IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 35/2014
SCZ/8/377/2013

BETWEEN:

TANZANIA ZAMBIA RLY AUTHORITY — APPELLANT

V

MEKANI ISAAC MWANZA & 24 OTHERS — RESPONDENTS

CORAM: Mambilima, CJ, and Kaoma and Kajimanga, JJS
On 4th October, 2016 and 11th November, 2016

For the Appellant: Mr. J. Kabuka of J. Kabuka & Co.
For the Respondents: Mr. T.M. Chabu of Terence Chabu & Co.

JUDGMENT

Kaoma, JS delivered the Judgment of the court

Cases referred to:

1. **Wise v E.F. Hervey Ltd (1985) Z.R. 197**
2. **Mazoka and others v Mwanawasa and others (2005) Z.R. 138**
3. **Lewanika and others v Chiluba (1998) Z.R. 79**
4. **Roy v Chitakata Ranching Company Ltd (1980) Z.R 198**
5. **Lisulo v Lisulo (1998) Z.R. 75**
6. **Mumba and others v Zambia Red Cross Society (2006) Z.R. 137**
7. **Saban and another v Milan (2008) Z.R. Volume 1, 233**
8. **Finance Bank Ltd v Africa Angle Ltd and others (1998) Z.R. 237**
9. **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a Firm) - Appeal No. 76/2014**
10. **Henderson v Jenkin & Sons (1969) 1 ALL ER 401 at 412**
11. **Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**
12. **A.J. Trading Company Ltd v Chilombo (1973) Z.R. 55**
13. **Thynne v Thynne (1955) 3 ALL ER 129, (1955) WLR 465**

Legislation and other works referred to:

1. **High Court Rules, Cap 27, Order 39**
2. **Atkins Court Forms, 2011 Issue paragraph 49, Volume 23(2)**
3. **Supreme Court Rules, Cap 25, rules 11, 19, 58(2) and 68**
4. **Supreme Court of Zambia Act, Cap 25, section 8(2)**
5. **Supreme Court Practice, 1999 (White Book), Orders 59/3/13, 70 r. 1**
6. **Constitution of Zambia (Amendment) Act No. 2 of 2016, Article 118(2) (e)**
7. **High Court Act, Cap 27, section 13**

The facts of this appeal are that the respondents were employees of the appellant but had been retired on medical grounds. They issued a writ of summons seeking, *inter alia*, a lump sum payment equivalent to twice their annual salary at the time of retirement; an order for grant of a golden handshake of 35 pieces gauge 30 of 3 metres corrugated iron sheets or the equivalent in monetary terms; and an order for payment of unremitted NAPSA pension contributions. They alleged that it was an express term of the Trust Deed and Rules for the TAZARA Pension Fund that upon retirement they would be paid a lump sum equivalent to twice the annual salary drawn by them at the time of retirement; and would be given a golden handshake of 35 pieces gauge 30 of 3 metres corrugated iron sheets. But in breach of these express terms, the appellant failed or neglected to pay the lump sum and to give them

the iron sheets and to remit the pension contributions made by them to NAPSA resulting in the failure by the latter to pay them.

In its defence, the appellant admitted that the respondents were retired on medical grounds but denied all the claims and averred that the Trust Deed referred to by the respondents had made an exception when one was retired on medical grounds.

On 19th March, 2012 the parties filed into court a Consent Order for Partial Settlement of Claims in which they agreed that the respondent do recover the lump sum payment equivalent to twice the annual salary at the time of retirement, to be paid in batches of five respondents per month with effect from April, 2012; that the appellant must use best endeavours to facilitate the payment of NAPSA pension; that the respondents' claim for grant of a golden handshake of 35 pieces gauge 30 of 3 metres corrugated iron sheets or the equivalent in monetary terms should proceed to trial; and that each party should bear own legal costs.

