IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 237 OF 2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

THE EXAMINATIONS COUNCIL OF ZAMBIA **APPELLANT**

AND

CHRISTOPHER M'KANDAWIRE ***(Suing as next Friend of Dorothy Wongani M'kandawire)*** **RESPONDENT**

CORAM: Chashi, Ngulube and Banda-Bobo, JJA

ON: 21st January and 11th February 2026

For the Appellant: ***A. J Shonga Jnr, SC and S. Namusamba (Ms), Messrs Shamwana and Company***

For the Respondent: ***E. B Kaluba and O. Sambo, Messrs Emmanuel and Onesimus Legal Practitioners***

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Time Trucking Limited v Kelvin Kapimpi - CAZ Appeal No. 250 of 2020***
2. ***Raymond West Evan v Loanco Limited - CAZ Appeal No. 51 of 2025***

3. ***Jamas Milling Company Limited v Imex International (PTY) Limited - SCZ Judgmnet No. 20 of 2002***

4. ***Robert Lawrence Roy V Chitakata Ranching Company Limited (1980) ZR, 198***

5. ***Fearnought Systems Limited v Fearnought System (Z) Limited & Another - SCZ Appeal No. 35 of 2015***

6. ***Mutembo Nchito v Attorney General - 2016/CC/0029***

7. ***Codeco Limited v Elias Kangwa & Others - SCZ Appeal No. 199 of 2012***

8. ***Frederick Jacob Titus Chiluba v The Attorney General - SCZ Appeal No. 125 of 2002***

9. ***Nyampala Safaris & Others v Zambia Wildlife Authoirty – SCZ Judgment No. 6 of 2004***

Legislation referred to:

1. ***The Examination Council of Zambia Act, Chapter 137 of the Laws of Zambia***

2. ***The Education Act, No 23 of 2011***

Rules referred to:

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

2. ***The Supreme Court Practice (White Book) 1999***

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Lady Justice G. Milimo Salasini, delivered on 25th August 2022, in favour of the Respondent.

1.2 In the said Judgment, the learned Judge found that, the Respondent, who was the Applicant in the court below had proven his case. The learned Judge opined that the Respondent had succeeded on the grounds of illegality, irrational/unreasonableness, legitimate expectation and damages.

2.0 BACKGROUND

2.1 Dorothy Wongani M'kandawire, *(the Child),* on whose behalf the action herein was taken, wrote her grade seven examinations at David Livingstone Memorial Presbyterian Pre & Primary School, using examination No. 180306000038.

2.3 The Child was subsequently accepted for grade 8 at Ndola Girls' National Technical School. The acceptance letter indicated her examination No. as 180306000038.

2.4 Before the grade 9 examinations, as part of the registration process, the Child verified her particulars in the provisional examination register and confirmed that she was registered. She however discovered that her gender was indicated as "male" instead of "female. This was brought to the attention of the school who contacted the Appellant's Kitwe Office, which advised them to get in touch with the primary school, at which the child wrote her grade 7 examinations.

2.5 The primary school wrote a letter to the Appellant's regional office in Livingstone, advising the Appellant to make the necessary correction to the child's gender. The examination number indicated was 180306000038. The Regional Manager wrote a letter to its headquarters in Lusaka, advising them to make the necessary corrections.

2.6 After sometime, the Respondent, made a follow up with the regional office and was advised that everything was under control and that the Child's particulars in the final examination register would be corrected.

2.7 However, when the Appellant released the final examination register, the Child's name had been removed from the register. When the Respondent followed up with the school in Ndola and the Appellants regional office, they both assured him that there was no serious problem, as the Child could still sit for the examination under protest.

2.7 Following that decision, the School prepared and issued the Child with an examination identity card, bearing examination number 180502160054, which the Child used to sit for the examinations.

2.9 When the Respondent released the results for 2020, it was discovered that the Child's results were not released. After the Respondent followed up the issue, the marked examination slips were delivered to the Appellant's head office in Lusaka in March 2021, but to date the Respondent has not processed and released the child's results.

2.10 The Respondent lodged a complaint with the Appellant, who responded that they could not resolve the problem

because the examination number appearing on the scripts, belonged to a male candidate with similar names who sat for grade 9 examinations, from St Paul's Secondary School.

3.0 MATTER IN THE COURT BELOW

3.1 On 9th November 2021, the Respondent applied for special leave to apply for judicial review out of time, which was granted by the court below on 14th January 2022.

3.2 In the substantive application for judicial review, the Respondent alleged that, the Appellant's refusal or failure to process and release the Child's results was illegal, as it contravenes Section 8 of **The Examination Council of Zambia Act**[1] and Section 14 of **The Education Act**[2]. That the refusal/failure to process and release the results was irrational and unreasonable.

3.3 According to the Respondent, they had legitimate expectation from the representations by the Appellant that the results would be processed and released.

3.4 Apart from declarations, the Respondent sought Orders for certiorari, mandamus and damages.

3.5 The judicial review was opposed by the Appellant. According to the Appellant, the Child, whilst at Ndola Girls National Technical School, instead of registering under her examination number,180306000038 assumed the identity of Wongani M'kandawire, a male student under examination number 180502160054. That this was contrary to the policy that candidates should use the same examination number for the grade 7 composite examination in registering for the Junior Secondary School *(Grade 9 Internal)* and School Certificate *(Grade 12)* examinations.

3.6 The Appellant contended that it had not breached Section 14 of the **Education Act**[2]. It disputed any illegality and submitted that, there exists no decision capable of being judicially reviewed. It was further contended that there was no irrationality nor legitimate expectation. The Appellant asked the Court to dismiss the application.

3.7 As earlier alluded to, in its Judgment of 25th August 2022, the learned Judge ruled in favour of the Respondent.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellant appealed to this Court advancing the following four (4) grounds:

(i) The court erred in fact and law when it exercised the power to review its own judgment suo motu under Order 39 (1) High Court Rules, Chapter 27 volume 3 of the Laws of Zambia;

(ii) The court erred in fact and law in finding that the Respondent satisfied the grounds of illegality, irrationality and procedural impropriety for which an order for judicial review could be granted;

(iii) The court erred in fact and law in failing to differentiate the different roles of the Appellant and the District Education Board,

and in finding that the Appellant had given the Respondent's daughter legitimate expectation that her results would be processed and released;

(iv) The court erred in fact and law when it awarded damages to the Respondent.

5.0 ARGUMENTS

5.1 The Appellant at the hearing relied on its heads of argument dated 24th July 2023 and the arguments in reply dated 25th June 2024, which Shonga Jnr, SC relied on at the hearing and augmented with brief oral submissions. Equally, Mr Kalaba Counsel for the Respondent relied on the Respondent heads of argument dated 17th June 2024 which he augmented with brief oral submissions.

5.2 State Counsel Shonga also brought to our attention the cases of **Time Trucking Limited v Kelvin Kipimpi**[1] on applicability of Order 39 **HCR** and **Raymond West Evan v Loanco Limited**[2] on the consequences of a Judgment which is a nullity.

6.0 ANALYSIS AND DECISION

6.1 We have considered the grounds of appeal, the Judgment being impugned and the arguments by the parties. We are of the view that determination of this appeal revolves around the first ground of appeal. The outcome of the first ground will have an effect on the three remaining grounds.

6.2 The first ground attacks the learned Judge for evoking Order 39 (1) of **The High Court Rules[1] (HCR)** *suo motu.* Our attention was drawn to Order 39 **HCR** which reads as follows:

> ***"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."***

6.3 It was the Appellant's submission that the power of the court to review its own decision under Order 39 **HCR**, exists and is discretionary. That however, there must be sufficient grounds to exercise that discretion. That further, in order to exercise that discretion, it is apparent that an application must be made by one of the parties to the

action within fourteen days from the date of the Judgment of the court.

6.4 Reliance was placed on the case of **Jamas Milling Company Limited v Imex International (PTY) Limited**[3], where the Supreme Court stated as follows:

> ***"The application for review was made pursuant to Order 39/1 of The High Court Rules. The affidavit in support of this application did not state that fresh material evidence had been found after the delivery of the Judgment, but stated that since the Judgment was entered on admissions, the court should re-look at paragraphs 4,5,6 and 7 of the defence and counterclaim.***
>
> ***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 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: Robert Lawrence Roy v Chitakata Ranching Company Limited[4]. 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."

6.5 It was submitted that the above stated position was reiterated by the Supreme Court in the case of **Fearnought Systems Limited v Fearnought (Z) Limited & Another[5]** where they held as follows:

"There are principles that give guidance as regards how this Order should be applied in practice.....first the application for review is heard. At that stage, the applicant must show to the satisfaction of the Judge the grounds that warrant the review of the decision. If those grounds are shown, then the order for review is

granted. The next stage is now for the Judge to re-open the matter and review the Judgment...

