IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 72/2007**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BP ZAMBIA PLC **APPELLANT**

AND

YUYI MUBITA LISHOMWA **1ST RESPONDENT**

HASTINGS O'BRIEN GONDWE **2ND RESPONDENT**

SINGUMBE KEITH MUTUPO **3RD RESPONDENT**

Coram: Mumba, Ag/DCJ, Muyovwe and Musonda, JJS

On the 24th April, 2013 and 23rd October, 2013

For the Appellants: Mr. Vincent Malambo, SC. of Messrs Malambo and Company

For the Respondents: Mr. A.J Shonga Jnr SC, of Messrs Shamwana and Company

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R U L I N G

MUYOVWE JS, delivered the Judgment of the Court

Cases referred to:

1. **Mwale and Phiri v. BP(Zambia) Limited in Appeal No. 109A of 2002**

2. **Raphael Mwale and Ruth Phiri vs. B.P. (Zambia) Limited Appeal No. 16 of 1999**
3. **Mutale vs. Munaile (2007) ZR 118**
4. **Juldan Motors vs. Chimsoro Farms Limited (2009) ZR 148**
5. **Trinity Engineering (PVT) Limited vs. Zambia National Commercial Bank Limited (1966) SCZ 7/1996**
6. **The Attorney General, Development Bank of Zambia vs. Gershom Moses Button Mumba(2006) Z.R. 77**
7. **Mususu Kalenga Building Limited and Another vs. Richman Lending Enterprise (1999) Z.R. 78**
8. **Chibote Limited, Mazembe Tractor Company Limited vs. Meridian BIAO Bank (Zambia) Limited (2003) Z.R. 76**
9. **Godfrey Miyanda vs. Attorney General (1985) Z.R. 243**

When we heard this Motion, Hon. Dr. Justice Musonda sat with us. He has since resigned. Therefore, this Judgment is by the majority.

The Respondents have moved this court pursuant to **Rule 48(5) and 78 of the Supreme Court Rules Chapter 25 of the laws of Zambia** for an order that this court varies and/or corrects its judgment delivered on the 19th January, 2009. In the said judgment the particular words requested to be varied are as set out below:

"therefore, Respondents are entitled only to a refund of their contribution made towards the pension scheme"

And the respondents are now asking this court for the above words to be substituted with the following words:

"under the Pension Rules, each member has his own account to which his and the employers contributions are credited and these sums become his, and at the normal pension date these amounts are his and make him qualify to the pension on the formula provided by the Pension Managers. Under Rule 19 of the Pension Rules, no contributions or premium revert or become the employers property. So the employers contribution become a member's contribution and these should be paid to the Respondents as their contributions"

The respondents in their Affidavit in support sworn by the 1st respondent noted that the pension scheme that was interpreted in the case of **Raphael Mwale and Ruth Phiri vs. B.P. (Zambia) Limited[1]** was the same scheme towards which respondents had made contributions. That the Pension Scheme Rules applied to them in the same manner.

In support of their application, the respondents filed Heads of Argument which State Counsel Malambo relied on.

The gist of the argument advanced by the respondents is that this Court is empowered under Rule 78(1) of the Supreme Court Rules to correct or vary its Judgment. Counsel cited inter alia, paragraph 1666 of **Halsbury's Laws of England (3rdEdition) Vol. 22** where the learned authors stated that:

"After the Judgment or Order has been entered or drawn up, there is power, both in the Rules of the

Supreme Court and inherent in the Judge, or master who gave or made the Judgment or Order, to correct any clerical mistake or some error arising from any accidental slip or omission or to vary the Judgment or order so as to give effect to his meaning and intention.

The power applies to the case of mistakes or accidental slips made by officers of the Court or by the parties such as where a Judgment is entered in default of appearance for too large an amount of costs or there has been a miscalculation of interest or a mistake in a date or accidental omissions from a bill of costs or neglect to ask for certain costs or omission to provide for the first charge of the Legal Aid Fund or omission of words giving liberty to apply or possibly in special cases where the order is founded upon a mistake of fact."

It was submitted that the Slip rule allows a Court to fully express its intention or meaning in a case where a Court misapprehended the full impact of the words used or omitted in a judgment or Order. That the present case has a long history and that there is a close linkage with the case of **Raphael Mwale and Ruth Phiri case.**[2] In the words of Counsel, the common thread between the two cases was the interpretation and applicability of the Pension Rules applicable to a pension scheme managed by Zambia State Insurance Corporation on behalf of B.P. (Zambia) limited to which both the litigants in the **Raphael Mwale and Ruth Phiri case** and the present Respondents were members, contributors and beneficiaries.

Counsel went through the history of the **Raphael Mwale and Ruth Phiri case[2]** and pointed out that in that case in our ruling dated 14th May, 2012 we said that:

"But perhaps we may agree that under the Pension Rules, each member has his own account to which his and the employer's contributions are credited and these sums become his, and at the normal pension date these amounts are his and make him qualify to the pension on the formula provided by the pension managers.

We are fortified in this argument because under Rule 19, no contributions or premium revert or become the employer's property. So the employer's contributions become a member's contributions. To this extent only that the employers contributions on leaving the fund become member's contributions as they are in his account, our Judgment is clarified."

According to Counsel, the above clarification was in response to the appellant's argument that the Court had restricted itself to Rule 11 of the Pension Rules but that all Rules should be read together in particular Rule 18 and 19.

It was the respondents' position that Rule 78 is extensive in its application to permit the clarification of a judgment and they relied on the **Raphael Mwale and Ruth Phiri case[1]** for this proposition. That this Court never intended that the same Pension Rules should apply differently to persons of similar standing. It was submitted that this Court has inherent authority to correct its judgment to ensure that its intent and

effect of the words in its judgment are fully expressed and understood by both parties including those reading and relying on its judgment. They pointed out that under the Pension Rules, (Rule 19) no contributions or premiums revert to the employer and that, therefore, these should be paid to the respondents as their contributions. Further, that the interpretation this Court has given on the Pension Rules is not case specific but rather an interpretation that will give similar application in all cases to all persons involved as in the **Raphael Mwale and Ruth Phiri case**. That the omission and or error by this Court in failing to take into account Rules 18 and 19 of the Pension Rules in its judgment in Appeal No. 72/2007, case in casu, can be corrected by this Court. That the omission to take into account Rule 19 of the Pension Rules led to grave miscalculation of the sums due to the respondents.

On behalf of the appellant, Counsel also filed Heads of Argument which they relied on and State Counsel Shonga briefly augmented.

The appellant also filed an Affidavit in Opposition sworn by one Mbeya Chaala Somili, the Human Resources Advisor at the appellant company. In the said affidavit, the deponent deposed that this Court indeed delivered its judgment in this

matter on the 19th January, 2009 in Appeal No. 72/2009. That this Court took into account all facts and the law when reaching its decision and, therefore, the judgment was not ambiguous. That the judgment of this Court did not and does not contain any errors and the nature of this application can only be made where there is a clerical mistake or an error arising from an accidental slip or omission in the judgment. That the judgment is very clear and the intention of the Court was clearly communicated to the parties. That, therefore, it is not correct as alleged in paragraph 12 of the Affidavit in support that there was an omission or error in the judgment. That the respondents are asking this Court to re-hear the appeal and or to replace a portion of a judgment from another case into the judgment of this Court, which is improper.

In the Heads of Argument, firstly, Counsel argued that the application should fail on the basis of a defective Notice of Motion. Counsel cited **Rule 48 (7)** which provides that:

> **"A Notice of Motion shall be substantially in form B of the Third schedule, and the relative motion paper shall be in similar form."**

Counsel submitted that Form B of the Third Schedule gives the format and the contents of the Notice of Motion, which includes the grounds for the application.

Counsel noted that the Notice of Motion filed by the respondents in this matter does not contain any grounds upon which the application is made to this Court. The Notice of Motion provides further on the second page that:

> **"AND TAKE FURTHER NOTICE that the grounds for this application are contained in the affidavit in support filed herewith."**

Counsel cited various authorities including the case of **Mutale vs. Munaile**[3] in which according to counsel confirmed the position on mandatory and directory provisions. That on page 130, we said that:

> **"In construing whether it is mandatory or directory for the petitioner to sign the petition personally, we had occasion to visit the case The Attorney General and Another vs. Lewanika and Others (1993-1994)…in that case we said;**
>
> **If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense…"**

It was pointed out that although the Notice of Motion states that the grounds are contained in the affidavit in support

a perusal of the said affidavit reveals no grounds for the application but contains arguments on why the application should be allowed. That this is a departure from the requirements of **Rule 48 (7),** which dictates that the Notice of Motion should contain grounds upon which the application is being made.

Further, Counsel submitted that this Court has always taken a strong position where there is failure to comply with the rules of the Supreme Court and has on occasion dismissed cases that have come before it that were not in conformity with the rules of the Court. To cement his argument Counsel cited the case of **Juldan Motors vs. Chimsoro Farms Limited**[4] in which this Court dismissed the appeal for failure to comply with the manner of preparing the Record of Appeal. Counsel submitted that in the same manner the provisions of Rule 48 (7) are mandatory and failure by the respondents to comply renders this application invalid and should be dismissed.

Secondly, Counsel argued that the respondents' application should fail because the application does not fall within the category of matters that ought to be brought under Rule 78 of the Supreme Court Rules. Counsel submitted that this Court has in decided cases outlined what the slip rule is

meant to achieve. That in the case of **Trinity Engineering (PVT) Limited vs. Zambia National Commercial Bank Limited 5**[5] and the case of **The Attorney General, Development Bank of Zambia vs. Gershom Moses Button Mumba**[6] this Court held that the slip rule is meant for the Court to correct clerical mistakes or errors in a judgment arising from accidental slips or omissions.

It was submitted that in its judgment, this Court made several findings, the most significant one being that the respondents were not entitled to a pension as claimed. He contended that the issue now before us was not pleaded in the Court below and cited the case of **Mususu Kalenga Building Limited and Another vs. Richman Money Lenders Enterprises**[7] in support of this argument.

In his brief oral submission, State Counsel Shonga questioned the application by the respondents which he said seeks to import words from another judgment and transplant them into the judgment of the 'current' case. Counsel contended that such a dangerous precedent will be born where issues not argued in the Court below and in this Court will be forced into a judgment to the detriment of one of the parties. That this means there would be no finality to litigation as

anyone would demand that their Supreme Court judgment be re-written on the basis of a new Supreme Court Judgment. It was submitted that there should be a limit as to how long a litigant must return to Court on the basis of the slip rule.

In reply, State Counsel Malambo submitted that there was no time limit under Rule 78. Further, that the issue at hand was raised in the Court below. That the claim in the Court below was for pension and this Court decided that the respondents were entitled to a refund of their contributions and that the contention is the calculation of their refund and the meaning of the words "their contributions" which has become an issue now and that this was the same issue in the **Raphael Mwale and Ruth Phiri case**.

We have considered the submissions by learned Counsel for the parties as well as the two judgments referred to herein.

It is a fact that the respondents did not reach retirement age neither were they entitled to go on early retirement but merely negotiated with their employer to go on early retirement. We are alive to our decision in the **Raphael Mwale and Ruth Phiri case** which has been heavily relied on by the respondents. Basically, we are being invited to

determine this case in the same manner as we did in the **Raphel Mwale and Ruth Phiri case**[1] where we held that the appellants in that case were entitled to their contributions which included the employer's contribution.

Firstly, the appellant contended that the application before us is not compliant with Rule 48 (1) of the Supreme Court Rules as the Notice of Motion does not contain grounds for the application. We have considered the appellant's submission on this argument and notably State Counsel Malambo did not address us on this point. We take the view that since the Notice of Motion is basically what moves the Court, it is important that the same is clear and that the grounds of the application should be contained therein. It is, therefore, mandatory that Rule 48(7) is adhered to. In this case we note that although the Notice of Motion indicates that the grounds are contained in the affidavit, the grounds were not included in the affidavit in support. In any case, it would be wrong to enumerate the grounds in the affidavit as the same ordinarily contains the facts in support of the application.

This case is almost on all fours with the **Chibote Limited, Mazembe Tractor Company Limited vs. Meridian BIAO Bank (Zambia) Limited**[8] which was brought also pursuant to

Rule 48(1) and Rule 78. The Notice of Motion in that case contained grounds which were argued before Court. In our view, this application is not properly before us as the Notice of Motion contains no grounds.

The other leg of the appellant's argument was that this matter is not properly before us due to lapse of time which is against the slip rule. We agree with State Counsel Malambo that Rule 78 does not provide any time limit within which a party can apply under the said Rule.

We have nevertheless examined the main issue before us which is that the respondents are inviting us to apply the **Raphael Mwale and Ruth Phiri case**[1] to 'their case' which was already determined by this court in its judgment dated 19th January, 2009. In the words of State Counsel Shonga, we are being asked to import words from another judgment into the respondents' judgment.

Further, it is our firm view that importing the proposed words from the **Raphael Mwale and Ruth Phiri case**[1] will fundamentally alter the whole judgment. It is not within the provisions of Rule 78 to import words from one judgment into another. Rule 78 is meant for the Court to correct clerical

errors or mistakes in a judgment arising from accidental slips or omission. This was the holding in the case of **The Attorney General, Development Bank of Zambia case.**[6] Further, in the case of **Godfrey Miyanda v. Attorney General**[9] it was held that:

> **"there is no rule which allows the Supreme Court generally to amend or alter its final judgment; as all the issues raised in the application were canvased and given due consideration in the judgment complained of, there was nothing accidental in that judgment."**

The respondents' case was determined by this Court after giving due consideration to all the issues raised. There were no errors, omissions and nothing accidental in the judgment complained of.

In our view, the respondents are simply dissatisfied with our judgment and would have us vary our judgment so as to bring about a result more acceptable and favourable to them. They simply want to have another bite at the cherry. This Court rejected such an application in the case of **Chibote Limited, Mazembe Tractor Company Limited case**[8] where we held that:

1. **An appeal determined by the Supreme Court will only be reopened where a party, through no fault of its own has been subjected to an unfair**

procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong.

2. **There was no error, omission or slip in the judgment. The applicant was simply dissatisfied with the judgment and sought the Supreme Court to vary the judgment so as to bring about a result more acceptable.**

We are of the view that allowing this application would certainly be setting a dangerous precedent. We have said time and again that there must be finality in litigation. We find that this is not a proper case for us to invoke the provisions of Rule 78 as the case was heard in its finality as per our judgment delivered on 19th January, 2009.

In conclusion, this application lacks merit and it is dismissed. Costs to the appellant to be taxed in default of agreement.

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F.N.M. MUMBA
ACTING DEPUTY CHIEF JUSTICE

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E.N.C. MUYOVWE	**P. MUSONDA**
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**