IN THE SUPREME COURT OF ZAMBIA **SCZ/8/018/2015**
HOLDEN AT LUSAKA **APPEAL NO. 035/2015**
(CIVIL JURISDICTION)

BETWEEN:

FEARNOUGHT SYSTEMS LTD **APPELLANT**

AND

FEARNOUGHT SYSTEMS (Z) LTD **1ST RESPONDENT**
ROBINSON KALEB ZULU **2nd RESPONDENT**

CORAM : Hamaundu, Malila, and Kaoma, JJS
On 12th August, 2015 and 23rd August, 2017

For the appellant	:	Mr B. Gondwe, Messrs Buta Gondwe & Associates
For the 1st respondent:		Messrs Frank Tembo & Partners
For the 2nd respondent:		Mr E.C. Mwansa, Messrs Mwansa Phiri & Partners

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JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Robert Lawrence Roy v Chitakata Ranching Company Limited [1980] ZR 198**
2. **Walusiku Lisulo v Patricia Anne Lisulo [1998] ZR 75**
3. **Jamas Milling v Imex Internatinal (PTY) Limited [2003] ZR 29.**
4. **Lewanika and Ors v Chiluba [1998] ZR 79**
5. **Thynne v Thynne [1955] 3 All E.R 129**

Legislation referred to:
High Court Rules, Chapter 27 of the Laws of Zambia

The appellant appeals against a judgment of the High Court which was granted upon a review of an earlier judgment. The appeal raises questions as regards; first, the correct procedure on review of a judgment under **Order 39** of the **High Court Rules, Chapter 27 of the Laws of Zambia**. Secondly, the extent to which a court should go in reviewing the judgment.

The facts of this case are undisputed, and are these:

The appellant and the 1st respondent companies appear to be related in terms of shareholding. In 2005, the appellant lent a sum of US$169,500 to the 1st respondent to enable the latter to purchase stand 9628 Lusaka. The loan was secured by a mortgage created by the 1st respondent over stand 9628 in favour of the appellant. On 12th August, 2008, the 1st respondent sold stand No. 9628 Lusaka to Robinson Kaleb Zulu, the 2nd respondent. Robinson Zulu placed a caveat on the property in the Lands Register. Having become aware of the sale through the caveat, the appellant commenced this action. In the action, the appellant requested the

two respondents to settle the money secured by the mortgage, failing which it should be granted an order to enforce the mortgage by way of sale of stand No. 9628.

The 1st respondent admitted owing a sum of US$100,000 but disputed the sum of US$69,500, arguing that it was the understanding between the appellant and the 1st respondent that the sum would be used to renovate the property.

The 2nd respondents' defence was that he placed the caveat in order to protect his interests in the property since he had bought it in good faith from the 1st respondent. He contended that the appellant was aware and acquiesced in the sale of the property.

The matter went for hearing in respect of the disputed sum of K69,500. The court below presided over by Mutuna J rejected the reason given by the 1st respondent for disputing the sum of US$69,500, stating that it did not constitute a justificable defence. As for the 2nd respondent, Mutuna J held that had he conducted due diligence on the property before he bought it, the 2nd respondent would have seen that the property had an encumbrance in the form of a mortgage. For that reason, Mutuna J rejected the 2nd respondent's contention that he bought the property genuinely

and in good faith. Therefore, Mutuna J entered judgment for the appellant against the 1st respondent in the sum of US$69,500. The sum was to be paid within 60 days, failing which the appellant was at liberty to take possession of the property and sell it.

More than a year later, the 2nd respondent became desirous of reviewing the judgment under **Order 39** of the **High Court Rules**. Seeing that he was way outside the fourteen days permitted by **Order 39 Rule 2** within which to make an application for review, the 2nd respondent applied before Mutuna J for special leave, as required, to file an application for review. In that application the 2nd respondent contended that both the appellant and the 1st respondent were aware about the circumstances under which he bought the property; namely, that the purchase price was intended to resolve the mortgage dispute that had arisen between them. He contended that he should not be victimized on account of the failure by the appellant and the 1st respondent to have shared the purchase price which was intended to resolve the mortgage dispute that had arisen between them. The 2nd respondent exhibited the contract of sale between him and the 1st respondent, showing that he had paid a purchase price of K980,000,000 (unrebased). The 2nd

respondent also exhibited a letter written by the appellant's advocates, sometime in March, 2009, to the 2nd respondent's advocates stating that the appellant (that is, their client) had informed them that the 2nd respondent was intending to remit the appellant's full interest in the sum of US$169,500 directly to the appellant. The appellant's advocates, in that letter, were enquiring as to when the money was likely to be remitted. According to the 2nd respondent, those two documents supported his contention that the appellant was aware about the circumstances under which the 2nd respondent had bought the property. The 2nd respondent did not exhibit the two documents when the matter was first heard. However, the second of the two documents, the letter, was exhibited by the appellant in its originating summons. Mutuna J, granted the 2nd respondent leave to file the application for review.

In the application for review, proper, the 2nd respondent explained that his previous advocates had lost his copy of the contract which he had given to them; and that the copy which he had exhibited after the judgment had been retrieved by him from the estate agents that had acted in the sale. He did not explain why he had not exhibited the letter, although we think that doing so

would have amounted to duplication since the appellant had already exhibited it.

The appellant opposed the application, arguing that it did not reveal any new evidence which the 2nd respondent did not have at the time of the judgment which was sought to be reviewed.

The court below, this time presided over by Nyambe, J, heard the matter *de novo* on affidavit evidence only. She examined the affidavits that had been before Mutuna, J and also the further affidavits that the parties had filed in the application for review and came to the conclusion that, since a shareholder in the appellant company was also a shareholder in the 1st respondent company, then the appellant had full knowledge of and acquiesced in the sale of the property to the 2nd respondent. She held, therefore, that the 2nd respondent had obtained good title to the property and was entitled to quiet enjoyment thereof.

As for the appellant's claim for the sum of US$69,500, the learned judge held that the issue was an internal affair between the two sister companies. On those grounds, the learned judge dismissed the appellant's action, in its entirety.

The appellant has advanced four grounds of appeal as follows:

(i) **The court below erred in construing the order for leave to file an application for review out of time as an order for review.**

(ii) **The matter in the court below was not appropriate for review both substantively and procedurally and the court was bereft of jurisdiction to have proceeded in the manner it did.**

(iii) **The court below erred in finding that the failure to settle the mortgage loan secured was an internal matter and, that, consequently, the 2nd respondent was an innocent purchaser and he should be allowed quiet possession of the property.**

(iv) **The court below erred in law and in fact in piercing the corporate veil to justify its judgment.**

In view of the position we have taken we shall deal with this appeal on the basis of the first two grounds of appeal only.

In his oral arguments before us Mr Gondwe, learned counsel for the appellant, attacked the learned judge's finding that Mutuna,J had already granted leave for review. Counsel argued that, in fact, the last order that was on record made by Mutuna, J was the one granting leave to the 2nd respondent to file an application for review out of time. We were referred to a number of authorities, particularly the following which we think are of particular importance to this appeal: **Robert Lawrence Roy v Chitakata Ranching Company Limited**[1], **Walusiku Lisulo v**

Patricia Anne Lisulo[2] and **Jamas Milling v Imex Internatinal (PTY) Limited**[3].

We shall set out the decisions in some of these cases in the course of our judgment. On the strength of these authorities, counsel for the appellant submitted that this was not a proper matter for review because no new evidence was produced by the 2nd respondent which he did not have during the first hearing. Instead, counsel argued, the 2nd respondent introduced new legal arguments. According to counsel, the 2nd respondent was having a second bite at the cherry.

We received arguments on behalf of the 2nd respondent as well. The main point of contention by Mr Mwansa, learned counsel for the 2nd respondent, was that the appellant is trying to indirectly appeal against Mutuna, J's ruling which granted the 2nd respondent leave to review out of time. According to the counsel, once leave was granted, it remained for the 2nd respondent to either formally file summons for review or to pray to the court to review the matter based on the documentation already before the court. According to counsel, therefore, the court below had jurisdiction to hear the application for review.

We have heard the respective arguments by the parties on the two grounds of appeal.

Order XXXiX of the **High Court Rules** upon which this appeal is, and the application in the court below was, based provides:

> **"1. Any judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.**
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> **Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.**
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> **2. 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"**

There are principles that give guidance as regards how this order should be applied in practice. In terms of procedure,

In **Lewanika and Ors v Chiluba**[4] we held:

> **"Review under Order 39 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. Review enables the court to put matters right. The provision for review does not exist to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable."**

This means that, first, the application for review is heard. At that stage, the applicant must show to the satisfaction of the judge the grounds that warrant the review of the decision. If those grounds are shown then the order for review is granted. The next stage is now for the judge to re-open the matter and review the judgment.

As regards the substance of the application, High Court Commissioner Dare in **Roy v Chitakata Ranching Company Limited**[1], held:

> **"Setting aside a judgment on fresh evidence will lie on the ground of the discovery of material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but would not with reasonable diligence have been discovered before"**

In **Walusiku Lisulo v Patricia Anne Lisulo**[2] we applied the above principle and denied the appellant a review under **Order 39** of the **High Court Rules** on the ground that the financial statements which he sought to introduce were not *"new evidence"* since they had been available throughout the hearing and could have, with proper diligence, been adduced in the High Court.

Clearly the application for review is a very crucial stage because it is at that time that the following should be established or shown:

(i) that fresh evidence has been discovered which would have had material effect on the judgment or decision;

(ii) that the evidence has been discovered since the judgment or decision;

(iii) that such evidence could not, with due diligence, have been discovered before; and

(iv) that such evidence does not comprise events that have occurred for the first time after delivery of judgment.

When it comes to the actual review, care must be taken to ensure that the same is premised on determining what material effect, if any, the fresh evidence may have had on the judgment or decision; otherwise the whole exercise will amount to merely providing a dissatisfied litigant an opportunity to have a second bite

and argue for alteration of the judgment in order to bring about a result that he considers more acceptable.

Coming to the application that was before the court below; first, did it meet the threshold required for a judgment or decision to be reviewed? The reason that the 2nd respondent gave for seeking to review the judgment was that at the first hearing he had omitted to exhibit the contract of sale between him and the 1st respondent and also the letter from the appellant's advocates which we have referred to above. As we have said, the letter from the appellant's advocates was exhibited by the appellant. Therefore, it could not be said to be fresh evidence. As regards the contract of sale, all the parties were aware of its existence right from the commencement of the action; in fact, it was the reason why the action was commenced. In the circumstances it cannot be said that the contract of sale was a piece of evidence that was only discovered after the judgment. Therefore, the application did not meet the threshold; and Nyambe, J, should not have proceeded to review the judgment.

However, having proceeded to review the judgment, Nyambe J's primary concern should have been to ascertain in what material

respect the evidence introduced would have had on the judgment being reviewed. In this case, the contract of sale which the 2nd respondent exhibited before Nyambe, J, merely established the fact that the 2nd respondent bought the property from the 1st respondent. As we have said, this was a fact which was not in dispute when the matter was before Mutuna, J, even though the document containing the contract was not exhibited. Therefore, Mutuna, J, arrived at his judgment with the full knowledge of the existence of the contract by which the 2nd respondent bought the house from the 1st respondent. The subsequent production by the 2nd respondent of the contract did not help him at all because, even if the same had been produced before Mutuna, J, it would not have affected his decision. Clearly, even on that ground, Nyambe, J should have confirmed Mutuna J's judgment.

All in all, we think that this was an attempt by the 2nd respondent to have a second bite; and this can be evidenced by his further affidavits when he sought review of the judgment. In those affidavits he kept on re-casting his case. We, therefore, find merit in this appeal. We allow it. We set aside the judgment of Nyambe, J. Instead, we re-instate and confirm Mutuna J's judgment. The 2nd

respondent is condemned in costs for this appeal as well as for those of the proceedings before Nyambe, J, in the court below.

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E. M. Hamaundu
SUPREME COURT JUDGE

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Dr. M. Malila SC
SUPREME COURT JUDGE

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R. M.C. Kaoma
SUPREME COURT JUDGE