TANZANIA TRANSCONTINENTAL TRADING COMPANY *v.* DESIGN PARTNERSHIP LTD.

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

CIVIL APPLICATION No. 62 OF 1996

(Application for Review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam (Ramadhani, Mnzavas and Lubuva, JJ.A.), in Civil Appeal No. 28 of 1996, dated 2 October 1996)

Court of Appeal – Review Powers – Circumstances in which Court Appeal may review its own decision – Whether list of such circumstances is closed.

Court of Appeal – Review Powers – Bench of three judges – Whether the Court of Appeal consisting of three justices may extend the list of circumstances for review beyond those stated by the full bench.

Court of Appeal – Review Powers – Full Bench of the Court of Appeal – Circumstances in which only the full bench may exercise review powers.

Court of Appeal – Review Powers – Condition precedent for invoking review powers of the court.

This was an application to the Court of Appeal to review its previous decision on the ground that the advocate for the applicant who had argued the appeal previously had overlooked important points of law and fact, and misdirected himself by abandoning the main relief sought in the appeal, namely, to ask for an order vesting the suit land in the applicant. It was argued that the abandonment was done without the applicant's approval, resulting in a judgment with manifest injustice to the applicant. In response, it was argued that the application for review was incompetent as it did not fall within the list of grounds for review as set out by the court's full bench in *Transport Equipment Ltd v. Devram P. Valambhia* (1), and that the full court was not competent to consider any additions to the grounds established by the full bench.

Held: (i) The court, consisting of three justices of appeal, has jurisdiction to review any decision of the court, including that of the full bench;

(ii) Where, firstly, there are conflicting decisions of the court making it necessary to decide which of them is the correct law and, secondly, where the court is considering

to depart from its own previous decision, then the review powers may be exercised only by the full bench;

(iii) The court will not readily extend the list of circumstances for review because the court's power of review ought to be exercised very sparingly and only in the most deserving cases, bearing in mind the demands of public policy for finality of litigation and for certainty of the law as declared by the highest court of the land.

(iv) Where review is sought it must be established as a condition precedent that a wrong has been committed or an error has been made, and that review is being sought in order to redress the same.

Application refused

Cases referred to:

(1) *Transport Equipment Ltd v. Devram P. Valambhia*, 1998 T.L.R. 89

(2) *Poole v. R*, [1960] EA 62

(3) *Richard William Sawe v. Woitara Richard Sawe*, CAT., Civil Application Number 32 of 1994 (unreported)

Mr C. Tenga, for the Applicant

Prof Fimbo, for the Respondent

RULING

(Dated 06 August 1998)

KISANGA, J.A.: This is an application to this court to review its own judgment in Civil Appeal Number 28 of 1996 in which the applicant lost to the respondent. When the matter came on for hearing the first time, the court heard arguments advanced on a preliminary objection that the review was incompetent. The preliminary objection specifically alleged that the ground on which review was being sought did not fall within the instances for review as set out by this court in the case of *Transport Equipment Ltd. v. Devram P. Valambhia* (1) hereinafter to be referred to simply as *Valambhia's* case. In the course of that

preliminary objection, arguments centered on whether the list of instances or circumstances for review as set out in that decision was exhaustive and, overruling the objection, the court on 16 March 1998 held that the list was neither exhaustive nor closed. The relevant portion of that ruling reads:

> ... our interpretation and understanding of that decision is that the list of circumstances warranting the court's review of its own decision as stated therein is neither exhaustive nor closed. We think that those were the circumstances which came to light as a result of the research and survey that was carried out at the time. In that case, we do not think that it could be stated conclusively that those are the only circumstances in which this court could invoke its inherent powers of reviewing its own decision. For it is quite possible that with further research under changing circumstances, other equally suitable circumstances warranting the court's review of its own decision could well be brought to light. In that way, the list of circumstances stated in *Valambhia's case* would likewise change. From that point of view, we are respectfully not in agreement with Professor Fimbo's submission that the list is closed.

At the resumed hearing leading to the present ruling, the parties were represented by the same advocates who had argued the preliminary objection; they were Mr C. Tenga, learned advocate for the applicant and Professor M. Fimbo who advocated for the respondent. The Notice of Motion states that the court is being asked to review its decision in this case on the ground.

> That the advocate for the applicant in Civil Appeal Number 28 of 1996 either by accidental slip, mis-conception or deliberate omission overlooked important points of law and fact on the record thereby abandoning without instructions and approval of the applicant the most important and main relief sought by the applicant in the appeal thereby resulting in manifest injustice to the applicant.

On his submission, Mr Tenga seemed to waver or prevaricate somewhat. If we understood him correctly, he was saying that the advocate's error or mistake of overlooking important points of law and fact on

the record leading to the court rendering a judgment which resulted in manifest injustice to the applicant, either constituted a new circumstance warranting review, or that it amounted to one of the settled circumstances warranting review as spelt out in *Valambhia's* case, namely, an error which was manifest on the face of the record.

Before going into the merits of this ground it is necessary first to consider Professor Fimbo's related submission that this court as presently constituted by only three justices of appeal has no competence or jurisdiction to consider adding to or extending the list of circumstances for review beyond those spelt out by the full bench in *Valambhia's* case. According to him that issue can only be considered by full bench of the court which originally settled the list. Thus it becomes necessary to determine this point first because if Professor Fimbo is right, then it would be pointless for us to dwell on whether or not the error or mistake alleged in the Notice of Motion constitutes a new ground for review over and above those set out in *Valambhia's* case; we would have to reserve the issue for consideration by full bench.

Professor Fimbo could not cite any authority for the proposition that full court consisting of three justices of appeal has no jurisdiction to extend the grounds for review beyond those mentioned in *Valambhia's* case. Nor could we find any such authority ourselves. For our part, we could not accept his argument. We think that full court consisting of three justices of appeal have jurisdiction to interpret any decision of the court including that of full bench. A full court has competence or jurisdiction to interpret statutory law including the Constitution, which is the supreme law of the land, we can hardly find any justification for saying that such a division of the court is precluded from interpreting a judicial precedent. We feel certain that a full court has jurisdiction to interpret any decision of the court, including that of full bench. And as far as *Valambhia's* case is concerned, being a decision of full bench, a full court can, in the course of interpreting it, extend it in a fit case, beyond those circumstances for review enumerated therein. We need to emphasize, however, that the court will not readily

A extend the list of circumstances for review, the idea being that the court's power of review ought to be exercised very sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality of limitation and for certainty of the law
B as declared by the highest court of the land.

The view that full court has jurisdiction to interpret any decision of the court is subject to two recognized exceptions. These arise first, where there are conflicting decisions of the court, which makes
C it necessary to decide which of them is the correct law. The second exception arises following the decision in *Poole v. Republic* (2) which laid down in effect that where the court is considering to depart from its own previous decision, it is obviously desirable that
D if practicable the matter be considered by a full bench. In these circumstances the matter is to be decided by full bench. But in the instant case neither of the two situations arose. There was certainly no question of any conflicting decisions of the court. The question
E of the court departing from its own previous decision did not arise either. Rather the issue here was that of extending the rule in *Valambhia's* case to cover a new or additional circumstance warranting review by High Court of its own decision. It seems plain to us that the question
F of the court departing from its own previous decision and the issue of extending the application of its decision are two different things; the former involves full bench in that according to *Poole's* case cited above it is obviously desirable that if practicable the issue of the
G court departing from its own previous decision be considered by full bench. But we are firmly of the opinion that the issue of extending the application of the court's decision does not require or make it desirable that it be considered by full bench.

H In yet in another dimension Professor Fimbo took the view that currently, there are two conflicting views or decisions of the full court on this issue, which makes it necessary to have the matter reserved for consideration by a full bench. He referred to the decision
I of this court dated 16 March 1998, overruling his preliminary objection to this very application in which, as already stated, it was held that

the list of circumstances for review by this court, of its own decisions as set out in *Valambhia's* case, was not closed. As against this, the learned counsel referred us to another decision also of a full court in *Richard William Sawe v. Woitara Richard Sawe* (3) where, according to Professor Fimbo, it was held that the list was closed. In that case this court refused the applicant's Notice of Motion to it to review its own decision which had gone against him. In so doing the court said:

> This court can only be moved to exercise its review jurisdiction which is inherent not statutory in the following situations:
>
> (a) Where there is a manifest error apparent on the (face of) the record.
>
> (b) Where it is established that the court acted without jurisdiction.
>
> (c) Where it is established that the judgment was obtained by fraud.
>
> (d) Where it is established that one of the parties was condemned unheard.

It seems to us that Professor Fimbo's alleged conflict between *Sawe's* case and the said court's ruling of 16 March 1998 is more apparent than real. When deciding *Sawe's* case the court, undoubtedly had *Valambhia's* case in mind although it did not say so expressly. This is so because at that time *Valambhia's* case was the only authority on the power of this court to review its own decisions. And all that the court said there was that as the law stood then, the court would review its own decision only in the circumstances enumerated in *Valambhia's* case, but that Mr Sawe, the applicant, had not put forward any ground which fell within the scope of the list in *Valambhia's* case. There the court was not considering whether the ground advanced by Mr Sawe could or could not constitute a ground for review beyond those listed in *Valambhia's* case. In other words the court was not concerned with, and it was never invited to consider, whether the list in *Valambhia's* case was exhaustive or not, but rather with whether what the applicant had put forward as a ground for review did fall within that list or not. In the said ruling of 16 March 1998, however, the court specifically dealt with the question whether or not that

A list was exhaustive or closed, and it held that the list was neither exhaustive nor closed; that is currently the law on that point.

It is significant to note that the said ruling of 16 March 1998 was delivered only five days after the ruling in *Sawe's* case dated
B 11 March 1998 which means that the two rulings were given independently of each other. Again it is noted that the ruling in *Sawe's* case was very short, covering hardly one full page, which re-affirms the view that the court did not consider the question of extending the list in
C *Valambhia's* case. In contrast the ruling dated 16 March 1998, in which that question was specifically considered, is a long one, covering seven pages, which in our view, increasingly suggests that if the court had considered that question in *Sawe's* case it is most unlikely that
D it would have come to a conclusion different from that contained in its ruling of 16 March 98.

Even if we were to uphold Professor Fimbo's submission that this court's ruling in *Sawe's* case dated 11 March 1998 and that of
E 16 March 1998 were in conflict, we think that the matter could not be resolved by adjourning this application for cosideration by full bench as urged by Professor Fimbo. Because assuming, for instance, that the ruling of 16 March 1998 which was given in the course of
F this application number 62 of 1996, did not represent the correct law, it would not be proper to consider the matter and declare the correct law in this very Application Number 62 of 1996. To do so would appear to infringe upon the principle of the need for finality
G of litigation. The practice adopted by the court so far has been to deal with the matter in a subsequent case where that issue is raised. In the context of the present case the matter would have to wait until another case comes up in future which raises the question whether
H or not the list of circumstances for review as spelt out in *Valambhia's* case is exhaustive or closed.

Having decided that a full court constituted by three justices of appeal have competence or jurisdiction to extend the list of circumstances
I for review as spelt out in *Valambhia's* case, we now turn to consider

whether the ground put forward in the applicant's Notice of Motion constitutes one such ground which warrants extension of the said list of circumstances. The said ground put forward by the applicant was reproduced earlier in this ruling, and the thrust of it is the applicant's own advocate improperly and without the applicant's approval abandoned the main relief sought in the appeal, thereby leading to the court giving judgement which resulted in manifest injustice to the applicant. It is at once apparent that the first question that arises for determination is whether the said advocate of the applicant acted improperly as alleged. In an attempt to establish this the applicant filed a total of three affidavits. The first two were sworn by Mr Jack Briller, the Managing Director of the applicant's company and Mr William Mwakasungula of Mwakasungula and Co. Advocates who had been retained to conduct the appeal. Their evidence is to the effect that the applicant had specifically instructed his counsel to ask for an order vesting the suit land into the applicant, but that Mr Mwezi Mhango of the same firm of Mwakasungula and Co. Advocates who actually argued the appeal abandoned that prayer.

The third affidavit was deposed to by Mr Mhango himself. Paragraphs 4, 5, 6 and 7 of his affidavit are very pertinent and are reproduced hereunder:

> 4. In the course of arguing the appeal I realized [that] ground number six which was in respect of 40% interest was neither supported by the prayers in the plaint filed by Donaldson and Wood nor by the evidence adduced before the trial court. I was also unable to see any amended plaint which contained any prayer of interest at 40% per annum. As a result of this I abandoned the [prayer] numbered (c) as far as it related to the order sought in respect of interest at 40% interest on the ground that I was bound by the pleadings filed in the High Court.
>
> 5. Further, I discovered from the record that evidence had been led at the trial that by the time the case came to trial the space in dispute had already been re-allocated to African Journal Ltd. This evidence appears on page 41 lines 15 to 17 where Exhibit P16 is produced;

page 46 from line 34 onwards up to the following page and Exhibit P16 which on page 71 of the record from the respondent to the appellant which informed the appellant of the re-allocation to African Journal Ltd.

6. Since the space in dispute had been allocated to African Journal Ltd. which was not a party to the suit which ended in the Court of Appeal in the form of this appeal I was of the opinion, possibly wrongly, that the issue of specific performance could not be pursued against the respondent who was no longer in a position to hand over the said area without African Journal Ltd., being given an opportunity to be heard.

7. In making the decision to drop the prayers in (b) and (c) in the Memorandum of Appeal I acted on my own for the reasons I have stated above and did not consult any officer of the appellant company or any other person. I based my decision purely on what is contained in the Record of Appeal and on my understanding of the law.

Our understanding of these paragraphs is that Mr Mhango does not admit that he acted improperly in taking the decision he did. Nor are we prepared to say that on information which was before him he acted improperly. Mr Tenga strenuously contended that had Mr Mhango consulted the applicant, he would have realized that the suit land had not been re-allocated to anyone, in which case he would not have abandoned the prayer for vesting such suit land in the applicant. With due respect to the learned counsel, however, we could find no basis for this submission. For, according to paragraphs 5 and 6 of Mr Mhango's affidavit the evidence in there cord of appeal is that the suit land had been re-allocated to African Journal Ltd, who were not a party to the suit. That averment by Mr, Mhango has not been contradicted or challenged in any way. Then the question is: What should have prompted Mr Mhango to consult the applicant on this point and solicit information which contradicted the Record of Appeal? In other words so long as the correctness of the Record of Appeal was not impeached, there was no reason for Mr Mhango seeking or

accepting information from the applicant, or indeed from anyone else, to contradict the Record of Appeal which clearly shows that the suit land had been re-allocated to a person who was not a party to the suit.

Mr Mhango was neither challenged nor contradicted when in paragraph 7 of his affidavit he stated that he based his decision purely on what was contained in the Record of Appeal and on his understanding of the law. Professor Fimbo submitted before us that indeed that is what senior counsel should have done, and we are inclined to agree. For, when in paragraph 6 of his affidavit Mr Mhango says that since the suit land had been handed over to third parties he "... was of the opinion, possibly wrongly, that the issue of specific performance could not be pursued against the respondent ...," he is simply saying that he based his decision on the opinion which, it is now being alleged, was wrong. But in our view, he is not acknowledging that his opinion leading to that decision was necessarily wrong.

Admittedly the applicant's instructions to counsel were to ask for the vesting of the suit land in the applicant. However, it has not been alleged that the applicant, in addition, restricted the powers or authority of his counsel in dealing with the appeal. The applicant continued to recognize his counsel as his agent who had the full conduct of the appeal. In conducting the appeal, Mr Mhango, as an advocate, was supposed to take decisions based on the Record of Appeal and on his own understanding of the law, which is exactly what he did. If, in the course of arguing the appeal, he discovered that the evidence did not support the prayer as instructed by the applicant, we think that he was not obliged to have recourse to the applicant before taking the decision he did. In our view, he rightly took a decision which was in consonance with the evidence on record, and in so doing he was not acting outside the scope of his authority as was submitted by Mr Tenga. For, as an advocate having the conduct of the appeal he had a duty not only to safeguard the interests of his client, but also to make correct representations before the court. Mr Mhango would not be discharging this latter duty, and indeed he

would be misleading the court, if he had pressed for the vesting of the suit land in his client knowing, as he did, that the evidence before the court went contra to the prayer. In short, in our view, Mr Mhango acted professionally.

Thus we are satisfied that no case has been made out showing that Mr Mhango acted improperly in abandoning the prayer for the vesting of the suit land in the applicant. In arriving at this conclusion we take note of Mr Tenga's disclosure at the hearing of this application that it was no longer intended to make submissions about Mr Mhango's decision to abandon the prayer for 40% interest p.a. on the sum of TZS. 1 028 071-70 as per paragraph 8 of the applicant's affidavit. For, if Mr Mhango's decision to abandon that prayer is no longer complained of, because no doubt it was proper, we could not see how his decision to abandon the prayer for vesting the suit land in the applicant can be said to be improper because both decisions were based on non-availability of material on record to support the prayers.

Thus in the absence of any finding that Mr Mhango acted improperly, then the question whether or not a circumstance exists which would warrant review does not arise. For, where review is sought, it must be established, as a condition precedent, that a wrong has been committed or an error has been made, and that review is being sought in order to redress the same. But in the instant case, as already demonstrated, the allegation that Mr Mhango acted wrongly in abandoning the prayer has not been established. Thus we can find no material in the applicant's Notice of Motion, for consideration whether a new circumstance exists or has emerged which would warrant extending the circumstances for review by the court of its own decision beyond those as enumerated in *Valambhia's* case.

Likewise Mr Tenga's alternative view that Mr Mhango's wrongful decision constituted or led to an error manifest on the face of the record is equally untenable because, as stated before, it has not been established in the first place that Mr Mhango acted wrongly in abandoning the prayer in question. Perhaps we should mention that there were long and interesting arguments than those made by the court, and

whether or not errors or mistakes by counsel can constitute a ground for review. But since it was not established that counsel, or indeed anyone, had committed an error in the instant case, we think that it would be of no practical value to decide on such matters.

In the result, and for the reasons set out above we refuse the application with costs to the respondent.

PEOPLES' BANK OF ZANZIBAR v. NAUSHAD MOHAMED SULEIMAN

HIGH COURT ZANZIBAR
At Vuga
(Dahoma, J.)

CIVIL CASE No. 23 OF 1997

Civil Practice and Procedure – Suits – Withdrawal of suits – Oral application for withdrawal of suit – Order XXVII, rule 1 of the Civil Procedure Rules.

Civil Practice and Procedure – Withdrawal of suit – Liberty to bring a fresh suit after withdrawal – Order XXIII, rule 2 of the Civil Procedure Rules.

Limitation of time – Limitation of time for suits – Computation of time of limitation for a suit previously – Items 34 and 52 of the schedule to the Law of Limitation Decree Chapter 12.

A suit filed in the High Court of Zanzibar and was withdrawn, upon an oral application to withdraw, even before a written statement had been filed by the defendant. It was subsequently argued that the withdrawal of that suit did not bar the plaintiff from bringing a fresh suit on the same matter, and that the new suit was not time barred as it was based on fraud and therefore fell under Item number 34 of the Law of Limitation Decree Chapter 12. It was noted that the leave to withdraw the suit granted was not accompanied with liberty to bring a fresh suit.