IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 94/96/SCZ 8/92/96

HOLDEN AT NDOLA.

(Civil Jurisdiction)

MERCANTILE PRINTERS LIMITED	APPLICANT
AND	
SWIZA LABORATORIES LIMITED	RESPONDENT

Coram: Sakala, Chaila and Chirwa JJS.
11th September and 2nd December, 1997.

For the Applicant, Mr. L. Mwanawasa of Mwanawasa and Company assisted by Mr. G. Kunda of George Kunda and Company.

For the Respondent. Mr. S. Malama of Jaques and Partner assisted by Mr. C. Chileshe of Lloyd Jones and Collins.

J U D G M E N T

Sakala JS delivered the Judgment of the Court.

Cases referred to (1) Miyanda V. Attorney General (2) (1985) ZR 243.

(2) Trinity Engineering (PVT) Ltd V. Zambia National Commercial Bank SCZ Appeal No. 76 of 1995).

This is an application, by Mercantile Printers Limited, the appellant in the main action, herein after referred to as the applicant, pursuant to Section 8 of the Supreme Court Act as read with Rule 78 of the Supreme Court Rules, to correct accidental slips and or omissions and pursuant to Order 2 Rule 1 and Order 59 Rule 11 of the Rules of the Supreme Court, and also pursuant to the inherent jurisdiction of the court to vary or alter or set aside this court's judgment delivered on 6th September, 1995 in which the court dismissed the applicant's appeal. The accidental slips or omissions which the court is asked to correct

in the said judgment are set out in the memorandum of application. The relevant portion of the memorandum reads as follows:

"a) The court ommitted to hold that in terms of Section 23 of the Landlord and Tenant (Business Premises), Act, Cap 440, of the Laws of Zambia, the tenancy in respect of which Notice to terminate is given by the Landlord to the Tenant under the Act and the Tenant has made an application to the Court for grant to the Tenant of a new tenancy, does not come to an end until three months after the final determination of such application and if the matter is the subject of an appeal until 3 months after the determination of such appeal. Consequently the court ommitted to hold that the respondent was not in illegal occupation of the property and therefore mesne profits and the cost of alternative accommodation awarded to the appellant ought not to have been granted."

The history of the application is that on 6th September, 1995 this court delivered a judgment dismissing the applicant's appeal against a judgment of the High Court Commissioner granting possession of plot No. 378, Makoli Avenue, Ndola to the respondent, the tenancy having been duly determined by a notice dated 15th May 1987. The facts not in dispute in that appeal were that, by notice dated 15th May 1987, Swiza Laboratories Limited, hereinafter referred to as the respondent gave notice to the defendant to quite the premises by 30th November, 1987. The applicant, according to the facts not in dispute in that appeal, did not apply to court for a new tenancy but continued to occupy the premises even after the expiry of the notice to quit.. But in this application, as will be seen later, it is contended that an application for a new tenancy had actually been made. The applicant did admit receiving the notice to vacate

the premises. Their contention at that time was that the period given was too short and that the provisions of Sections 11 (2) of the Landlord and Tenant (Business Premises) Act precluded the respondent from evicting them because the interest they had acquired was less than five years. During the hearing of that appeal the court was informed by the then advocate for the applicant that the appeal was being fought to avoid a collosal sum of damages that might be awarded if the judgment of the learned trial Commissioner was upheld, that the applicant should have yielded possession of the premises. The then advocate conceded that if the court found that the respondent seriously wanted possession of the premises for purposes of reconstruction his argument based on Section 11 (2), would not have been of assistance to the applicant.

In this application Mr. Mwanawasa, appearing for the applicant explained that the applicants were tenants of the business premises way back in 1985. In the same year the premises were bought by the respondent, Swiza Laboratories Limited, who decided to terminate the tenancy. After a number of representations and irregular notices to quit, a proper notice to quit was finally served by the respondent on the applicant. According to Mr. Mwanawasa, on 7th July 1988, the applicant obtained leave for an extension of time within which to apply for a new tenancy. It must be observed at this point that the leave for an extension of time, and the application itself for the new tenancy, were made seven months after the expiry of the notice to quit. Mr. Mwanawasa further explained that at the time the applicant obtained leave to apply for the grant of a new tenancy, the respondent, Swiza Laboratories Limited, had already, as far back as 7th December 1987, commenced

an action for possession of the property in issue under cause No. 1987/HN/845. But that before that matter could be heard and before the application for a new tenancy could also be heard, the advocates for the applicant applied for consolidation of cause Nos 1987/HN/845; 1988/HN/358; and 1986/HN/357 which had been commenced by the applicant on 12th May 1986 claiming for, among others, a declaration that it is entitled to possession of the Business Premises in question. According to Mr. Mwanawasa, while the consolidation of cause Nos 1988/HN/358 and 1987/HN/845 was pending the court ordered that cause No. 1986/HN/357 be stayed pending the outcome of the consolidated action. However, when the matter was set down for hearing, only pleadings for cause No. 1987/HN/845 were before the court. Thereafter the matter was handled by a different advocate who had just recently been admitted to the Bar and who did not raise any objection when the bundle of pleadings were served. Mr. Mwanawasa pointed out that the court was then not aware that the action had been consolidated and that not all the pleadings were before it. According to Mr. Mwanawasa, as a result of this development, the case was dealt with as one purely for possession by the defendant. As a result, the applicant's application for a new tenancy was not before the court although argued as a counter-claim. Mr. Mwanawasa however conceded that the defence of a counter-claim for a new tenancy was nevertheless before the judge.

In arguing the application before us Mr. Mwanawasa contended that there was an omission in the High Court proceedings and judgment arising from the fact that the pleadings for the grant of a new tenancy and the order for consolidation were not before a High Court Commissioner with the result that not all the relevant

documents were before the High Court and the High Court Commissioner treated the action before him as an action only by the respondent, Swiza Laboratories Limited, asking for the eviction and possession of the premises on the ground that they needed to reconstruct them and thereafter occupy them themselves for their own business. Mr. Mwanawasa argued that errors or ommissions or mistakes by counsel which induce a court to make errors ought to be treated as errors by the court itself. Mr. Mwanawasa submitted that in the present case, the applicant had made an application for a new tenancy and therefore the holding by this court in its judgment that the applicant made no application for a new tenancy was an error which ought to be set aside otherwise the applicant would not be protected by the provisions of Section 5 and Section 23 of the Landlord and Tenant (Business Premises) Act and would consequently suffer a collosal sum in damages. According to Mr. Mwanawasa the consolidated order having not been placed before the High Court Commissioner the subsequent proceedings in the matter were a mullity, contending that in so far as this court was concerned it did not have before it an application for a new tenancy and that the speeches made by the then applicant's advocate to the effect that no application for a new tenancy was made were illegal and misled the court, submitting that part of the judgment which ruled that the applicant did not make an application for a new tenancy, was founded upon a mistake of fact. It was Mr. Mwanawasa's contention that it made no difference how the mistake was brought about. He urged the court to set aside its judgment on the basis of irregularity and failure to take into account the consolidated order. Mr. Mwanawasa vehemently submitted that a holding that there was no application for a new

tenancy was a fundamental mistake and must be set aside in order that justice must be seen to be done. According to Mr. Mwanawasa if that portion of the judgment is corrected the applicant will then benefit from the protection provided under sections 5 and 23 of the Landlord and Tenant (Business Premises) Act, because as of now that judgment has prejudiced the applicant forcing them to go into the members liquidation.

In his brief submissions Mr. Malama pointed out that the question of whether there was or there was no application for a new tenancy in the court below should be looked at in the following two ways:

> that the application was made to court for a new tenancy; this being supported by documents; that that application had not been prosecuted at the stage of the trial and that even if it were prosecuted the court was entitled to find for the respondent.

Mr. Malama submitted that the court found that the respondent had proved their ground for the claim and the objection and on that basis, whether an application for a new tenancy was made or not was irrelevant.

We have deliberately taken the liberty of setting out the historical facts as well as the arguments in this case in some great detail simply to put the issue raised by the application in its clear perspective. We acknowledge the various authorities cited by Mr. Mwanawasa in support of his submissions. The gist of Mr. Mwanawasa's grievances in relation to this court's judgment of 6th September 1995 is centred on the following passage of that judgment:

"By notice dated 15th May 1987 the plaintiff gave notice to the defendant to quit the premises by 30th November 1987. The defendant did not apply to court for a new tenancy. The defendant has continued to occupy the premises."

According to Mr. Mwanawasa this passage contains a fundamental mistake prejudicial to the applicant but not supported by the historical facts as now revealed before this court. He contended that the finding was made in error. He submitted that it was a slip or omission which must be corrected and or set aside. Mr. Mwanawasa further contended that allowing the passage to stand would deny the applicant the protection provided by Section 5 and 23 of the Landlord and Tenant (Business Premises) Act.

We have carefully considered the historical facts leading to this application. We have also examined the submissions by both learned counsel. We take note that the application itself, although made pursuant to Rule 78 of the Supreme Court Rules, was worded in very broad and generous terms which include a request to this court to set aside its own judgment dated 6th September 1995.

The question of whether this court has power to set aside or vary its own judgment seems to be now settled by various decisions of this court. In the case of Miyanda V Attorney-General (1) (2) the applicant brought an application under Rule 78 asking the court to amend its final judgment to declare the dismissal a nullity and reinstate him rather than awarding him damages. This court stated:

> "..... there is no rule which allowds the Supreme Court generally to amend or alter its final judgment..."

In a number of recent decisions this court has held that it has no power or jurisdiction to vary or set aside its own judgments (See Trinity Engineering (PVT) Limited V Zambia National Commercial Bank (Z) (SCZ Appeal No. 76 of 1995).

