IN THE HIGH COURT FOR ZAMBIA **2012/HP/0910**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

KENNEDY TEMBO PLUS 28 OTHERS
(AS PER ATTACHED LIST) **PLAINTIFFS**

AND

INTERNATIONAL DRUG COMPANY LIMITED **DEFENDANT**

Before the Honourable Justice Mrs. J.Z. Mulongoti
on the 5th day of February, 2016.

For the Plaintiffs : Mr. G. Pindani, of Messrs Chonta, Musaila & Pindani Advocates

For the Defendant : Mr. M. Chiphanzya, of Messrs Inambao Chiphanzya & Company

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RULING

Cases cited:

1. Zamtel Telecommunication Company Ltd v. Mulwanda and Another (2012) ZR Vol. 1, p 405
2. Robert Lawrence Roy v. Chitakata Ranching Co. Ltd (1980) ZR 198
3. Lisulo v. Lisulo (1998) ZR 75
4. Lewanika and Others v. Chiluba (1998) ZR 79

This is a ruling for an application for review of Judgment on behalf of the plaintiffs. It is made by summons pursuant to order 39 of the High Court Rules, Chapter 27 of the Laws of Zambia. The summons was supported by an affidavit in support sworn by the 1st plaintiff. He deposed that he had come across certain documents, that is, letters from Zambia Union of Technical Allied Workers (ZUTAW) to the defendant dated 28th March, 2011 which the Court should consider and vary or set aside parts of its earlier Judgment. That the said documents were in the custody of the union leaders who have since left office. The plaintiffs only came across them before or during trial, after all diligent efforts to bring all the relevant documents to court were made.

That this Honourable Court having found as facts that; the effective date of memorandum of settlement was 1st October, 2009 and ably decided that all the other increments agreed upon and as contained in the memorandum of settlement be implemented should not have made an exception on the date when the two year

contract should have started running simultaneously. The documents intended to be introduced by way of Judgment, clearly show the intention of the parties on the two year contract which was to start running from 1st October, 2009 until 30th September, 2011. That effective date entails the date when the memorandum of settlement became enforceable or took effect including the two year contract.

That reviewing the judgment aforesaid will also enable the Court to reflect on the position of the law on trade unions to the effect the once an employee joins a trade union, he gives up his right to individually negotiate for better conditions of service to the Union. It was therefore otiose, unnecessary and null and void for the defendant to directly inform the plaintiffs, who were already represented by the union whilst a negotiated and signed memorandum of settlement of a collective dispute was in place, to individually apply for renewal of the contracts.

The learned counsel for the plaintiffs also filed the plaintiffs skeleton arguments on review. Relying on the case of **Robert Lawrence Roy v. Chitakata Ranching Co. Ltd (1)**,

counsel submitted that the documents the plaintiffs intend to produce have just been found after judgment was delivered. And that they are material and relevant to the case as they show the intention of the parties at the time of signing the memorandum of settlement.

That the court should review the judgment in light of the documentary evidence now in possession of the plaintiffs. That this will enable the court to come to a finding that will reflect the contest of the memorandum of settlement providing for a new two year contract effective 1st October, 2009, that bound the plaintiffs in as far as the duration of the new two year contract is concerned.

The defendant filed an affidavit in opposition and its list of authorities and skeletal arguments in opposition to summons for an order of review, dated 3rd November, 2015.

The affidavit in opposition was deposed to by one Vitha Thomas in her capacity as the Administrative Director of the defendant company. The salient features are that the documents exhibited as 'KT1' do not constitute fresh

evidence not available at the trial and which could not have been discovered with due diligence, as they were in the possession of the plaintiffs' union officials and public officers. In addition that the other matters raised by the plaintiffs (especially in paragraphs 5 to 11) are arising for the first time after delivery of the Judgment and cannot be grounds for review.

Learned counsel for the defendant submitted that the plaintiffs have not proved the basis upon which the matter could come up for review or at all because the grounds do not exist. A plethora or cases were cited in which the Supreme Court and the High Court defined what constitutes fresh evidence.

The case of **Zambia Telecommunications Company Ltd v. Mulwanda and Another (2)**, was one of the cases relied upon, in which Mwanamwambwa, JS, whilst acknowledging that review under order 39 Rule 1 of the High Court Rules had a very limited scope, held that for the review to be available, the party seeking it must show that he had discovered fresh material evidence, which would

have material effect upon the decision but could not with reasonable diligence, have been discovered before.

It was argued that the documents referred to in casu, do not constitute fresh evidence not available at the trial, which could not have been discovered with due diligence or at all as the same were in the possession of the plaintiffs' union officials and public officers as can be seen from the addresses thereon. In addition that the application must be seen to be an attempt to argue for an alteration of the verdict to bring about a result considered more acceptable to the plaintiffs instead of them appealing to a high court.

Accordingly, that the application be dismissed with costs.

Let me state from the outset that powers of review are enshrined in order 39 of the High Court Rules as submitted by counsel. In the cases **of Lisulo v. Lisulo (3)** and **Lewanika and Others v. Chiluba (4)**, the Supreme Court observed that "*Review under order 39 of the High Court Act 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". And that "*Review enables a court to put matters right*".

It is settled law that for the Judgment to be reviewed depends on the ground of discovery of material evidence which would have had material effect upon the decision, but could not with reasonable diligence have been discovered before.

The 1st plaintiff in his affidavit in support deposed that they did not come across the said documentation before or during trial after all diligent efforts. He does not state what these diligent efforts were. As argued by the defendant, these documents could have been easily obtained before or during trial, as they have been now, without any difficult.

I have considered the submission by the defendant's counsel. I am inclined to dismiss the application. I concur with him that the documents the plaintiffs wish to rely on for review could have been obtained with due diligence at the time of trial of this matter. The other issues raised by the plaintiffs are fit to be considered at appeal stage. A

review is not an appeal such that I should reconsider my judgment and interpretation of the effective date clause as argued by the plaintiff's counsel. Accordingly, I find no merit in the application and I refuse to grant the review sought. Costs to the defendant.

Leave to appeal is granted.

Delivered at Lusaka this 5th day of February, 2016.

J.Z. Mulongoti
HIGH COURT JUDGE