Clearly, the application for review is a very crucial stage because it is at that time that the following should be established or shown:

(i) That fresh evidence has been discovered which would have had material effect on the Judgment or decision;

(ii) That the evidence has been discovered since the Judgment or decision;

(iii) That such evidence could not with due diligence, have been discovered before and;

(iv) That such evidence does not comprise events that have occurred for the first time after delivery of Judgment.

When it comes to the actual review, care must be taken to ensure that the same is premised on

determining what material effect, if any, the fresh evidence may have had on the Judgment or decision; otherwise the whole exercise will amount to merely providing a dissatisfied litigant an opportunity to have a second bite and argue for alteration of the Judgment in order to bring about a result that he considers more acceptable."

6.6 According to the Appellant, in the present case, the circumstances under which the court below exercised the right of review, were without application from either party. That moreover the court simply stated that *"I found that not all evidence before me had been critically addressed by this Court."* That it was not even highlighted which portions of the said evidence had allegedly not been critically considered, enough to warrant the upheaval of the previous Judgment.

6.7 The Appellant further submitted that the decision of the Judge to review that Judgment in the manner in which it

was done was a misapprehension of the powers under the provision of the law that it was exercised. That even assuming that the court had legal backing to exercise the power of review *suo motu*, there should be sufficient cause. That this was not a mere slip or omission, but an overhaul of an entire Judgment.

6.8 In response to the first ground, the Respondent submitted that this ground of appeal is misconceived. That the record will show that, there was no initial Judgment of the court, which was subsequently reviewed. According to the Respondent, what actually transpired was that the learned Judge on 3rd August 2022, read out to the parties a draft Judgment. That the draft Judgment was never finalized, signed, sealed or given to the parties. That in the premise, there is only one Judgment which was delivered.

6.9 It was further submitted that although the learned Judge stated in her Judgment that she had reviewed her earlier Judgment of 3rd August 2022, she did not in fact review any Judgment. That what she did was to simply correct or

amend the draft Judgment before it was finalized and delivered to the parties.

6.10 According to the Respondent, the court below was properly entitled to change or correct its own Judgment before it was perfected. Our attention was drawn to Order 42/1/4 of **The Rules of The Supreme Court[2] (RSC)** which provides as follows:

> ***"A Judgment takes effect from the time when the Judge pronounces it and the subsequent entry of it is a mere form of obedience to the direction of the court...But it is within the powers of a Judge to alter his Judgment at anytime before it is entered and perfected."***

6.11 It was submitted that although the learned Judge relied on Order 39/1 **HCR**, to vary her decision and termed the same as a review, her powers were still validly exercised and can be traced to a legitimate provision in the law. That her mistaken reliance on a different provision of the law does not render her decision irregular or invalid. Reliance

was placed on the case of **Mutembo Nchito v Attorney General**[6] in submitting that reliance on the wrong provision of the law does not render invalid the exercise of power if the same power can be traced to a legitimate source.

6.12 At this juncture, it is important to note the events which led to the Judgment being impugned. The learned Judge called the parties on 3rd August 2022 and read out a Judgment in which she dismissed all the Respondent's reliefs which were being sought in judicial review. Subsequently on 25th August 2022, the learned Judge called the parties and delivered the Judgment before us. This is what the learned Judge stated in the introductory part:

> ***"This Judgment is a review of my earlier Judgment of 3rd August 2022. The review is made pursuant to Order xxxix (1) of The High Court Rules, Chapter 27 of the Laws of Zambia, which provides for a Judge to review his previous***

Judgment, on sufficient grounds. Having reviewed my earlier decision, I found that not all the evidence before me had been critically addressed by the court."

6.13 The learned Judge then *volte face*, in abrupt and complete reversal of the Judgment of 3rd August 2022, granted the Respondent all the reliefs he was seeking in the judicial review. Although the Judgment of 3rd August 2022, is not on the record, it is not in contention that it was orally delivered. In line with Order 42/1/4 **RSC**, a Judgment or Order is valid from the time it is pronounced. The learned Judge in her introductory remarks was emphatic that there was an earlier Judgment of 3rd August 2022, and that was the Judgment she was reviewing by evoking order 39 **HCR**. We therefore do not agree with the Respondent that there was no earlier Judgment.

6.14 We also do not agree with the contention by the Respondent that the learned Judge mistakenly evoked Order 39 **HCR**. In our view, the learned Judge was alive to

the fact she was evoking Order 39 **HCR**. That is evident from the introductory remarks.

6.15 In the case of **Time Trucking Limited v Kelvin Kapimpi**[1], we were confronted with the issue of *"can a court on its own motion and without hearing the parties review its decision..."* Although we do not seem to have determined that issue in that case, it is noted that in most of the authorities relating to Order 39/1 **HCR**, there were applications from either party for review. The review of a Judgment by the court *suo motu* is typically limited to correcting clerical or arithmetical errors, or errors arising from an accidental slip or omission.

6.16 Therefore generally a review under Order 39 **HCR** requires an application for review within fourteen (14) days. However, under this provision, a Judge is not proscribed from initiating a review *suo motu,* when circumstances demand. However, in our view, the Judge ought to adhere to the provision of Order 39 **HCR**, as spelt out in a number

of cases which have ably interpreted the applicability of Order 39 **HCR**.

6.17 As was observed in the case of **Codeco Limited v Elias Kangwa & Others**[7], the power of the High Court Judge to review his own Judgment or decision is discretionary. The Supreme Court in the case of **Robert Lawrence Roy V Chitakata Ranching Company Limited**[4], laid down the principles as to when a court will set aside a Judgment on fresh evidence and as to when it will review a Judgment under Order 39 **HCR**. The Supreme Court set down the following test:

> ***"Setting aside a Judgment on fresh evidence will lie on the ground of the 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."***

6.18 The test in the case of **Jamas Miling**[3] was espoused as follows:

> ***"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. Robert Roy v Chitakata Ranching Company Limited[4]. 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."***

6.19 Further on the application of Order 39 **HCR**, the Supreme Court in the case of **Fearnought Systems Limited**[2] stated that the review of a Judgment or decision was a two stage process as follows:

(i) considerations when determining whether review is appropriate and

(ii) determining what material effect, if any fresh evidence may have had on an initial decision

6.20 The Supreme Court then went on to hold as follows:

> ***"There are principles that give guidance as regards how order 39 should be applied in practice. First, an application for review must be heard. At this stage, the applicant must show to the satisfaction of the Judge the grounds that warrant the review of the decision. If the grounds are shown, then the Order for review is granted. The next stage is now for the Judge to reopen the matter and review the Judgment."***

6.21 In the case before us, the learned Judge decided to review, her Judgment of 3rd August 2022, *suo motu.* The reason given was that, not all the evidence before her was critically addressed, the parties were not invited to address

the court. The court did not also open and rehear the case wholly or in part and take fresh evidence as required by Order 39/1 **HCR** before it wholly reversed its decision and coming up with a totally different outcome.

6.22 In our view, the reason advanced by the learned Judge did not qualify as sufficient ground. Further, the application of Order 39 **HCR** by the learned Judge did not meet the test as set out by the cases of **Robert Lawrence Roy** and **Jamas Milling[3].**

6.23 In our view there was a clear misdirection by the learned Judge. This is a proper and fit case for setting aside the Judgment in the court below and ordering of the rehearing of the judicial review, as the Judgment of the court delivered on 25th August 2022 was a nullity. In the view, that we have taken, there is no need to consider the remaining three (3) grounds which are challenging the nullified Judgment as they become *otiose.*

6.24 Before we leave the matter, we wish to comment on the manner in which the hearing of the judicial review was

conducted. The proceedings in the court below shows that when the matter was called for hearing, the Respondent and the Appellant all called witnesses to give *viva voce* evidence. All in all, five witnesses testified and were cross examined.

6.25 In the case of **Frederick Jacob Titus Chiluba v The Attorney General**[8], the Supreme Court opined as follows:

> ***"The practice in Zambia and in England is that all applications for judicial review, the principle source of evidence is from affidavits, but the court has power to order that a deponent and not any other witness, attend to give oral evidence and to be cross examined (Order 53/8 and 38/2 RSC). It is important to emphasize the point that the only witness that may give viva voce evidence on applications for judicial review are deponents of the affidavits on record."***

6.26 The aforestated was not observed by the learned Judge. There was no Order from the court to receive *viva voce*

evidence. Also three of the witnesses who gave evidence were not deponents.

7.0 CONCLUSION

7.1 The Judgment delivered and dated 25th August 2022 is accordingly set aside as it is a nullity.

7.2 The matter is remitted back to the High Court for determination of the judicial review before another Judge of the High Court.

7.3 Each party to bear its own costs.

J. CHASHI
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE