IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO. 153/2001**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

GERSHOM MUMBA **APPELLANT**

AND

RAJIV KUMAR DEWAN **RESPONDENT**

Coram: Lewanika, DCJ., Sakala and Mambilima JJS.,
19th March and 27th June, 2002.

For the Appellant: Mr. D.O. Sakala with Mr. C. Mabutwe of Mabutwe and Associates.

For the Respondent: Mr. D.K. Kasote of Levy Mwanawasa & Company.

J U D G M E N T

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

Cases Referred to:

1. Rowland V Divall (1923) 2 KB 500.

When we heard this appeal, we allowed the appeal and indicated that we shall give our reasons later. We now give those reasons. This appeal was against

a judgment on review which reversed an earlier judgment entered in favour of the Appellant. For convenience, we shall refer to the Appellant as the Plaintiff and the Respondent as the Defendant which they were in the court below.

The facts which were not in dispute are that the Plaintiff entered into an agreement with the Defendant for the sale of his motor vehicle namely a Mercedes Benz S320, registration No. AAM 1604 valued at US$ 50,000.00. According to the agreement, the Plaintiff's vehicle was to be paid partly by way of an exchange with the Defendant's vehicle, a Mercedes Benz E280 registration No. AAM 8759 valued at US$ 20,000.00. The difference in price of US$ 30,000 was to be paid in cash. According to the evidence, after the transaction was completed sometime in January 2000, the Defendant's vehicle, which had been in possession of the Plaintiff, was impounded by the Zambia Police on the ground that it was a stolen motor vehicle.

The learned trial judge found on the facts not in dispute that an exchange of motor vehicles did take place between the parties. He also accepted that the Defendant's vehicle that was given to the Plaintiff had been impounded by the police. According to the trial judge, the question for determination was whether there had been a failure of consideration in the transaction; and if so whether the Plaintiff was entitled to recover from the Defendant the total value of his Mercedes Benz.

The learned trial judge considered the provisions of Section 12 of the Sale of Goods Act 1893 on an implied condition of the right to sell goods on the part of a seller as applied in the case of ***Rowland V Divall(1)*** in which the Plaintiff

successfully sued to recover back the price of the vehicle that he had paid to the Defendant on the ground of total failure of consideration. The learned trial judge accepted that that case was on all fours with the case before him. He found that there was a total failure of consideration and entered judgment in favour of the Plaintiff. The court then proceeded to consider the value of the impounded vehicle. The court noted that in defence, the value of the motor vehicle was US$ 10,000 which in the defence and counter-claim filed in the Subordinate court the same vehicle was valued at US$ 20,000. The court found US$ 20,000 to be the correct value and awarded the Plaintiff the same. In the same judgment the learned trial judge ordered that the third party, Mr. J. Mulanda, who had sold the Defendant the impounded stolen vehicle, should indemnify the Defendant with the full amount of the judgment and costs.

On 20th May, 2001 on his own motion, the learned trial judge reviewed his judgment of 21st March 2001. In the reviewed judgment, the learned trial judge stated:

> ***"I have since realized that there is an omission in the Judgment. Having found that there was no contract, the order which I made in the body of the record should have read and will now read as follows:-***
>
> ***In order to put the parties back in the position they were before the Contract, the Defendant is required by this order to return to the Plaintiff Motor Vehicle registration No. AAM1604 or pay US$ 20,000:00 its value to the Plaintiff. The Plaintiff to refund to the Defendant US$30,0000:00 which the Defendant paid him for a consideration that has wholly failed. The order made against the third party remains unchanged."***

On behalf of the Plaintiff, Mr. Sakala filed written heads of argument based on three grounds of appeal. The three grounds were that the learned trial judge erred

in law to review the judgment of 20th March 2001 on its own motion without the attendance of the parties and without summons; that the learned trial judge erred in law to review the judgment to put the Plaintiff in a position of the Defendant as the one owing to the Defendant when in fact it was the Defendant who was owing him; that the learned trial judge erred in law to review a judgment as the review was done 62 days after judgment was passed contrary to order 39 rules 1 and 2 of the High Court rules.

On account of the view we take of the judgment in review, we find it unnecessary to delve into the submissions by both learned counsel in great detail. Suffice it to say that the reviewing of the judgment in the absence of the parties 62 days after it had been entered, was highly irregular on the part of the learned trial judge. While a court is entitled, on its own motion, to review a judgment, the circumstances of this case were such that the parties should have been afforded an opportunity to be heard. More importantly, the case before the learned trial judge was not one of a total failure of the consideration as in the case of ***ROWLAND V DIVALL(1).*** Here was a case of the Defendant's vehicle being exchanged with the Plaintiff's vehicle as part payment, only while the other part of the payment was done by the Defendant in cash. This was

therefore a case where there was only partial failure of consideration in that the Defendant's vehicle failed as part of the consideration. This cannot be said of the cash consideration which was part of the full consideration. Thus, if the Defendant had paid the whole consideration in cash only for the Plaintiff's vehicle there would never have been partial failure of the consideration. The learned trial judge was therefore wrong on review to have taken a position that there was no contract between the parties. It was for that reason that we allowed the appeal with costs, quashed the judgment on review and restored the judgment earlier entered in favour of the Plaintiff

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D. M. Lewanika,
DEPUTY CHIEF JUSTICE.

.....
E. L. Sakala,
SUPREME COURT JUDGE.

.....
I. C. Mambilima,
SUPREME COURT JUDGE.