



**MALAWI JUDICIARY
IN THE SUPREME COURT OF APPEAL**

SITTING AT BLANTYRE

MSCA CIVIL APPLICATION NO 15 OF 2018

BETWEEN

GEORGE WILFRED LIBVUWO.....APPELLANT

AND

BLANTYRE CITY ASSEMBLY.....RESPONDENT

**CORAM: HONOURABLE CHIEF JUSTICE A.K.C. NYIRENDA, SC
HONOURABLE JUSTICE E.B. TWEA, SC JA
HONOURABLE JUSTICE DR. J.M. ANSAH, SC JA
HONOURABLE JUSTICE R. R. MZIKAMANDA, SC JA
HONOURABLE JUSTICE A.C. CHIPETA, SC JA
HONOURABLE JUSTICE L.P. CHIKOPA, SC JA
HONOURABLE JUSTICE F.E. KAPANDA, SC JA
HONOURABLE JUSTICE D.F. MWAUNGULU, SC JA
HONOURABLE JUSTICE A.D. KAMANGA, SC JA**

Makwinja
Ndolo
Msowoya/Shaiibu
Minikwa/Masiyano
Mthunzi

Counsel for the Appellant
Counsel for the Respondent
Judicial Research Officers
Recording Officers
Court Reporter

JUDGMENT

Mzikamanda JA (for the Majority).

The judgment of the majority appears first and the dissenting judgment follows.

This is an appeal against the decision of Honourable Justice Kenyatta Nyirenda dated 5th September 2016, dismissing the appellant's summons for lack of merit. The appeal is opposed.

The background of the matter remains undisputed. It is that the appellant commenced an action against the respondent in the High Court claiming payment of repatriation benefits to his home village, payment of severance allowance for 23 years of continuous service with the respondent, payment of compensation for unfair dismissal, payment of full pension benefits and costs of the action. After full trial, the Court delivered its judgment on 11th February 2016 in which it awarded the appellant severance allowance/gratuity and directed that the appellant be repatriated to his home village. The respondent subsequently complied with the judgment.

Months later, and by his amended summons dated 14th June 2016, the appellant moved the High Court that decided the case under the inherent jurisdiction of the Court and section 11 of the Courts Act. The Judge quoted the substance of the summons as follows:

“an application on the part of the above-named. Plaintiff for an order for the clarification of the Court Order dated 11th day of February 2016, that the Defendant pays interest at bank lending rate or such other rate as the Court deems appropriate on the severance benefit/gratuity due to the Plaintiff from the 18th day of September 2001 or in the alternative for an order that the Defendant takes into account devaluation and inflation in the calculation of severance benefit/gratuity.”

The Judge also reproduced some paragraphs of the supporting affidavit filed by counsel for the appellant. The quoted paragraphs showed that the respondent had calculated the severance benefit/gratuity payable to the appellant in the sum of K233,499.90. It also showed that after some correspondences between the parties, and in 2003, the respondent admitted that severance allowance was payable to the appellant although the same remained unpaid at the time of the summons and that severance benefit/gratuity remained unpaid in September 2001. It was averred that

it was only just and proper that the respondent was ordered to pay interest on the amount of money withheld or in the

alternative that the respondent should take into account devaluation of the Malawi Kwacha and inflation that took place since 2001 when the appellant was entitled to the severance benefit/gratuity.

The respondent's affidavit in opposition shows that the judgment that favoured the appellant was in line with the pleadings when the respondent was ordered to pay the appellant severance benefit/gratuity, but did not award the appellant severance benefit or gratuity with interest because the same was not claimed or pleaded by the appellant in statement of claim. It also shows that the severance benefit or gratuity was calculated in line with the order of the Court. It was averred that the absence of an award of interest on the severance benefit/gratuity was not a clerical error or accidental slip, rather it was intentional and the appellant could not sustain its application for clarification of the order of the Court made on 11th February 2016. It was also averred that in this application, the appellant sought to re-open the matter for which the Court lacked jurisdiction as it had become functus officio.

In its ruling, dismissing the application, the Court below focused on what it considered to constitute a threshold question, being whether or not it was still open to the Court, having rendered its judgment, to entertain the appellant summons.

The Court considered the arguments that had been presented to it by both counsel. Counsel for the appellant had argued that the Court had jurisdiction under its inherent jurisdiction to grant the reliefs.

sought in the summons. Although counsel contended that the High Court had hitherto exercised such a power in cases similar to the one at hand, and although he undertook to produce case authorities to this effect, he failed to support the argument or to produce case authorities that he relied on and more than 8 weeks elapsed.

