the second defendant *in casu* which was the only defendant in the first matter.

The requirements for the *exceptio rei judicata* are settled and require no recital, see *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316 B-E; *Tobacco Sales Producers (Pvt) Ltd v Eternity Star Investments* 2006 (2) ZLR 293 (H) at 300. These requirements are that (a) the proceedings must be between the same parties or their privies, (b) the same question must arise for determination, and (c) the cause of action is the same in the two matters. See also *Banda & Ors v Ziso* 1999 (1) ZLR 340 (S) at 341G-342E.

A look at the pleadings in HC 7801/17 and the pleadings *in casu* shows that the cause of action against the second defendant is the same in both cases. The same amount of damage is also being claimed, based on the same alleged damages to the same motor vehicle. This court having found that based on those facts there is no cause of action cannot entertain this claim which is founded upon the same facts.

In the special plea and the heads of argument filed on behalf of the second defendant a prayer for costs on the attorney-client scale is made. In my view the legal practitioners for the plaintiff are to blame for re-instituting the same claim against the second defendant. I would have been inclined to grant costs *de bonis propriis* against Mr *Mandizvidza* for the plaintiff. He has escaped that censure only because it is his first appearance in this court.

But the case points to lack of supervision of a junior legal practitioner by his principals. This is a matter of concern to this court. It would have been clear from a reading of the pleadings in the two matters that this claim against the second defendant was manifestly doomed to failure and amounted to an unacceptable abuse of the procedures of this court but, understandably because of his inexperience, the legal practitioner did not appreciate that reality. I believe, however, that attorney-client costs are still warranted against the plaintiff itself because the second defendant has been unnecessarily put out of pocket by having to defend this matter.

In the result, IT IS ORDERED THAT:

1. The special plea of *res judicata* be and is hereby upheld, and the plaintiff's claim against the second defendant is dismissed.
2. The plaintiff shall pay the second defendant's costs on the attorney-client scale.

*Muunganirwa and Company*, plaintiff's legal practitioners  
*Kadzere, Hungwe & Mandeverere*, defendant's legal practitioners