IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 073/2022**
HOLDEN AT LUSAKA **CAZ/08/048/202**
(Civil Jurisdiction)

BETWEEN:

KONKOLA COPPER MINES PLC **APPELLANT**

(In Liquidation)

AND

TRIBLEMS ENTERPRISES LIMITED **RESPONDENT**

CORAM : Siavwapa JP, Makungu and Chishimba JJA

On 23rd March, 2023 and 21st July, 2023

For the Appellant : Mr. B. Kangwa of Messrs. ECB Legal Practitioners

For the Respondent: Mr. F. Tembo of Messrs. GM Legal Practitioners

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JUDGMENT

CHISHIMBA, JA delivered the judgment of the court.

CASES REFERRED TO:

1) Lapemba Trading Limited v Pemba Lapidiaries & Industrial Credit Company Selected Judgment No. 27 of 2016 (SCZ Appeal No. 49/2014, SCZ/8/269/2013)
2) Jamas Milling Company v Imex International (Pvt) Limited (2002) ZR 79
3) Bernard Kutalika v Dainess Kalunga SCZ/8/070/2013
4) Atlantic Bakery Limited v ZESCO Limited Selected Judgment No. 61 of 2018
5) Mubita Namabunga v Motor Holdings (Z) Limited (1988 - 1989) ZR 188
6) Lusaka City Council & Others v Astro Holdings Limited SCZ/8/285/2014
7) Lewanika & Another vs. Chiluba (1998) ZR 79

8) Kalusha Bwalya v Chardmore Properties Limited, Ian Chamunora Nyalungwe Haruperi 2009/HPC/0274
9) Vendanta Resources Holdings Limited and Konkola Copper Mines v ZCCM Investment Holdings PLC App 14 Of 2021
10) Attorney General v Million Juma (1984) ZR 1
11) D.E Nkhuwa v Lusaka Tyre Services Limited (1977) ZR 43
12) Paul Evans Kasonde v Finance Building Society & Lingson Chikoti Selected Judgment No. 9 of 2017/Appeal No. 194/2016
13) Shamwana & others v The People (1985) ZR 41
14) Leopold Walford (Z) Limited v Unifreight (1985) Z.R. 203

LEGISLATION CITED:

1) The Corporate Insolvency Act No. 9 of 2017
2) The Rules of the Supreme Court of England, 1999 Edition
3) The High Court Rules Chapter 27 of the Laws of Zambia

1.0 INTRODUCTION

1.1 This is an interlocutory appeal against the ruling of the Hon. Mrs. Justice P. Lamba dated 27th January, 2022 in which she reviewed her earlier ruling dated 24th May, 2021 and discharged the stay of execution of judgment granted earlier on the ground that there was no basis to warrant precluding the respondent from pursing the enforcement of the default judgment in its favour.

2.0 BACKGROUND

2.1 On 10th June, 2020, the respondent issued a writ of summons claiming *inter alia*, the sum of K1, 128, 674.40 being debt occasioned by the appellant, damages for breach of contract

and interest. The appellant did not enter appearance nor file a defence to the claim. The respondent filed a 'judgment in default of liquidated sum.' The court below entered judgment in default of appearance and defence in favour of the respondent on 24th March, 2021 for payment of the claimed sum and damages for breach of contract.

2.2 The appellant applied to set aside the default judgment and for an order for stay of execution of the judgment in default, contending that it was undergoing liquidation proceedings and allowing the respondent to execute would result in disruption of the liquidation proceedings as well as management of debts as outlined in **section 127 of the Corporate Insolvency Act No. 9 of 2017** (the CIA). It was further contended that execution against the appellant, a company in liquidation, would be contrary to the provisions of **section 63 of the CIA**.

2.3 The respondent opposed the above application, arguing that the appellant had not shown a defence on the merits.

2.4 In a ruling dated 24th May, 2021, the learned Judge held that the intended defence did not sufficiently disclose any defence on the merits and refused to set aside the default judgment. The court below noted that the appellant is a company in

liquidation and that allowing the respondent to execute its judgment would result in disruption of the course of the liquidation proceedings and management of debts.

2.5 The learned Judge also considered the provisions of **Order 47 rule 1 of the Rules of the Supreme Court of England, 1999 Edition** which gives the court the power to stay execution of a judgment absolutely or for such period and subject to such conditions as the court may deem fit. In that regard, the court below confirmed its order staying execution of the default judgment so that the respondent may fairly join the queue of other creditors to the appellant to be paid accordingly.

