IN THE SUPREME COURT OF ZAMBIA **SCZ/8/150/2012**
HOLDEN AT KABWE **APPEAL No.130/2016**
(Civil Jurisdiction)

B E T W E E N:

NYIMBA INVESTMENTS LIMITED **APPLICANT**

AND

NICO INSURANCE (ZAMBIA) LIMITED **RESPONDENT**

Coram: **Mwanamwambwa DCJ, Wood and Malila, JJS on 20th July, 2017 and 9th August, 2017**

For the Appellant: Mr. K. Kamfwa, Messrs Wilson & Cornhill Advocates

For the Respondent: Mr. M. Mutemwa SC of Messrs Mutemwa & Co. with Mr. M. Chipanzhya of Messrs Inambao Chipanzhya & Company

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R U L I N G

Malila, JS delivered the ruling of the court.

Cases referred to:

1. *Mususu Kalenga Building Limited v. Richman's Money Lenders Enterprises (1999) ZR 27*
2. *Norton v. Lostrom (2010) ZR Vol.1, 358*
3. *Liuwa v. Attorney General (Appeal No. 43 of 1996)*
4. *Liuwa v. Judicial Complaints Authority and Another (2011) ZR 318*
5. *Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited (1995-1997) ZR 166*
6. *Re Swire, Mellor v. Swire (1885) 30 Ch. D 239 at p. 246*

7. *Chibote Limited and Others v. Meridien BIAO Bank (Zambia) Limited (In Liquidation) (2003) ZR 76*
8. *Attorney-General, Development Bank of Zambia v. Gershom Moses Button Mumba (2006) ZR 77*
9. *BP Zambia Limited v. Lishomwa and Others (Appeal No. 72 of 2007)*
10. *Godfrey Miyanda v. Attorney General (1985) ZR 243*
11. *Preston Banking Company v. William Allsup & Sons (1895) J I Ch. D at p.143*
12. *Finsbury Investments Limited v. Antonio Ventrigria (Appeal No. 11 of 2009)*

Legislation referred:

1. *Supreme Court Rules, chapter 25 of the laws of Zambia*

The notice of motion in this matter was taken out under rule 78 of the Supreme Court Rules, chapter 25 of the laws of Zambia. By the said motion, the applicant beseeches us to order that:

> **the accidental slips, omissions contained in the judgment of the Supreme Court dated 31st March, 2017 and delivered herein be corrected to the extent that the business interruption claim by the appellant was in fact adjusted by the Loss Adjuster in the sum of US$181,160.00.**

The background facts are common cause. By writ of summons dated 13th September, 2013, the respondent (then plaintiff) sought to recover from the applicant (then defendant) certain monies they considered due and owing from the applicant under an insurance policy that had covered the respondent against certain insured

losses. In specific terms, the claim as endorsed in the writ was as follows:

(i) The sum of US$320,483.00 Kwacha equivalent being the sum due as indemnity for business interruption and/or loss of income under an Asset All Risk Policy Number P/01/9001/902/10/63 which incepted on the period 15th October, 2010 to 14th October, 2011 in respect of its business premises located at Sand No. 6980 Katanga Road, Heavy Industrial Area, Lusaka, which was destroyed by a fire on the 12th September, 2011 or alternatively, damages.

(ii) Interest on the sum of US$320,483.00 Kwacha equivalent or alternatively on such other sum as the court shall find due and at such rate and for such period as the court shall think just.

(iii) Costs of and incidental hereto.

This claim was reproduced in a paraphrased form in paragraphs 9 and 11 of the statement of claim which was filed together with the writ of summons.

The reaction of the applicant to this claim was set out in its defence and counter claim filed on 25th September, 2013 as follows:

9. The defendant denies liability to the Plaintiff as is alleged in paragraph 9 of the statement of claim. The defendant repeats paragraph 8 above and avers that the property was not insured

and neither did the plaintiff have an insurable interest in the same.

10. The defendant denies any liability to the plaintiff whatsoever as alleged in paragraph 10 of the statement of claim and maintains that the property was not insured and the plaintiff had no insurable interest in the subject property at the material time.

11. The defendant denies paragraph 11 of the statement of claim as well as all the plaintiff's claims itemised as (i)-(iii) herein.

The applicant not only denied the claim as pleaded by the respondent on the basis of lack of insurable interest, but also put up a counterclaim against the respondent. The applicant claimed that in proposing insurance, the respondent had wrongly represented that it was the legal owner of the property or that the same was owned by its subsidiary or associated or affiliated companies. It also averred that following the loss of the insured property through a fire, the applicant paid the respondent the sum of US$503,781.00 for property damage. Of significance to the present motion are the following paragraphs of the counterclaim:

8. However, before attending to the claim relating to business interruption the defendant decided to engage Independent Adjusters Limited who are chartered loss adjusters and

surveyors to adjust the loss of the US$320,483.00 which the plaintiff was claiming for loss of rental income.

9. **On 12th October, 2012, the said Independent Adjusters Limited rendered their report to the defendant which revealed that the subject property was actually not owned by the plaintiff or any of its group companies trading in the Republic of Zambia but by Gulam Ahmed Adam Patel and Ayub Adam Patel who were not the defendant's insured.**

10. **The plaintiff had either misrepresented the facts or deliberately decided not to make full disclosures when both the claims for property damage and business interruption were made.**

11. **As a result of the misrepresentation and or failure to make a truthful and honest disclosure, the defendant ended up wrongly paying the said sum of US$503,781.00 for property damage to the plaintiff who had no insurable interest in the subject property.**

AND THE DEFEANDANT COUNTER CLAIMS:

(i) **Repayment by the plaintiff of the sum of Kwacha equivalent of US$503,781.00 wrongly paid by the defendant to the plaintiff as a result of false representation or deceipt.**

(ii) **Interest on the said sum.**

(iii) **Any other relief the court may deem justified the circumstances**

(iv) **Costs.**

With the issues mapped out in the pleadings as we have highlighted them, the matter was tried in the High Court. The learned High Court judge, after hearing the evidence of the parties' witnesses and examining the documents tendered in court, held, with regard to the respondents claim for US$320,483.00, that whether or not the respondent was entitled to this specified sum was dependent on whether the respondent had insurable interest. She decided that as the respondent had no insurable interest in the insured property, it had no legitimate claim to the US$320,483.00. She also held, for the same reason, that the respondent ought to refund the sum of US$503,781.00 which it had recovered under the policy.

On appeal by the respondent to this court against the High Court judgment, we reversed the judgment of the lower court, holding that the respondent had insurable interest and, therefore, that the claim it had against the applicant was legitimate and ought to be settled by the applicant in accordance with the terms of the insurance policy. We further held that the payment already effected of US$503,781.00 was regularly made and ought not to be refunded to the applicant.

The applicant has now returned to this court on a motion that we made a clerical error or mistake when we ordered the applicant to settle the respondent's claim of US$320,483.00 because the Independent Adjuster had in fact adjusted the loss for business interruptions from US$320,483.00 to US$181,160.00 before he advised that the applicant's claim should not be honoured in its entirety as the respondent had no insurable interest at the time of seeking insurance cover. The applicant has particularly taken issue with the statement in our judgement which reads as follows:

> **The appellant is entitled to have their claim on the All Risk Insurance Policy No. P/10/9001/901/10/63 honoured by the respondent in full in accordance with its terms. We note in passing that while the claim in respect of material damage to the insured property was adjusted on recommendation of the Loss Adjuster from US$798,776.00 to US$503,781.00 which was in fact paid, no similar adjustment was advised by the loss Adjuster in regard to the sum of US$320,483.00 in respect of business interruptions, nor had that sum been contested in any way by the insurer as not being the sum insured.**

The point the applicant makes is that contrary to the above quoted statement we made in our judgment, the respondent's claim in respect of business interruptions was adjusted by the Loss Adjuster from US$320,483.00 to US$181,160.00. We were referred to the Loss Adjuster's report in the record of appeal [at pages 160 to 181].

It is this seemingly misstatement that the appellant alleges is an error that is correctable though the slip rule as set out in rule 78 of the Supreme Court Rules.

At the hearing of the appeal, Mr. Kamfwa, learned counsel for the applicant, placed reliance on the affidavit in support of the motion as well as the heads of argument whose substance we have captured in the preceding narrative.

In his oral arguments, Mr. Kamfwa referred us to exhibit "PN2" of the affidavit in support of the motion. That was the Independent Adjuster's Report dated 12th October, 2012 which provided, to the extent relevant, as follows:

DESCRIPTION	S.I. US$	CLAIM US $	ADJUSTMENT US $	COMMENT
Business Interruption on Gross rentals	1,200,000	320,483	181,160	(Subject to admission of liability)

This report, according to Mr. Kamfwa, was submitted in evidence in the court below.

The learned counsel also referred us to the witnesses' statement of Paul Zion Bwalya tendered in the court below at trial, submitting

that this witness acknowledged the fact of adjustment in a paragraph which read as follows:

> **16. having been satisfied with the information provided, the Loss Adjuster recommended on October 201`2, that an amount of US $181,160.00 be paid towards Nyimba Investments Limited's claim subject to admission of liability. NICO Insurance Zambia Limited has however denied liability and has since refused to pay the claim.**

Mr. Kamfwa submitted that although the thrust of the applicant's defence to the respondent's claim was that the respondent had no insurable interest, that position changed when the court held that the respondent did, after all, have insurable interest. The relationship of the parties should then have been guided by the recommendation of the Loss Adjuster's Report and the respondent's claim should have been moderated downwards accordingly. We were urged to uphold the motion.

The respondent opposes the motion. State Counsel Mutemwa indicated that he was relying on the affidavit in opposition and the heads of argument filed on behalf of the respondent. In the heads of argument, it is contended that in determining the motion, we should have regard to two issues namely:

(i) whether it is competent for a party to raise an issue before this court which was not raised in the court below.

(ii) whether the Supreme Court has jurisdiction to review its judgments or to set aside and re-open an appeal.

In answering these two issues, the learned counsel for the respondent contended, on the authority of **Mususu Kalenga Building Limited v. Richman's Money Lenders Enterprises**[1], that it is not competent for the Supreme Court to deal with an issue on appeal that was not raised in the lower court. The learned counsel also cited the case of **Norton v. Lostrom**[2] to buttress the same point. It was counsel's submission that the sum of US$320,483.00 in respect of business interruptions and/or loss of income had not been contested in any way by the applicant in the court below, and even before us when the appeal was heard. The learned counsel also contended that the Loss Adjusters' final report, a portion of which is exhibited to the affidavit in support of the notice of motion, shows that the adjustment sum of US$181,160.00 was "subject to admission of liability," and no such admission was present in this case.

Counsel for the respondent then moved to the argument that this court has no jurisdiction to review its judgments or to set aside and re-open an appeal. They cited the cases of **Liuwa v. Attorney General**[3] and **Liuwa v. Judicial Complaints Authority and Another**[4] in support of that submission. More purposely, counsel cited the case of **Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited**[5] in which we stated that the slip rule was meant to enable the court to correct clerical mistakes or errors in a judgment arising from accidental slips or omissions and that in this case, the applicant was effectively seeking a review and setting aside of a previous judgment.

In augmenting the heads of argument, State Counsel Mutemwa submitted that the question determinative of the present motion is whether the Loss Adjuster's Report and the recommendation therein was relevant. He referred to the Loss Adjuster's Report and pointed out that the recommendation to adjust the sum claimed was expressed "subject to admission of liability"; that in other words the recommendation was conditional. He contended further that it was improper for the applicant to seek to rely on a recommendation which

they did not accept in the first place. According to counsel, the issue of the recommendation of the Loss Adjuster as to the quantum was never canvassed in the lower court and the matter was decided on a purely different premise. Even if the lower court was deflected in its consideration of the issue of the quantum the applicant should have filed a cross-appeal. Furthermore, the fact that this court did not address itself fully to the Loss Adjuster's report and recommendation did not prejudice the applicant as the issue was never raised in the court below.

State Counsel Mutemwa also argued that there was no clerical error or omission in the judgment of this court. More importantly, he submitted that even if it was positively acknowledged in this court's judgment that the Loss Adjuster had recommended an adjustment of the claim to US$181,160.00 that would not have affected the basis of the judgment.

Mr. Chipanzhya, co-counsel for the respondent reiterated that the issue of the Loss Adjuster's Report was neither pleaded nor raised in the court below. The applicant's argument, according to Mr. Chipanzhya, is therefore outside the ambit of rule 78 of the Supreme

Court Rules as there are no errors to be corrected in this court's judgment. He submitted that the issue in the court below was not about the quantum of liability; rather it was whether or not insurable interest existed.

We were urged to dismiss the motion.

We have carefully considered the applicant's grievance in this motion. This motion raises, yet again, the important problem regarding the meaning of what is generally referred to as the 'slip rule' and the extent of its applicability. It also highlights the importance of elegance in pleadings, particularly in settling a defence.

The motion was taken out in terms of rule 78 of the Supreme Court Rules, chapter 25 of the laws of Zambia. That rule provides as follows:

> **Clerical errors by the court or a judge thereof in documents or process, or any judgment, or errors therein arising from any accidental slip or omission, may at any time be corrected by the court of judge thereof.**

Rule 78 of the Supreme Court Act under which the present motion is brought is similar to Order 20 Rule 11 of the Rules of the Supreme Court (1999) (edition) which provides that:

> **Clerical mistakes in 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.**

Apart from the provisions of rule 78 of the Supreme Court rules, the court does possess the power, subject to appropriate safe guards, where the justice of the case so required, to correct or amend the terms of its own orders or judgments to effect such variations therein in such a way as to carry out the meaning which the court intended to convey where, for instance, the language used in the phrasing of a judgment or order is ambiguous or does not express the order actually made by the judgment, or is otherwise open to misapprehension. Such judgment may be corrected (per **Lindley LJ in Re Swire, Mellor v. Swire**[6]).

An error in a judgment may therefore, be corrected so far as it is necessary for the proper expression of the court's intention or what we referred to in **Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited**[5] as the court's "manifest intention." Order

20 Rule 11 of the Rules of the Supreme Court (White Book 1999 edition) 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." We affirmed the inherent power of the court in this regard in **Chibote Limited and Others v. Meridien BIAO Bank (Zambia) Limited**[7].

In **Attorney-General, Development Bank of Zambia v. Gershom Moses Button Mumba**[8] we restated the position that the slip rule is meant for the court to correct clerical errors or mistakes in a judgment arising accidentally. The rule is not intended to be used as an avenue for a dissatisfied party to have the matter and the judgment reviewed. We stressed this position in **BP Zambia Limited v. Lishomwa and Others**[9]. In that case 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 and favourable to them. They simply want to have another bite at the cherry. This court rejected such an application in the Chibote Limited, Mazembe Tractor Company Limited case where we 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 are of the view that allowing this application would certainly be setting a dangerous precedent. We have said time and again that there must be finality in litigation. We find that this is not a proper case for us to invoke the provisions of Rule 78 as the case was heard in its finality...

In **Godfrey Miyanda v. Attorney General**[10] we observed as follows:

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.

Lord Halsbury LC in **Preston Banking Company v. William Allsup & Sons**[11] with respect to the general principle in the application of the 'slip rule' observed as follows:

> **If by mistake or otherwise an order be drawn up which does not express the intention of the court, the court must always have jurisdiction to correct it. But this is an application to the Vice Chancellor in effect to re-hear an order which he intended to make but which it is said he ought not have made. Even when an order has been obtained by fraud it has been held that the court has no jurisdiction to rehear it. It such jurisdiction existed it would be most mischievous.**

In the present case, what the applicant considers an error was a statement that the appellant's claim for US$320,483.00 had not been recommended for adjustment by the Loss Adjusters. We admit that we did make that statement in our judgment. We also agree that there was on record a report of the Loss Adjuster recommending adjustment of the claim. The crucial question, however, is whether that statement formed the basis of our judgment. The applicant's learned counsel believes it did. Counsel for the respondent are of the contrary position. We think that in order to determine whether or not our misstatement is amenable to correction through the slip rule it is imperative to situate the statement in issue in the overall context of our judgment and the issues the judgment sought to address.

The statement complained of was made, as is expressly stated in the judgment, "in passing" after the court gave, in very unambiguous terms, its decision on the issues falling for determination. It is undoubtedly settled law that an appeal is normally against a ratio and not against an obiter except in cases where the obiter is so closely linked with the ratio as to be deemed to have radically influenced the ration. But even then, the appeal is against the ratio.

The issue that fell to be determined in the trial court as mapped out by the pleadings of the parties, and to which we have already made reference, was whether or not the respondent had insurable interest. The respondent had sought the court's ruling on their entitlement to the sum of US$320,483.00. The applicant denied liability to pay the US$320,483.00 not because the applicant was not entitled to that particular amount under the contract, but because it believed the applicant was not entitled to anything at all on account of lack of insurable interest. The alternative defence which the applicant could have put up was that the respondent was entitled

only to the adjusted sum of US$181,160.00. This the applicant did not do.

By confining its defence to absence of insurable interest only the applicant robbed itself of the opportunity to put up an alternative relief or defence and also denied the trial court the chance to pronounce itself on the admitted quantum in the alternative. By taking the approach it did, the applicant did in our view, create a problem for itself from the onset. The subject matter of the respondent's alternative defence was neither pleaded nor proven by evidence to justify the trial court's award of the lesser sum recommended by the Loss Adjuster. We agree with State Counsel Mutemwa that the mere fact that a conditional recommendation by the Loss Adjuster had been made could not without more trigger the recommendation when the main defence chosen by the applicant failed.

Even assuming that by merely producing the Loss Adjuster's report in the documents filed in the lower court the issue of the adjustment of the claimed sum was properly canvassed, the applicant still had challenges staring in its face. As already observed

the trial court did not pronounce itself on the alternative defence of the applicant. The complaint on such omission could not even have been raked up in the appeal arising from the lower court's judgment. The point we make is that any issue arising for determination in an appeal must be traced and linked to the judgment of the trial court. In this case the issue of the loss adjustment should have been traced back to the respondent's defence in the lower court and the pronouncement of the lower court judge on it.

The basis of this court's judgment was that the respondent had insurable interest and therefore, that the claim it had made in the lower court, that is to say for US$320,483.00, could not be defeated by that technical defence of insurable interest put forth by the applicant. The specific sum of US$320,483.00 ought to have been specifically denied by the applicant in its pleadings in the alternative. The situation would have been different had the claim for that figure been denied simply on the basis of absence of insurable interest or denied in the alternative on the basis of the recommendation of the Loss Adjuster.

What emerges is that the applicant had a clear opportunity in the lower court to deny liability to settle the claim in its entirety on the basis of absence of insurable interest. Secondly, and more importantly for the present motion, to state in the alternative that in the event that the court held that the respondent had insurable interest and was entitled to anything at all under that head of the claim, it would be the lesser figure of US$181,160.00 as per adjustment by the Loss Adjusters. This the applicant never did in the court below. The result was that the lower court never considered any alternative plea and premised its judgment strictly on the footing that the respondent's claim under the relevant head was US$320,483.00 and that on the facts and the law as the court understood it, the respondent was not entitled to it. We agree with Mr. Chipanzhya's submission that the issue of adjustment was never raised in the court below and could not be an issue in the appeal even if it was erroneously referred to.

The respondent made no attempt whatsoever, not even a feeble one, to refer to the Loss Adjuster's report in the record of appeal.

Every appeal is determined on the basis of questions raised in the grounds of appeal and the heads of argument. It is not surprising to us that no mention was made of the adjusted figure of US$181,160.00 by either the appellant or the respondent. We say we are not surprised because the issue was never raised in the lower court. The result is that this court gave its judgment and made the order that it did in that judgment. There was no error or omission in the court's expression of its intention which is now amenable to correction under the slip rule.

From the wording of the motion and the grounds for bringing it, it is manifestly clear that the validity of the judgment of this court is being challenged. The purpose of the applicant's application before us is clear. It is an appeal or request for a review cloaked in the guise of a motion under the slip rule. This court has consistently refused to be dragged into this pitfall. The position is that once the Supreme Court has entered judgment in a case, that decision is final and will remain so forever unless the conditions for its reopening it as we set them out in **Finsbury Investments Limited v. Antonio Ventrigria**[12] are satisfied. Our judgments are final not because we are infallible but

in order to avoid the spectre of repeated efforts at re-litigation. In this case, no grounds exists, for reopening the judgment nor has the argument of counsel been moulded in that direction. Equally the alleged misstatement does not affect the ratiocination and the outcome of the appeal.

The motion is destitute of merit. We decline it. We award costs to the respondent.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

A. M. Wood
SUPREME COURT JUDGE

Dr. M. Malila SC
SUPREME COURT JUDGE