

**IN THE HIGH COURT FOR ZAMBIA  
THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2019/HP/0261**



**BETWEEN:**

**KHALIF MOTORS ZAMBIA LIMITED**

**PLAINTIFF**

**AND**

**MADISON GENERAL INSURANCE COMPANY  
ZAMBIA LIMITED**

**DEFENDANT**

**BEFORE THE HONOURABLE MR. JUSTICE I. M.  
MABBOLOBOLO IN CHAMBERS ON THE 21<sup>ST</sup> DAY OF MAY,  
2025.**

**For the Plaintiff:** *Mr. K. R. Malipenga - Messrs Robson Malipenga and  
company*

**For the Defendant:** *Mr. L. Mwiche - Messrs Jacques and Partners*

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**RULING ON APPLICATION FOR REVIEW OF RULING ON RES  
JUDICATA**

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**A. CASES REFERRED TO:**

1. *Zambia Telecommunication Limited v Aaron Mulwanda and Another SCZ  
No. 7 of 2012.*

**B. LEGISLATION REFERRED TO:**

2. *The High Court Act, Chapter 27 of the Laws of Zambia.*

**1.0 INTRODUCTION**

- 1.1. This is a Ruling on the Plaintiff's Application for Review of the  
Ruling Dated 11<sup>th</sup> December, 2019.

- 1.2. The Application by the Plaintiff was filed on 10<sup>th</sup> March, 2020 accompanied by an Affidavit in Support filed on even date. The Plaintiff also filed a Further Affidavit in Support of the Application dated 5<sup>th</sup> May, 2020.
- 1.3. The Defendant opposed the Application by filing an Affidavit in Opposition on 27<sup>th</sup> March, 2020.
- 1.4. The Plaintiff then proceeded to file an Affidavit in Reply to the Affidavit in Opposition on 13<sup>th</sup> November, 2020.

## **2.0 BACKGROUND**

- 2.1. The Matter was commenced by way of Writ of Summons and Statement of Claim on 19<sup>th</sup> February, 2019.
- 2.2. In the Statement of Claim the Plaintiff averred that an insurance policy contract was entered into with the Defendant for the Plaintiff's Trailer with registration number ABD 5089 on 27<sup>th</sup> December 2011. That the insurance policy was valid from January 2012, to 31<sup>st</sup> December 2012. The said contract provided that in the event the property was damaged, the Defendant was to indemnify the Plaintiff a sum of ZMW 60,000,000.00 unrebased per event and in the event of loss of life or injury the Defendant would indemnify a sum of ZMW 30,000,00 unrebased per person.

- 2.3. That there was a matter under Cause No. 2013/HP/0988, where the Plaintiff was ordered to pay a total sum of ZMW 807 793.9 and they wrote to the Defendant for indemnification on the under payment as per insurance policy, but to no avail. That due to the failure by the Defendant the Plaintiff was made to pay the Judgement sum without indemnification.
- 2.4. In the said Writ of Summons and Statement of Claim the Plaintiff is claiming for:
- 2.4.1. *An Order for indemnification of the sum of ZMW 209 950.00*
  - 2.4.2. *Damages*
  - 2.4.3. *Interest*
  - 2.4.4. *Costs*
  - 2.4.5. *Any other relief the Court may deem fit.*
- 2.5. On 15<sup>th</sup> April, 2019, an Interlocutory Judgment in Default of Appearance and Defence was entered against the Defendant herein.
- 2.6. In the said Judgment, the Defendant was Ordered to indemnify the Plaintiff the sum of ZMW 209, 950.00, interest and Costs.
- 2.7. On 19<sup>th</sup> September, 2019, by Consent Order dated 12<sup>th</sup> September, 2019, the Default Judgment was Set Aside.
- 2.8. The Defendant entered Appearance and filed the Defence on 14<sup>th</sup> November, 2019. In the said Defence the Defendant averred that this matter is *Res Judicata* because all the matters raised in this action were raised under Cause No. 2013/HP/0988.

- 2.9. That during the course of trial under Cause No. 2013/HP/0988, the Plaintiff had an opportunity to seek leave of Court to issue Third Party Notice and claim for whatever it wanted from the Defendant but slept on its own right.
- 2.10. The Defendant also filed into Court a Notice of Motion to Raise Preliminary Issues on a Point of Law on 19<sup>th</sup> November, 2019. The Court rendered a Ruling on the aforementioned Application on 11<sup>th</sup> December, 2019 wherein the Court found that this matter was *Res Judicata* and further dismissed it. It is this Ruling that the Plaintiff is seeking to be reviewed by this Court.

### **3.0 AFFIDAVIT EVIDENCE**

- 3.1 The Affidavit in Support of the Application was deposed by Abdulrhaman Hassan Abdullahi Khalif the Operations Manager in the Plaintiff's Company.
- 3.2 He deposed that, on 11<sup>th</sup> December, 2019 the Court rendered a Ruling that this matter is *Res Judicata* premised on the affidavit sworn by one Poccent Mwansa.
- 3.3 He averred that, the Plaintiff herein insured their motor vehicle namely ABD 5089 and AFA 1314T as shown in exhibit marked "**AHAK1**". It was also stated that the other trailer Registration number ANN 1314T was insured by Zambia Insurance State Corporation (ZISC) Limited and ZISC liability was ZMW 120,000.00 and reference was made exhibit marked "**AHAK2**".
- 3.4 The deponent averred that, the Volvo FH12 Truck registration number ABD 5089, trailer registration number AAH 1314T was insured with Madison General Insurance

with independent insurance cover and that also the trailer registration number AHH 1314T was insured with ZISC General Insurance independently.

- 3.5. An averment was made that the extent of the liability in an event of an accident of both truck and trailer by the Defendant was K239,950.00 as both the horse and trailer were insured separately. It was stated that in 2013, the Plaintiff's motor vehicles were involved in an accident and the Defendant together with ZISC was sued. That the Plaintiff insured both the horse and trailer separately and that as per insurance policies in an event of an accident, the Defendant was required to indemnify the Plaintiff an amount of ZMW 60,000.00 for loss of property and ZMW 120,000.00 for loss of life.
- 3.6. It was deposed that the Defendant without the knowledge of the Plaintiff underpaid the sum of ZMW 30,000.00 into Court under Cause No. 2013/HP/0988 for both the horse and the trailer. That the Defendant was unilaterally discontinued by the Plaintiff under the Cause No. 2013/HP.0988 before trial commenced without the knowledge of the Plaintiff Company. Reference was made to exhibit marked "**AHAK3**".
- 3.7. Further that, the Plaintiff herein only learnt about this development when the Judgment came out as the Plaintiff's Counsel under Cause No. 2013/HP/0988 who had conduct of the matter was unwell during trial. That the said trial was conducted within a day without the Plaintiff herein being given a chance to be heard.

- 3.8. That as soon as the Plaintiff learnt about the Judgment he took out Third Party Proceedings against the Defendant. That the Court under Cause No. 2013/HP/0988 advised the parties to settle the matter *ex-curia* and further advised that the Third-Party Proceedings cannot be brought after Judgment.
- 3.9. It was averred that in the spirit of settling the matter *ex-curia*, the Plaintiff herein decided to withdraw the Third-Party Proceedings under the aforementioned cause number and that the parties out of good faith agreed to engage each other and settle the matter *ex-curia*. Further that, after the Plaintiff herein having withdrawn the Application, the Defendant changed its earlier position and refused to indemnify the Plaintiff hence this action.
- 3.10. A deposition was made that herein the Plaintiff is simply asking the Defendant to indemnify the Plaintiff as per the two insurance policies, as the Defendant underpaid into Court and as they were prematurely disjoined from the proceedings in the earlier cause.
- 3.11. It was also stated that the Plaintiff herein never had an opportunity through the Third-Party Proceedings as the same was withdrawn to enable parties to resolve the matter *ex-curia*. That the claim before this Court has never been determined under Cause No. 2013/HP/0988.
- 3.12. The Plaintiff herein also filed into Court a Further Affidavit in support of this Application on 5<sup>th</sup> May, 2020 wherein it was stated that the Court on 11<sup>th</sup> December, 2019 dismissed the

matter for reasons that the Plaintiff had an opportunity to be heard on the dispute under Cause No. 2013/HP/0988. That the Plaintiff insists that the matter under this current dispute was never dealt with. Reference was made to exhibit marked “**AHAK1**” in the said Further Affidavit being Proceedings under the aforementioned Action.

- 3.13. Further reference was made to the Judgment of the Court under Cause No. 2013/HP/0988 marked as “**AHAK2**” in the Further Affidavit and the Plaintiff stated that the Court did not deal with the under payment in that Judgment.
- 3.14. The Affidavit in Opposition to the Application was sworn by Christopher Katilungu the Head-Claims in the Defendant Company.
- 3.15. It was deposed by the deponent that firstly the deponent of the Affidavit in Support and indeed the Further Affidavit did not disclose his full particulars because he did not include his residential address.
- 3.16. An averment was made that the Contents of the Plaintiff's Affidavit are incorrect and that the Court's record will show that the Plaintiff was given an opportunity to be heard. That the deponent is advised by the Defendant's advocate and believes to be true that at the time this matter came up on 14<sup>th</sup> November, 2019, the Court's record will show that an appearance was made for the Plaintiff by Counsel by the name of Yully Silomba from Robson Malipenga and company, who are the advocates on record for the Plaintiff.

- 3.17. Further that, when the Defendant's Application to Raise Preliminary Issues came up on 11<sup>th</sup> December, 2019, the Court proceeded without an appearance for the Plaintiff as there was an Affidavit of Service on record dated 11<sup>th</sup> December, 2019 which showed that the Plaintiff's advocates were duly served with the date of the hearing.
- 3.18. It was averred that no documentation had been exhibited to show that the said legal counsel being referred to was on medical leave and that he is advised by his advocates that the said legal counsel who was initially seized with conduct of this matter, Binwell Mukatuka, had left Robson Malipenga and Company and that this is evidenced by the headed paper of the law firm where his name used to appear and then stopped appearing until recently. Reference was made to exhibit marked "**PM 1(a), (b) and (c)**" being copies of the letters with dates in ascending order on headed paper.
- 3.19. It was deposed that the deponent is advised by the Defendant's advocates that all the issues raised in this Application were issues for adjudication under Cause No. 2013/HP/0988 and that the Defendant's Affidavit in Support of Notice of Motion to Raise Preliminary issues dated 19<sup>th</sup> November, 2019 brought out these facts by exhibiting the Judgment of Honourable Justice A.M. Sitali dated 22<sup>nd</sup> May, 2018.
- 3.20. That the deponent is further advised by the Defendant's Advocates that to have this Honourable Court pronounce itself on matters that will have the effect of challenging the Judgment of the Court under Cause No. 2013/HP/0988 and therefore, the

said depositions confirm that the finding of the Court that this matter is indeed *Res Judicata*.

3.21. It was stated that if the Plaintiff intended to challenge any findings that were made under Cause No. 2013/HP/0988, the Deponent was advised by the Defendant's advocates that the right avenue would have been an appeal to a higher Court.

3.22. An Averment was made that the Plaintiff is seemingly challenging the conduct of the Court under Cause No. 2013/HP/0988 by alleging that the Plaintiff under that cause was never given an opportunity to be heard of which this Court has no jurisdiction to make pronouncements over as the said assertions could have been a subject of appeal.

3.23. Further that the Plaintiff's withdrawal of its Third-Party Proceedings was because it was procedurally incorrect and the deponent duly acknowledged this when he stated in his Affidavit in Support that Third Party Proceedings cannot be brought after Judgment.

3.24. Furthermore, that the Defendant has nothing to settle with the Plaintiff as it had fully discharged its liability and that was always the position on the matter. That the Defendant's liability to the Plaintiff was duly discharged and it was therefore rightly disjoined from the proceedings.

3.25. It was averred that the Deponent is advised by the Defendant's advocates that had the Plaintiff's representatives appeared at the trial under Cause No. 2013/HP/0988, they would have had an opportunity to be heard concerning any alleged further liability that the Defendant has. That the Plaintiff's advocates

however stayed away from Court as noted by Honourable Justice A.M. Sitali at paragraph 4 of page J7 of her Judgment and that the Plaintiff now intends to take a second bite of the cherry under these proceedings. Reference was made to exhibit marked "**PM2**" being a copy of the said judgment.

3.26. Furthermore that, the Plaintiff had the opportunity to have the claims that are before this court determined under Cause No. 2013/HP/0988 and it is *Res Judicata* to bring claims before this Court emanating from the same facts under the other cause.

3.27. Lastly that no new facts or evidence which could not have been reasonably discovered at the time of the Application has been disclosed in the Plaintiff's Affidavit and the time within which to make this Application lapsed. As such, there are no reasons to warrant this Court to review the Ruling dated 11<sup>th</sup> December, 2019.

3.28. In the Affidavit in Reply deposed to by Abdulrhaman Hassan Abdulahi Khalif, the Operations Manager in the Plaintiff Company, he stated that Yully Silomba was merely standing in for Mr. Binwell Mukatuka who is a senior associate who has never left the firm. That counsel seized with the conduct of the matter was unwell to attend the matter.

3.29. It was averred that the issues raised in this matter were never determined under Cause No. 2013/HP/0988 hence the Plaintiff sued in this matter. That because of the forgoing the matter can not be said to be *Res Judicata*.

3.30. Further that time cannot be said to have lapsed within which to make this Application because special review is one of the avenues the Court can revisit its decision. That the Plaintiff is in no way challenging the decision of the other Court under Cause No. 2013/HP/0988.

3.31. It was deposed that the Third-Party Proceedings were withdrawn in the spirit of settling the matter *ex-curia* but the Defendants advocates later on changed his position. That the Defendant still needs to settle its obligation as per insurance policy and that the Defendant under paid the claim and it was wrongly discharged from the matter. Further that, the Court under Cause No. 2013/HP/0988 did not address its mind to the issue at hand. That the Court in the aforementioned cause never dealt with under payment as stated earlier and this can be evidenced by the proceedings and Judgment and the Third-Party proceedings that were not heard, which were withdrawn to pave way for an *ex-curia* settlement that was unsuccessful.

#### **4.0 SKELETON ARGUMENTS**

4.1 No skeleton arguments are on record as being filled by either party relating to this Application.

#### **5.0 HEARING**

5.1. At the hearing held on 4<sup>th</sup> April, 2025, Counsel for the Plaintiff placed total reliance on the Affidavit in Support of the Application dated 10<sup>th</sup> March, 2020 and Further Affidavit in Support dated 5<sup>th</sup> May, 2020.

- 5.2. In opposing the Application, Counsel for the Defendant relied on the Affidavit in Opposition filed on 27<sup>th</sup> March, 2020 and referred me to the case of **Zambia Telecommunication Limited v Aaron Mulwada and Another**<sup>1</sup>. It was stated that in the aforementioned case the Court stated that a party seeking for Review must demonstrate that fresh material evidence which would have material effect on the decision of the Court has since been discovered but could not have been discovered before despite due diligence.
- 5.3. Further that, the evidence relied upon by the Plaintiff was available when the Court made its decision and was also considered hence they are of the view that the Plaintiff's Application be dismissed as the proper course of action for the Plaintiff should have been an appeal and not review of the Ruling.

## **6.0. CONSIDERATION AND DECISION OF THE COURT**

- 6.1. I have carefully considered the Application by the Plaintiff, the Affidavits in Support of the Application and the authority I was referred to. I am grateful for the industry by Counsel on behalf of the Parties.
- 6.2. For this Application the Plaintiff relied on **Order XXXIV Rule 1 and 2 of the High Court Rules**<sup>2</sup> which provides that:

***“1. Subject to the Provisions of the Act and these Rules, the Court may, in its discretion, appoint any***

*day or days, from time to time, for the hearing of causes and matters, as circumstances require.*

*2. Subject to special arrangements for any particular day, the business of the day shall be taken, as nearly as circumstances permit, in the following order:*

*(a) Judgments standing over for delivery;*

*(b) Ex Parte motions;*

*(c) Motions on notice, and arguments on showing cause against orders;*

*(d) Civil causes and matters for hearing.*

*The above shall be taken in the order in which they stand in the lists, unless the Court sees fit to vary the order.”*

6.3. It is clear from the law cited above that this is not the Order that gives the Court authority to review the decision of the Court dated 11<sup>th</sup> December, 2019. I am therefore not vested with the requisite jurisdiction to determine this Application before me. It is important for me at this point to urge Counsel to pay particular attention when drafting documents and the law relied upon to avoid what has transpired herein.

6.4. I am of the well considered view that the correct law that should have been relied upon by Counsel is **Order XXXIX Rule 1 and 2 of the High Court Rules** 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:*

*Provided that where the judge who was seized of the matter has 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 14 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.”*

6.5. From the Law cited above and the case of **Zambia Telecommunication Limited v Aaron Mulwanda and Another**<sup>1</sup> the position of the law is clear that fresh evidence must be brought before Court for its consideration in Order to review any decision that was earlier made. The evidence that is before me is that the Plaintiff has not brought any fresh evidence that would justify a review of the Ruling dated 11<sup>th</sup> December, 2019.

6.6. I have already found that this Application is improperly before me as I have determined that the High Court Order cited by the Plaintiff for this Application does not give me any authority to hear and determine this Application. I have also found that even

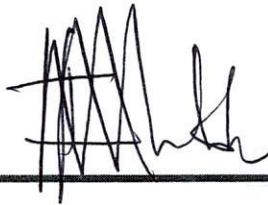
if the right Order would have been used, the Plaintiff has not provided any fresh evidence that would enable me to review the Ruling dated 11<sup>th</sup> December, 2019 in accordance with **Order XXXIX Rule 1 and 2<sup>2</sup>** referred to above.

## **7.0. CONCLUSION**

7.1. In the final analysis, I have found that the law relied on by the Plaintiff does not give me the requisite jurisdiction to hear and determine the Application. I have also established that even in the event that the correct legal provision had been used, the Plaintiff has not satisfied the requirement that fresh evidence must be provided for a Court to review a decision. I therefore find no merit in this Application and dismiss it accordingly.

7.2. Costs shall be for the Defendant.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 21<sup>ST</sup> OF MAY, 2025.**



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**I. M. MABBOLOBOLO**

**HIGH COURT JUDGE.**