Trial on the issue referred to court commenced on 12th July, 2012 in the absence of counsel for the appellant. The matter had earlier been adjourned to allow counsel to attend and the notice of

hearing was served on him. The gist of the evidence-in-chief of the only witness for the respondents was that the basis of the claim for a golden handshake was clause 15.4 of the Collective Agreement for the period 1st July, 2003 to 30th June, 2005 which provided that when an employee retires, he shall be given a golden handshake of 35 pieces gauge 30 of 3 metres corrugated iron sheets.

The witness also testified that twenty of the respondents were unionised and were entitled to the golden handshake whilst four, including him, were in management and were not entitled to the golden handshake. However, he referred to a letter from head office regarding Management Staff Conditions of Service and alleged that when paying them, the company did not follow the same. It was also his evidence that he was entitled to compensation under the same scheme for management staff and that the lump sum the appellant had agreed to pay was different from the compensation.

After the evidence-in-chief, the trial Judge adjourned the matter for cross-examination by counsel for the appellant. Mr. Kabuka attended on 25th September, 2012. He applied and was granted leave to produce extracts from the Collective Agreement for

the period 1st July, 2005 to 30th June, 2007. The Collective Agreement was made on 3rd March, 2006. Clause 15.4 thereof provided that when an employee retires at the normal retirement age of 55 years, he/she shall be given a golden handshake of 35 pieces gauge 30 of 3 metres corrugated iron sheets.

Mr. Chabu, counsel for the respondents also applied and was granted leave to recall PW1. When PW1 was referred to the Collective Agreement produced by the appellant, his response was that the document was not applicable to them because they were no longer in employment. Thereafter, PW1 was cross-examined at length by Mr. Kabuka on clause 15.4 of the two Collective Agreements and the entitlement to the golden handshake.

The appellant also called one witness, the acting Head Human Resource. Her testimony was that the respondents were not entitled to the golden handshake because under the applicable conditions (the second Collective Agreement), only those who retired at 55 years were entitled. She admitted in cross-examination that the respondents were not given other benefits or compensation. In her words, they would be paid a lump sum.

At the close of the trial both sides filed written submissions. In his submissions, Mr. Chabu addressed two issues, first, whether the unionised respondents were entitled to the golden handshake; and, secondly, whether the other four respondents were entitled to base payment of 30 months plus 6 months for each completed year of service in lieu of the golden handshake under the voluntary retirement package applicable to management staff.

In his response to the second issue, Mr. Kabuka contended that at the close of trial, the respondents attempted, ostensibly, on behalf of non-unionised staff, to bring forth a claim for additional payment under the retrenchment or voluntary retirement package. That the claim was not pleaded or referred to the court for determination in the Consent Order, and therefore, reference to the base payment served no functional utility to both litigants and to the court. To support this argument, counsel cited the case of **Wise v E.F. Hervey Limited**[1] on the function of pleadings.

In her judgment the learned trial Judge dealt with three issues: (1) whether the respondents who were retired on medical grounds were entitled to the golden handshake; (2) whether the

Collective Agreement of 2006 applied to the respondents or it was the 2003 Collective Agreement that applied; and, (3) whether the four management employees were entitled to base payment of 30 months plus 6 months for each completed year of service in lieu of golden handshake.

On the first two issues the trial Judge found that only the respondents who were retired when the 2003 Collective Agreement was in force were entitled to the golden handshake. On the third issue, with which we are concerned here, the Judge concurred with Mr. Kabuka that the golden handshake was the only claim that remained unresolved and that the claim for base payment was not specifically pleaded.

However, the Judge decided to consider the claim on the basis of our remarks in the case of **Mazoka and others v Mwanawasa and others**[2] that where any matter not pleaded is let in evidence, and not objected to by the other side, the court should not be precluded from considering it. The Judge also observed that Mr. Kabuka did not object during the trial and in fact proceeded to cross-examine PW1 over this claim.

The trial Judge found that the Management Staff Retrenchment/Voluntary package produced by the respondents was meant to cater for those who were retrenched or retired voluntarily, and that the respondents were not retrenched or did they retire voluntarily. Yet, the Judge went on to find that since there was evidence by DW1 that some management staff who had retired normally were paid compensation under the package as they were functional heads, the four respondents should equally be paid as they were all serving under management conditions, and that retirement on medical grounds is like normal retirement.

On 4th July, 2013 the appellant filed summons for special leave for review of the judgment pursuant to **Order 39 of the High Court Rules, Cap 27**. On the basis of the affidavit in support, Mr. Kabuka argued, quoting **paragraph 49, Volume 23(2) of Atkins Court Forms 2011 Issue**, that once there is a consent order the parties cannot vary it, neither can the court without their consent and in the absence of consent; it can only be varied by appeal or bringing a fresh action to set it aside. He prayed that the judgment be reviewed and the additional relief given to management staff on

ground that it was not objected to by the defence be reversed as there was no representation for the appellant when PW1 testified in-chief and they could not object then.

It was also argued that the issue of costs was also addressed in the Consent Order but that the judgment varied the agreement for each party to bear own costs; and that the trial Judge found as a fact that the respondents were not retrenched nor retired voluntarily; therefore they were not entitled to base payment. That consequently, this was a proper case for review in consonance with our pronouncement in the case of **Lewanika and others v Chiluba**[3] that review under Order 39 enables the court to put matters right.

The respondents filed an affidavit in opposition and in his response, Mr. Chabu cited the cases of **Robert Lawrence Roy v Chitakata Ranching Company Ltd**[4], **Lisulo v Lisulo**[5] and **John Mumba and others v Zambia Red Cross Society**[6] for the principle that for the court to exercise discretionary power of review, there has to be fresh evidence which was not available at the time of judgment; that Order 39 (1) is not designed for the parties to have a

second bite; and that litigation must come to an end and successful parties should enjoy the fruits of their judgment.

Mr. Chabu insisted that there was no objection to the claim for base payment and Mr. Kabuka had cross-examined PW1 on that claim; and that DW1 admitted that the four respondents were entitled to base payment as management staff in lieu of golden handshake. He submitted that there was no variation of the Consent Order as the court merely determined the issues that arose; that the issue of costs related to execution of the Consent Order and not the later proceedings; and that if the appellant was not satisfied, the alternative was to appeal.

In reply, Mr. Kabuka submitted that the power of review under Order 39 is wide enough to capture the application as guided in the case of **Lewanika and others v Chiluba** [3]; and that in the case of **Saban and another v Milan**[7] it was held that review under Order 39 may be made even more than once after judgment as long as there are sufficient grounds. It was argued that it was not correct that recourse lies in appeal; and that on costs, the Consent Order itemised what the parties intended to resolve.

The record shows that there was no objection to the application for special leave to review. Therefore, that application was granted. On the merits of the application for review, the trial Judge identified the issue for decision as whether she could review her judgment on the grounds stated in the affidavit in support and she referred to our decisions in the cases of **Lewanika and others v Chiluba**[3] and **Robert Lawrence Roy v Chitakata Ranching Company Limited**[4].

On the issue of the unpleaded claim of base payment, the trial Judge took the view that the issue was raised by Mr. Kabuka in his written submissions; hence her ruling that he did not object and even cross-examined PW1 over the same. She rejected the argument by counsel that he could not have objected to the issue because he was not available at the commencement of trial when PW1 testified in-chief. The trial Judge concluded that there were no new issues as the issues arose at trial and she considered them and rendered her judgment; and that the appellant had failed to show sufficient grounds upon which she should review the judgment. She agreed with Mr. Chabu that recourse lies in appeal.

The trial Judge further rejected Mr. Kabuka's argument on costs and found that the costs in the Consent Order related to that and not to subsequent proceedings. Thus, the application for review was dismissed with costs to the respondents.