This was the position taken by all the five judges in their separate rulings in the Election Petition case involving the Presidential Elections. To the extent that the applicant prays that this court sets aside or varies its own judgment of 6th September 1995, the application is certainly misconceived and is accordingly dismissed. The power of the Supreme Court to correct clerical errors and accidental slips or omissions is set out in Rule 78 of the Supreme Court Rules which reads:-

> "78. Clerical errors by the Court or a judge thereof in documents or process, or in any judgment, or errors therein arising from any accidental slip or omission, may at any time be corrected by the Court or a judge thereof."

Order 20/11 of the Whitebook, 1995 edition is to the same effect. The notes and authorities cited under order 20/11/2 are to the effect that the error or mission must be an error in expressing the manifest intention of the court and that the court cannot correct a mistake of its own in law or otherwise even though apparent on the face of the order such as a mistake due to a misunderstanding of a rule or statute.

The manifest intention of our judgment of 6th September was the granting of vacant possession of the premises in issue to the respondent, the court having been satisfied that the grounds given for the termination of the tenancy had been established and proved.

We agree with Mr. Mwanawasa that a holding or a finding in that judgment that the applicant did not apply for a new tenancy deprived them of the protection under Sections 5 and 23 of the Landlord and Tenant (Business Premises) Act. Section 5 (1) relates to termination of tenancy by the Landlord. It reads:-

> "5 (1) The Landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as "the date of termination").
>
> Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court."

Section 23 provides for interim continuation of tenancies pending determination of by court. The Section reads:-

> "23(1) In any case where -
>
> (a) a notice to terminate a tenancy has been given, or a request for a new tenancy has been made, under this Act, and
>
> (b) an application to the court has been made under this Act, and
>
> (c) apart from this section, the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of:-
>
> the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time.

(2) The reference in paragraph (e) of subsection (1) to the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing has expired, except that if the application is withdrawn or an appeal is abandoned, the reference shall be construed as a reference to the date of the withdrawal or abandonment."

Our understanding of Section 5 is that a Landlord is entitled to terminate a tenancy by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end. It was common cause that the Landlord's notice to quit complied with the requirements of Section 5. Section 23 provides an interim continuation of a tenancy only where:-

(a) a Notice to terminate a tenancy has been given, or a request for a new tenancy has been made, Under the Act; and

(b) an application to the court has been made under the Act.

The issue of notice to terminate having been settled as common cause, the question that arises now is whether the applicant made a request for a new tenancy in terms of how a tenant's request is to be made. Relevant to the present application is Section 6 (4) which reads:-

"(4) A tenant's request for a new tenancy shall not be made if the Landlord has already given notice under Section five to terminate the current tenancy, or if the tenant has already given notice to quit or notice under Section eight; and no such notice shall be given by the Landlord or the tenant after the making by the tenant of a request for a

new tenancy."

We are prepared, just for a moment, to agree with the submissions by Mr. Mwanawasa that the applicant was granted leave to apply for a new tenancy and that he applied for a new tenancy and that that application was consolidated with other causes commenced separately by the applicant and the respondent. The question for determination on the other hand is whether the applicant made the application for the grant of a new tenancy in terms of the Act. The facts that have emerged which facts we accept and appear to us to be common cause are these:

(a) On 15th May 1987 the respondent issued a notice to the applicant to quit the premises by 30th November 1987.

(b) On 7th December 1987, the respondent commenced an action for the possession of the premises.

(c) On 7th July, 1988, over seven months after the expiry of the notice to quit, the applicant applied and was granted leave to apply for a new tenancy.

We are satisfied that in terms of Section 6(4) of the Act, the applicant's request for a new tenancy, made over seven months after the expiry of the notice to quit, was in law incompetent and misconceived. It follows that even if the order of consolidation that included the applicant's application for a new tenancy had been before the High Court, the position in law would not have changed, namely that the request for a new tenancy was not in accordance with the law. It follows that in law the applicant did not apply for a new tenancy. But in fairness to the trial court, there were pleadings before it which included the appellant's Defence and counter-claim wherein

the applicant counter-claimed for a new tenancy. There was also oral evidence from the applicant's Financial Controller asking for a new tenancy on terms the court would deem fit. After considering the pleadings and the oral evidence the learned trial Commissioner concluded his judgment as follows:-

"In my view the plaintiff genuinely intends to reconstruct the premises in question and later carry on his own business. For the reasons aforesaid, I order that the plaintiff is entitled to oppose the application for a new tenancy and that he is entitled to possession of the premises."

While we agree with the learned High Court Commissioner, we are still satisfied that our finding that the applicant did not in law apply for a new tenancy was not an accidental slip or omission. On this limb the application also fails.

The result is that our judgment of 6th September 1995 still stands and the application is refused with costs to be taxed in default of agreement.

E. L. SAKALA
SUPREME COURT JUDGE.

M. S. CHAILA
SUPREME COURT JUDGE.

D.K. CHIRWA
SUPREME COURT JUDGE.