

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

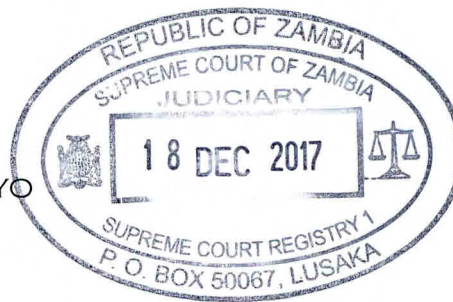
APPEAL No. 57/2007

BETWEEN:

MARLON PETER ELIFALA MOYO

AND

ATTORNEY - GENERAL



APPELLANT

RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Wood, Malila J.J.S.

On the 20th of July, 2017 and 30th November, 2017

For the Appellant:

In person

For the Respondent:

*Fredrick Imasiku, Principal State Advocate with Major
Chidakwa, State Advocate*

R U L I N G

MWANAMWAMBWA, DCJ, Delivered the Ruling of the Court.

Cases referred to:

1. **Juldan Motors v. Chimsoro Farms Limited (2009) ZR 148.**
2. **Trinity Engineering Limited v. Zambia National Commercial Bank (1996) ZR 166**
3. **Attorney-General, DBZ v. Gershom Mumba (2006) ZR 77.**
4. **BP Zambia v. Lishomwa (Appeal No. 72/2007) (unreported).**
5. **Godfrey Miyanda v. Attorney-General (1985) ZR 243.**
6. **Nkata and 4 others v. Attorney-General (1966) ZR 124**

7. Attorney-General v. Marcus Kampamba Achiume (1983) ZR 1
8. Mususu Kalenga Building and Another v. Richman Money Lenders (1999) ZR 78
9. DBZ and Mary Ncube (Receiver) v. Christopher Mwanza and 63 others SCZ/8/103/08 (unreported)
10. Bank of Zambia v. Jonas Tembo and others (2002) ZR 103
11. Thynne v. Thynne (1955) 3 ALL ER 129 at page 145.
12. 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:

1. The Zambia National Service Act, Chapter 121 of the Laws of Zambia.
2. The Zambia National Service, Statutory Instrument No. 2 of 1973.
3. The Supreme Court Act Rules, Chapter 25 of the Laws of Zambia, Rules 48 and 78

When we heard this appeal, we dismissed it. We stated that we would give our reasons later. We now give those reasons.

The Appellant brought a Notice of Motion before this Court, pursuant to Rule 78 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, for:-

“an order that clerical errors arising from any accidental slip or omission may be corrected on the grounds sufficiently stated in the affidavit in support herein, especially as to the jurisdiction and powers of the Board of officers (if any) and the power to appoint and retire Zambia National Service Officers and the legality or otherwise of anonymous letters and that costs be to the Respondent.”

The brief facts of the matter are that the Appellant was employed in the Zambia National Service (ZNS) and rose to the rank of Colonel. The Commandant for ZNS received a lot of complaints about the work and conduct of the Appellant. A Board of Officers was then constituted to look into the Appellant's stay in the ZNS. The Commandant acted using powers vested in him by section **22 of the Zambia National Service Act, Chapter 121 of the Laws of Zambia** herein referred to as the “Act”. This section provides that:-

“22. (1) Subject to this Act and to the direction of the President and the Minister, the Commandant shall have the command, superintendence, direction and control of the Service.

(2) The Commandant may, subject to the general instructions of the Minister and to the provisions of this Act, from time to time make standing orders for the general government of Servicemen in relation to their training, arms, accoutrements, clothing, equipment, places of residence, classification and duties as well as their distribution and inspection and such other orders and instructions as he may deem expedient for preventing neglect and for promoting efficiency and discipline of Servicemen in the discharge of their duties.

(3) Save where a contrary intention appears, the Commandant may delegate to a Serviceman not below the rank of Assistant Commandant the duties, powers and functions vested in him by this Act or any other written law.

(4) The President may, in the event of the Commandant being for any reason absent, appoint another person to act as Commandant during the period of the

Commandant's absence and the person so acting shall perform the functions of the Commandant under this Act."

The Board inquired into the matter, and it recommended that the Appellant be retired in National Interest. The Appellant was, however, retired in public interest.

The Appellant sued the Attorney-General in the High Court. The learned trial Judge found that the retirement of the Appellant was lawful and dismissed the Appellant's claims.

He appealed to this Court. This Court delivered its Judgment on the 24th of May, 2010. In that Judgment, we held that-

"The Commandant is head of the Service and he has to administer it and run it orderly. In doing so, he has to do so according to instructions of the Minister or according to the Act. Where such administrative instructions are lacking, he has to provide directions. He is responsible for the day to day running of the Service. He is therefore empowered to issue administrative instructions or orders for the efficient running of the Service. To us, section 22(2) gives the Commandant wide and general administrative powers to give such administrative orders as are necessary to promote efficiency and maintain discipline.

The Board was constituted to assess the suitability of retaining the Appellant in the Service. It is borne out in evidence that the Appellant

was subject of about three interviews by the Commandant over the running of his station and his general conduct. These interviews had no effect on the Appellant. All these interviews were of administrative nature to promote efficiency in the Service. They were not of disciplinary nature. To be assessed, one need to commit any disciplinary offence so as to warrant proceedings under Part IX of the Act.... It is such assessment that can be inquired into by a Board constituted by the Commandant under section 22(2) of the Zambia National Service Act. We entirely agree with the submissions by the State that the wide powers given to the Commandant by section 22(2) of the Act covered the Board in issue. We therefore dismiss this limb of ground one of appeal....

The second limb covers the anonymous letters. It was argued that since writing anonymous letters is a disciplinary offence under section 29(i) (g) (iv) of the Act, the Appellant's inquiry should have been under Part IX of the Act. This does not apply to the Appellant because he was not the author of the anonymous letters..."

The Appellant has now brought this motion asking for an order that we correct clerical errors in our Judgment. He filed an affidavit in support as well as heads of argument.

In his affidavit in support of the motion, the Appellant deposed that the use of section 22(2) of the Act, was not correct in this case. That the correct and relevant provisions of the law

are sections 28 up to 37 and 50 of the Act and regulations 19 and 27 up to 31 of the Zambia National Service Statutory Instrument No. 2 of 1973. He added that his retirement was on the wrong legislation. He exhibited a retirement letter to this effect. The Appellant went on to depose that the applicable section concerning appointment and retirement of an officer of his rank is section 6(1) the Act.

At the hearing of the Motion, the Appellant relied on his heads of argument. He stated that he had brought the motion late because he was still in discussion with the Respondent.

In his heads of argument, the Appellant submitted that this Court erred or slipped by holding that section 22(2) of the Act gives power to the Zambia National Service Commandant to convene a Board of Officers to assess the suitability or otherwise of retaining the Appellant in the employ of the Zambia National Service. That in stating this, this Court omitted to consider the following:

1. That the Act in sections 29(2) and 30 only provides for a Tribunal or a commanding officer to inquire into allegations such as those which were made against the Appellant

2. That section 22(2) of the Act is not absolute. That the Commandant, in relying on this power must do so subject to the general instructions of the Minister and the existing provisions of the Act.
3. That section 22(2) of the Act not only empowers the Zambia National Service Commandant to make standing orders for the general Government of Servicemen, but also if need be, gives power to other members of the Service, having command of any branch unit, sub unit camp or settlement of the service as provided for under section 50(3) of the Act.
4. That by stating that “these interviews had no effect on the Appellant,” this Court was wrongly implying that the Appellant failed or neglected to run his station and that his conduct was not to the required standard.
5. That by stating that “to be assessed”, this Court meant that one needs not commit any disciplinary offence so as to warrant proceedings under Part IX of the Act.
6. That by stating that the Board of Officers recommended that the Appellant be retired in national interest when his letter read that he should be retired in public interest.

