

Date

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2023/HP/0737



BETWEEN:

**MARY NDHLOVU
ELINA MUTIKITELA
MANDO MWANZA
KAMOBWA MUKUKA**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF**

AND

**CHISALA LOMBE
PAMELA MONTA
MELBA NYAWA NACHALWE**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Before the Hon. Mrs. Justice R. Chibbabbuka on the 28th May, 2024.

**For the Plaintiffs: Messrs GM Legal Practitioners
For the Defendants: Messrs Ilunga and Company**

RULING

Cases referred to:

1. *Time Trucking Limited vs Kelvin Kipimpi CA Appeal No. 250 of 2020*
2. *Walusika Lisulo vs Patricia Anne Lisulo (1998) ZR 75 SC.*
3. *Jamas Milling Company Limited v Amex International Pty Limited [2002] Z.R. 79*
4. *Telecommunications Company Limited (Zamtel Ltd) vs Aaron Mweenge Mulwanda and Paul Ngandwe SCZ/8/63/2009*

Legislation referred to:

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

1.0 Introduction

This matter was commenced on 5th May, 2023, by way of writ of summons and statement of claim, and allocated to Lady Justice M. Wina. On 14th November, 2023 following the non-attendance to a hearing by both parties, Justice Wina struck off the matter from the active cause list with liberty to restore within 30 days failing which the matter was to stand dismissed. The order of the court was written on the jacket of the court file.

On 13th February, 2023, this matter was reallocated to this court following the transfer of Justice Wina to Livingstone. By the foregoing date, the plaintiffs had not applied to restore the matter to the active cause list and so it stood dismissed as per Lady Justice M. Wina's order. Accordingly, on 14th February, 2024, this court issued an order stating that this matter was dismissed as per Justice M. Wina's order and that the parties were at liberty to recommence a fresh action.

The plaintiffs have now applied for an ex-parte order for special leave to review this court's order of 14th February, 2024. The application is made by summons pursuant to *Order 39 Rule 2* of the *High Court Rules, Chapter 27* of the *Laws of Zambia*, and supported by an affidavit. The application was filed on 26th March, 2024.

2.0 The Plaintiffs' Affidavit in Support.

The affidavit in support of the application was deposed to by one Natasha Mumba, an Advocate in the employ of Messrs. GM Legal Practitioners. She deposed that on 10th October, 2023, Lady Justice Wina, at the scheduling conference, directed the parties to conduct a search and comply with the order for directions within 21 days thereof. Upon conducting a search at the principal registry on 13th October, 2023, it was brought to her attention that

the order for directions were neither typed nor placed in her firm's pigeon hole. A further inquiry on a later date revealed that there was another matter with the same cause number which made it impossible for her firm to conduct a digital search as only the other matter's file was found.

On 14th November, 2023, Justice Wina issued an order striking out this matter with liberty to restore to the active cause list within 30 days. The court also issued a notice of hearing for 23rd November, 2023. That the order of 14th November, 2023 was unknown to her and thus she did not apply for the matter to be restored to the active cause list within the stipulated time. That on 14th February, 2024, this court issued an order dismissing the matter for want of prosecution. That the plaintiffs could not restore the matter to the active cause list as they did not know that it had been struck out.

2.1 The Plaintiffs' Supporting Arguments

In support of the application, the plaintiffs filed skeleton arguments wherein counsel argued that the court has a discretionary power to review its own judgments and decisions within 14 days from the date of the judgment or decision, failing which a party is required to apply for special leave. Counsel relied on the provisions of *Order 39 Rules 1 and 2 of the High Court Rules*, as well as the cases of **Time Trucking Limited vs Kelvin Kipimpi**¹ and **Walusika Lisulo vs Patricia Anne Lisulo**². That there has been a lapse of 14 days within which the application for review ought to have been made and hence the application for special leave. Counsel argued that this is a proper case for the court to exercise its discretion and prayed that the application be granted.

3.0 At the Hearing

This court exercised its power under *Order 30 Rule 6A (1)* of the *High Court (Amendment), Rules, 2020*, to dispense with the attendance of the parties and dispose of the application on the basis of the documents filed.

4.0 Decision of the Court

I am indebted to counsel for the arguments. I have carefully considered the same.

The application herein is made pursuant to *Order 39 Rules 1 and 2* of the *High Court Rules*, of the *High Court Act, Chapter 27* of the *Laws of Zambia*, which provide that:

“(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. [underling for court’s emphasis]

(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.”

The law clearly affords the court the discretion to review its own judgments and decisions within 14 from the date the said judgment or decision is made. After expiration of the 14-day period, a party may apply to the court for special leave to review, as the plaintiffs have now done.

Looking at the order the plaintiffs want this court to review, it is imperative for this court to establish under what circumstances a court may be moved to review its own decisions. It is well established law that a review under *Order 39* of the *High Court Rules* is only available to a party seeking it where such a party has discovered vital fresh evidence which was not available to the court at the time the court made its decision. In the case of **Jamas Milling Company Limited v Amex International Pty Limited**³ the Supreme Court stated 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 material evidence, which would have 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."

This position of the law was reaffirmed in the case of **Zambia Telecommunications Company Limited (Zamtel Ltd) vs Aaron Mweenge Mulwanda and Paul Ngandwe**.⁴ Further, it is clear from the wording of *Order 39 Rule 1* that a review is only available in a matter that was heard.

In *casu*, there is no fresh evidence that has been discovered by the plaintiffs for the obvious reason that this matter was not heard on its merits. The order of this court of 14th February, 2024 merely states that the plaintiffs having failed to restore this matter to the active cause list within the stipulated time as per Justice Wina's order, this matter stands dismissed. Where a matter is struck

off the active cause list, the avenue available to a litigant is to restore the same to the active cause list within the time stipulated. Should the litigant fail to do so and the matter is dismissed, the only recourse available after such a dismissal is to recommence under a fresh action. It follows therefore that this court's order of 14th February, 2024 which states that this matter is dismissed for want of prosecution cannot be reviewed as the only recourse available to the plaintiffs is to recommence the action under a different cause.

In any case, even in assuming that the order of 14th February, 2024 was reviewable, the same would have no effect on the status of this matter as Justice Wina's order of 14th February, 2023 is still in force and it is by that order that this matter was dismissed. Justice Wina's order cannot equally be reviewed for the reasons outlined above, and even in assuming it could, this court has no authority to do so as High Court Judges rank at par, with no authority to review each other's decisions. In the premises, the plaintiffs' application for special leave to review is not tenable and is hereby dismissed.

The plaintiffs shall bear their own costs.

Leave to appeal is granted.

Dated at Lusaka this.....day of.....2024

28th May
23 MAY 2024
R. CHIBBABBUKA, J
P.O. BOX 30007, LUSAKA

R.H Chibbabbuka
HIGH COURT JUDGE