IN THE HIGH COURT FOR ZAMBIA **2009/HP/1541**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PETER NJOVU **PLAINTIFF**

VS

BP ZAMBIA PLC **DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. Mr. H.A. Chizu of Messrs Chanda Chizu and Associates*

For the Defendants: *Mrs. K.M. Chileshe of Messrs Mweemba Chashi and Partners*

RULING

Cases Referred to:

1. *Jamas Milling Company v Amex International Pty Limited(2002) Z.R. 79*
2. *Khalid Mohamed v The Attorney General (1982) ZR 49*
3. *Kitwe City Council v. William Nguni (2005) ZR 57*
4. *ZAMTEL v Aaron Mweene Mulwanda and Another SCZ No. 7 of 2012*

Legislation Referred to:

1. High Court Act Chapter 27 of the Laws of Zambia

This was the Defendant's Application for Special Leave to Review the Judgment of this Court pursuant to Order XXXIX Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia.

The Application was supported by an affidavit deposed to by one Kasongo Myra Mweemba, the Defendant's advocate. She swore that on 14th March, 2007, the Court Ordered that the parties to this matter file into Court Agreed facts, Issues in Dispute as well as submissions after which the Court would render judgment.

Both parties filed in their respective submissions and the Court handed down judgment on 24th May, 2017. The deponent averred that in the said Judgment, it was stated that the Defendant had not filed in their submissions which they had and a copy of the said submission was exhibited and marked "**KMM1**".

Further, that there was reference to an authority which stated that a proposition that a Plaintiff should succeed automatically whenever a defence failed was unacceptable. She emphasized that the said submissions prayed that the Defendant's counter claim succeeds.

It was her contention that it was in the interest of justice that the Court reviews his judgment in order to take into account the Defendant's submissions and determine the counterclaim of its merits.

Counsel filed in skeleton arguments where she argued that there was a counterclaim in this matter wherein the Defendant was claiming the sum of K7, 551.86 plus interest which the Plaintiff claimed would be set off from the redundancy payment.

Upon analysis of Order XXXIX Rule 1 it was her argument that the Defendant was desirous of prosecuting the counterclaim.

I have carefully considered the Defendant's affidavit in support of the application and the skeleton arguments.

From the onset I wish to state that the authority which this Court referred to pertaining to the Plaintiff's burden to prove its case and has been referred to in the affidavit is the case of ***Khalid Mohamed v. The Attorney General (1982) ZR 49***. That case basically emphasizes that regardless of whether the Defendant has filed in a defence or not, the Plaintiff still has to prove its claim for there to be judgment in their favour. I therefore do not find any issue with this authority.

Having said this, I will now consider the issues raised for this application for review to succeed. The Defendant has alluded to the fact that this Court Ordered that the parties file in agreed facts and issues in dispute and then file in submissions and the Court would then render Judgment. It is important to note that the Court's Order dated 23rd March 2017 for the parties to file in agreed facts was by consent of the parties.

The agreed facts clearly outlined the issues that were not in dispute of which one of them was that the Plaintiff would offset the

K7,551.86 owed to the Defendant from the redundancy payment. The issues that were outlined for the Court's determination were as follows:

1. *Whether or not the supernumerary position was temporary or permanent and formed part of the contractual conditions of service.*
2. *Whether or not the Plaintiff's continued supernumerary position amounted to constructive dismissal entitling the Plaintiff to damages.*
3. *Whether the Plaintiff continuously worked for the Defendant from 1995 to 2007.*
4. *Whether the Plaintiff was entitled to reliefs stated in the Writ of Summons and Statement of Claim.*

Based on these issues raised, the Court addressed its mind to each issue and it was ultimately found that the Plaintiff's claims had no merit.

It is conceded that the Court did not consider the Defendant's submissions because the same was unfortunately not on the record at the time of the judgment and the only copy on record to date is the copy supplied by the Defendant due to this application. However, the law is clear regarding submissions. In the case of ***Kitwe City Council v William Nguni (2005) ZR 57*** the Supreme Court stated that:

> *"Counsel has submitted that contrary to the learned trial Judge's assertion that the defendant did not file or deliver*

written submissions, these were actually filed on 8th of August, 2002 and were found lying on the court's file.....what is important is for the parties to note that the learned trial Judge was not bound to consider counsel's submissions as these were meant only to assist the trial court in shaping up its judgment"

In view of the authority above, this Court is not bound by the submissions of the parties as they are merely meant to assist the Court in framing the Judgment. In any event Order XXXIX Rule 1 is strict as to the instances that the Court can review its judgment. It provides as follows:

"Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter."

The Supreme Court has ably guided on the strict instances that a Court may review its own Judgment. I call in aid the case of ***ZAMTEL v Aaron Mweene Mulwanda and Another SCZ No. 7 of 2012*** where Mwanamwambwa, JS delivering the Judgment of the

Court referred to the case of ***Jamas Milling Company v Amex International Pty Limited (2002) Z.R. 79***andheld as follows:

"In that case we said:-

"For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have 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."

In the present case, the learned trial judge acknowledged the fact that in her judgment of 5th June, 2008, she had inadvertedly omitted to state that the award of damages was over and above terminal benefits due to the plaintiffs. To address that omission, she altered her judgment by adding that terminal benefits should be paid to the benefits....

In our view, the learned trial judge amended her judgment, by adding a relief which she, inadvertedly, did not grant. Such an amendment is not permitted on the various authorities referred to above. The terminal benefits were specifically pleaded. That she omitted to make a determination on them was an error on a fact. Such an error could only be addressed by an appeal and not an amendment of the judgment, on review.....

We also note that there was no fresh material evidence, discovered since the judgment, which would have material effect on the judgment. Review was clearly not available to the respondents. Contrary to the submission by the 1st respondent, review under Order 39, rule 1 of the High Court Rules has very limited scope, as per our decisions in the Jamas, Lisulo, and Lewanika cases, referred to above.

Similarly in the case before more, I have carefully looked at the submissions that have been provided and I am of the firm view that there is no new evidence that was revealed in the submissions which this Court did not already consider. The issue of the counter claim was agreed upon by the parties in their agreed facts. The Court exhaustively dealt with the issues that were presented for determination.

It is my view that if it is in the opinion of the Defendant that there was something that was not dealt with exhaustively, the proper course of conduct is to appeal to the higher Court in that regard.

In view of the foregoing I dismiss this application with costs.

Leave to appeal is granted.

Dated the 27th day of July, 2017

Mwila Chitabo, S.C.
Judge