Dissatisfied with the ruling the appellant now appeals advancing three grounds as follows:

1. **The learned trial judge misdirected herself when she refused to review her judgment which was rendered contrary to the Consent Order executed by the parties with the approval of the court in the matter.**

2. **The court below erred both in law and fact when it refused to review judgment in which some of the plaintiffs (now respondents) were awarded unpleaded claims by reasons that the otherwise inadmissible evidence relied on was not objected to during trial despite the fact that such objectionable evidence was tendered and received in the absence of the appellant and its counsel.**

3. **The learned trial Judge misdirected herself by refusing to correct the apparent error on record by way of review when it was brought to the court's attention that the additional award of voluntary or retrenchment package to four of the plaintiffs (now respondents) was at variance with the exclusive claim for medical retirement benefits for all plaintiffs.**

Before considering the appeal, we wish to deal with the preliminary issues raised by Mr. Chabu pursuant to **Rule 19 of the Supreme Court Rules, Cap 25**. The first issue is that ground 3 of the appeal is improperly in the appellant's heads of argument on the basis that it was amended without leave of court. The second

issue is that the appellant's grounds of appeal are improperly before Court on the basis that they contain arguments and narrative.

We note that other than raising the preliminary issues in the heads of argument, Mr. Chabu has not supported the same with written arguments. The written arguments relate to the merits of the appeal. In his oral arguments, he submitted, in respect of the first preliminary issue, that **Rules 11 and 68(1) of the Supreme Court Rules** require an order of the court before any amendment to the grounds of appeal is made. That ground 3 as framed in the memorandum of appeal, is at variance with ground 3 as stated in the appellant's heads of argument, and there was no application to vary the ground of appeal, and therefore, ground 3 in the heads of arguments should be expunged.

With regard to the second preliminary issue, Mr. Chabu submitted that rule 58(2) of the Supreme Court Rules requires that the grounds of appeal be set forth without argument or narrative but the grounds of appeal framed by the appellant contain arguments, narratives and assumption of certain facts that were not found as facts in the court below.

He also contended that the respondents did not waive their right to challenge the appeal when they filed their heads of argument because the heads of argument clearly indicate that there are preliminary issues being raised. Counsel submitted that the grounds of appeal should be dismissed for infringing Rule 58(2).

In response to the first preliminary issue, Mr. Kabuka submitted, in his heads of argument in reply, that ground 3 in the appellant's heads of argument, was rephrased but the substance of the appellant's contention in both the memorandum of appeal and the heads of argument, is the refusal by the lower court to put matters right, within the court's discretionary powers under Order 39 of the High Court Rules, Cap 27.

Regarding the second preliminary issue, counsel contended that Rule 58(2) of the Supreme Court Rules, demands that the grounds be set forth in the memorandum of appeal, substantially in Form CIV/3 of the Third Schedule and further prescribes that the grounds of objection to the judgment appealed against should be set forth concisely and specifying the points of law or fact that were wrongly decided.

It was argued that in the absence of specific guidance on formulating the grounds under Form CIV/3, recourse must be taken pursuant to **section 8(2) of the Supreme Court of Zambia Act, Cap 25** to the practice and procedure obtaining as nearly as possible to that under the Supreme Court Practice, 1999.

It was argued that the grounds of appeal were prepared in substantial conformity with the prescribed format under **Order 59/3/13 of the White Book** and that if there was non-compliance with the technical prescription under Rule 58(2), this has not prejudiced the respondents who have since filed their heads of argument in the appeal and are thereby deemed to have waived any irregularity that may have been there. Counsel also quoted **Article 118(2) (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** and contended that the appeal must be determined on the merits without undue regard to subtle legal technicalities.

We have considered the preliminary issues and the arguments by counsel. First and foremost, in terms of Rule 68 (1) of the Supreme Court Rules, the Court may, at any time, allow amendment of any notice of appeal or memorandum of appeal or

other part of the record of appeal on such terms as the Court thinks fit. And in terms of Rule 68 (2), if the record of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.

In relation to the first preliminary issue, we agree with Mr. Chabu that there was no amendment to ground 3 as framed in the memorandum of appeal and that ground 3 in the appellant's heads of argument is not worded the same as the initial ground of appeal. Admittedly, ground 3 in the heads of argument was rephrased. However, we agree with Mr. Kabuka that the substance of the two grounds is the same. The appellant's grievance as we understand it, relates to the refusal by the trial Judge to review the matter so as to correct the apparent error on the record, relating to the additional award of voluntary/retrenchment package or base payment to some of the appellants or the refusal by the court to put matters right under its powers of review. We do not believe that the difference in the wording is fatal. Hence, the first preliminary issue fails.