7. That by omitting to note that the convening order for the Board of Officers did not provide grounds or reasons or a standard upon which the Board was to assess the Appellant's suitability or otherwise.
8. That by stating or confirming that the Appellant was properly retired by the Republican President under section 6(2) of the Act.

He urged us to effect the necessary corrections to what he termed "errors and accidental slips" in our Judgment.

Major Chidakwa argued the matter on behalf of the Respondent. He relied on the heads of argument filed and added that the Motion was an attempt to abuse Rule 78 of the Supreme Court Rules. He stated that the issues raised in the Motion go to the merits of the matter and did not show any clerical errors or mistakes.

His heads of argument were in three parts. Firstly, he submitted that although Rule 78 of the Supreme Court Rules Chapter 25 of the Laws of Zambia does not provide a time limit for the filing of a motion under that rule, a period of 7 years since the judgment in question was delivered is inordinate.

Secondly, he argued that the Notice of Motion did not conform with Rule 48(7) of the Supreme Court Rules, which requires that it should be in the format prescribed in Form B of the Third Schedule to the Rules of the Supreme Court. He argued that under Form B, the grounds of motion are supposed to be stated. That in this motion, the grounds of motion are not clear as the Appellant merely states the following-

"Grounds sufficiently stated in the affidavit in support herein, especially as to the jurisdiction and powers of the Board of Officers (if any) and the power to appoint and retire Zambia National Service Officers and the legality or otherwise of the anonymous letters and the costs to be to the Respondent."

Major Chidakwa went on to state that although the Appellant stated that the grounds are in the affidavit in support, the grounds are not clearly set out in the affidavit. That in any case, it is wrong to enumerate the grounds in the affidavit as the affidavit ordinarily contains the facts in support of the application. He argued that the failure to comply with the Supreme Court Rules is a ground for dismissal of this action as held in the case of **Juldan Motors v. Chimsoro Farms Limited**⁽¹⁾.

Lastly, his argument attacked the motion on its merits. He submitted that there was no error, omission or slip in the

Judgment before this court but that the Appellant was seeking to vary or review the judgment which he is dissatisfied with. He stated that this matter was not within the provisions of rule 78. He also cited the following cases to support his argument:

1. **Trinity Engineering Limited v. Zambia National Commercial Bank** ⁽²⁾.
2. **Attorney-General, DBZ v. Gershom Mumba** ⁽³⁾.
3. **BP Zambia v. Lishomwa** ⁽⁴⁾.
4. **Godfrey Miyanda v. Attorney-General** ⁽⁵⁾.

Major Chidakwa added that the issues raised by the Appellant herein were all raised and canvassed and given due consideration. That there were no errors or omissions arising from accidental slips in the Judgment complained of. He argued that the Respondent properly retired the Appellant from the Zambia National Service and was not entitled to any relief sought. He urged this court to take note of the holding in the case of **Nkata and 4 others v. Attorney-General** ⁽⁶⁾ and **Attorney-General v. Marcus Kampumba Achiume** ⁽⁷⁾. He argued that this is not an appropriate case in which to vary the finding of fact.

It was Major Chidakwa's submission that the Appellant's argument on whether he was retired in national interest or public interest was not raised in the court below. He cited **Mususu Kalenga Building and Another v. Richman Money Lenders** ⁽⁸⁾ to support his argument.

He added that this motion is an attempt to re-open litigation that was closed and offends the principle that there should be finality to litigation which this court has upheld several times. To aid his argument, he cited the following:

1. **DBZ and Mary Ncube (Receiver) v. Christopher Mwanza and 63 others** ⁽⁹⁾
2. **Bank of Zambia v. Jonas Tembo and others** ⁽¹⁰⁾

In reply to the Respondent's arguments, the Appellant submitted that there is no time limit within which a person should bring an application under Rule 78. He stated that in the case of **BP v. Mwale**, whose citation he did not give, the court entertained an application under Rule 78 after 12 years.

We have looked at the evidence on record and considered the submissions filed by both parties.

We shall start with addressing the argument that the period the Appellant took to bring this motion is inordinate. We note that Judgment in this matter was delivered in 2010. The Appellant only took out this Motion in 2016. It took him six years to bring the Motion. Counsel for the Respondent, Major Chidakwa argued that the period of six years was inordinate. We agree that the period of six years, which lapsed before the Appellant could bring this motion, is too long. However, we note that Rule 78 of the Supreme Court Rules does not provide any time limit within which a party can make an application under the said rule. We, therefore, agree with the Appellant's argument on this ground that there is no time limit under Rule 78. We accordingly dismiss the Respondent's argument on this issue.

The second issue that was raised by the Respondent when responding to the Appellant's arguments in the main motion was that the Notice of Motion did not conform to Rule 48 of the Supreme Court Rules. That that Rule requires that the format of the Notice of Motion should be as prescribed in Form B of the Third Schedule to the Supreme Court Rules. The Notice of Motion states that-

“... on grounds that are sufficiently stated in the affidavit in support herein, especially as to the jurisdiction and powers of the Board of Officers (if any) and the power to appoint and retire Zambia National Service Officers and the legality or otherwise of anonymous letters and that costs be to the Respondent.”

In our view and without going into the merits of the ground, the Notice of Motion does not state the grounds of motion. It suggests that the grounds are sufficiently stated in the affidavit when Rule 48 requires that the grounds should be set out in the Notice of Motion. The Notice of Motion does not conform with Rule 48 and with format prescribed in Form B of the Third Schedule. Therefore, the motion is irregularly before us. That notwithstanding, we shall proceed to deal with the motion on its merits.

Rule 78 which grants this Court jurisdiction to correct clerical errors in a judgment provides as follows:

“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.”

From the above provision, it is clear that the jurisdiction of this Court is limited to correcting clerical errors arising from accidental slips. This power to correct clerical errors arising from any accidental slip or omission was discussed in the case of

Thynne v. Thynne ⁽¹¹⁾. 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 the correction of any clerical error arising from an accidental slip or omission. The arguments go to great lengths to discuss points where the Appellant feels that this Court erred in arriving at its decision. The Appellant is inviting us to, among other things, correct what he terms as “clerical errors” especially as to the jurisdiction and powers of the Board of Officers and the power to appoint and retire Zambia National Service Officers and the legality or otherwise of anonymous letters.

Our consideration of his motion and heads of argument suggest otherwise. He cites provisions in the law which he feels this court misconstrued. It is our view that what the Appellant

is inviting us to do will fundamentally alter the whole judgment. It is not within the spirit of Rule 78 that judgments of this court should be altered and the original decision changed. We are 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)** ⁽¹²⁾, 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.

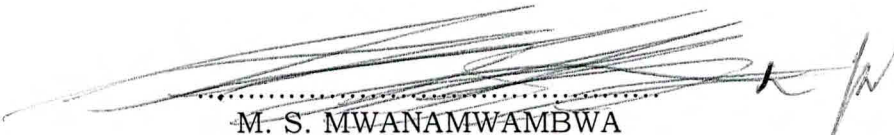
2. There was no error, omission or slip in the judgment. The applicant was simply dissatisfied with the judgment and sought the Supreme Court to vary the judgment so as to bring about a result more acceptable.”

The Appellant’s case was determined by this court upon due consideration of the record of appeal and the evidence that was before the lower court. We have not seen any clerical errors arising out of accidental slips or omissions in our judgment. 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. The issues complained of by the Appellant do not qualify

to be clerical errors but grounds of appeal in a case where there cannot be any appeal. Rule 78 does not extend to giving this Court power to look at the case from a different angle, consider different laws which the Appellant feels should have been looked at or indeed new evidence as the Appellant is trying to do.

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.

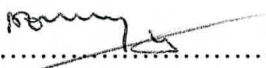
We award costs to the Respondent, to be taxed in default of agreement.



M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



A.M. WOOD
SUPREME COURT JUDGE



M. MALILA, SC
SUPREME COURT JUDGE