IN THE SUPREME COURT OF ZAMBIA **Appeal No. 66/2010**
HOLDEN AT LUSAKA **SCZ/8/89/2010**

(CIVIL JURISDICTION)

BETWEEN:

TIMES NEWSPAPERS ZAMBIA LIMITED **1ST APPELLANT**

GEORGE CHILUMANDA **2ND APPELLANT**

21 JAN 2021

AND

STILLIANOS GEORGE KOUKOUDIS **1ST RESPONDENT**

AETOS TRANSFARM LIMITED **2ND RESPONDENT**

Coram: **Phiri, Muyovwe and Malila, JJS**
on 15th October, 2014 and 21st January, 2021

For the Appellants: No appearance

For the Respondents: Mr. V. N. Michelo, Messrs V. N. Michelo & Partners

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RULING

MALILA, JS, delivered the Ruling of the Court

Cases referred to:

1. *Danish Mercantile Co. Ltd v. Beaumont Co. Ltd (1951) All ER 925*
2. *Bellamano v. Ligure Lombard Ltd. (1976) ZR 267*
3. *Attorney-General, Development Bank of Zambia v. Gershom Moses Button Mumba (2006) ZR 77*
4. *BP Zambia Ltd. v. Lishomwa and Others (Appeal No. 72 of 2007)*
5. *Godfrey Miyanda v. Attorney-General (1985) ZR 243*
6. *Nyimba Investments Ltd. v. Nico Insurance (Zambia) Ltd (Appeal No. 130/2016)*
7. *Lenard Kayanda v. Ital Terrazo Ltd (in receivership) (SCZ/8/273/2015)*

Legislation referred to:

1. *Supreme Court Rules, chapter 25 of the Laws of Zambia.*
2. *Rules of the Supreme Court (While Book) (1999) (ed)*

1.0 INTRODUCTION

1.1 We sincerely regret the long delay in rendering this ruling. When we heard the motion on 15th October, 2014 we sat with the Honourable Mr. Justice G. S. Phiri who had in fact been assigned to deliver this ruling on behalf of the court. He proceeded into retirement before the ruling was delivered. It is now one by majority.

1.2 This motion was taken out by the respondents under Rule 78 and Rule 48(5) of the **Supreme Court Rules, chapter 25 of the Laws of Zambia.**

1.3 The action, which ultimately gave rise to the current motion, has its genesis in an article published in the *Times of Zambia* of 22nd November, 2005 attributed to the second appellant. That article annoyed the respondents considerably.

1.4 The said article called upon the authorities to shut Nkana Hotel which had been purchased by the respondents, on

account of the fact that the second appellant believed it was operating as a brothel.

1.5 The respondents then commenced an action for defamation against the appellants. The appellants apparently did not defend the action, resulting in a default judgment being entered against them. Subsequently, damages were assessed by the learned Deputy Registrar in October, 2008.

1.6 An award of damages in the sum of K5 billion was made in favour of the respondents. Additionally, K160 million was awarded as costs to the respondents. This award was followed by determined efforts on either side; to enforce the judgment on the part of the respondents, and to stay execution and set aside the judgment on the part of the appellants. The order on assessment was ultimately set aside.

1.7 In the wake of all this, the respondents approached the appellants to consider an *ex-curia* settlement. This was done by letter dated 17th November, 2008 addressed to Messrs Josias & Partners who had placed themselves on record as Advocates representing the appellants. In response, the

Legal Counsel for the first appellant wrote, on 5th December, 2008, stating that the respondent was willing to settle the claim at K70 million as damages and K100 million as costs.

1.8 Messrs Josias & Partners promptly accepted the respondents' proposal, and following further correspondence with the Legal Counsel of the first appellant, the sum of K170 million broken down as per proposal of the first appellant's Legal Counsel of 5th December 2008, was tendered by the appellants, received and duly acknowledged by Messrs Josias & Partners.

1.9 Apace with these developments, there were other happenings in the professional life of the sole practitioner in the firm of Messrs Josias & Partners, Dr. Josias Soko. A memo had been written by the Hon. Secretary of the Legal Practitioners Committee (Copperbelt) informing all advocates and various law offices that Dr. Josias Soko of Messrs Josias & Partners had been suspended from practicing law with effect from the 31st October 2008 and that as the firm Josias & Partners was 'a one man firm' it was to be closed with immediate effect.

1.10 For some reason, the respondents did not appear too enthused with the settlement. They thus took out a notice of assessment of damages before the Deputy Registrar in terms of which they claimed K6 million as damages for the same libel. The appellants opposed the application. Their new advocates, Messrs Mukumbi & Co. placed themselves on record.

1.11 The Deputy Registrar assessed the respondents' damages at K2 billion which was to attract interest at short term deposit rate from the date of the writ to the date of judgment and thereafter at current lending rate as determined by the Bank of Zambia until full settlement of the judgment debt.

1.12 The ruling of the Deputy Registrar naturally rattled the appellants. They appealed to the Supreme Court on three grounds claiming that the Deputy Registrar was wrong to hold that the first appellant had not made payment by way of settlement out of court when there was clear evidence that such payment had been received by the respondents' advocates of the record. They also complained that it was a misdirection for the Deputy Registrar to have held that

payment to the respondents' advocates did not constitute settlement of the respondents. Finally, they grumbled that an award of K2 billion damages was for excessive and thus unreasonable.

1.13 In our judgment dated 3rd September 2013, we held that the *ex-curia* agreement between the parties was legally binding and that the respondents could not distance themselves from that agreement. We quashed the Deputy Registrar's award of K2 billion and maintained the K170 million settlement inclusive of costs agreed to by the parties in the *ex-curia* settlement. We further found, on the evidence on record, that this sum had already been paid by the appellant to the respondents.

2.0 A MOTION IS FILED

2.1 Following our judgment of the 3rd September 2013, the respondents took out the current motion some two months later - to be precise, on 6th November 2013. The motion was taken out pursuant to rule 78 and 48(5) of the Supreme Court Rules, chapter 25 of the Laws of Zambia.

2.2 By the said motion the respondents sought a "rectification of clerical errors, omissions and mistakes appearing in the said judgment AND on the grounds or reasons contained and outlined in the affidavit hereof."

2.3 The affidavit supporting the notice of motion was sworn by Stillianos George Koukoudis, the first respondent and Managing Director of the second respondent. In the said affidavit, the respondents averred that our judgment of 3rd September 2013 is afflicted with serious errors, mistakes and omissions which the court ought to rectify.

2.4 The deponent alleged that among the omissions or slips in our judgment were the failure to observe or include the fact that the advocates for the first appellant acted without authority in the court below and before us, as they did not file a notice of appointment as agents, nor did they produce the first appellant's resolution authorizing them to act on the company's behalf.

2.5 It was also averred that the court should have 'noted' that the notice of appointment of agents, though signed and filed into court on 16th February 2009 is not enough appointment

legally; and that some affidavits were wrongfully sworn by counsel on behalf of their clients.

2.6 The deponent of the affidavit also averred that the court should have noted that the second appellant had not defended himself against the respondents' claim from the commencement of the proceedings, meaning that the default judgment and subsequent assessment of damages was binding on him. This, according to the respondents, is an error requiring to be rectified.

2.7 Additionally, the respondents deposed that there was an error in the dates on the judgment. "6th December, 2011 and 3rd September, 2013" should have read "6th December, 2011 and 3rd September, 2012."

2.8 Furthermore, the respondent alleged that the record of appeal that had been used in the court to come up with the judgment that now requires rectification was so manifestly defective for failure to comply with mandatory legal prescriptions that the whole appeal ought to have been dismissed. Allowing, as we did, the appeal to be argued on the basis of such a defective record of appeal, to the

respondents, constituted a miscarriage of justice and this situation ought to be corrected.

2.9 Without any elaboration the respondents also complained of the defects regarding the title of the appeal both on the cover and inside.

2.10 The respondents also alleged a general misperception on our part of the events giving rise to the appeal before us. In particular, they asserted that there was legally no way that the appellants could be said to have been bound by a payment of K100 million and K70 million by the appellants to the respondents' former advocates who were at the time suspended from practicing law; that while the court explained in its judgment that the suspension of the respondents' advocate was a matter of public knowledge, it did not explain how the first appellant could have dealt with a suspended lawyer to legally transact on a settlement that bound the respondents.

2.11 The respondents also alleged that the notice suspending the respondents' counsel was widely publicized. Having been authored by Mr. S.A.G. Twumasi, Hon. Secretary, Legal

Practitioners' Committee, who was also the first appellant's advocate, the appellant's counsel should thus have known about the said settlement was unlawfully undertaken by counsel who was suspended from practicing law.

2.12 At the hearing of the motion, Mr. Michelo, learned counsel for the respondents, rehashed the respondents' position as narrated in the supporting affidavit. He intimated that in addition to relying on the affidavit in support, he also relied on the respondents' skeleton arguments filed by Messrs Peter Chimutangi & Co. produced in the record of motion.

2.13 By way of augmentation, the first point Mr. Michelo called our attention to is that whereas the judgment of this court had three parties, i.e. two appellants and one respondent, the record of appeal showed four parties, i.e. two appellants and two respondents. This, according to Mr. Michelo, was a slip that the court ought to correct under rule 78 of the Supreme Court Rules.

2.14 The next point counsel orally raised was that although our judgment states on its face that the appellants were represented by Mr. M. N. Simwanza of Kitwe Chambers, the

second appellant had no advocate representing him from inception. In other words, Mr. Chulumanda was never legally represented. Not only that, the judgment shows that Mr. Mulenga represented both respondents when he did not. These are, according to counsel, errors correctable under rule 78.

2.15 In the skeleton heads of argument filed by Messrs Peter Chimutangi & Co. the emphasis was on representation of the appellants by Kitwe Chambers without a company resolution. On the strength of the authorities of **Danish Mercantile Co. Ltd v. Beaumont Co. Ltd**[1] and **Bellamano v. Ligure Lombard Ltd.**[2], counsel argued that Kitwe Chambers had no authority to represent the first appellant and consequently what they purported to on behalf of the first appellant amounted to nothing.

3.0 THE POSITION OF THE APPELLANTS

3.1 At the hearing of the motion, there was no representation for the appellants, nor was there any explanation for their absence.

3.2 We satisfied ourselves from the available records that service of the notice of hearing had been duly effected.

3.3 There was no document filed by or on behalf of either of the appellants in opposition to the motion.

4.0 ANALYSIS AND DECISION

4.1 We have given due consideration to the motion before us and in particular the averrements in the affidavit filed in support, and the submissions of the learned counsel for the respondents.

4.2 We have already stated that the motion was taken out pursuant to rule 78 of the Supreme Court, otherwise referred to as the slip rule, and rule 48 of the Supreme Court Rules.

4.3 Rule 78 of the Supreme Court Rules is the rule that provides the substantive right to a party who believes that a judgment delivered by this court has typographical, clerical or such other errors or omissions, to apply to have the same rectified. It provides as follows:

> **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.**

4.4 While the court may *suo motu* correct any accidental slip, omission or clerical error under rule 78, the usual practice is by the court to be moved by one of the parties to litigation to correct the perceived errors. Rule 48 appropriately titled "civil applications" provides the pathway for moving the court. That rule begins with applications to a single judge which are covered in sub-rules (1) to (4).

4.5 The relevant sub-rule of rule 48 under which the present application was made is (5) which states as follows:

> **An application involving the decision of an appeal shall be made to the court in like manner as aforesaid, but the proceedings shall be filed in quintuplicate and the application shall be heard by the court unless the Chief Justice otherwise directs.**

We shall revert to the import of this rule shortly. For now we continue our consideration of rule 78 and what it means for the motion before us.

4.6 Rule 78 of the Supreme Court Rules, chapter 25 of the Laws of Zambia under which the present motion is brought is similar to Order 20 Rule 11 of the **Rules of the Supreme Court (While Book) (1999) (ed)** which provides that:

> **Clerical mistakes in any judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by this court on motion or summons without an appeal.**

4.7 Order 20 Rule 11 of the White Book explains the effect of the court's jurisdiction to correct clerical errors or omissions that may exist in its final judgment. It states that "the court has inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain."

4.8 In **Attorney-General, Development Bank of Zambia v. Gershom Moses Button Mumba**[3] we reiterated the position that the slip rule is meant to enable the court to correct clerical errors, omissions or mistakes in a judgment arising accidentally and is not intended to provide an opportunity for a dissatisfied party to have the matter and the judgment reviewed.

4.9 In **BP Zambia Ltd. v. Lishomwa and Others**[4] in declining to entertain a motion to interfere with a judgment under rule 78, we observed as follows:

> **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 or favourable to them. They simply want to have another bite of the cherry.**

4.10 In **Godfrey Miyanda v. Attorney-General**[5] we pertinently observed 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 canvassed and given due consideration in the judgment complained of, there was nothing accidental in that judgment.**

4.11 In the present case, the slips, errors or omissions complained of are numerous. We have set them out in paragraph 2.4 to 2.15 of this ruling. They include trivial and mundane issues such as the date on the judgment and the titling of the appeal, to more substantive issues of defect in the record of appeal, absence of authority by counsel to act and failure by a party to challenge a consent judgment.

4.12 While we agree that some of the issues raised such as misstatement of the date on a judgment could quite easily fall within the correctable errors under the slip rule, the substantive bases for taking out the current motion do not

offer a proper case for us to invoke the provision of rule 78 of the Supreme Court Rules.

4.13 On a proper assessment of the reasons advanced for the application to correct the judgment, we are in no doubt whatsoever that the motion is in essence a request for a review of our judgment cloaked in the guise of a motion under the slip rule. We refuse to be dragged into the pitfall of reviewing our judgment under rule 78.

4.14 As we stated in our ruling on a motion under rule 78 in **Nyimba Investments Ltd. v. Nico Insurance (Zambia) Ltd.**[6]:

> **Our judgments are final not because we are infallible but in order to avoid a spectre of repeated efforts at relitigation.**

4.15 Our view is, therefore, that on the whole, this is not a proper case in which we can invoke our jurisdiction under rule 78 of the Supreme Court Rules.

4.16 And yet, the foregoing is not the only reason for the failure of the present motion. We have earlier on pointed out that the motion was taken out under rule 48(5) which we have quoted at paragraph 4.5 of this ruling. We have already stated that rule 48(5) is part of the provision drawing its

logical inspiration from applications in civil appeals – starting with applications before a single judge of this court.

4.17 Quite notably rule 48(5) requires that applications made under it shall be made "in *like manner* as aforesaid." This effectively means that any application under sub-rule 5 ought to be made (like those under preceding sub-rules) within fourteen days of the decision complained of.

4.18 In **Lenard Kayanda v. Ital Terrazo Ltd**[7] we stated in para 5.5 (p. J6) of our judgment as follows:

> **Rule 48(1) which we have set out ... is couched in mandatory terms in relation to the period within which to make an application to a single judge, that is within fourteen days of the decision complained of. It is no longer open ended as it was before the amendment of 2012. Furthermore, because of the use of the phrase "shall in like manner" in sub-rule (4), any application made under that sub-rule challenging the decision of a single judge should be made within fourteen days as provided in sub-rule (1). The same applies to an application involving the decision of an appeal under rule 48(5).**

4.19 The decision that is targeted for correction by the current motion was made in a judgment dated the 3rd September 2013. The motion to have that judgment corrected was filed on 6th November 2013 – exactly sixty-three days later. The

respondent has even claimed that the date should in fact read 3rd September 2012. This could even make the respondent's position worse. Either way, it does not pass the requirement of the fourteen days as we have explained it. The motion is incompetent and must fail on that account as well for having been filed beyond the prescribed period of fourteen days from the judgment.

4.20 The upshot of our decision is that the substance of the judgment sought to be corrected takes it beyond the intendment of rule 78 of the Supreme Court Rules. The application through this motion was also brought way beyond the stipulated fourteen days. The motion is, therefore, without merit and is hereby dismissed.

4.21 We note that the appellants took no steps to resist the motion nor did they attend court when the motion was heard. We make no order as to costs.

E. N. C. MUYOVWE
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE