IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No. 250 OF 2020

BETWEEN:

30 NOV 2021

TIME TRUCKING LIMITED — **APPELLANT**

AND

KELVIN KIPIMPI — **RESPONDENT**

Coram: **Makungu, Sichinga, and Muzenga, JJA**
on 26th August, 2021, 20th October, 2021, and 30th November, 2021

For the Appellant: *Mr L. Mwamba of Messrs Simeza Sangwa and Associates*

For the Respondent: *In person*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Robert Lawrence Roy v Chitakata Ranching Company Limited (1980) Z.R. 198***
2. ***Jamas Milling Company Limited v Imex International (Pty) Limited SCZ Judgment No. 20 of 2002***
3. ***Codeco Limited v Elias Kangwa and Others SCZ Appeal No. 199 of 2012***
4. ***Zambia Telecommunications Company Limited v Aaron Mweenge Mulwanda and another SCZ Appeal No. 63 of 2009***
5. ***Watson Nkandu Bowa (suing as Administrator of the estate of the late Ruth Bowa) v Fred Mubiana and ZESCO Limited SCZ Appeal No. 121 of 2011***
6. ***Akashambatwa Mbikusita Lewanika and others v Frederick Jacob Titus Chiluba (1998) Z.R. 79***

7. *Zambia Telecommunications Company Limited v Mirriam Shabwanga and others SCZ Appeal No. 78 of 2016, SCZ Appeal No. 81 of 2016*
8. *Hakainde Hichilema and Others v The Government of the Republic of Zambia SCZ Appeal No. 28 of 2017*
9. *Fearnought Systems limited v Fearnought Systems (Z) Limited and Another SCZ Appeal No. 35 of 2015/ZMSC Judgment No. 76 of 2017*

Legislation referred to:

1. *Order 39 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia*

Other works referred to:

1. *Halsbury's Laws of England, Vol 17(1) (4th edition, Lexis Nexis 2008)*

1.0 Introduction

1.1 This appeal concerns the question whether a court can move on its own motion to review its own decision and dismiss a matter for want of prosecution.

1.2 The appellant, Time Trucking Limited is the former employer of the respondent, Kelvin Kipimpi. On 25th July, 2017, the appellant took out a writ of summons and statement of claim before the High Court claiming damages for wrongful execution of its property arising from the actions of the respondent.

1.3 On 12th June 2018, the appellant filed a motion for determination of a question of law or construction, which was heard, and on 16th July, 2018

the court rendered its ruling on the preliminary issue awarding the appellant damages to be assessed by the Deputy Registrar.

1.4 On 27th August 2018, the appellant filed a notice of assessment of damages.

1.5 On 15th October 2020, the court on its own motion and without hearing the parties, rendered a ruling reviewing its earlier decision and setting aside its entire order and dismissing the matter for want of jurisdiction.

2.0 Background

2.1 The background to the matter on appeal is that the respondent had commenced an action in the High Court Industrial Relations Division at Ndola seeking reliefs from the appellant, his employer at the time. The outcome of the suit was that the respondent was awarded unliquidated sums of money under various heads which were to be taxed in default of agreement.

2.2 The respondent then prepared a computation of sums he claimed were due to him which he termed "statement of claim." He proceeded to file a writ of fifa in the High Court Industrial Relations Division which was executed. The execution was stayed by the court ex-parte. The ex-parte order was subsequently discharged on an inter-partes hearing.

2.3 The application for stay of execution was renewed before the Court of Appeal. We granted the stay pending determination of the substantive appeal before the Court.

2.4 Arising from the execution that had occurred, Time Trucking then commenced this action before the High Court General list seeking damages as a result of the execution.

2.5 The parties had agreed to proceed by way of a preliminary issue on the point of law whether the defendant (Kipimpi) was in order to issue a writ of fifa to enforce the Judgment of the High Court Industrial Relations Division after self-assessment.

2.6 In her ruling of 16th July 2018, Wanjelani J set aside the writ of fifa. She upheld the plaintiff's preliminary issue and held that the plaintiff was entitled to the relief (damages) set out in the statement of claim. She ordered damages to be assessed by the Deputy Registrar.

2.7 On 15th October 2021 the learned judge rendered a ruling, which is the subject of this appeal, on her own motion and without hearing the parties. In her ruling she reviewed her earlier decision and set aside her orders and dismissed the matter for want of prosecution on the basis that it was wrong for Time Trucking to commence a fresh action on the General List when there was a subsisting matter before the Industrial Relations Division.

