IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 63/2009**

# **HOLDEN AT LUSAKA** SCZ/8/63/2009

*(Civil Jurisdiction)*

**B E T W E EN :**

**ZAMBIA TELECOMMUNICATIONS**

**COMPANY LIMITED (ZAMTEL ltd) APPELLANT**

**AND**

**AARON MWEENGE MULWANDA 1ST RESPONDENT**

**PAUL NGANDWE 2ND RESPONDENT**

**CORAM: Chirwa, Ag. DCJ, Chibesakunda, Mwanamwambwa, J.J.S.**

***On 1st December 2009 and 22ND February 2012***

## *For The Appellant: In-house Legal Counsel, Zamtel Co. Ltd.*

*For the 1st Respondent: In person*

*For the 2nd Respondent: No appearance*

JUDGMENT

**Mwanamwambwa, JS, delivered the Judgment of the Court.**

***Cases Referred to:***

1. **Bright v Seller [1904] 1 KB, 6.**
2. **Lazard Brothers & Company v Midlands Bank Limited [1993] A.C., 289.**
3. **Walusiku Lisulo v Patricia Lisulo [1998] Z.R. 75.**
4. **Mayo Transport v United Dominions Corporation Limited [1962] R & N R.22.**
5. **Thynne v Thynne [1953] 3 All E.R. 129.**
6. **Lewanika & Others v Chiluba [1998] Z.R. 79.**
7. **Jamas Milling Company Limited v Amex International Pty Limited [2002] Z.R. 79.**

***Legislation referred to:***

1. **The High Court Rules, Order 39, Rules 1 and 2.**
2. **The Supreme Court Rules [1999] Order 20, Rule 11/17.**

The delay in delivery of this Judgment is deeply regretted. It is due to a heavy workload.

This is an appeal against the Ruling of the High Court, dated 26th February 2009. By that Ruling, the learned trial Judge, of her volition, reviewed her earlier Judgment of 5th July 2008, and awarded the Respondents, terminal benefits, which she inadvertedly omitted to award, in addition to damages for wrongful dismissal.

The brief facts of this matter are these: on 18th July 2007, the Respondents instituted an action against the Appellant, for:-

1. **Damages for wrongful and/or unlawful dismissal.**
2. **Terminal benefits.**
3. **Interests on the amounts found due.**
4. **Costs.**

The case underwent full trial. On 5th June 2008, the learned trial Judge passed Judgment in favour of the Respondents and said:

***"This is an appropriate case in which to depart from the normal measure of damages. I, therefore grant the Plaintiffs damages amounting to a year's salary and other perks with interest at the average short-term deposit rate of 10% per annum, from the date of the Writ to the date hereof, thereafter at the current Bank lending rate of 23%, per annum until full settlement and costs."***

On 13th February 2009, the Respondents filed summons, asking the learned trial Judge to interpret the Judgment. The supporting affidavit state that pursuant to the Judgment, the 1st Respondent was paid K50,002,512.71 and the 2nd Respondent, K21,514,606.38. That the Appellant refused to pay them other perks, which they understood to mean terminal benefits. They sought an interpretation as to whether terminal benefits, which they had claimed, fell under *"other perks"* or were inclusive of damages amounting to one year's salary.

In her Ruling of 26th February 2009, the learned trial Judge observed that the Respondents should have applied for special leave to review, pursuant to **Order 39**, **Rules 1** and **2** of **the High Court Rules**. That under these Rules, the High Court has jurisdiction to rehear the case wholly or in part and to take fresh evidence, and to reverse, vary or confirm its previous judgment or decision. She then held as follows:-

**“In the award, I inadvertedly omitted to state that the award is over and above the terminal benefits due to the plaintiff. In the authorities, I mentioned, the Supreme Court awarded terminal benefits plus damages and perks. I, therefore, have good reasons to exercise my discretion and invoke my power pursuant to Order 39, Rule 1. I alter my judgment by adding that terminal benefits should be paid to the Plaintiffs**

**My judgment was very clear and required no interpretation. So this application is dismissed. Each party shall bear its own costs."**

There are two grounds of appeal.

The **1st ground** of appeal is that the learned trial Judge erred in law when she used her discretion to substitute the Respondents' application for interpretation of Judgment with her own application for review.

**Ground two** is that the learned trial Judge erred in law in hearing an application which the Respondents did not bring before the Court and which application required special leave of Court.

In house Legal Counsel for the Appellant filed a Notice of non-attendance of hearing. He intimated that he relies on his filed heads of argument. The 1st Respondent attended hearing and told us that he relies on his filed written heads of argument. The 2nd Respondent neither filed heads of argument nor attended Court.

On ground one, Counsel for the Appellant submits that **Order 39** of **the High Court Rules** gives inherent jurisdiction to the Court to correct clerical errors arising from an accidental slip or omission. That as a general rule, no Court or Judge has power to rehear, alter or vary any Judgment or Order, after it has been made. That Order 39 of the High Court also gives inherent jurisdiction to the Court to vary or clarify an Order so as to carry out the Court's meaning or make the language plain. He submits that the trial Court did not make any error that needed to be corrected in order to bring into harmony with the Judgment that it intended to pronounce. He points out that this is confirmed by the trial Court itself in its ruling which is stated as follows:-

***"My Judgment was very clear and required no interpretation. So, this application is dismissed."***

He adds that he was at a loss as to why the trial Court was compelled to vary the Judgment when the meaning and intention of the Court was expressed in the Judgment. In support of his submissions he referred us to Order 20, Rule 11/17 of **the Rules of the Supreme Court [1999]**; which provides as follows:-

**"The Court has no power under any application in the action to alter or vary a Judgment after it has been entered, except so far as it is necessary to correct errors in expressing the intention of the Court."**

He submits that this Order does not in any way grant the Court power to change the substance of the Judgment, which the trial Court did in this case. That in the absence of any error, the operative and substantive part of the Judgment cannot be varied and a different form substituted. He submits that amending the Judgment to include terminal benefits would totally change the substance of the Judgment. That it would be an injustice to the Appellant, as the amendment would be tantamount to allowing the Respondents having a second bite at the cherry. He points out that the Respondents made the application after they had been paid damages. He concludes that it was erroneous and a mistake at law for the Court on one hand, to find that Judgment was very clear and required no interpretation and on the other hand, review the Judgment on its own volition. In support of his submission he cites **Bright v Seller (1)**, in which it was held that:

**"The error or omission must be an error in expressing the manifest intention of the Court. The Court cannot correct a mistake of its own in law or even though apparent in the face of the record."**

On the second ground, he refers us to **Order 39, Rule 2** of **the High Court Rules** which provides:-

**"Any application for review of any Judgment or decision must be made not later than fourteen days after such Judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just."**

He submits that it is mandatory for special leave to be obtained where an application is made later that 14 days. He submits that firstly and foremost, there was no application to review before the Court. Secondly, if there was such an application to review before the Court, it should have been made within 14 days. If made out of time, it required special leave of the Court. That no such leave was obtained in this matter. He submits that having established in ground one that the trial Court did not have inherent jurisdiction for review, in the circumstances of this case, it follows that the trial Court erred in entertaining the application before it.

He then refers to **Lazard Brothers & Company v Midlands Bank Limited (2), (per Morris LJ)** which held that 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 an action to set aside the Judgment: the particular circumstances may denote what procedure is appropriate, but the power to amend cannot be invoked. He argues that in this case, the trial Court invoked a procedure without an application before it. He submits that it was a misdirection. That the trial Court exceeded its jurisdiction in hearing or entertaining an application which was not before it. He points out that the application that was before the trial Court was for interpretation of Judgment, which was dismissed. That the trial Court should have confined itself to that application. He concludes that the review done by the Court below, on its own motion, did not fall within **Order 39** of the High Court; because it was irregular. That **Order 39**, provides for an application to be specifically brought before the Court.