In respect of the second preliminary issue, we held in the cases of **Finance Bank Limited v Africa Angle Limited and others**[8] and **Access Bank (Zambia) Limited v Group Five/Zcon**

Business Park Joint Venture (Suing as a Firm) [9] that according to Rule 58(2) of the Supreme Court Rules, a memorandum of appeal should not contain arguments and or narrative but only points of law and facts which are alleged to have been wrongly decided.

We have scrutinised the grounds of appeal in this case. Our view is that the alleged breaches are not grave and do not go to the root of the appeal. We disagree with the contention by Mr. Chabu that there was apparent prejudice to the respondents in that he had to rephrase the issue that we need to determine or that the grounds of appeal could not be argued in the way they were framed. Looking at the grounds of appeal, there would really be no need to respond to each ground because the grounds are repetitive. It is also quite clear, that Mr. Chabu filed heads of argument in response and adequately dealt with what he understood to be the main issue in this appeal. The second preliminary issue must also fail. In the circumstances, we dismiss both preliminary issues for lack of merit.

Coming back to the appeal, the gist of Mr. Kabuka's contention in ground 1, is that it was a misdirection on the part of the trial Judge to refuse to review the judgment which considered

other claims beyond the contemplation of the Consent Order in which the parties had resolved all but one of the issues in dispute; that is, the entitlement to the benefit of a "*golden handshake*" and that even at the commencement of trial, the court was informed by Mr. Chabu that there was only one claim to be tried by agreement of the parties. The case of **Henderson v Jenkin & Sons**[10] was cited where Edmund Davies L.J., stated that:

> **"In general, a case should fall to be decided on those issues of fact which the parties themselves choose to raise, and it is only in rare instances that the Court itself should, as it were, assume the role of architect and attempt to create a different type of case, or consider issues different from those which the parties have raised."**

In ground 2, it was argued that the trial Judge was influenced by our remarks in the case of **Mazoka and others v Mwanawasa and others**[2] to decide in favour of the respondents in management that they were entitled to base payment when the claim was not pleaded; and that the court misconstrued our observation in the above case by failing to make a specific finding on the effect of admitting an unpleaded claim in the absence of the other side who could not thereby raise objection to the admission of such evidence.

It was also contended that the mere fact that the otherwise inadmissible evidence could be considered if not objected to, did not

impose a mandatory obligation on the court to accept the evidence, but reposed in it the inherent power to evaluate the cogency of that evidence on the particular facts of the case. It was counsel's submission that on a proper evaluation of the documentary evidence relied on by the respondents, the court below had realised that the claimed additional relief, was only applicable to employees who were separated by voluntary retrenchment/retirement, and that in the circumstances, there was no justification to accept a claim for base payment which they were not entitled to.

In respect of ground 3, Mr. Kabuka submitted that although the court's power of review is discretionary, the discretion must be exercised judiciously where sufficient grounds exist and that in the case of **Lewanika and others v Chiluba**[3] we guided that Order 39 of the High Court Rules enables the trial court to put matters right.

It was further argued that where it is brought to the attention of the trial court that there are certain issues in an earlier judgment that deserve to be corrected, it is the function of the court to rehear the case and then reverse, vary or confirm the earlier judgment as the case may be; and that it was a misdirection for the court to

refuse to review its judgment notwithstanding that sufficient grounds were raised for the court to do so.