3.0 The appeal

3.1 Dissatisfied with the Ruling of 15th October 2020 the appellant appealed to this Court raising three grounds of appeal as follows:

1. ***The learned judge grossly erred in law when she moved on her own motion to review the matter in her Ruling dated 16th July 2018 and dismissed the action for want of jurisdiction;***
2. ***The learned judge erred in law and fact when she dismissed the matter for want of jurisdiction on grounds that the appellant should not have commenced a fresh action for wrongful execution and that the appellant should instead have sought the same before the same court that issued the writ of fieri facias; and***
3. ***The learned judge erred in law and fact when she held that leave to appeal not having been granted, the matter was amenable to review on sufficient grounds which grounds she provided herself.***

4.0 Appellant's heads of argument

4.1 The appellant filed its heads of argument of 9th October 2020. Under the first ground of appeal, the appellant questions whether the court below in reviewing its ruling on preliminary issue dated 15th October 2020 improperly exercised its power to review its decision. Reference was made to a number of decisions on how the courts have interpreted ***Order 39 of the High Court Rule***[1] which provides the court the discretion to review its decision.

4.2 That the rule was considered in the case of ***Robert Lawrence Roy v Chitakata Ranching Company Limited***[1] wherein it was held:

> ***"As a matter of basic principle I have come to the conclusion that one can never take into account events which occur for the first time after delivery of judgment as grounds for review of a judgment. If it were***

otherwise there would never be an end to any litigation. The losing party would in most cases find something happening after he had lost which would enable him to ask for a second bite at the cherry."

4.3 ***Jamas Milling Company Limited v Imex International (Pty) Limited***[2] was referred to for its holding that:

"For review under Order 39 Rule (2) of the High Court to be available, the party seeking it must show that he has discovered fresh material evidence which has had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before."

4.4 That in ***Codeco Limited v Elias Kangwa and Others***[3] the Supreme Court stated:

"From the above, there are two important points to note. Firstly, the power of the Judge of the High Court to review his own judgment or decision, is discretionary. Secondly the law prescribes a limited time frame of fourteen days from the date of the judgment or decision to be reviewed within which the application may be made. Thereafter, prior special leave of the court is required and is in the discretion of the court."

4.5 In ***Zambia Telecommunications Company Limited v Aaron Mweenge Mulwanda and another***[4] the Supreme Court held:

"We further note that there was no application for review, before the learned trial Judge. What was before her was an application to interpret the Judgment, which she dismissed. It was on that application

that the appellant was heard. And when the learned trial Judge proceeded, on her own motion, to review the Judgment, she did not give the appellant a chance to be heard on the review."

4.6 And in ***Watson Nkandu Bowa (suing as Administrator of the estate of the late Ruth Bowa) v Fred Mubiana and ZESCO Limited***[5] it was held:

> ***"It is critical if procedural justice has to be served that both parties are heard, so that the credibility of such evidence is tested before the court makes a decision. A trial judge, cannot as in this case merely reverse her decision, because after having sight of the grounds of appeal, she forms the opinion that, she may have misdirected herself on a point of law or fact. That is a misdirection. Stay of execution pending appeal and review under order 39 are qualified under different grounds. Different also are the principles that sustain such applications. We agree with Mr Moono that the grounds for review did not exist. There is merit in grounds one and two of the appeal. The review is a nullity."***

4.7 It was submitted that from the above decision ***Order 39 Rules 1*** and ***2*** afford the High Court discretionary power to review its own decision. That the said power is activated by an application for review made within the limited period of 14 days after the decision. That the power cannot be exercised at the court's own instance. And that any review that is made on the court's own motion unsupported by the evidence necessitating the review is ultra vires ***Order 39 of the High Court Rules*** *supra*.

4.8 It was submitted that the exercise of the power to review arises when there are sufficient reasons disclosed by a party seeking to have the order or judgment reviewed. It was argued that one such instance is where there is

evidence discovered after the decision that could have materially affected the court's decision had such evidence been discovered before.

4.9 The appellant invited the Court to intervene and overturn the decision of the lower court because it is bound by the decisions of the Supreme Court in the decisions highlighted.

4.10 Grounds two and three were argued together. It was submitted that the primary issue arising from the above grounds is whether a ruling is amenable to review on the premise of those grounds solely provided by the lower court.

4.11 Reference was made to the case of ***Akashambatwa Mbikusita Lewanika and others v Frederick Jacob Titus Chiluba***[6] in which the Supreme Court held as follows:

> ***"Review of Judgments is a two staged process, that is to say, first showing or finding a ground considered to be sufficient which then opens the way to actual review. Review enables a court to put matters right. However, I do not believe that the provisions simply exists to offer a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more favourable to him."***

4.12 It was submitted that the party seeking to review a decision must provide the court with a ground/s considered sufficient to then open the matter for the actual review of the decision under scrutiny. The appellant contended that a dissatisfied party may not simply present grounds that only bring about a result favourable only to him.

4.13 It was submitted that the lower court's reference to pleadings on record showing a writ of fifa was not sufficient ground to warrant a review of the decision. Counsel contended that the circumstances cited by the court were already known at the time when the Ruling on preliminary issue was delivered on 16th July, 2018. It was submitted that the court below misread an elementary principle of procedural law because wrongful execution, which was the premise of the appellant's action in the court below, is a cause of action legitimately recognised at common law and in our jurisdiction. Reference was made to ***Halsbury's Laws of England***[1] and the case of ***Zambia Telecommunications Company Limited v Mirriam Shabwanga***[7] which authorities show that wrongful execution is a cause of action that can be commenced by an aggrieved party.

4.14 The appellant submitted that it was equally erroneous for the court below to impute that there was abuse of process in the appellant commencing an action because the relief sought in the two cases were different. Therefore there was no possibility of there being two conflicting decisions.

4.15 We were urged to find that the grounds underlying the review of the decision of 16th July 2018 fail to meet the threshold set out in the ***Akashambatwa Mbikusita Lewanika case*** and that in any event, it is within the appellant's right to commence process for wrongful execution as enunciated in the case of ***Zambia Telecommunications Company Limited v Mirriam Shabwanga*** *supra.*

4.16 Counsel prayed that the decision of the lower court dated 15th October 2020 be reversed and in its place we should find that the action under cause no. 2017/HP/1230 was properly before the court. Further, that the

matter be referred back to the lower court for the learned Deputy Registrar who was hearing the assessment of damages application to continue with the hearing.

5.0 Respondent's heads of argument

5.1 On 27th October, 2021, the respondent filed his heads of argument following an order by this Court to do so. In his arguments, the respondent argued all three grounds together. He commenced his arguments with a background of the matter, which we have given at the beginning of this judgment. We therefore shall not regurgitate the same.

5.2 The respondent submitted that the lower court was on firm ground when she reviewed the matter on her own motion because it was within her jurisdiction to assess her own previous decision based on applicable laws. He argued that the learned trial judge was in order to reverse her earlier Ruling after observing that the appellant had earlier filed the same matter in the court of the same jurisdiction where the main matter was commenced but failed to prosecute it. He submitted that the appellant was aware that the Ruling dated 10th October, 2016 remained unchallenged and not appealed against. Therefore it remained enforceable.

5.3 The respondent submitted that the learned judge was right to annul her Ruling dated 16th July, 2018 because the court below is not an appellate court to the Ndola High Court where the matter originated from. He contended that the appellant erred in taking out an action against him regarding the same matter in another court of the same jurisdiction for

allegedly wrongful execution of judgment. He argued that the execution was backed up and directed by court order on record. He submitted that the appellant was wrong to seek to retrieve from him the damages he was awarded. He contended that it was wrongful for the appellant to ignore the Ruling dated 15th October, 2016, which ordered the seizure of items of the same value of the Fifa because the execution of the judgment was a court order.

5.4 In conclusion, the respondent urged the Court to uphold the lower court's Ruling of 15th October, 2020 and dismiss the appeal for lack of merit.

6.0 Appellant's arguments in reply

6.1 The appellant filed arguments in reply on 1st November, 2021. In reacting to the respondent's submission that the learned judge was on firm ground by moving her own motion because it was within her jurisdiction to assess her own previous decision based on applicable laws, counsel submitted that *Order 39 rule 1 and Order 3 rule 2 of the High Court Rules* were not applicable. Counsel contended that it is clear that *Order 39 rule 1* is only applicable in instances where leave to appeal has not been obtained. He argued that in the Ruling appealed against the lower court had granted leave to appeal, and it was therefore erroneous for the lower court to have reviewed its decision on the basis of *Order 39 rule 1*.

6.2 On *Order 3 rule 2*, it was submitted that the same was only applicable where the court makes an interlocutory order. Reference was made to the case of ***Hakainde Hichilema and Others v The Government of the Republic***

of Zambia [8] in which the Supreme Court had the following to say on the applicability of *Order 3 rule 2*:

> ***"Looking at the provisions of Order 3 rule 2 of the High Court Rules, it is clear that the Order only applies to interlocutory orders and not final orders. According to Order 59/1A of the Rules of the Supreme Court, a judgment or order of a court 'shall be treated as final' if the entire cause or matter would have been finally determined. This is what happened in this case. The court granted what it termed as an 'interlocutory Order of dismissal' on the ground that it was clothed with jurisdiction to make any order under Order 3 Rule 2 of the High Court Rules without any regard as to whether such order was interlocutory or final."***

6.3 It was submitted that *in casu* the learned judge ordered as follows:

> ***"Thus on the totality of the facts and authorities cited herein, I uphold the plaintiff's Preliminary Issue and find that the Plaintiff is entitled to the claims stated in the Statement of Claim."***

6.4 It was submitted that the effect of the above order is final, as granting the reliefs sought in the statement of claim had the effect of finally determining the matter. Counsel contended that *Order 3 Rule 2* was therefore erroneously employed by the court below.

