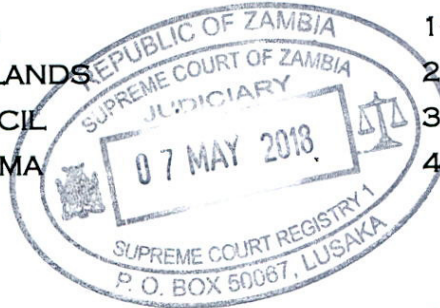


IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 174A/2008
SCZ/8/160/2003

BETWEEN:

THE ATTORNEY GENERAL
THE COMMISSIONER OF LANDS
LIVINGSTONE CITY COUNCIL
CAPTAIN JOHN MWAMULIMA



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT

AND

AMBEX CLOTHING
MANUFACTURER LIMITED

RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Phiri, Malila, J.J.S.,
On 6th February 2018 and 7th May 2018

For the Appellant: Attorney General's Chambers
For the Respondent: Mr. N.K Dindi of Messrs. Dindi & Company

JUDGMENT

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. Trinity Engineering Limited v. Zambia National Commercial Bank (1996) ZR 166
2. Thynne v. Thynne (1955) 3 ALL ER 129 at page 145.
3. Chibote Limited Mazembe Tractor Company Limited Minestone (Zambia) Limited Minestone Estates Limited v. Meridien Biao Bank(Zambia) Limited (In Liquidation) (2003) ZR 76

Legislation referred to:

The Supreme Court Rules, Chapter 25 of the Laws of Zambia, Rule 48(5) and 78.

This is the 4th Appellant's Motion, (hereinafter referred to as the "Applicant"), for the award of costs and damages.

The brief facts of the matter are that the Respondent was the registered owner of stand 1499. Its Certificate of Title was issued by the Registrar of Lands and Deeds. In 2001, the Livingstone City Council placed an advert in the newspaper, inviting people to apply for the property. The Applicant responded to the advert and applied. He was allocated the property. The property was allocated to him at a time when it was still registered in the Respondent's name and before the Commissioner of Lands re-entered. Upon being allocated, the Applicant started building a lodge on the property. He did so with the approval of the Livingstone City Council.

As a result of the above events, the Respondent, Ambex Clothing Manufacturers Limited, lodged a complaint with the Lands Tribunal, against the Applicant, Livingstone City Council, the Commissioner of Lands and the Attorney – General.

After hearing the complaint, the Lands Tribunal found that the Applicant was involved in "sharp practice" against the Respondent. However, the Tribunal stated that although the

Applicant had gone to the Tribunal with dirty hands in form of “sharp practice”, in equity, the Applicant had a beneficial interest in the structure and development he made on the Respondent’s land. That he could not be deemed to have intended such development as a gift to the Respondent. The Tribunal then cancelled the Certificate of Title that was issued to the Applicant.

The Livingstone City Council and the Applicant appealed to this Court against the decision of the Lands Tribunal. The Respondent cross-appealed on the ground that the Lands Tribunal erred in law and fact when it awarded compensation to the Applicant in respect of the structures and developments erected by him on the land in dispute. However, before Judgment could be delivered in this matter, the Applicant and Livingstone City Council withdrew their appeals leaving the Respondent’s cross- appeal.

As regards the cross appeal, we held that the Lands Tribunal had no jurisdiction to order cancellation of a Certificate of Title in land matters. We stated that the jurisdiction to order cancellation of a Certificate of Title, at the time, lay with the High Court and not the Lands Tribunal. This Court went on to hold that the Ruling by the Lands Tribunal in this matter was a

nullity. Accordingly, we refused to vary or entertain it altogether. We held that in the first place, the matter should have been commenced in the High Court and not the Lands Tribunal. We accordingly, dismissed the appeal and made no order as to costs.

After this decision, the Respondent commenced a fresh action in the High Court under cause number 2013/HP/0297. The Applicant applied that this matter be dismissed for irregularity and for being an abuse of Court process pursuant to **Order 18 Rule 19 (d) of the RSC 1999**. After hearing the application, the learned trial Judge dismissed the Applicant's application and ordered the parties to file their respective appearances and defences. Dissatisfied with the above Ruling by the High Court, the Applicant, the Livingstone City Council and 2 others appealed to this Court against the Ruling of the learned Judge. This appeal was titled appeal number 134 of 2013.

This appeal came up for hearing on 7th November, 2017, at Kabwe. During the hearing, the Applicant complained that his matter had been in Court for too long and that no costs were being awarded to him. He argued that the matter had been dismissed in 2013 by this Court and that the Respondent had engaged in multiplicity of actions.

In the interaction between the panel of the Supreme Court that sat at Kabwe on 7th November 2017, and the Applicant, the Applicant said that-

“My Lord, it does not stop them from going to recommence the matter in another Court but at the same time the people you are going with, the Respondents, we also have got rights, how many Courts is this Respondent going to go to get his rights right...”

In response, the panel made the following statement:

“the law does recognize that they do have rights to be compensated by way of damages but it doesn’t say you can stop them from going ahead...”

The Courts are there but the court will not do what the litigant is supposed to do, if you think that you have been exposed to multiplicity of actions the court expects that you should take certain measures so that whatever it is inconvenience or costs which should have been put can be remedied.”

After this hearing in the above cause, which arose from the fresh action, the Applicant, brought this motion which is to the effect that-

“the 4th Appellant can be heard for an order for leave of Court to grant an order as to costs and damages, as advised by this Honourable Court during the Supreme Court Sessions at Kabwe. And further that the 4th Appellant can seek for

leave of Court for an order as to costs and damages as a remedial to the inconveniences caused by the endless on-going of the Respondent's Court actions from one Court to another for over 17 years. The grounds of the application are deposited in the 4th Appellant's affidavit in support of the Notice of Motion."(sic)

In his affidavit in support of the motion, he brought out the following as his grounds of the application:

1. That this Honourable Court, while sitting at Kabwe on 7th November, 2017, highlighted the rights of the 4th Appellant as regards costs and damages in this matter, that the 4th Appellant can litigate for costs and damages as occasioned from failed the Respondent's nulled proceedings at Court below and the cross appeal in the Supreme Court. (sic)
2. An order for leave as to costs and damages occasioned as the loss of business as a result of the ex parte interim injunction granted to the Respondent dated 7th March 2001.(sic)
3. That this Honourable Court dismissed the Respondent's cross appeal, but awarded no costs and damages to the 4th Appellant for laboring the trouble of the length the Respondent's proceedings in the Supreme Court. (sic)
4. That as highlighted by the Lords during this Honourable Court sitting on 7th November, 2017 at Kabwe that actually the 4th Appellant can proceed to pursue for costs and damages as occasioned from the Respondent failed Court

actions at Court below and the cross appeal in the Supreme Court. But cannot prevent the Respondent's bid for this matter on its merits.(sic)

5. That this matter has been going on the Respondent's intention and will dragging on the innocent the 4th Appellant for bid in these several Courts for the matter to be determined on its merits from one Court to another Court and one judge to another judge.(sic)
6. That the 4th Appellant as per advised of the Honourable Court see Page 10 of the Court proceedings, seeks for leave of this Honourable Court for an order so that the 4th appellant can litigate for costs and damages at the Lands Tribunal failed the Respondent's failed application in the Court below and the Respondent cross appeal in Supreme Court 29th January, 2013.(sic)
7. That the 4th Appellant also seeks for an order of refund of costs with interest that were paid to the Respondent based on the Lands Tribunal Judgment dated 2003 which the Respondent failed to return after the proceedings were nulled by the Supreme Court. Upon the Respondent's fictitious ex-curia settlement for agreed discontinuation of the 4th Appellants appeal in the Supreme Court No. 133/2003. (sic)
8. That if this Honourable Court does not grant the 4th Appellant's an order as to costs and damages as advised by the same Court during the sitting Supreme Court sessions at Kabwe the 4th Appellant shall endless continue to suffer

prejudice and injustice on the peril of the Respondent's forum shopping on going proceedings in this same subject matter and parties in various Courts.(sic)

During the hearing of the motion, the Applicant was asked to state what law he was relying on. He responded that he was relying on Rule 48(5) of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia. Further, when asked as to what was the basis of his motion, he responded that his motion was based on two grounds. Firstly, it was based on this Court's judgment of 29th January 2013, and secondly, on the advice given by the panel that sat to hear his appeal on 7th November 2017, in Kabwe. He argued that in Kabwe, the panel advised him that he could recover his costs through other means and as a result, he decided to apply to this Court, through this motion. He stated that this Court should waive its order of not awarding costs in its judgment of 29th January 2013, and allow the Applicant to go and claim all the costs and expenses he suffered for the 18 year period when this matter has been in Court.

The above was a summary of his arguments.

None of the Respondents appeared on the date of hearing and neither did they file any documents to oppose the motion.

We have looked at this motion and considered the affidavit in support as well as the grounds of Motion. We have also looked at the Applicant's list of authorities and skeleton arguments filed into Court on the 10th of November 2018.

We wish to state that a consideration of this motion, as well as the Applicant's arguments, both in writing and orally during the hearing, suggest that the Applicant wants this Court to change the order it made on costs in its judgment of 29th January 2013.

In that judgment, we stated the following:

“In effect, we hold that the Ruling by the Lands Tribunal in this matter was a nullity. Therefore, we refuse to vary or entertain it altogether. This matter, in the first place, should have been commenced in the High Court and not the Lands Tribunal. Accordingly, the cross appeal is hereby dismissed. We make no order as to costs.”

From our holding above, it is clear that our decision on costs is unequivocal. Changing the order above would entail fundamentally amending our Judgment. The jurisdiction of this Court to amend a judgment is limited. It is found in Rule 78 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia. This rule provides that-

“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.”

In the case of Trinity Engineering Limited v. Zambia National Commercial Bank ⁽¹⁾ this Court held that-

“That the slip rule was meant for the Court to correct clerical mistakes or errors in a judgment arising from accidental slips or omissions. In the present case the applicant was effectively seeking the reviewing and setting aside of the previous judgment which was not permissible.”

This power to correct clerical errors arising from any accidental slip or omission was also discussed in the case of Thynne v. Thynne ⁽²⁾. In that case, **Morris L.J.** stated the following as some of the circumstances under which a court can exercise its power to vary, modify or extend its orders;

“(a) if there is some clerical mistake in a judgment or order which is drawn up, there can be a correction under the powers given O.20, R.S.C;

(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.20, 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 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;

(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; and

(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 case before us, neither the notice of motion nor the heads of argument point to any clerical error arising from an accidental slip or omission. The arguments go to great lengths to discuss points where the Applicant feels this Court should consider the 18 years this matter has been in Court and the inconvenience that he may have suffered. He argued that as a result of this, this Court should vary its order on costs made on 29th January 2013. In essence, the Applicant is inviting us to change our order as to costs. As we have already stated above, this would alter our judgment. We say so because firstly, costs are in the discretion of the Court. A party is not entitled to them as a matter of right. **See:** Order 40 of the High Court Rules, Chapter 27 of the Laws of Zambia. Secondly, there are no clerical errors or omissions in our judgment of 29th January 2018.

The Applicant's case was determined by this court upon careful consideration of the record of appeal and the evidence that was before the Tribunal. We have not seen any clerical errors arising out of accidental slips or omissions in our

judgment. Neither have we seen any circumstances allowing this Court to amend its judgment as envisaged in the cases cited above. It seems to us that the Appellant is unhappy with our judgment and seeks to get his matter re-looked at in the guise of clerical errors when the issues complained of by the Appellant do not qualify to be clerical errors. It is not within the spirit of Rule 78 that judgments of this court should be altered and the original decision changed. We are further fortified in saying this by the holding in the case of **Chibote Limited Mazembe Tractor Company Limited Minestone (Zambia) Limited Minestone Estates Limited v. Meridien Biao Bank(Zambia) Limited (In Liquidation)**⁽³⁾, where Sakala, CJ, 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 now come to the claim for the award of damages. Damages are awarded by the Court to a party that has suffered some injury. If the Court does not find that a party has suffered injury, the Court cannot award damages. Damages must be proved and once they are proved, they are awarded by the Court. Therefore, damages cannot be claimed and awarded through a motion like this one where no injury was found to have been suffered by the Applicant. In any case, in the judgment of 29th January 2018, we held that the proceedings in the Lands Tribunal were a nullity. There is no way we could have awarded damages for a matter where we said that the proceedings were a nullity. In addition, the Applicant had withdrawn his appeal to this Court in that case. What remained for this court to determine was the cross-appeal. Therefore, it puzzles us that a party that withdraws an appeal would turn around and request the Court to award such a party costs. Our order on costs was not an error or omission.

As regards the interaction between the panel that sat to hear the matter in Kabwe on the 7th of November 2017, where the Applicant was a party, we wish to say that the interaction was not a judgment and neither was it advice given by the Court as

the Applicant wants to portray. The Court that sat simply asked the Applicant questions in trying to understand what his contention was in that case. Even assuming that the Applicant wanted to bring a motion on the matters that arose as a result of that appeal, we would expect him to bring the matters in that appeal and not this one.

In conclusion, we are of the view that this is not a proper case for us to exercise our jurisdiction and invoke the provisions of Rule 78 of the Supreme Court Rules. Accordingly, this motion has no merit and we dismiss it.

Since the Respondents did not appear at the hearing of this motion, we make no order as to costs.



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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



.....
G.S. PHIRI
SUPREME COURT JUDGE



.....
M. MALILA, DR.
SUPREME COURT JUDGE