In response, the 1st Respondent submits that the High Court has inherent powers to recall or review its own judgment or decisions on its own motion, provided that there is no appeal pending. That Order 39 gives extensive jurisdiction to the High Court to review its decisions. That Order 39 Rule 1 empowers the High Court to start the case all over again, admit fresh evidence and reverse, vary or confirm its previous Judgment or decision, as long as there is no appeal pending. As authority for the submission that the Court can, on its own motion, recall or review its earlier Judgment or decision, he referred us to **Walusiku Lisulo v Patricia Lisulo (3)** and the unreported 2006 High Court Case of **Godfrey Miyanda v A.G**. He points out that in this case, there was no appeal pending. That none of the parties applied for review. He adds that the High Court does not need to seek leave from itself, to move its own motion for review. That the trial Court is not affected by the 14 days limitation of time.

We have considered the submissions on both sides and have looked at the authorities cited. The issue as to whether a trial Court can amend, rehear, review alter or vary its Judgment, was effectively dealt with in **Mayo Transport v United Dominions Corporation Limited** **(4)**. That case held that:-

1. **The general rule as to the amendment and setting aside of Judgments or orders after a Judgment or order has been drawn up was as follows:**

*"Except by way of appeal, no Court, Judge or Master has power to rehear, review, alter or vary any Judgment or Order after it has been or drawn up, respectively, either in application made in the original action or matter, or in fresh action brought to review such Judgment or Order. The object of this rule is to bring litigation to a finality but it is subject to a number of exceptions".*

1. In regard to the exceptions, the Court preferred not to attempt a definition of the extent of its inherent jurisdiction to vary, modify or extend its own Orders if, in its view, the purpose of justice required that it should do so. Eight possible types of exceptions were set out in the Judgment, though these did not pretend to be exhaustive.

*(Thynne v Thynne (1955) 3 All E.R. 129 followed. Court Order not altered.)*

The Mayo Transport case was an application by the Plaintiff for review of a Judgment. The question was whether there was jurisdiction for a Judge to review his own Judgment on the merits. The application was made under **Order 33** of **the High Court Rules**, which reads exactly, word for word, like the current **Order 39, Rule 1.** After quoting a passage from **Halsbury's Laws of England**, the learned trial Judge said at **page 23**:

**"These exceptions are set out in the Judgment of Morris, L.J., in Thynne v Thynne (1) [1955] 3 All E.R. 129 at p.145 and p.146 who agreed with the words of EVERSHED, L.J., in Meier v Meier (2), [1948] P.89:**

*"I prefer not to attempt a definition of the extent of the Court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so."*

**He then illustrated a few of the Court's powers in this respect, which can be summarized as follows:-**

**"(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., O.28.**

**(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 O.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 the Court has come to an erroneous decision either in regard to fact or law 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-settled 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, pointing out the distinction between seeking to get rid of the *'operative and substantive'* part of a judgment and the correction of a misnomer or misdescription. An instance of an attempt to change the substantive part of a judgment is MacCarthy v Agard (3), [1933] 2 K.B. 417. The proper course to adopt was to appeal.**

**(g) A Court may in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment, e.g. a person named as a judgment debtor was at all material times 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."**

**Mayo Transport v United Dominions Corporation Limited** **(4)**, which followed **Thynne v Thynne (5)**, was a High Court decision. However, it was approved by this Court in **Lewanika & Others v Chiluba (6)** and **Walusiku Lisulo v Patricia Lisulo (3)**. In those two cases, this Court gave guidance when a trial Court can review its judgment or decision. Then there is also **Jamas Milling Company Limited v Amex International PTY Limited (7)**, on the issue. 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.

In the premises, we hold that the learned trial Judge erred in law when she reviewed her Judgment. 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. **Lisulo v Lisulo** **(3)**, cited by the 1st Respondent, is not an authority for his argument that a trial Court has inherent jurisdiction, on its own, and without an application, to review its own decision or Judgment. In that case there was an application before the trial Court, for review. In the circumstances of this case, we further hold that the learned trial Judge erred in law in reviewing her Judgment on her own motion.

At this stage, there are two issues we would like to deal with. These are relief and order in a Judgment. These are the issues which gave rise to this appeal and the Ruling appealed against. These two issues were dealt with, in detail and with precision, by two learned Judges. One is Hon. Mr. Justice M. M. Corbett, the former Chief Justice of the Supreme Court of South Africa, in article entitled: **"Writing a Judgment"**. This article is published in **the South African Law Journal, [1997] Volume 115, Part I, page 116**. The other is Hon. Mr. Justice Fritz Brand, of the Supreme Court of Appeal of South Africa, in an article entitled: **"Writing a Judgment"**. This article was presented to **the Southern African Chief Justices' Forum, 1st Judges' Summer Colloquium, Club Makokola, Mangochi, Malawi, 7th to 11th December 2008.**

In the sub-heading: **The Structure of a Judgment**, Hon. Mr. Justice Corbett says that a Judgment comprises of the following elements:-

1. **An introductory Section.**
2. **A Setting out of the facts.**
3. **The law and the issues.**
4. **Applying the law to the facts.**
5. **The relief; and**
6. **The Order of the Court.**

On the 5th and 6th elements he observes as follows:-

**"5. The relief (including Order for Costs): The next and penultimate stage is to determine the relief the parties are entitled to, including orders as to costs. This depends upon the findings of law and fact and the conduct of the proceedings generally. Sometimes a Plaintiff, though successful, is entitled in its entirety to the order claimed. Consequently, this must be carefully scrutinized in the determination of the relief to be granted. Similarly, careful consideration must be given to the question of costs and whether there should be any deviation from the rule that normally costs follow the event.**

**6. the Order of the Court: This must be carefully drafted in the light of the findings as to the relief to be granted. You will be surprised how often the Judges overlook some essential part of the Order, for instance by allowing an exception without making any consequential order in regard to the pleading in question, or by allowing an appeal and omitting to substitute an appropriate order for that of the Court below."**

Agreeing with Hon. Mr. Justice Corbett, Hon. Mr. Justice Brand also lists the seven elements of a Judgment as follows:-

1. **An introductory structure, setting forth the nature of the case and identifying the parties.**
2. **The facts.**
3. **The law relevant to the issues.**
4. **The application of the law to the facts.**
5. **The remedy.**
6. **The Order.**

On the 5th and 6th elements, he similarly observes as follows:-

**"5. Relief**

**The next and penultimate stage is to determine the relief the parties are entitled to. More often than not it will at this stage follow as a matter of course. But sometimes one has to decide ancillary issues. Though, for example, plaintiff may have won the case, he or she is not entitled to the costs. This is the place to formulate the reasons for the order you propose to make.**

**6. The Order**

**Then, finally, there is the order. As far as the parties are concerned, this is what the litigation was all about. This is what the winner will take to the Sheriff for execution. Make sure that the order is properly formulated; that it reflects the intended result. Though it may be possible to rectify the terms of an incorrect order, the approach to do so is always embarrassing."**

Earlier in the paper, he advised that a Judgment should be thorough. He said:

*"I often hear colleagues that complain that their Judgments have been misconstrued by the press. Though of course the press can be mischievous, I think we have to admit that many misunderstandings result from less than carefully formulated Judgments. We only get one opportunity to explain our decisions. We must make the best use of that opportunity. Judgments are not accompanied by a telephone number and note to say '****if you want further information, phone me.'*** *Our Judgment is our final word. We have no right of reply."*

In particular, Section 13 of the High Court Act states that as far as possible, a trial Court should completely and finally determine all matters in controversy, properly brought before it, to avoid multiplicity of proceedings concerning such matters.

The application that gave rise to this appeal was for an interpretation of the Judgment. In our view, a Judgment is not supposed to be interpreted. It should be thorough, exhaustive and clear on all issues. Before delivering a Judgment, a trial Court is advised to check it; to ensure that all the issues raised in the matter and claims are determined.

**For the reasons stated above, we allow ground one of the appeal.**

**Ground two** centres on review of Judgment, an issue we have fully dealt with in ground one. What we have said in ground one covers ground two as well. So, we find it unnecessary to deal with ground two separately.

We hereby reverse and set aside the learned trial Judge's Ruling of 26th February 2009. The appeal is hereby allowed. On the facts of this case, we order that each party bears its own costs.

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**D. K. CHIRWA**

**SUPREME COURT JUDGE**

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**L. P CHIBESAKUNDA**

**SUPREME COURT JUDGE**

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**M. S. MWANAMWAMBWA**

**SUPREME COURT JUDGE**