6.5 On the respondent's submissions that: the appellant neglected to prosecute the application at the High Court at Ndola on 25th July 2017, but instead commenced the same matter at the High Court at Lusaka; and that it was unlawful for the appellant to abandon the same matter for alleged wrongful execution, counsel reiterated earlier submissions that the matter

that commenced at Lusaka under cause number 2017/HP/1230 arose under a distinct cause of action for wrongful execution.

6.6 In conclusion, it was submitted that contrary to the respondent's assertion, *Order 39 Rule 1* and *Order 3 Rule 2* of the *High Court Rules* are not applicable to the facts that arose *in casu* and that reliance on the said provisions by the court below was therefore a misdirection. Counsel urged the Court to allow the appeal with costs.

7.0 Decision of the Court

7.1 We have carefully considered the grounds of appeal, the impugned Ruling and the submissions on behalf of the parties. We note that the grounds of appeal are structured to address each of the learned judge's reasons for her conclusion in the Ruling. However, we are of the view that the issue raised by the appeal can more simply be addressed by considering the question:

- *Can a court on its own motion and without hearing the parties review its decision and dismiss a matter for want of prosecution?*

7.2 In the detailed submissions by counsel for the appellant it was submitted that the guidance given by the Supreme Court in a plethora of authorities *inter alia* the ***Jamas Milling Limited case*** is that the yardstick used to determine the materiality of ground/s considered to merit the review of a decision are the following:

(i) There must be fresh evidence which existed at the time of the decision; and

(ii) A demonstration of failure to discover such fresh evidence with due diligence.

7.3 In the instant case at page R4 of the Ruling, the learned judge stated the following:

> ***"The Pleadings on record show that the Writ of Execution was issued in the Industrial Relations Court pursuant to a Judgment delivered by that court.***
>
> ***Consequently, the Plaintiff should have applied to set aside the Writ of Fifa and claimed damages arising from the execution before the same court that had issued the Writ and which could have determined whether or not that Writ had been properly issued and executed."***

7.4 In the case of ***Fearnought Systems Limited v Fearnought Systems (Z) Limited***[9] the Supreme Court stated that the review of a judgment or decision was a two stage process as follows:

(i) Considerations when determining whether review is appropriate; and

(ii) Determining what material effect, if any, fresh evidence may have had on an initial decision.

7.5 In that case the Supreme Court held:

> ***"There are principles that give guidance as regards how Order 39 should be applied in practice.***
>
> ***First, an application for review must be heard. At this stage the Applicant must show to the satisfaction of the judge the grounds that***

warrant the review of the decision. If the grounds are shown, then the order for review is granted.

The next stage is now for the judge to re-open the matter and review the judgment."

7.6 The Supreme Court had followed its earlier decision in the case of ***Lewanika v Chiluba*** *supra* cited by the appellant's counsel.

7.7 In ***Codeco v Elias Kangwa and Other*** *supra* the Supreme Court said:

"Firstly, the power of a Judge of the High Court to review his own judgment or decision is discretionary.

Secondly, the law prescribes a limited time frame of fourteen (14) days from the date of the judgment or decision to be reviewed within which the application may be made. Thereafter, prior special leave of the court is required and is in the discretion of the court."

7.8 Applying all the authorities cited herein we opine that *in casu* the reason ascribed to by the learned judge for the view was hardly fresh evidence as the suit she was referencing commenced in 2014 which was not fresh evidence. It is also clear to us that the review of the Ruling on preliminary issue took place after over two years from the decision sought to be reviewed which offends the prescribed review period provided in *Order 39 of the High Court Rules.* And finally, none of the parties to the action were accorded an opportunity to be heard by the learned judge on her review. We accept the appellant's counsel's submissions *in toto* and allow the first ground of appeal.

7.9 Having accepted the appellant's submissions in full the other grounds of appeal become otiose. We accordingly allow the appeal. In doing so, we set aside the lower court's ruling dated 15th October 2020, and we refer the matter back to the lower court for assessment of damages under cause no. 2017/HP/1230 before the learned Deputy Registrar. Costs follow the event.

C.K. Makungu
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

K. Muzenga
COURT OF APPEAL JUDGE