On his part, Mr. Chabu identified the main issue for decision as to whether the court below erred in law and in fact when it refused to review its judgment. He first discussed the principles on review as laid down, *inter alia*, in the cases of **Robert Lawrence Roy v Chitakata Ranching Company Ltd**[4], **Lisulo v Lisulo**[5] and **John Mumba and others v Zambia Red Cross Society**[6]**.** He then submitted on the court's duty to determine all issues in dispute between the parties as stated in **section 13 of the High Court Act** and in the case of **Wilson Masauso Zulu v Avondale Housing Project Ltd**[11]. He then contended that the Consent Order was in partial satisfaction of the claims and that the respondents did not waive any of the other claims they had made.

The gist of Mr. Chabu's argument on non-objection to the claim for base payment was that this was insufficient ground on which the Judge could review her judgment as the evidence on that issue was available at trial and DW1 agreed that the 4 respondents would be paid. He cited, *inter alia*, the case of **A.J. Trading**

Company Limited v Chilombo[12] which concerns admission of evidence of unpleaded matters where there is no objection.

In his heads of argument in reply, Mr. Kabuka reiterated his arguments in the main and we find it unnecessary to restate them.

We have considered the record of appeal, the ruling appealed against and the arguments by counsel. In our view, there is only one main issue raised by this appeal, that is, whether or not there were sufficient grounds upon which the trial Judge could review her judgment or to use Mr. Chabu's words, whether the court below erred in law and fact when it refused to review the ruling appealed against. We shall deal with all the grounds of appeal together.

The application for review was predicated on Order 39 (1) of the High Court Rules which 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..."**

This provision has been the subject of interpretation in various decisions of this Court. In **Robert Lawrence Roy v Chitakata Ranching Company Ltd**[4] we held, *inter alia*, that:

> **"Setting aside a judgment on fresh evidence will rely on the ground of discovery of material evidence, which would have 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".**

In **Walusiku Lisulo v Patricia Anne Lisulo**[5] we held that:

> 1. **The power to review under Order 39 Rule 1 is discretionary for the judge and there must be sufficient grounds to exercise that discretion.**
> 2. **Evidence relating to the appellant's financial statements was available throughout the hearing. Therefore, it cannot be said to be fresh evidence for the purposes of review under Order 39 Rule 1 of the High Court Rules.**
> 3. **Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgments.**

And in **John Mumba and others v Zambia Red Cross Society**[6] we held, *inter alia*, that:

> **"A court may review its decision or order on sufficient grounds. One of such grounds is that some evidence that existed at the time of the hearing was not made available to court on the ground that even after a diligent search it could not be found. Further, this power is discretionary..."**

Without doubt, in the case of **Lewanika and others v Chiluba**[3], which is greatly relied upon by Mr. Kabuka, we held, *inter alia*, that:

> **"Review under Order 39 is a two stage process. First showing or finding a ground or grounds considered to be sufficient, which then opens the way to the actual review. Review enables the court to put matters right. The provision for review does not exist to afford a dissatisfied litigant, the chance to argue for an alteration to bring about a result considered more acceptable"**

In that case, Ngulube CJ (as he then was), accepted that although not exhaustive, the grounds tabulated by Morris L.J., in the case of **Thynne v Thynne**[13], could constitute sufficient justification for a review. However, he pointed that it is not enough merely to recite an established principle; the ground selected should be shown to be applicable and sufficient within the rule.

In the case of **Thynne v Thynne**[13], the applicant had sought to amend a petition for dissolution of marriage, and the decree nisi and absolute granted thereon, by substituting, for the particulars of the marriage ceremony which had been pleaded and proved in the proceedings, those of an earlier marriage ceremony between the same parties to which no reference had been made. It was held, *inter alia*, that the court had power under its inherent jurisdiction and also by virtue of RSC Order 70 r 1, to vary, modify or extend its own order so as to ensure the purposes of justice and correctly to

express the intention of the court's order. Morris L.J. put the matter as follows at pages 489 to 491:

> **"Without in any way purporting to categorize and certainly without indicating any limits, a few illustrations in regard to the court's powers may be mentioned.**
>
> **(a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., Ord. 28, r. 11, and also under the powers which are inherent in the jurisdiction of the court.**
>
> **(b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, r. 11, and under the court's inherent powers.**
>
> **(c) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation.**
>
> **(d) If it is suggested that a court has come to an erroneous decision, either in regard to law or fact, then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available .**
>
> **(e) If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured, then likewise amendment of a judgment cannot be sought; there might be an appeal and an endeavour to come within the rules and the well established principles relating to applications in such circumstances to adduce fresh evidence.**
>
> **(f) If a party is wrongly named or described, amendment may in certain circumstances be sought.**
>
> **(g) A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment. An example of this would be where it comes to the knowledge of a court that a person named as a judgment debtor was at all material times, at the date of the writ and subsequently, non-existent.**
>
> **(h) Even if a judgment has been obtained by some fraud or false evidence the court cannot amend the judgment: there must be either an appeal or there must be an action to set aside the**

> **judgment: the particular circumstances may denote what procedure is appropriate; but a power to amend cannot be invoked."**

In the same matter, Singleton L.J., stated at page 479 that:

> **"I am satisfied that the court has power to amend the petition and the decree nisi and absolute in the way sought in this case. It arises under the inherent jurisdiction of the court to do what is necessary and proper to correct an order so that the position under it shall be clear and free from ambiguity. It does not extend so far as to allow an amendment of the effective part of the order ..."**

In the present case, the reasons advanced by the appellant, for seeking review of the judgment, were that a new issue, relating to base payment for four of the respondents, which was not pleaded and was not referred to the court below for determination under the Consent Order was raised by the respondents in evidence and was considered and determined upon by the trial court when the appellant could not object to the evidence as it was not represented at the commencement of the trial.

Now, applying all those principles highlighted above to this case, we do not believe that the appellant satisfied any of the tests for review under Order 39 (1). To start with, we agree with the view taken by the learned trial Judge that all the issues raised by the appellant in the application for review of the judgment arose at the

trial and were dealt with by the court and that there was no fresh evidence which was not available at the trial.

Further, Mr. Kabuka may not have been present when trial commenced for him to object to the evidence at that point, but as rightly observed by the trial Judge, PW1 was recalled at the appellant's instance and he was cross-examined at length by Mr. Kabuka. If counsel omitted to object to evidence of unpleaded matters which was on the record, he had only himself to blame. In any case, Mr. Kabuka discussed the issue of unpleaded matters in his written submissions and he is raising the same issue before us.

Additionally, while we agree with the statement of Edmund Davies L.J., in the case of **Henderson v Jenkin & Sons**[10] quoted by Mr. Kabuka, it cannot be said that the decision by the trial Judge to consider the claim for base payment that was not pleaded or referred to the court for determination under the Consent Order arose from an accidental slip or omission. Neither did the alleged errors or misconstructions in the judgment, relating to our remarks in the case of **Mazoka and others v Mwanawasa and others**[2] and or the admission of the alleged otherwise "inadmissible" evidence.

Moreover, the meaning and intention of the court was clearly expressed in the ruling and we do not see any ambiguity. Mr. Kabuka has not pointed to anything that the trial Judge did not intend to set out in her judgment.

Mr. Kabuka is right that the trial Judge came to an erroneous decision, in regard to law and fact, when on evaluation of the documentary evidence relied upon by the respondents she realised that the additional relief for base payment was only applicable to employees who were separated by voluntary retrenchment and or retirement but went on to find in favour of the four respondents in management when they were not entitled. However, the authorities highlighted above show that in such circumstances amendment of the judgment cannot be sought but recourse must lie in an appeal.

In other words, the trial Judge could not put matters right under Order 39. In our view, the appellant's application was nothing more than an attempt to have a second bite at the cherry but as we said in the case of **Lewanika and others v Chiluba**[3], Order 39 (1) is not designed for that purpose.

In conclusion, we are satisfied that the trial Judge was on firm ground when she ruled that recourse lay in appeal and that there were no sufficient grounds advanced by the appellant for review of the judgment. Therefore, we find no merit in this appeal and we dismiss it with costs to be taxed if not agreed.

I.C MAMBILIMA
CHIEF JUSTICE

R.M.C KAOMA
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE