IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 119/2006

HOLDEN AT KABWE/LUSAKA

(CIVIL JURISDICTION)

R. C. MANASE APPELLANT

AND

ZAMBIA TELECOMMUNICATIONS CO. LIMITED RESPONDENT

Coram: Sakala, CJ., Chibesakunda and Mushabati JJS
10th April and 27th July, 2007

For the Appellant: Mr. B.K. Chishimba of Chishimba and Company. Standing in for Silweya and Company.

For the Respondent: Mr. J, Mulenga, Legal Counsel.

J U D G M E N T

Sakala, CJ., delivered the Judgment of the Court.

Cases referred to: nb

1. *Lawrence Roy Vs Chitakata Ranching Company Limited (1980) ZR198.*
2. *Jamas Milling Company Limited and Imex International pty Limited SCZ Appeal No. 17 of 2000*
3. *Mohamed V The Attorney-General (1982) ZR 49.*

This is an appeal against a ruling of the High Court sitting at Kabwe on the 5th December, 2005 in which ruling the High Court refused to review its earlier ruling of 22nd April, 2005, on the grounds that no new material evidence had been discovered since the earlier decision but which could not, with reasonable diligence, have been discovered before upon which the court could have reviewed its earlier ruling and that the parties had known of the Agreement Form (TS 10) which the court had to construe but had not been produced.

The facts of the case leading to this appeal are that on 30th November, 2004, the Appellant, pursuant to Order 30 Rule 11(b) of the High Court Act, Cap 27 of the Laws of Zambia, applied by way of an originating summons for the construction of a Deed of Agreement Form (TS 10). The originating summons was couched in the following terms:

"LET ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED as a party with an interest in a deed of agreement form (TS10) dated 22/6/79, within 14 days after the service of this summons on the Defendant inclusive of the day of such service cause appearance to be entered for the Defendant to this summons which is issued upon application of R.C. Manase of Kabwe who is a party to the deed of agreement form (TS 10) dated 22/6/79 entered into and signed between him and the then Posts and

Telecommunications Corporation Limited and claims to be entitled to the use and enjoyment of a telephone line number 224903 at Kabwe and for the determination of the following questions:-

1. *Whether upon a proper construction of the provisions and terms of the agreement form (TS 10) dated 26/6/79 for the provision of telephone service, the defendant can transfer charges from other telephone lines to the Plaintiff's personal line No. 224903;*
2. *Whether the Plaintiff having cleared all charges on telephone line No. 224903 the Defendant would be entitled to deprive the Plaintiff of his use and enjoyment of telephone service at the said telephone line No. 224903;*
3. *When the Defendant upon a proper construction of the agreement form (TS 10) would have any lawful justification to disconnect the phone and deprive the Plaintiff of the use and enjoyment of the telephone service, (sic);*
4. *Whether pursuant to the terms of the agreement form (TS 10) the Plaintiff would be entitled to the restoration forthwith or while pending determination of the matter; and*
5. *That provision be made for the costs of this application*

6. SUCH FURTHER OR OTHER RELIEF as the court shall deem fit in the circumstances of this."

The originating summons was supported by a very detailed affidavit in which the Appellant explained how he applied for the telephone service and how he made an agreement with the Posts and Telecommunications Corporation Limited for the provision of the telephone service in respect of telephone number 224903.

He deposed that the Telephone was provided but was subsequently disconnected for non payment of the Telephone Bill for the same phone; that by a special agreement the phone was connected but that later he received a Bill of K13,416,378.70 on the same phone as a transfer account balance; that the amount having not been paid, the same phone was again disconnected; that his written requests for the restoration of the phone were not responded; and that the action taken by the Respondent to transfer the balance on phone number 224903 without consent for whatever reasons was in breach of the agreement entered into.

