IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 04/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ATTORNEY GENERAL	**APPELLANT**
AND	
DONALD SIAKAKOLE	**1ST RESPONDENT**
MILDRED MUZYAMBA KABWENDA	**2ND RESPONDENT**
GRACE SIAKAKOLE	**3RD RESPONDENT**

CORAM: Malila CJ, Wood and Chinyama, JJS,
on the 10th August, 2021 and on the ...

For the Appellant:	*Ms. D. N. Mwewa, Principal State Advocate, Ms. J. Mazulanyika, Senior State Advocate, Ms. K. Mumba, Assistant Senior State Advocate and Mr N. Mwiya, Assistant Senior State Advocate all of Attorney General's Chambers*
For the 1st, 2nd and 3rd Respondents:	*Mr. J. Mataliro of Messrs James and Doris Legal Practitioners.*

J U D G M E N T

Chinyama, JS., delivered the judgment of the Court.

Cases referred to:

1. **Daniel Chizoka Mbandangoma v the Attorney General (1979) Z.R. 45**

2. **C and S Investment Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General (2004) Z.R. 216**
3. **Fearnought Systems Limited v Fearnought Systems (Z) Limited and Another, SCZ Appeal No. 35 of 2015**
4. **Robert Lawrence Roy v Chitakata Ranching Company Limited (1980) Z.R. 250 HC**
5. **Jamas Milling Company Limited v Imex International (Pty) Limited [2002] Z.R. 79**
6. **Lewanika and Others v Chiluba (1998) Z.R. 79**
7. **Zambia Telecommunication Company Limited v Aaron Mweenge Mulanda, SCZ Appeal No. 63 of 2009**
8. **Lisulo v Lisulo (1998) Z.R. 75**
9. **Kalusha Bwalya v Chardore Properties Limited and Another (2012) Vol 1 Z.R. 341**

Legislation referred to:

i. **Constitution of Zambia, Chapter 1 of the Laws of Zambia**
ii. **Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia**
iii. **Prohibition and Prevention of Money Laundering Act No. 14 of 2001**
iv. **High Court Rules, Chapter 27 of the Laws of Zambia**
v. **Supreme Court Act, Chapter 25 of the Laws of Zambia**

Works referred to:

a. **Halsbury's Laws of England Volume 22 Third edition London Butterworth and Company (1958)**

Introduction

1. This is an appeal against the ruling of the High Court at Kabwe (Zulu J.,) dated 6th November, 2020, dismissing the appellant's application for special leave to review its earlier judgment delivered on 1st March, 2019 and for stay of execution. Leave to appeal was granted by a single judge of this Court in the ruling dated 8th February, 2021.

Common Background

2. The respondents filed a joint petition against the appellant in the High Court seeking a declaration that their detention and subsequent arrest and seizure of properties by the Drug Enforcement Commission (DEC) was illegal and an infringement of their protected rights under Articles 11, 15, 16, 17 and 18 of the **Constitution of Zambia, Chapter 1** [(i)].

The respondents' case

3. The respondents, in an affidavit filed in support of the petition, deposed that the 1st respondent, an employee of Kalumbila Minerals Limited (KML) and businessman, was arrested and detained twice, on 21st February, 2017 and 24th February,

2017, by the DEC and released on each occasion without charge. The only condition was that the 1st respondent should report himself to the DEC offices, initially at Solwezi and then at Ndola respectively. The DEC seized the following properties: House No. 2714 in Pamodzi, Ndola, in which the 1st respondent lived with his mother (the 3rd respondent) and siblings; House No. 63135 in Mitengo, Ndola belonging to the 2nd respondent (a police officer and business partner); assorted household items; and 15 motor vehicles which were used in the 1st and 2nd respondent's transport business. The DEC further froze their business and personal bank accounts.

4. It was deposed that the 1st respondent was formally arrested on 1st March, 2017 and was for the first time informed that he was being charged for theft, obtaining money by false pretences and money laundering and that the properties and household goods were seized on suspicion of being proceeds of the alleged crimes. The respondents deposed that despite the arrest and charge, the 1st respondent had not been made to appear in court.

5. At trial, the respondents testified in their own behalf as PW1, PW2 and PW3 and relied on their joint affidavit. They also called PW4, Davies Palanywa, a taxi driver who testified that he had an agreement to lease the 1st respondent's motor vehicle until PW4 had paid the full purchase price.

The appellant's case

6. The appellant opposed the petition in an affidavit filed on 14th June 2017 and called three witnesses at trial. In a nutshell, the combined testimony of RW1 (Artwell Hachunde), RW2 (Mathias Kamanga) and RW3 (Lillian Chiyesu Mubialelwa), was that in February 2017, they were assigned to investigate allegations of fraud in the KML Goods in Transit unit where the 1st respondent was a supervisor. Their investigations revealed that 14 transactions were purportedly made for the supply of transport services and that payments made by KML to the suppliers were traced to the 1st and 2nd respondents. The trio admitted that the 1st respondent was arrested on 1st March, 2017 and that the search was conducted under the provisions of the **Narcotic Drugs and Psychotropic**

Substances Act, Chapter 96 [ii] and not the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001**[iii]. Further that the respondents had not appeared in court as investigations were still ongoing and that the seizure of properties was meant to facilitate impending criminal proceedings.

Consideration and decision of the case in the High Court

7. The learned trial judge narrowed down the issues to be determined as-

   a. **whether the detentions and arrests of the 1st petitioner (1st respondent) by the DEC officers were illegal and an infringement of the 1st petitioner's protected rights under Articles 13 and 18 of the Zambia Constitution;**

   b. **whether the searches conducted by the DEC were illegal and an infringement of the petitioners' (respondents') rights under Article 17 of the Constitution; and**

   c. **whether the seizure of the petitioners' (respondents') property was illegal and infringement of the petitioners' rights protected under Articles 11 and 16 of the Constitution**.

8. In dealing with the first question, the learned judge found that

although the DEC was lawfully entitled to carry out the arrest and detention based on reasonable suspicion that the 1st respondent had committed offences, the Commission arrested and detained the 1st respondent twice, searched his properties and that of the other respondents and seized properties, without bringing them to answer charges before a court of competent jurisdiction. The Court below further noted that the respondents were only formally warned and cautioned on charges of obtaining money by false pretences after they took out process by way of the petition.

9. The learned judge accordingly took the view that the 1st respondent's detention without being informed, at the time of arrest, of the reasons was improper, contrary to the provisions of Articles 13 and 18 of the Constitution and the pronouncement of this Court in the case of **Daniel Chizoka Mbandangoma v The Attorney General** [1] where this Court held that:

> **"It is improper for the police to detain a person pending further investigations without bringing them before court as soon as practicable, but it is equally improper to require persons released on bond to present themselves at the police station for the same purpose".**

10. Coming to the second question, the learned judge resolved it in favour of the appellant on the ground that search warrants issued on a wrong statute did not invalidate the searches, provided the right source was legally in existence at the material time in line with the decision of this Court in the case of **C and S Investment Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General** [2].

11. Turning to the third question, the learned judge stated that the fact that the **Prohibition and Prevention of Money Laundering Act** [iii] granted power to the DEC to seize property on reasonable belief that the property was derived or acquired from money laundering or proceeds of crime, was not a criterion to justify global and arbitrary seizure of property "without primordially demonstrating a factual basis upon which" the seized property was connected to the alleged offence.

12. The learned judge thus took the position that the seizure of personal and real properties was arbitrary, given the manner in which the seizure was conducted and the fact that the 1st

respondent was not told the nature and cause of the charge even when the DEC had a report from February, 2017.

13. Agreeing with Counsel for the respondent, the learned trial judge came to the conclusion that the wholesale and global seizure of property was illegal, arbitrary and unfair. He declared the seizure of the property a violation of Articles 11 and 16 of the **Constitution** [(i)] and directed that the properties should be restored to the respondents forthwith. The Court, however, did not award damages or costs.

Application for review and ruling of the High Court

14. Disenchanted with the decision of the High Court, the appellant applied for an order of stay of execution and special leave (having fallen out of time) to review the Judgment delivered on 1st March, 2019. The application was made pursuant to Order III Rule 2, Order XXXVI Rule 10 and Order XXXIX Rule 2 of the **High Court Rules, Chapter 27** [(iv)].

15. The appellant, in an affidavit in support deposed to by Lillian Chiyesu, averred that the 1st and 2nd respondents were formally charged on 11th July, 2018 on multiple counts of

obtaining money by false pretences and money laundering and were appearing before the Subordinate Court. And therefore, the order of the Court to release the seized property would impact the on-going criminal proceedings as the property constituted exhibits necessary to prove the offences the respondents were charged with.

16. The respondents opposed both applications. They argued that the respondents, having been dissatisfied with the decision not to award damages and costs, had appealed against the judgment to this Court, which appeal had ousted the jurisdiction of the Court below to review the judgment. Furthermore, that the appellant had not revealed fresh evidence in their affidavit in support which would have had material effect on the decision of the High Court.

17. The learned trial judge dismissed the application for review with costs, on the ground that the jurisdiction of the High Court had been ousted because the respondents had lodged an appeal before the Supreme Court and that consequently, the application for stay of execution of the judgment had equally failed.

This appeal

18. The appellant is dissatisfied with the ruling of the High Court and has appealed to this Court advancing only one ground of appeal as follows:

    1. **The learned High Court Judge erred in both law and fact when he denied to grant special leave for review on account of the appeal pending before the Supreme Court when the said appeal was filed after the application for special leave for review was filed.**

Submissions for the appellant

19. At the hearing of the appeal, counsel representing the appellant relied on the written heads of argument filed in support of the appeal and augmented them orally.

20. Counsel's submission on the sole ground of appeal was that it was settled principle of law that a Judge may, upon such grounds as the Judge shall consider sufficient, review any judgment or decision except where leave to appeal has been obtained. This submission was captured from Order XXXIX of the **High Court Rules** [iv] which states-

    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:

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.

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.**

3. **The application shall not of itself operate as a stay of execution unless the Judge so orders, and such order may be made, upon such terms as to security for performance of the judgment or decision or otherwise as the Judge may consider necessary. Any money in court in the suit shall be retained to abide the result of the motion or the further order of the Judge.**

21. Counsel submitted that the issue for determination was a narrow one. That since the single Judge of this Court in granting leave to appeal had also granted a stay of execution of the judgment of the High Court, the question was whether

there was an appeal at the time the appellant filed its application for review to warrant the refusal for review by the Court below.

22. Counsel argued that from the sequence of events on the record, it was clear that the appellant filed *ex parte* summons for special leave to apply for review and stay of execution of judgment, affidavit in support and skeleton arguments on 28th March, 2019. And that the respondents only filed their notice of appeal and memorandum of appeal on 1st April, 2019. The learned judge, therefore, fell into grave error as he did not address his mind to this fact and that there was no appeal at all when the appellant launched its application.

23. Counsel submitted that another question this Court should consider was whether, in the circumstances, there was fresh evidence to warrant a review of the judgment. In this regard, Counsel argued, as he did in the Court below, that Order XXXIX of the **High Court Rules** [iv] gives the court discretion to take fresh evidence and reverse or vary its judgment. In support, Counsel cited **Fearnought Systems Limited v Fearnought Systems (Z) Limited and Another**[3] and a

decision of the High Court **Robert Lawrence Roy v Chitakata Ranching Company Limited** [4].

24. Counsel proceeded to argue that the appellant had demonstrated grounds in the Court below to justify the exercise of discretion to review the judgment. That in this regard, the appellant showed that long before the Court delivered its judgment and ordered the appellant to release the seized properties, the respondents were formally charged and arraigned on 11th July, 2018 on multiple counts of obtaining money by false pretences and money laundering.

25. Counsel submitted that this information came after the learned judge had reserved his judgment and was likely to have an effect on the Court's decision. For this proposition, Counsel referred us to a portion in the case of **C and S Investment Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General** [2] where it was held by this Court that -

> **"Clearly, any order to release the property would have an impact on the criminal investigations. We do not find that it was far-fetched for the Judge to conclude, in these circumstances, that there was an attempt,**

through these civil proceedings to arrest criminal investigations".

26. Counsel posited further that it would be contrary to public interest for civil proceedings and a judgment therefrom to be used to arrest criminal proceedings in the Subordinate Court, and thereby impede the proper and due administration of justice. Counsel reiterated that the arrest and prosecution of the respondents was fresh evidence upon which the Court below could have exercised discretion to review its 1st March, 2019 judgment.

27. Orally, counsel maintained that this Court was divested of jurisdiction and that the respondents' appeal ought to have been stayed to allow for the determination of the application to review judgment on its merits.

Respondent's submissions

28. In response to the appeal, counsel representing the respondents relied on the written heads of argument, which he augmented orally.

29. The gravamen of the respondents' argument (as in the Court below) was that the respondents, unaware of the *ex parte*

application for special leave to review judgment, filed a notice of appeal and memorandum of appeal on 29th March, 2017, and not on 1st April, 2017 as purported by the appellant.

30. Counsel submitted that in the circumstances, the learned judge was on firm ground to have declined to grant the appellant's application. He stated that Order XXXIX rule 1 of the **High Court Rules** [iv] sets out in clear terms when the High Court can review its judgment and that review of judgment or order of the Court was possible except where leave to appeal had been granted to either party and the appeal had not been withdrawn.

31. Counsel went on to submit that it was undisputed that at the time of hearing of the application for special leave to apply for review, there was an appeal pending before the Supreme Court which divested the Court below of jurisdiction to entertain an application under Order XXXIX. Counsel submitted that even assuming special leave was granted, review of the lower Court's judgment was not possible because the appeal in this Court had not been withdrawn.

32. Counsel submitted further that the only remedy available to the appellant in this case was an appeal and wondered why the appellant had taken a long-winded path instead of cross appealing. Counsel submitted further that the appellant had not provided any authority that prohibits the filing of an appeal where there was a pending application for special leave for review and where the grounds of appeal cannot be addressed by review process.

33. Responding to the appellant's argument that there was fresh evidence to warrant a review of the judgment namely, the charge and arraignment of the respondents, Counsel for the respondent submitted that the argument was misplaced. That in any event and contrary to the appellant's assertion, only the 1st and 2nd respondents were charged and arrested in March 2017, and that they only appeared before court on 8th May, 2018.

34. Counsel argued further that the arrest was not fresh evidence that "could not with reasonable diligence have been discovered" within the context of **Jamas Milling Company Limited v IMEX International (Pty) Limited** [5] which cited

with approval the case of **Robert Lawrence Roy v Chitakata Ranching Company Limited** [4] where it was held that-

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

35. Counsel submitted that the appellant was simply seeking an opportunity to argue its case in the alternative, a position that was not acceptable at law. The case of **Lewanika and Others v Chiluba** [6] was cited. In closing, Counsel submitted that the appellant's appeal should be dismissed as it has no basis at law. He urged us to bear in mind that the 2nd respondent was according to the record of appeal, acquitted of her criminal charges and that the 3rd respondent had never been charged.

36. Counsel submitted orally that based on the appellant's evidence in paragraph 6 of the affidavit in support, there was no fresh evidence because the respondents had already been arrested by the time the petition was being heard. Further, Counsel cited the case of **Zambia Telecommunication Company Limited v Aaron Mweenge Mulanda** [7], which

states that the application for review, under Order XXXIX rule 1, is very limited in scope.

Consideration of the appeal and our decision

37. We have considered the appeal together with the ruling of the High Court appealed against as well as the submissions or arguments in support of the appeal. The issue for determination turns on the construction to be placed on rule 1 of Order XXXIX of the **High Court Rules** [iv] which states that-

> **"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".**

38. The words critical to deciding the appeal are in the statement **'except where either party shall have obtained leave appeal and such appeal is not withdrawn.'** Our understanding of the statement is simply that where leave to appeal has already been obtained and there is an appeal and

the appeal is not withdrawn, a court will have no power to entertain and determine an application to review its judgment. In other words, there must be already be an appeal in place filed pursuant to the granting of leave to appeal at the time that the application for the review of the judgment or decision is being made. In these circumstances, the Court will have no power to entertain the application to review.

39. In the present case, the appellant filed *ex parte* summons for special leave to review the judgment of the Court below on 28th March, 2019. The special leave, for obvious reasons, was a necessity as the appellant had fallen out of the 14-day period prescribed under rule 2 of Order XXXIX of the **High Court Rules** [iv] to apply for review of the High Court judgment, which was delivered on 1st March, 2019. The respondents, on the other hand, filed a notice of appeal and memorandum of appeal, challenging the decision not to award damages and costs into the High Court Registry at Kabwe on 29th March, 2019 and which application was entered in the Supreme Court Registry on 1st April, 2019.

40. Clearly, from the record, the application for special leave to review the judgment of the Court below was filed earlier (on 28th March, 2019) than the respondents' appeal against the judgment. In the circumstances, our view is that the application for review took precedence over the appeal and was in fact a bar to the appeal in that it had to be heard first before the appeal could be entertained.

41. The learned Judge was required to determine the application for review of the Judgment of 1st March, 2019 on the basis whether or not there was sufficient grounds entitling him to grant the application within the terms of Order XXXIX rule 1 of the **High Court Rules** [iv]. The refusal to grant the application on the basis that there was an appeal was undoubtedly a misdirection because there was no appeal at the time of the application.

42. Having found that the Court below erred, the question that arises is whether we should refer the matter back to the High Court to deal with and resolve the application for special leave to review on its merits. In the light of the view that we have regarding the prospects of the application, we feel compelled in

the interests of justice and to save time that we can dispose of the application.

43. We are alive to the fact that rule 1 of Order XXXIX of the **High Court Rules** [iv] provides that review of a judgment be done by the judge who was seized with the matter except where the judge dies or ceases to have jurisdiction for any reason, in which case, another judge may have to review the matter. However, we are fortified to proceed in the manner proposed in the preceding paragraph by virtue of Section 25 (1)(a) of the **Supreme Court Act, Chapter 25** [v] which provides that:

> **"(a) On the hearing of an appeal in a civil matter, the Court shall have the power to confirm, vary, amend or set aside the judgment appealed from and give such judgment as the case may require."** [underlining provided for emphasis]

44. Since an appeal operates as a hearing on the record, the issue is whether there are sufficient facts on the record to enable us determine the application one way or the other.

45. As stated earlier, the appellant had filed an affidavit in support of the application to review, in which it averred that there was fresh evidence to the effect that the 1st and 2nd respondents

were formally charged and arraigned on multiple counts of obtaining money by false pretences and money laundering on 11th July, 2018; that they were currently appearing before the Subordinate Court; and that the release of the seized properties would have an impact on the criminal proceedings.

46. The respondents had equally filed an affidavit in opposition whose substance was that they had already filed an appeal against the judgment of the Court below, rendering the application for special leave to review the judgment, incompetent. In the alternative, the respondents argued that the appellant had not demonstrated fresh evidence to warrant a review of the judgment in question.

47. We have considered the contents of the two affidavits. Rule 1 of Order XXXIX of the High Court Rules, which we have reproduced in paragraphs 20 and 37 has been broken down in various decisions of both the Supreme Court and the High Court. The cases of **Jamas Milling Company Limited v IMEX International (Pty) Limited** [5], **Lewanika and Others v Chiluba** [6], **Lisulo v Lisulo**[8] **, Robert Lawrence Roy v**

Chitakata Ranching Company Limited [4] and **Kalusha Bwalya v Chardore Properties Limited and Another** [9] come to mind. some of these have been cited by Counsel.

48. The consensus in these decisions appears to be that for review under Order XXXIX to be available, the applicant must satisfy the Court that material fresh evidence has been discovered after the judgment or decision sought to be reviewed; that the evidence was in existence prior to the judgment but could not with reasonable diligence have been discovered; and would have material effect upon the judgment or decision in question.

49. In the case of **Lewanika and Others v Chiluba** [6] in particular, Ngulube CJ, (as he then was) stated that -

> **"Review under Order 39 of the High Court Act is a two- stage process, that is to say, 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. I do not believe that the provision exists simply to afford a second bite or simply to afford a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more acceptable to him".**

50. In **Robert Lawrence Roy v Chitakata Ranching Company** [3], which was approved in the **Jamas Milling** case the following parameter was set out:

> **"As a basic principle, I have come to the conclusion that one can never take into account events which occur for the first time after the delivery of judgment as grounds for review of a judgment. If it were otherwise there would never be an end to litigation. A losing party would in most cases find something happening after he had lost, which would enable him to ask for a second bite of the cherry".**

51. In **Lisulo v Lisulo** [8] it was said that it could not be said that the power to review was discretionary and that there must be sufficient grounds to exercise that discretion. Further that it could not be said that the new evidence was fresh evidence for purposes of review because the evidence was available at the hearing and throughout the material time.

52. The learned authors of **Halsbury's Laws of England** [a] reinforce the same legal position when they state at page 791 in paragraph 1670 that -

> **"An action will lie to rescind a judgment on the ground of discovery of new evidence which would have had a material effect upon the decision of the court. It must be shown that**

such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new; and that it could not with reasonable diligence have been discovered before".

53. In the case before us, the appellants alleged in paragraph 9 of the affidavit in support that the release of the seized property would have an impact on the progress of the criminal proceedings in which the respondents were appearing. Further it is averred in paragraph 10 that the matter was suitable for the exercise of the Court's discretion to grant the application for special leave to review the judgment.

54. We are at a loss to fathom how the charge and arraignment of the respondents and the subsequent decision to release the properties seized from them can be material fresh evidence to justify the re-opening of the petition. It is clear that the matters alluded to are not fresh or new evidence at all in the manner contemplated in the Rules of Court. It is obvious that the appellant misapprehended the grounds required to satisfy the court for it to grant an order to review the judgment.

55. Clearly, there is no merit in this appeal and we dismiss it with costs to the respondents.

M. Malila
CHIEF JUSTICE

A. M. Wood
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE