

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

**Appeal No. 165/2024**



**BETWEEN**

**SAVENDA MANAGEMENT SERVICES LIMITED**

**APPELLANT**

**AND**

**LUMWANA MINING COMPANY LIMITED**

**RESPONDENT**

**CORAM: Mchenga, DJP, Muzenga and Chembe, JJA**  
**On 14<sup>th</sup> October 2024 and 31<sup>st</sup> December 2024**

For the Appellant: Mr. M. Katolo & Mrs. M. P. Nkunika of Messrs  
Milner & Paul Legal Practitioners

For the Respondent: Mrs. S. M. Namwila of Messrs Corpus Legal  
Practitioners

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## **J U D G M E N T**

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**MUZENGA, JA, delivered the Judgment of the Court.**

Cases referred to:

- 1. John Mumba and Others v Zambia Red Cross Society  
(2006) ZR 135**
- 2. Simpasa and Another v Mwanza – Appeal 28 of 2013 ZMSC**
- 3. Milarad Saban and Another v Gordic Milan (2008) 1 ZR 233**
- 4. Kajimanga v Chilemya – Appeal 50 of 2014 ZMSC 189**
- 5. Indo Bank Zambia v Byaruhanga – Appeal 97 of 2021**
- 6. Access Bank Group Five Z-Con Business Park Joint Venture  
(suing as a firm) (SCZ 8/52/of 2014)**

7. **Fearnought Systems Limited v Fearnought Systems (Zambia) Limited and Another – SCZ Appeal No. 35 of 2015**
8. **R. Liberty Limited v Arcades Development Plc – CAZ Appeal No. 234/2021**
9. **Jamas Milling Company Limited v Imex International (Pty) Limited (2002) ZR 79**
10. **Akashambatwa Mbikusita Lewanika and Others v Frederick Jacob Titus Chiluba (1998) ZR 79**
11. **Walusiku Lisulo v Patricia Anne Lisulo (1998) ZR 75**
12. **Lewanika and Others supra and Tanzania Zambia Railways Authority v Mwanza and Others – Appeal No. 35 of 2014**
13. **Mwape Chlambwe v Elias Tembo (Sued as an Attorney for Kelvin Mwakoi) and Others (2013/HP/0797) (unreported)**
14. **National Breweries Plc v Chakama Investments Limited Appeal No. 6 of 2022**
15. **Kalunga Chansa v Evelyn Hone College – Appeal No. 134 of 2019**
16. **Codeco Limited v Elias Kangwa & Others – Appeal No. 199/2012 [2015] ZMSC 14**

Legislation referred to:

1. **High Court Act, Chapter 27 of the Laws of Zambia.**
2. **Rules of the Supreme Court of England RSC.**

Other Works referred to:

1. **Odger’s Principles of Pleading and Practice.**

## **1.0 INTRODUCTION**

- 1.1 This appeal is against a Ruling of the High Court, delivered on 24<sup>th</sup> November 2024, by B. G. Shonga, J, in which she declined to grant the appellant leave to review her Ruling dated 19<sup>th</sup> January 2023.

## 2.0 BACKGROUND

2.1 The background to this matter is that the appellant entered into a Blanket Purchase Agreement No. FPA9107 (Forward Purchase Agreement) with the respondent for the supply of Flocculant (Savofloc 3055) on 17<sup>th</sup> September 2017, which agreement was to expire on 30<sup>th</sup> August 2020.

2.2 The respondent however terminated the agreement and refused or neglected and failed to pay the sum of USD 2,347,197.15 under the agreement which led to the appellant suffering financial loss and damage. Disenchanted with this, the appellant commenced this action against the respondent by way of writ of summons claiming the following reliefs:

- i) Immediate payment of the sum of USD 2,347,197.15 outstanding on the account for the chemical products ordered from the plaintiff by the defendant;**
- ii) Interest on the said sum due and payable at the rate as prescribed by law;**
- iii) Damages for breach of contract;**
- iv) Damages for loss of expected earnings;**
- v) Damages for loss of chance;**
- vi) Damages for loss of profit;**
- vii) Damages for loss of money usage;**
- viii) Costs; and**
- ix) Any other relief the Court may deem appropriate to award in the circumstances.**

- 2.3 The appellant made an application for leave to file further supplementary list and bundles of documents on the basis that it inadvertently omitted to attach important documents pertinent to the matter. The trial court proceeded to determine the application in the appellant's absence and in its Ruling dated 19<sup>th</sup> January 2023 dismissed the appellant's application on the ground that it did not give the respondent an opportunity to discover the bundle of documents sought to be filed.
- 2.4 Dissatisfied with the ruling of the lower court, the appellant subsequently made an application for leave of the court to review the ruling made *ex-parte* against its application to file supplementary list and bundles of documents.
- 2.5 The gist of the appellant's application was that it had presented sufficient grounds upon which the court could exercise its discretionary power to review its ruling and that the appellant would be prejudiced if leave to review was not granted.
- 2.6 In opposing the application, the respondent contended that granting leave to review would be re-litigating the appellant's application and effectively giving them a second bite at the cherry. The respondent argued that the appellant had not satisfied the pre-requisites for granting leave to review.

### **3.0 DECISION OF THE COURT BELOW**

3.1 After considering the arguments advanced by the parties, the court below was of the view that the appellant did not purport to have discovered fresh material evidence after the ruling sought to be reviewed had been rendered. The court found that in the absence of fresh material evidence there was no basis upon which to review the ruling and she consequently dismissed the application.

### **4.0 GROUNDS OF APPEAL**

4.1 Disgruntled with the Ruling of the learned Judge of the High Court, the appellant appealed to this Court advancing the following grounds of appeal:

- i) That the lower court erred in law and in fact when it held that the appropriate course of action would have been to appeal as opposed to a review.**
- ii) That the lower court erred in law and in fact when it held that it could not review its ruling as there was no discovery of fresh evidence as though the discovery of fresh evidence is the only ground for review under Order 39 of the High Court Rules.**
- iii) That the lower court erred in law and in fact when it overlooked the grounds advanced by the appellant for which it could review its earlier Ruling dated 19<sup>th</sup> January, 2023.**

## 5.0 APPELLANT'S ARGUMENTS

5.1 The appellant argued grounds one and two together. The Court was referred to **Order 39 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia** which provides 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 reserve, vary or confirm his previous judgment or decision."**

5.2 It was submitted that this provision gives the High Court power to review a judgment, order or ruling made by the court where there are sufficient grounds upon which the order can be reviewed.

5.3 It was submitted that the record would show that the appellant's Advocates were retained on 30<sup>th</sup> January 2024 and that unknown to them, the appellant had filed an application to file a supplementary bundle of documents. When they carried out a search on 23<sup>rd</sup> January 2023, it was discovered that the application was heard on 19<sup>th</sup> January 2023 in their absence. It was argued that their non-appearance was neither deliberate nor meant to disrespect the court.

5.4 Counsel referred the Court to a number of authorities on review of a court's decision, ruling or order, including the case of **John Mumba and Others v. Zambia Red Cross Society**<sup>1</sup> where it was stated that:

**"A court may review its decision or order on sufficient grounds. One of such grounds is that some evidence that existed at the time of the hearing was not made available to court on ground that even after a diligent search it could not be found. Further, this power is discretionary..."**

5.5 It was argued that the appellant raised sufficient grounds in its application for leave to review its ruling dated 19<sup>th</sup> January 2023 which were:

- i) **That discovery was done by list as the plaintiff exhibited in its application the list and description of the bundles of documents and the defendant had an opportunity to discover the material documents the plaintiff sought to file;**
- ii) **That inspection could not have been done as leave to file the supplementary list and bundle of documents had not yet been granted by the lower court. As such it would have been in vain to inspect bundles for an application that had not yet been determined;**
- iii) **That inspection of documents is effected when orders for direction have been given by the court and in this case, the court had not given orders for direction regarding the documents sought to be filed.**

- 5.6 Counsel further referred to the cases of **Simpasa and Another v. Mwanza**<sup>2</sup> and **Milarad Saban and Another v. Gordic Milan**<sup>3</sup> to stress the point that there must be sufficient grounds for an application for review. It was argued that the learned trial judge in the ruling of 24<sup>th</sup> November 2023 dismissed their application to file a supplementary list and bundle of documents on grounds that there was no fresh material evidence after the ruling sought to be reviewed and that the appropriate course should have been to appeal the said ruling. It was contended that in light of the aforementioned authorities, it is not only in the event of the discovery of fresh evidence after a ruling that a court can review its ruling, but also where sufficient grounds are laid before the court.
- 5.7 It was contended that the grounds for review raised by the appellant in its application for leave to review the ruling dated 19<sup>th</sup> January 2023, constituted sufficient grounds on which the lower court could re-open the matter and review its Ruling.
- 5.8 In relation to ground three, Counsel referred the Court to **Order 19 Rule 3 (2) (C) of the High Court Rules** which provides that:



**"A Judge may, in addition to any other general power, exercise the following power at the scheduling conference:**

**(c) Order the giving of evidence on the basis of affidavit evidence or give orders for discovery, production, inspection or interrogatories that may be appropriate to the case."**

5.9 Learned Counsel for the appellant referred the Court to a plethora of authorities on the importance of discovery and inspection of documents including the case of **Kajimanga v. Chilemya**.<sup>4</sup> It was submitted that the High Court Rules give the judge authority to make orders relating to inspection of document and that the authorities referred to obligate a party to bring all relevant documents they come into possession of. It was contended that the appellant's application to file supplementary list and bundle of documents was therefore rightly made and should have been granted as the defendant would have had an opportunity to look at them.

5.10 It was argued that the appellant, by exhibiting in its application the list and description of the bundle of documents as shown on pages 353 to 355 of the record of appeal, had complied with the first stage of giving the defendant an opportunity to discover the documents by list. That inspection of the documents could only come later after

orders for directions had been issued by the court. It was learned Counsel's contention that as opposed to dismissing the application to file a supplementary list and bundle of documents on 19<sup>th</sup> January 2023, the lower court should have ordered that the bundle of documents be filed in order to be inspected by the defendant. Counsel relied on our decision in the case of **Indo Bank Zambia v Byaruhanga**<sup>5</sup> where we stated that:

**"Notwithstanding that the respondent's application to produce the documents was made well after discovery and inspection and after the trial had commenced, our considered view is that the lower court was on firm ground when it ordered the production of the documents because it is a crucial document and is necessary for the full determination of the matter."**

5.11 Counsel further referred us to the case of **Access Bank Group Five Z-Con Business Park Joint Venture (suing as a firm)**<sup>6</sup> in arguing that the court should determine disputes on the merit and bring them to their finality. It was contended that the court erred in refusing to review its ruling on technical issues and it would be in the interest of both parties for the decision of the lower court to be reviewed on grounds stated.

5.12 It was argued that this was a proper case in which this Court should allow the appeal and invoke its powers to set aside the Judge's Ruling dated 24<sup>th</sup> November 2023.

## **6.0 RESPONDENT'S ARGUMENTS**

6.1 In response to grounds one and two, the respondent argued that even though **Order 39 of the High Court Rules** gives the High Court discretionary power to review its decisions, Courts had on numerous occasions guided as to when this discretionary power is applicable. He referred to the case of **Fearnought Systems Limited v. Fearnought Systems (Zambia) Limited and Another**,<sup>7</sup> where the Supreme Court construed **Order 39 Rule 1 of the High Court Rules**.

6.2 Counsel further drew credence from the case of **R. Liberty Limited v. Arcades Development Plc**<sup>8</sup> where while citing the decision of the Supreme Court in the **Jamas Milling Company Limited v. Imex International (Pty) Limited**<sup>9</sup> held that:

**"For review under Order 39 rule 2 of the High Court Rules to be available the party seeking it must show that he has discovered fresh evidence which would have had material effect upon the decision but could not with reasonable diligence have been discovered before. Roy v. Chitakata Ranching Company Limited. It is clear on this authority that the fresh evidence must have existed at the time of the decision but had not been discovered before. This is not the position**