The Respondent, through its Chief Communications Officer, filed an affidavit in opposition to the originating summons in which he deposed that the Respondent is not the former Posts

and Telecommunications Limited; that on 22nd April, 2004 after the telephone service on number 224903 was reconnected, the Appellant had been reminded to settle two phone bills on telephone numbers 223216 and 222739 within seven days; that in the same letter, the Appellant had been warned that if he failed to settle the two telephone bills within seven days, the same would be transferred to telephone number 224903 to facilitate recovery of the same; that the bills of the two telephones made up the sum of K13,416,378.70 which was transferred to telephone numbered 224903 on 4th August, 2004; and that by his failure to settle the two telephone bills, he did not come to court with clean hands.

The Appellant filed an affidavit in reply in which he denied receiving the Respondent's letter of 22nd April, 2004; that there were no accumulation of bills on telephone number 224903; and that he queried the amount the Respondent was demanding.

He further deposed that the other telephone numbers were for different usages and made under separate agreements. In the same reply, the Appellant produced a blank sample of the agreement he had entered into with the Respondent in respect of telephone number 224903.

Before the Originating Summons was set down for hearing, the Respondent, on 18th January, 2005, applied by way of a summons, pursuant to Order 2 Rule 2 of the Rules of the Supreme Court, to set aside the proceedings for irregularity. The summons was supported by an affidavit deposed by the Chief Telecommunications Officer in which he stated that the Appellant's proceedings, brought under Order 30 Rule 11(b) of the High Court Act, were for the determination of questions of construction of an indenture dated 22nd June, 1979, long before the Respondent came into existence; that the indenture was not on the court's record as the same was not filed at all by the Appellant; that this fundamental non compliance by the Appellant rendered the proceedings irregular in that the alleged subject matter was not brought to court; and that the proceedings were therefore frivolous, vexatious and a sheer waste of the court's time. The court was asked to set aside the proceedings.

The Appellant filed an affidavit in opposition to the application to set aside the proceedings. In that affidavit, the Appellant stated that the application by the Respondent was an abuse of court process and only intended to delay the hearing of the matter; that he had filed a reply to the affidavit in opposition to the originating summons in which he exhibited a copy of Form (TS 10) similar to what he had signed; that on the date he signed, he was given only one form for completion and no

copy was given to him; and that his efforts to secure Form (TS 10) at the Kabwe Offices proved unsuccessful as the Respondent were uncooperative.

The court heard the summons to set aside the proceedings. On 22nd April, 2005, the court delivered its ruling. In that ruling, the court observed that it had been called upon to construct a Deed of Agreement Form (TS 10) dated 22nd June, 1979, entered into by the parties. The court also observed that the Appellant had exhibited a blank Agreement Form (TS 10) similar to what he had signed. The court held that the Deed which it was supposed to construct, was not before it; that even if it were to proceed to trial, the subject matter of the proceedings would not be there. The court upheld the Respondent's application and set aside the summons for irregularity with costs.

The Appellant, pursuant to Order 39 Rules 1, 2 and 3 of the High Court Act, Cap 27, applied by way of summons for an order of special leave of the court to review its own ruling of 22nd April, 2005 and for an Order for stay of that ruling. The application was supported by an affidavit sworn by the Appellant in which he stated that he was seeking special leave of the court to review its own ruling setting aside the proceedings; that he had been advised that a witness can be subpoened to produce existing documents during trial; that it

was also possible to discover a missing document during inspection of documents under an Order for directions; that the ruling of 22nd April 2005 deprived him of a constitutional right to a fair trial because it was made prematurely and procedurally and that in Zambia procedural omissions and defects are curable in preparation for trial of triable issues.

The Respondent filed an affidavit in opposition to the affidavit to review the Order of 22ndApril, 2005. The Chief Telecommunications Officer swore this affidavit. He deposed that he had been advised that the indenture of 22nd June 1979 ought to have been filed with the court at the commencement of these proceedings but was not; that to date, the subject matter of these proceedings was not before court; and that the case may not be continued in the hope that the court would fill in gaps of a blank document or the possibility of discovering the document.

The court heard arguments and submissions. On 5th December, 2005, the court delivered its ruling. In that ruling, after setting out the reliefs sought in the originating summons, the court observed that the reliefs were inter-twined. The court then considered the cases of ***Robert Lawrence Roy Vs Chitakata Ranching Company Limited***[1] ***and Jamas Milling Company Limited Vs International (Pty) Limited***[2] in which cases this court 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 rule 2 of the High Court Rules.

The court then concluded as follows :-

"Applying the law as set out above to this case, no new evidence has been submitted upon which I can review my Ruling of 22nd April,2005. The parties knew about the agreement form (TS 10) which I was supposed to construct to date has not been produced. Although it is trite law that an interlocutory judgment can be set aside upon application it must be for a good reason. In this case "no 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.

For the reason I have given above I refuse to review my ruling of 22nd April 2005. The application is refused with costs to the Defendant to be agreed or taxed in default of agreement."(sic)

The Appellant appealed to this court against this ruling of 5th December, 2005. He filed a memorandum of appeal containing 10 grounds of appeal. The summary of the 10 grounds is that the trial court erred in holding that there were no good or sufficient reasons for reviewing its Judgment; that the parties

knew about the Agreement Form (TS 10) to be construed but was not produced and that by refusing to review the ruling the court deprived the Appellant a constitutional right to a fair trial and an opportunity to be heard fully in his cause. The further summary of the grounds of appeal is that the matter should have proceeded to trial on substantive issues during which inspection could have been made under an order for disclosure or notice to produce; that the trial Judge overlooked the provisions of the law that procedural omissions and defects are curable in preparation for triable issues; that the originating summons disclosed several causes of action, amongst which, was the construction of the agreement in question; that the trial judge erred in terminating the whole action on a presumption that the Appellant could not produce or demand for the production of the document during trial; that the trial Judge erred when he terminated and concluded the action at interlocutory application stage; that the trial judge erred in failing to rule that the Agreement (TS 10) actually existed and was admitted to exist by the Respondent; and that the trial Judge erred in refusing to review the ruling as it amounted to a requirement that all evidence in an action should be tendered at the commencement of an action.

The Appellants filed written heads of argument based on the 10 grounds. At the hearing of the appeal, both legal counsel informed the court that they were relying on their written

heads of argument. The combined summary of the written heads of argument on behalf of the Appellant is that the learned trial Judge erred in law by holding that he could not review his judgment so as to enable the Appellant to have a fair trial and an opportunity to fully present and argue his case on substantive issues touching the Agreement Form (TS 10) which was solely and exclusively in the possession of the Respondent who did not deny its existence; that the only proceedings on record which were set aside by the Order of the court of 22nd April, 2005 were the originating process which could only be issued under Order 6 of Cap 27 and not under Order 30 Rule 11 of Cap 27 and that the process only required an amendment and not setting aside; that the application to set aside an originating summons was wrongfully made because the interpretation of the documents was not the only cause of action and the only relief sought; that the erroneous approach by the Respondent in its application amounted to dismissing or killing the action as the Appellant could not proceed to take up summons for directions on an action that had been set aside and refused; that the other relief sought by the Appellant was the restoration of the telephone service; and that the court had wide discretion to review or refuse to review its decision; and that Form (TS 10) existed at the time of the issuance of the Originating process but had not been discovered and that discovery and inspection of documents is done under the

Order for Directions which are obtained and secured by subsequent applications in chambers and not by originating summons; and that because the parties had admitted the existence of Form (TS 10), the learned trial Judge should have given directions for discovery and inspection and trial.

It was further argued that the Respondent made the application to set aside proceedings when it had not entered a conditional appearance attacking a wrongful commencement of the originating summons; and that the court below did not act judiciously and consequently deprived the Appellant of its fundamental and constitutional right of a fair trial.

The summary of the written response on all the grounds of appeal is that the court below was on firm grounds when it ruled that no good reasons had been advanced for it to review its own judgment under Order 39; that at the time of the ruling of 22nd April, 2005, the indenture of 22nd June 1979 was not before the court even at the time of the application for review; that the court below was on firm grounds to refuse to review its ruling of 22nd April, 2005, as no fresh evidence which could have had material effect upon the decision had been discovered since the decision but could not with reasonable diligence have been discovered before; that the court below was on firm ground when it set aside the originating summons for irregularity; that the provisions of

Order 30 are for business to be disposed off in chambers on the basis of affidavit evidence as opposed to oral evidence and no Orders for directions, discovery and or inspection; and even trial are envisaged; and that the Respondent is a separate and distinct legal entity from the Post and Telecommunications Corporation Limited who is alleged to have entered into an Agreement with the Appellant; and that the Respondent was only incorporated on 31st March 1988, 9 years after the indenture was entered into and therefore the Respondent was not a party to the indenture of 22nd June and not in possession of the same.

We have deliberately delved into the history and the facts of the case leading to this appeal so as to put the issue for determination into its proper perspective. We have also considered the written arguments and submissions. On account of the view we take of this appeal we find it unnecessary to review the facts and the arguments again. We shall simply state the salient facts on which this appeal centers and which were common cause. The salient and relevant facts are that the Appellant's action, which was commenced by an originating summons, was based on a Deed of Agreement commonly known as Form (TS 10) dated 22nd June 1979. This agreement was entered into between the Appellant and Posts and Telecommunications Limited. It is this agreement that the court was called upon to construe.

The Appellant brought his action pursuant to Order 30 rule 11(b) of the High Court Rules. In the margins, the Order reads:- ***"Business to be disposed of in chambers".*** The Order provides for business to be disposed of in chambers. Generally chamber matters are dealt with on affidavit evidence. The trial Judge was therefore perfectly entitled to dispose of the matter in chambers and on the affidavit evidence. The Appellant, too, if he wished could still have produced the document by affidavit evidence. This, he did not do.

We have examined all the reliefs sought as set out in the originating summons. We are satisfied that all the reliefs centred and were dependent on the interpretation of the Agreement. At no stage was the Agreement produced or exhibited by the Appellant neither when the originating summons was filed nor when the application for review was made. What was actually belatedly exhibited by an affidavit in reply was a Blank Form (TS 10) which was said to be similar to the agreement entered into by the parties. We are compelled to state that courts do not try cases on fiction or assumptions. The Appellant, and not the Respondent, had to prove his case. This case was centred on a signed agreement; but this document was nowhere before the court. In the case of ***Mohamed V The Attorney-General[3],*** among other things, we

held that *"a Plaintiff cannot authomatically succeed whenever a defence has failed; he must prove his case."*

The Appellant's application for review did not meet the test we set down in ***Robert Lawrence Roy V Chitakata Ranching Company Limited***[1] where we said:-

> ***"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."***

Equally, the Appellant's application for review failed the test we laid down in ***Jamas Milling Company Limited and Imex International pty Limited***[2] where we said:-

> ***"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 Vs Chitakata Ranching Company Limited[1] (1). 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. That is not the position here. The Defence and Counter Claim were before the court below when it entered the Judgment."

We are satisfied that the Appellant did not discover fresh material evidence which could not with reasonable diligence have been discovered before. The trial Judge was, therefore, on firm ground when he ruled that no good reason had been advanced for him to review his own ruling.

We therefore uphold the trial Judge. For the reasons discussed, this appeal must fail. Accordingly, we dismiss the appeal. On the facts and the circumstances of this case; we make no order for costs.

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E. L. Sakala
CHIEF JUSTICE

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L. P. Chibesakunda
SUPREME COURT JUDGE

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C. S. Mushabati
SUPREME COURT JUDGE

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