3.0 APPLICATION SUBJECT OF THIS APPEAL

3.1 The respondent issued summons for special leave to review the ruling dated 24th May, 2021 pursuant to **Order 39 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia**.

3.2 The affidavit in support was deposed to by Frank Masaka, a director in the respondent company, who stated that following the ruling of 24th May, 2021, the respondent had been in the queue of creditors to be paid by the appellant. The respondent has now discovered that the appellant, though under

liquidation, has been operating as a going concern and paying its debts to other contractors. This was peculiar.

3.3 There was also a management brief which showed that the appellant was offering new contracts of employment, making plans to restructure the company in a bid to increase efficiency and business opportunities and the novation of existing contracts with contractors to the appellant's subsidiary companies which the appellant undertook to honour.

3.4 In addition, that, there was no indication that the appellant would formally begin to wind down but would continue operating normally under the guise of being in liquidation. It had been two years since the appointment of a liquidator who had not commenced the liquidation process. No communication had been received from the appellant as to the position of the respondent on the queue of creditors and when the liquidator would start paying out such debts.

3.5 When the matter came up for hearing on 27th January, 2022, counsel for the respondent informed the court below that the appellant had neither filed an affidavit in opposition nor skeleton arguments. Counsel submitted that pursuant to **Order 30 rule 3A (3) of the High Court Rules (HCR) as amended by**

Statutory Instrument No. 58 of 2020, the appellant had forfeited its right to be heard.

3.6 Counsel for the appellant responded stating that its intention was to merely oppose the application on a point of law without referring to any facts or without contesting the facts as alleged. In that regard, there was no need to file an affidavit in opposition to the application for special leave to review.

3.7 The learned Judge ruled that the provisions of **Order 30 rule 3A (3) of the HCR** were couched in mandatory terms requiring a party served with a summons and supporting affidavit to file an affidavit in opposition. She took the view that the provision has ousted the practice of arguing applications on points of law orally. It affords the court and the other party with evidence and authorities to be relied on by the parties prior to the hearing of an application. This is also meant to avoid the possibility of delays. On that basis, the learned Judge adjourned the matter for ruling on the substantive application.

4.0 DECISION OF THE COURT BELOW

4.1 In her ruling dated 27th January 2022, the learned Judge considered the application for special leave to review the ruling dated 24th May, 2021. The court below noted that the whole

essence of staying execution of the default judgment was because the appellant was said to be in liquidation. Therefore, there was need to ensure the orderly and equitable meeting of the appellant's obligations to its creditors.

4.2 The court observed that since the appointment of a provisional liquidator in May 2019, the liquidation process had not commenced and that the appellant continued to operate normally as a going concern while paying its debts to other contractors as evidenced by exhibit **"FM1"**, paying its running costs, offering new contracts, and making plans to restructure in order to increase efficiency and business operations as per exhibit **"FM2"**, the management brief.

4.3 The learned Judge formed the view that there was no basis to warrant preclusion of the respondent from pursuing the enforcement of the default judgment in its favour. The court below proceeded to review its earlier ruling by discharging the stay of execution of the default judgment.

5.0 GROUNDS OF APPEAL

5.1 Aggrieved by the above decision, the appellant appealed, raising six grounds couched as follows:

1) *The learned court below erred in law and in fact by proceeding to review its own ruling dated 24th May, 2021 on an application by the respondent for special leave to review.*
2) *The learned court below erred in law and in fact by treating an application for special review as if it were an application for review.*
3) *The learned court below erred in law and in fact when it held that the appellant was operating as a going concern, a conclusion that cannot be drawn on an application for special leave and in the absence of evidence to that effect.*
4) *The learned court below erred in law and in fact by failing to take judicial notice that the liquidation process involving the appellant has been stayed by the Court of Appeal and is currently subject to both arbitration proceedings and proceedings before the Supreme court.*
5) *The learned court below erred in law and in fact when it held that there was no basis to warrant precluding the respondent from pursuing the enforcement of the default judgment, thereby consequently altering the course of the liquidation proceedings of the appellant, which proceedings are currently pending arbitration; and*
6) *The court below erred in law and in fact when it declined to hear the appellant's advocates strictly on a point of law when the respondent's application for special leave for review came up for hearing.*

6.0 APPELLANT'S HEADS OF ARGUMENTS

6.1 The appellant filed heads of argument dated 7th April, 2022 and argued each ground separately. The gist of ground one is that the court below did not follow procedure in the manner it

reviewed its earlier ruling. It was argued that the respondent moved the court by way of **Order 39 rule 1 and 2 of the HCR** which provides as follows: in accordance with rule 2, an application for review must be made within 14 days from the date of the decision complained of. Once the timeline elapses, a party needs special leave of court. Without leave, an application for substantive review shall not be admitted. Therefore, an application for substantive review is different from an application for special leave to review. The latter is made when a party who wishes to take out an application for substantive review has not done so within the mandatory 14 days.

6.2 The appellant contended that in an application for special leave to review, the only consideration by the court is whether the applicant has demonstrated the reasons for the delay: any other issue or consideration is irrelevant. In support thereof, the case of **Lapemba Trading Limited v Pemba Lapidiaries & Industrial Credit Company** [1] was called in aid where the the Supreme Court guided that:

> ***"... in the case of an application for special leave to review a judgment, a plausible reason for the delay ought to be adduced. ...***

A court considering an application for special leave to review is not expected to grant every application as a matter of course. The purpose of the rules insisting that those seeking special leave to review should do so through an application supported by an affidavit, is to ensure that the applicant furnishes to the court reasons for the failure to make the application to review within the time prescribed. It follows that such reasons must be veritable, verifiable and should, in any case, offer a reasonable account for the delay."

6.3 The submission being that upon the court being convinced that the applicant has met the standard required to be granted an order for special leave to review, the door is opened for such an applicant to take out the substantive application for review. Therefore, in proceeding to actually review its own ruling on a mere application for special leave to review, the lower court fell into grave error and went beyond what it was required to do at that stage. A perusal of the affidavit in support shows that there was barely any explanation for the delay in taking out the substantive application for review as it was fraught with allegations of how the appellant company was being managed.

6.4 In ground two, the appellant contends that the court below treated the application for special review as if it were an application for review and proceeded to review its own ruling in

the absence of an explanation from the respondent as to the delay in making the substantive application within the prescribed 14 days.

6.5 Reference was made to the case of **Jamas Milling Company v Imex International (Pvt) Limited** [2], and it was submitted that in a substantive application for review, the respondent ought to have shown that it had discovered fresh material evidence which would have had a material effect upon the decision but which could not, with reasonable diligence, have been discovered before. In this case, no such fresh evidence existed at the time of the ruling, which could have materially affected the decision of the court below.

6.6 The appellant contends that the payment advice and management brief do not qualify to be fresh evidence because the payment advice dated 2nd July, 2021 only came into existence after the ruling while the management brief was exhibited by the appellant in its application to set aside the judgment in default.

6.7 In ground three, the appellant challenges the finding of the lower court that it was operating as a going concern arguing that such a finding cannot be drawn on an application for

special leave to review. The appellant further argued that the court below ought to have confined itself to the application at hand. Instead, it made findings beyond what the parties were asking for. The cases of **Bernard Kutalika v Dainess Kalunga** [3] and **Atlantic Bakery Limited v ZESCO Limited** [4] were cited for the principle that a court must not grant a party a relief not sought or more than sought. Further that a court should confine its decision to the questions raised in the pleadings.

6.8 In ground four, the appellant contends that the lower court failed to take judicial notice that the liquidation process involving the appellant has been stayed by the Court of Appeal and is currently the subject of arbitration proceedings and proceedings before the Supreme Court.

6.9 That at the time the respondent made the application for special leave to review on 24th September, 2021 as well as hearing the application on 27th January, 2022, the matter was still in the Supreme Court. On 22nd March, 2022, the Supreme Court rendered a ruling in which it guided that the winding up proceedings remain stayed pending the final determination of the issues by an arbitrator. The court below failed to take judicial notice of these facts.

6.10 In ground five, the appellant contends that the court below erred in holding that there was no basis to warrant precluding the respondent from pursuing the enforcement of the default judgment, thereby altering the course of the liquidation proceedings of the appellant, which proceedings are currently stayed pending arbitration.

6.11 It was argued that it is common cause that the appellant is the subject of liquidation following the order of the High Court in Cause No. 2019/HP/0761. Therefore, in terms of **sections 58 and 63 of the CIA**, any execution that occurs on the assets of the company, being in liquidation, or after the commencement of the winding-up petition, is void. In this regard, it was wrong for the lower court to state that there was no basis upon which to deny the respondent its right of execution on the appellant. Such basis existed, there being a winding-up petition against the appellant.

6.12 By allowing the respondent to execute on the appellant, the court below effectively altered the course of liquidation proceedings as regards the payment of liabilities as provided under **section 127 of the CIA**, which proceedings have since been stayed pending arbitration.

6.13 Lastly, in ground six, it is contended that the lower court ought to have heard the appellant's advocates when they sought to argue strictly on a point of law, at the time the application for special leave to review came up for hearing. It is long established practice that a party to an application made by way of summons and affidavit, can opt not to file an affidavit in opposition and merely oppose strictly on a point of law. That where an opposing party to an application does not contest the facts contained in the supporting affidavit either because they are true or irrelevant, such party is allowed to oppose the application strictly on a point of law without filing an affidavit in opposition.

6.14 The gist of the contention being that the view taken by the lower court that the provisions of **Order 30 rule 3A (3) of the HCR** are mandatory by the use of the word 'shall', no matter the circumstances, requiring a party to an application to file an affidavit in opposition, is not only wrong but absurd. The case of **Mubita Namabunga v Motor Holdings (Z) Limited** [5] was referred to as authority that whether a rule is mandatory or not is not solely dependent on the use of the word 'shall' as it is for the court to construe the intention and effect of a rule having

regard to that construction, whether or not such rule is to be regarded as mandatory or regulatory.

6.15 It was submitted that the appellant could not file skeleton arguments in opposition without an affidavit as it would offend the provisions of **Order 30 rule 3A (3)** which require an affidavit in opposition to be filed. That a construction of the rule reveals that it is regulatory, and on that score, a party who wishes to merely oppose an application on a point of law is not required to file an affidavit in opposition.

6.16 It was contended that where a court calls parties to a hearing, that court is required to hear the parties, as authority the case of **Lusaka City Council & Others v Astro Holdings Limited** [6]. That it is an infringement of the law and practice for a court to call parties to a hearing and then deny one of them an opportunity to be heard. The mere fact that the other party has not filed an affidavit in opposition is no basis to deny such a party an opportunity to make legal submissions.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent submits that it made a compounded application for special leave to review and to review the ruling dated 24th May 2021 made pursuant to Order 39 Rule 1 and 2 of the High

court Rules. Though an application for review must be made within 14 days from date of decision, and leave to review must first be obtained, there is no law that precludes a party from making a compound.

7.2 As regards the contention that no reason for the delay, was shown, the respondent submits that it did furnish reasons for delay and referred us to pages 80 to 82 of the record of appeal (ROA). The reasons being that it was under the impression that the appellant would pay it and was waiting on the queue of creditors as directed by the court until the 14 days elapsed. The above reasons are stated to be veritable, verifiable, and reasonable account for the delay.

7.3 In response to ground two the contention that the court erred by treating the application for special leave to review as if it were an application for review, the respondent reiterated its arguments under paragraph 7.1. After granting special leave to review, the court below proceeded to review its ruling of 24th May 2021. That the threshold for review was met, namely fresh evidence adduced, which had an effect on the decision of the court below. As authority, the cases of **Lewanika & another Chiluba** [7] and **Kalusha Bwalya v Chardmore Properties**

Limited Ian Chamunora Nyalungwe Haruperi [8] on review under **Order 39** being a two-stage process and the test to be satisfied were cited.

7.4 The new evidence being that the appellant was paying its creditors, which had a material effect on the court's decision. This evidence is said to have existed at the time the decision was made. Reference was made to two payments made before and after the ruling of 24th May 2021. Further that the respondent was not in possession of this information at the time when the matter came up for hearing as it was made to a third-party company.

7.5 The respondent submits that the appellant does not dispute making payments to creditors. Though the management brief alluded to does not qualify as fresh evidence, it buttresses the contention that the appellant has been operating as a going concern.

7.6 In respect to ground three, the holding by the court below that the appellant was operating as a going concern, and the contention that such a conclusion cannot be drawn on an application for special leave to review, the respondent submits

that, this was not the main issue in the application for special leave to review and review.

7.7 In respect to ground 4, the respondent contends that despite the stay of liquidation proceedings involving the appellant, the respondent has a right to pursue the appellant for the debt it owes. Our holding in **Vendanta Resources Holdings Limited and Konkola Copper Mines v ZCCM Investment Holdings** [9] was cited on the rights of third parties not part of the arbitration proceedings having alternative recourse. The gist of the argument being that even if the court below had taken judicial notice of the stay of Liquidation proceedings, it would not have had an impact on its ruling. Allowing the respondent an independent recourse in the courts of law would not alter the course of the liquidation proceedings.

7.8 As regards the refusal by the court below to hear the appellant's advocates on a point of law when the application for special leave to review came up, **Order 30 Rule 3A & 1 of the High Court Rules** is couched in mandatory terms that a respondent shall file an affidavit in opposition with arguments and authorities. The case of **Attorney General v Million Juma** [10] **and D.E Nkhuwa v Lusaka Tyre Services Limited** [11] were

cited on strict adherence to rules of procedure. Therefore, the court was on firm ground when it denied the advocates the opportunity to oppose the application *viva voce*. We were urged to dismiss the appeal for lack of merit. Therefore, the appeal should be allowed.

8.0 DECISION OF THE COURT

8.1 We have considered the appeal, the authorities cited, and the arguments advanced by the learned advocates. We shall start with grounds 1, 2, and 6. The issues raised for determination are as follows.

(i) Whether the court below treated the application for special review as it were determining an application for actual review.

(ii) Whether the court erred in law and fact by reviewing the ruling dated 24th May 2021.

(iii) Whether the threshold for review was met by the applicant.

8.2 Grounds one and two will be dealt with together as they are connected and raise the same issue. The contention in both grounds is that the court below erred to proceed to review its own ruling and treating the application for special leave to review as if it were an application for review.

8.3 Applications for review and special leave to review are provided for under **Order 39 rules 1 and 2 of the HCR** which read 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 seised 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.***

8.4 It is trite that an application for review must be made within 14 days of the judgment or decision sought to be reviewed. After the expiration of 14 days, a party seeking review must apply for special leave to review. The Supreme Court guided as follows in the case of **Paul Evans Kasonde v Finance Building Society & Lingson Chikoti** [12], that:

> ***"... in an application for special leave to review a party is duty bound to disclose the reason why the application is being made***

outside the mandatory 14 days stipulated in Order 39(2) of the High Court Rules Cap 27. No such reason has been disclosed in either the first respondent's affidavit in opposition or the affidavit in reply. It is this reason that the court should have considered in order to reach a decision whether or not to grant special leave to review.

If the court was satisfied that there were sufficient grounds for the delay, then it would move on to the next level which would be to consider the application to review itself. Once leave is granted, a party must show or find a ground or grounds considered to be sufficient, which then opens the way to the actual review. Review, as we held in Lewanika and others v Chiluba, enables a court to put matters right. It does not exist to afford a dissatisfied litigant a chance to argue for an alteration of a decision so as to bring about a result considered more acceptable. We are therefore of the view that the learned judge adopted an incorrect procedure with regard to the application to review that was being made out of time. When the learned judge dealt with the application to review itself, she applied wrong principles by taking into account matters not suitable for review such as the ten-year period and the letter from Zambia Railways Limited."

8.5 Further, in **Jamas Milling Company Limited v Imex International (Pty) Limited** [2] the Supreme Court held 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 had material effect upon the decision but could not with reasonable diligence have been discovered before. Roy v Chitakata Ranching Company Limited (3). 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. This is not the position here. The defence and counterclaim were before the court below when it entered the judgment. In any case, the Court below did not adjudicate on any evidence."***

8.6 It is not in issue that the application for review was made outside the fourteen (14) days requisite period. From the authorities cited and a reading of **Order 39 rule 1 and 2 of the HCR**, the court below was first required to consider the disclosed reason why the application for review was being made several months after the ruling. The respondent contends that it furnished the court the reasons for delay. That it delayed applying for special leave to review because it was under the impression that the appellant would pay it and was patiently waiting on the queue of creditors as directed by the court in its ruling of 24th May 2021. Unknown to the respondent, whilst waiting on the queue, the appellant was making payments to other contractors. Upon becoming aware, it applied for special

leave to review. The above reasons are contended to be reasonable account for the delay in bringing the application for special leave to review.

8.7 Before determining whether the above reasons for delay are reasonable, we will determine the issue of whether the respondent made a compound application for special leave to review and review. The application at page 78 of the ROA is titled; Summons for Special Leave to review ruling dated 24th May 2021 pursuant to **Order 39 Rule 2** of the High Court Rules. The said Order relates to applications for special leave to review made outside the mandatory 14 days.

8.8 We do not agree with the contention by the respondent that it made a combined or compounded application for both special leave and actual review. We say so because it is only after special leave is granted that the court moves to the next level to consider an application for review.

8.9 The question is whether the court below considered the reasons advanced by the applicant seeking special leave to review before proceeding to review its earlier decision. The learned trial Judge, in her ruling in respect of application for special leave to review, proceeded to consider the alleged fresh evidence on the

continued operation of the appellant company and jumped to the actual review, omitting to consider whether reasons were advanced for the delay or whether the reasons stated are reasonable to grant special leave to review.

8.10 We hold the view that the reasons advanced for the delay are unacceptable. There was no basis for the respondent not to apply for review within a reasonable time. Months elapsed on the pretext of waiting in the queue to be paid by the appellant. Therefore, the court erred by failing to consider the reasons advanced for the delay and further by proceeding to review or treating the application for special leave as if it were an application for review.

8.11 In an application for special leave to review, an applicant must disclose sufficient grounds for the delay in bringing the application outside the mandatory period of 14 days from decision sought to be reviewed. It is only after the court is satisfied that there are sufficient grounds for the delay, that it would proceed to consider the actual application for review. The court did not state whether it granted special leave.

8.12 Even assuming that by proceeding to review its earlier decision, special leave to review was impliedly granted by the court below,

the issue would still be whether the threshold for review was met. Whether the applicant showed that it had discovered fresh material evidence which would have had material effect upon the decision, but which could not with reasonable diligence have been discovered before.

8.13 We are of the view that the alleged fresh evidence submitted to the court below of the appellant continuing as a going concern would have been discovered with due diligence. Further, in our view it would not have had a material effect on the decision of the court for the obvious reason that a company in liquidation pays debts in order of priority and execution is not tenable.

8.14 Reverting to the earlier issue, we reiterate that a perusal of the affidavit in support of the summons for special leave to review at pages 80 to 94 of the record of appeal does not disclose any reason why the respondent delayed in making the application for special leave to review to be granted. Further, a perusal of the proceedings at pages 101 to 112 of the record and the ruling being challenged, shows that the court below proceeded to review its ruling without satisfying itself that there were sufficient grounds by the respondent for delaying in making the application. Therefore, the court below erred by proceeding to

review its own ruling dated 27th May 2021 and treating the application for special review as if it were an application for review. We find merit in grounds one and two.

8.15 In ground five, the appellant assails the actual review of the court below's earlier decision by holding that there was no basis to warrant precluding the respondent from the enforcement of the default judgment. We have already determined this issue by our holding that the court below erred in law and fact by going beyond and determining issues that were not before it for consideration. The pronouncements by the court below could have been considered after granting special leave.

8.16 In ground six, it has been argued that the lower court should not have declined to hear the appellant's oral arguments on a point of law having defaulted to file an affidavit and arguments in opposition as required by **Order 30 rule 3A (3) of the HCR**. It was contended that the appellant did not intend to file an affidavit in opposition but to merely submit on points of law. The said **Order 30 rule 3A (3)** reads as follows:

> ***(3) On receipt of the affidavit in support of the application, skeleton arguments and list of authorities, the respondent shall file an affidavit in opposition with skeleton arguments and list of authorities.***

8.17 A perusal of **Order 30 rule 3A (3) of the HCR** as amended, shows that it is couched in mandatory terms requiring the respondent to file an affidavit in opposition with skeleton arguments. The provision is a regulatory rule. As regards a regulatory rule, it was held in **Leopold Walford (Z) Limited v Unifreight** [13] that:

> ***".....As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings."***

8.18 A reading of the proceedings shows that the advocates for the appellant did not comply with the rule. The prudent course of action the court below ought to have taken was to adjourn the application to enable the respondent file its affidavit in opposition and skeleton arguments instead of denying it the right to be heard.

9.0 **CONCLUSION**

9.1 We reiterate that the court below erred in law and fact by proceeding to review its decision of 24th May 2021 on an application for special leave to review and by further treating the application for special leave to review as if it were an application for actual review. In addition, for failure to consider

the applicable principles in the grant of special leave to review, namely the reasons for the delay in filing the review application within 14 days. Instead, extraneous, and immaterial considerations were considered, arriving at the erroneous findings and holdings. The appeal is accordingly upheld.

9.2 We accordingly set aside the decision by the court reviewing its earlier decision because there were no sufficient grounds for the delay disclosed by the respondent to warrant review. Ordinarily costs follow the event, however in the circumstances of this case, the parties shall bear their own costs.

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M. J. Siavwapa
JUDGE PRESIDENT

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C. K. Makungu
COURT OF APPEAL JUDGE

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F. M. Chishimba
COURT OF APPEAL JUDGE