**here. The defence and counter-claim were brought before the court when it entered the judgment ...”**

- 6.3 Reliance was placed on a number of authorities on the subject matter on the strength of which it was submitted that a trial court should exercise its discretionary power to review its decision if the substance of a party’s application reveals that there is fresh evidence that has a material effect on the trial court’s decision and could not be reasonably discovered before the trial court rendered its decision.
- 6.4 It was further submitted that Courts have made it categorical that a review is not intended to operate as an appeal in that a party cannot use a review as a basis for challenging the merits of the trial court's decision in order to alter that decision to their favour. That if it were so, it will be tantamount to allowing litigants to have second bite at litigating the case and consequently lead to non-ending litigation. Counsel drew solace from the cases of **Akashambatwa Mbikusita Lewanika and Others v. Frederick Jacob Titus Chiluba<sup>10</sup>** and **Walusiku Lisulo v. Patricia Anne Lisulo<sup>11</sup>** for this proposition.
- 6.5 It was argued that the appellant made an application to file a supplementary bundle of documents on 19<sup>th</sup> July 2021 and the respondent opposed it on the basis that the documents sought to

be filed were never subject to discovery and inspection as required by law.

6.6 It was Counsel's submission that the three grounds for review advanced by the appellant did not bring forth any ground to the effect that there was discovery of fresh evidence which could materially affect the case. That the appellant was in essence challenging the merits of the court's ruling as its main argument was that the court misdirected itself by not finding that the discovery of documents ought to have been conducted after leave to file the supplementary bundle of documents was granted. That a review of the appellant's grounds for review, were in fact, grounds of appeal asking the court to re-litigate the same matter. Counsel for the respondent contended that in view of the foregoing, the trial court was on *terra firma* when it rendered its ruling declining to review its decision.

6.7 Learned Counsel for the respondent further referred us to plethora of authorities on the meaning of sufficient grounds, including the case of **Lewanika and Others** *supra* and **Tanzania Zambia Railways Authority v. Mwanza and Others**.<sup>12</sup> It was submitted in this regard that the term '**sufficient grounds**' should not be construed generally as what the courts have guided that a review

can be conducted where sufficient grounds are present relate to a situation where there is sufficient fresh evidence or the trial court's decision has a defect in form or there is an error or omission that requires correction.

- 6.8 It was argued that the appellant's grounds for review do not fall within the scope of '**sufficient grounds for review**' as these grounds neither purport the discovery of fresh evidence nor any defect in the trial court's ruling.
- 6.9 Learned Counsel for the respondent implored us to dismiss grounds one and two of this appeal
- 6.10 In relation to ground three, it was submitted that the gist of the appellant's argument was firstly, that the exhibition of the list and description of the bundle of documents in their application for leave to file supplementary documents was equivalent to discovery and secondly that the inspection of the same was to be conducted upon the court issuing further orders for directions for the said inspection.
- 6.11 It was argued that this Court should dismiss this ground solely on the basis that the appellant was requesting the court below to re-open and re-hear the application for leave to file supplementary list and bundle of documents. Counsel re-iterated their responses to grounds one and two.

- 6.12 In the alternative, it was argued that should this Court consider the merits of this ground of appeal, the practice in our jurisdiction regarding any application for leave is that the intended documents or application for which leave is sought must be exhibited in the affidavit in support. It was submitted that this allows the court and the opposing party an opportunity to discover the documents sought to be produced. That the appellants' application for leave to file supplementary documents also requires this very practice. We were referred to the High Court decision in **Mwape Chilambwe v. Elias Tembo (Sued as an Attorney for Kelvin Mwakoi) and Others**<sup>13</sup> for the purpose of persuasiveness in this regard.
- 6.13 It was contended that there was no fault in the trial court dismissing the appellant's application for leave for failure to exhibit the documents intended to be adduced.
- 6.14 In furtherance of their arguments, the Court was referred to **Access Bank (Zambia) Limited** *supra* and **National Breweries Plc v. Chakama Investments Limited**<sup>14</sup> on the principle that rules of procedure are meant to assist the courts in the proper dispensation of justice in a fair, just and orderly manner. It was submitted that the appellant's failure amounted to a breach of rules of procedure

which prejudiced the respondent by not giving them an opportunity to inspect the documents.

6.15 It was further submitted that the court exercised its discretion judiciously by considering the fact that granting the appellant's application would have taken the respondent by surprise and prejudiced them. Reliance was placed on our decision in **Kalunga Chansa v. Evelyn Hone College**<sup>15</sup> in contending that the court considered all the circumstances of the case and made a fair decision.

6.16 We were urged to dismiss this ground for lack of merit.

## **7.0 HEARING**

7.1 At the hearing of the appeal, both parties relied on the heads of argument filed into Court and augmented with brief oral arguments, which arguments have received thorough consideration.

## **8.0 ANALYSIS AND DECISION OF THIS COURT**

8.1 We have carefully considered the record of appeal and all the arguments before us. We shall consider the grounds of appeal together as they are related.

8.2 **Order 39 rules (1) and (2) of the High Court Rules**, clothes the High Court with power to review any judgment or decision rendered in the following terms:



- “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:
- 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.”

8.3 The import of **Order 39** above has been a subject of interpretation in a plethora of cases. For instance, in **Jamas Milling Company Limited v. Imex International** *supra* the Supreme Court stated that:

“For review under Order 39 Rule (2) of the High Court to be available, the party seeking it must show that he has discovered fresh material evidence which has 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.”

8.4 Similarly, in **Lewanika and Others v. Frederick Jacob Titus Chiluba** *supra* it was held that:

“Review of Judgments is a two staged process, that is to say, first showing or finding a ground considered to be sufficient which then opens the way to actual review. Review enables a court to put matters right. However, I do not believe that the provisions simply

**exists to offer a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more favourable to him."**

- 8.5 The principle underlying the court's inherent power to review its own decisions or judgments is predicated on a party showing that there has been discovery of fresh material evidence which has had material effect upon the decision of the court and could not with reasonable diligence have been discovered before the decision sought to be reviewed was made.
- 8.6 It must also be emphasised that the court's power to review its decisions or judgments is discretionary as espoused in **Codeco Limited v. Elias Kangwa & Others**.<sup>16</sup>
- 8.7 The appellant herein has argued that there is sufficient grounds on which the lower court could re-open the matter and review its judgment. For the avoidance of doubt, the grounds advanced by the appellant for leave to review were as follows:
- i) **That discovery was done by list as the plaintiff exhibited in its application the list and description of the bundles of documents and the defendant had an opportunity to discover the material documents the plaintiff sought to file;**
  - ii) **That inspection could not have been done as leave to file the supplementary list and bundle of documents had not yet been granted by the lower court. As such it would have been in vain to**

**inspect bundles for an application that had not yet been determined;**

**iii) That inspection of documents is effected when orders for direction have been given by the court and in this case, the court had not given orders for direction regarding the documents sought to be filed.**

8.8 We have meticulously analysed these grounds for leave to review the learned lower court's ruling against the backdrop of what the court must satisfy itself of before granting the said leave.

8.9 In essence, the appellant was arguing that discovery was done by list as it had exhibited the list and description of documents sought to be filed and that inspection of the documents could only be done after leave had been granted after orders for directions are issued by the court.

8.10 The Learned Authors of **Odger's Principles of Pleading and Practice** at page 215 have stated regarding discovery and inspection that:

**"It is generally desirable for each party to see all material documents in the possession of his opponent, and to take copies of the more important ones. Such disclosure is obtained by the process called discovery of documents. Two stages are involved: the disclosure of what documents exist and the inspection of those documents as the opposite party is entitled to see."**

court and further that the said evidence could not with reasonable diligence have been discovered before the rendering of the ruling of the lower court, which it sought to be reviewed, was made.

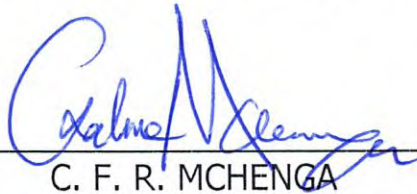
8.15 In light of what we have stated, we form the view that the grounds for leave to review the lower court's ruling do not present sufficient grounds upon which leave to review can be granted. As rightly observed by the court below, if the appellant was dissatisfied with the decision made, it should have appealed against the court's refusal to grant leave to file supplementary list and bundles of documents and not sought leave to review the learned trial court's ruling.

8.16 We therefore find no merit in all the grounds of appeal.

## **9.0 CONCLUSION**

9.1 In view of the foregoing, the appeal lacks merit and it is accordingly dismissed.

9.2 Costs shall be for the respondent, to be taxed in default of agreement.



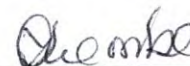
C. F. R. MCHENGA

**DEPUTY JUDGE PRESIDENT**



K. MUZENGA

**COURT OF APPEAL JUDGE**



Y. CHEMBE

**COURT OF APPEAL JUDGE**