Counsel for the respondent argued that the power to correct clerical mistakes or accidental slips, as well as to vary orders so as to carry out its own meaning and to make its meaning plain does not extend to variations of radical nature. She relied on order 20 r 11 of the Rules of the Supreme Court Practice Note 20/11/1 and the cases of R v Cripps exp. Muldoon [1983] 3 WLR 465 and Preston Banking Co v Allosop [1895] 1 Ch. 141 for the proposition that an order, as drawn, correctly

expresses the intention of the Court, it cannot be corrected under Order 20 r 11 RSC or the Courts inherent jurisdiction.

In discussing the *functus officio* rule, the Court below observed that it is a common law rule that prohibits, in the absence of statutory authority, the re-opening of a matter before the same Court, tribunal or other statutory actor which rendered the final decision. The Court observed that once a validly-made final determination has been issued, the Court is powerless to change it, other than to correct obvious technical or clerical errors, or unless specifically authorized to do so by statute or

regulation. The Court cited with approval a quotation from the Canadian case of *Candlex v Alberta Association of Architects* [1989] 2 SCR 848 that:

“The general rule (is) that a final decision of a Court cannot be re-opened ...The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions: where there had been a slip in drawing it up and where there was an error in expressing the manifest intention of the Court.”

The Court below went on to observe as follows:

“The functus officio rule exists to provide finality to judicial decisions so that people and businesses are afforded the certainty they require to operate effectively. The ability to revisit and change determinations could easily disrupt the lives and businesses of those affected by the determinations and cause them hardship and loss. The rule is premised on the idea that overall, the advantages of avoiding uncertainty (and its consequences) outweigh the reasons a Court might have for wanting to change a determination in a particular case. If a Court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.”

The Court thus, concluded that it became functus officio the moment the judgment was perfected on 11th February 2016.

The Court also found that the variation that was sought by the summons was radical and not a mere correction of a clerical error or accidental slip or a variation to give the order its full meaning. It further found that the appellant did not plead

interest in his pleading and that it was for that reason that the Court limited the awards to severance benefit/gratuity without interest.

The summon was thus dismissed with costs for lack of merit.

In this Court the appeal was premised on the following grounds:

- a) That the learned Judge erred both in law and in fact in stating that the Court was functus officio when the plaintiff's summons were premised on the judgment of the Court dated the 11th of February 2016 that the Defendant should pay the Plaintiff severance allowance/gratuity and the calculation of severance allowance/gratuity was done by the Defendant and not the Court.

That the learned Judge erred in law and in fact in not awarding interest which was prayed for in the Plaintiffs witness statement and not objected to by the Defendants at the trial of the matter.

- b) That the learned Judge erred in law and fact in not considering devaluation and inflation when the Plaintiff pleaded that he was in receipt of \$235.84 but payable in Malawi Kwacha in the Statement of claim; and
- c) That the judgment was against the weight of the evidence.

Counsel for the appellant argued grounds (a) and (c) separately. Grounds (b) and (d) were argued together. It was argued that the respondent did not give any reasons for withholding the severance benefit/gratuity for 15 years. In its order, the Court indicated that the respondent should calculate the severance benefit/gratuity and pay it within 14 days. According to Counsel for the appellant, it is the respondent who made the calculations and not the Court. In the summons the appellant was seeking the intervention of the Court to revisit the calculation of severance benefit/gratuity made by the respondent which found it to amount to K233,499.96 based on the salary of K10,141.30 per month which the appellant was earning at the time of termination of his employment multiplied by 23 years being the number of years the appellant worked for the respondent. Counsel for the appellant argued that with respect to the summons, the Court was not functus officio because the respondent should not be allowed to have a final say on the calculation and that the Court should be able to check if the calculation of severance benefit/gratuity by the respondent was justifiable. Counsel argued that the appellant was in receipt of the sum of \$235.84 salary per month but payable in Malawi Kwacha as stipulated in the statement of claim. The severance

benefit/gratuity having been withheld should have taken into account devaluation and inflation for the sum of \$235.84x23 being \$5,424.32 and then converted to Malawi Kwacha at the date of payment. Counsel cited the case of Kandoje v Malawi Housing Corporation [2008] MLR 43 in support of the proposition that Courts can in assessment of awards factor in devaluation and inflation as a matter of law.

On the matter of payment of interest and weight of the evidence, Counsel argued that although the respondent admitted in 2003 owing the severance allowance, it did not pay the same until 25th February 2016 a period of 13 years, yet by section 53 (1) of the Employment Act, severance benefit/gratuity was to be paid within 7 days. Crucially, Counsel argued that the issue of interest was contained in the appellants witness statement in the Court below and was not objected to by the

respondent. Counsel cited the case of Jane Matanga v Old Mutual Malawi Appeal case no 04 of 2012 in which Mwaungulu J (as he then was) ordered interest to be paid on unpaid wages. He argued that this is a proper case for the Court to order the severance allowance that the respondent unlawfully withheld from 2001 to 2016 as the real value in 2001 is not the same as in 2016. Counsel argued that the appellant was not reopening the

matter. The late payment of severance benefit/gratuity, it was argued amounts to unfair labour practice contrary to section 31 of the Constitution. It was further argued that in order to address the injustice caused to the appellant by the respondent with holding the severance benefit/gratuity which was due for payment in 2001 when the employment of the appellant was terminated, it is only right and proper that interest be paid to the appellant on the withheld benefits or in the alternative that the respondent takes into account devaluation and inflation in the calculation of severance allowance benefit/gratuity.

Counsel for the respondent argued that the Court below having found in favour of the appellant and having ordered that on 11th February 2016 that the respondent repatriates the appellant to his home village and pay the appellant severance allowance/gratuity within 14 days of the order, the respondent complied with the order. He observed that the appellant did not appeal against the order, although he subsequently took out summons for clarification of the order of 11th February 2016, seeking that the Court below orders payment of interest or alternatively, to factor in devaluation and inflation under inherent jurisdiction of the Court and section 11 of the courts Act. The respondent having challenged the summons, the

Court in its order of 5th September 2016 dismissed the summons holding that the Court was functus officio and that the appellant had not pleaded interest.

Counsel argued that the order of 11th February 2016 was a final decision of the Court below in which it neither awarded interest nor directed that inflation or devaluation be taken into account by the respondent when calculating the severance

allowance/gratuity. He also argued that the appellant did not allege that the severance allowance/gratuity was calculated contrary to the existing formular/guidelines applicable. In his further argument counsel stated that what the appellant was asking the Court to do was not a mere correction of a clerical error or accidental slip of its judgment but a radical variation of the Order which had the effect of re-opening the case in that the appellant did not plead interest devaluation or inflation in his pleadings. Counsel argued that it is trite law that interest must be specifically pleaded to be recoverable and he cited the case of Simiyoni v Kanyatula [1999] MLR 382 in support. He also quoted a paragraph in Attorney General v Masauli

[1999] MLR 28 to the wit:

“It is, however, noted that the damages that were awarded by the Court on this aspect included interest to be assessed by the Registrar. With respect, we are unable to agree with the Court below on this point. It is trite law that interest must be specifically pleaded to be recoverable. It was not so pleaded in the present case. The award of interest cannot, therefore be supported.”

It was argued that the Judge in the Court below had not erred in holding that he was functus officio and could not re-open the case.

Counsel argued further that it is trite law that parties are bound by their pleadings, citing the cases of Malawi Railways Ltd v Nyasulu [1998] MLR 195; Saukila v National Insurance Company [1999] MLR 362; Gurmar Garments Manufacturing (EP2) Ltd in Liquidation, Crown Fashions Limited v Ismail Properties Ltd [2007] MLR 127 in support.

As to the present case, Counsel argued that interest was not pleaded and therefore could not be awarded.

He argued that it is immaterial that the appellant raised the issue of interest in his witness statement because without amending the statement of claim to add the claim for interest, the issue was not before the Court. As to ground (C) of appeal and on the matter of devaluation and inflation, Counsel argued that the Court below having questioned the appellant whether he was receiving his salary in pounds or Malawi Kwacha and the appellant having assured that he was receiving it in Malawi Kwacha, his claim to be paid in pounds was dismissed during the trial and it was never an issue to be resolved in the subsequent judgment. It was contended that if the appellant was aggrieved with the Courts dismissal on the issue of currency, he ought to have appealed against the judgment of 11th February 2016, but he did not. It was further contended that to re-open the issue now would amount to allowing the appellant to appeal against the order of 11th February 2016 through the back door.

Regarding the ground of appeal that the judgment is against the weight of evidence, it was argued that it lacks merit in that there was no appeal to the judgment of 11th February 2016 and that the appellant sought to re-open the matter pretty much in the same way he would have appealed against the order of 11th February 2016, but through the back door. He argued that such an approach should not be allowed. The appellant confirmed that the calculations were correct and he never invited the Court to reassess. There were no accidental errors in the judgment that required clarification as the judgment itself clearly stated what was required, so Counsel argued. According to Counsel, the application for clarification of the judgment was an attempt to re-open the matter in order to bring in the issue of interest that was never pleaded, neither were devaluation nor inflation pleaded. It was further argued that the Court below dealt with the issue whether the claim should be in dollars or kwacha and that the appellant never appealed against the decision of the Court on the rejection of using the dollar as a basis for calculating the appellant's salary.

We will consider the grounds of appeal in our determination of appeal. As to the first ground of appeal, we are satisfied that at the time the application was made by the appellant, the Court had become functus officio. The judgment of the Court below was final perfected and had in fact been complied with by the party against whom it had been made. We agree with the discussion on the principle of functus officio as extensively made by the Court below. The cases cited in support of the discussion and the finding of the Court below are appropriate. We find that the Court below correctly held that it was functus officio and could not revisit its own judgment. We are satisfied that the application for clarification of the judgment of the Court below was an attempt by the appellant to appeal by the back door,

realizing that he had run out of time within which he should have filed an appeal. This Court cannot acquiesce such an attempt and that attempt must fail.

The second ground of appeal must also fail because the appellant never pleaded interest in his pleadings. It is trite that a claim for interest must be specifically pleaded and specially proved. In the Court below neither was interest specifically pleaded and specially proved nor is the interest now claimed statutory interest on judgment. Neither did the appellant plead devaluation nor did he plead inflation. No evidence was led to prove these. It would not be for the Court below to speculate on these matters. The Court below cannot be faulted for failure to award that which was not claimed.

As to the third ground of appeal, it is clear from the record that the appellant was paid his salary in local currency and not in any foreign currency. It is misleading to attempt to convert the salary into foreign currency for purposes of calculating what might be due in the form of damages. Again, what has been said about devaluation and inflation during the discussion of the second ground of appeal applied in respect of the third ground of appeal. This ground of appeal too is without merit and it must fail.

All in all, this appeal is without merit and it must fail. It is dismissed in its entirety with costs to be paid to the respondent.

MWAUNGULU, JA (Dissenting).

Précis

My Lords, I have had prior reading of the judgment of my Lord Justice Mzikamanda and, on the facts and the law, the Court below was never functus officio and should, on principle, have ordered, albeit not pleaded, interest up to the date of payment under the inherent power of the court, as the appellant applied for, and under the Civil Procedure Rules, 1998, which, on this aspect is *pari materia* with the predecessor Supreme Court Rules, 1965 or, at the least, because there was evidence in the witness statement which was not objected to, allow amendment of the pleadings. My Lords, failure to include interest in the claim form or particulars of claim is a failure to comply with the rules of court and should not forestall proceedings, but, is one of matters that the court, in the interests of justice, must regard in exercising discretion way or another on the circumstances of the case. As long as, as happened here, the judgment was not drawn and perfected, the Court,

had jurisdiction to recall and reconsider the matter. This action arose and was essentially concluded before the Courts (High Court) (Civil Procedure) Rules, 2017. The relevant rules of Court, therefore, were the Civil Procedure Rules, 1998, styled in our legislation as the Supreme Court Rules, 1999. Contrary to the conclusion of the Court below, moreover, there is no evidence that the judgment of the Court below was actually drawn as required by the Civil Procedure Rules, 1998, or the predecessor Supreme Court Rules, 1965. There are, as we see later in the judgment, a plethora of judgments of the Court of Appeals, now the England and Wales Court of Appeal, highly persuasive in your Lordships Court, where the Court, supporting the proposition that, once the judgment or order is drawn and filed, a Court cannot reopen its judgment, the power of a court to correct its judgment for errors and omissions not requiring an appeal has existed alongside the general proposition. The power under the inherent jurisdiction of the Court and the Rules of Court deploys to vary errors in calculation of interest or order interest. Moreover, a Court, if the judgment is not perfected, can alter a judgment substantially. It matters less, moreover, that there was or there was not a claim of interest. A court, exercising this power cannot be functus officio as this power is inherent to the Court and covered by the Rules of Court. In this case, albeit the appellant never pleaded interest, the witness statement, accepted without objection or countervailing evidence, mentions, without any surprise to the respondent, the interest claim. Your Lordships should, therefore, allow the appeal and order that the judgment of the Court below should include an award of interest at the investment rate not the lending rate.

Background

My Lords, the judgment of the Court below of 11 January, 2016 the appellant sought to correct was a consequence of an action in the Court below where the appellant, an employee of the respondent, successfully claimed payment of repatriation benefits to his home village, severance allowance for 23 years of continuous service with the respondent, compensation for unfair dismissal and full pension benefits and costs of the action. The appellant apparently never pleaded an interest claim. The appellant claimed interest claim in the witness statement. The Court below, however, never ordered payment of interest on the monies. The respondent, who did all the calculations, paid the sums under the judgment.

On 14th June 2016, the appellant moved the Court below under its inherent jurisdiction to under section 11 of the Courts Act order interest on the judgment at bank lending rate or such other rate as the Court deems appropriate on the severance benefit/gratuity due to the Plaintiff from the 18th day of September 2001

or in the alternative for an order that the Defendant takes into account devaluation and inflation in the calculation of severance benefit/gratuity. The Court below dismissed the application holding that it was functus officio and that the appellant never pleaded interest. The appellant, dissatisfied with the judgment of the

Court below, appeals against the judgment to your Lordships Court.

The Appeal

The appeal raises four grounds. First the appellant contends that the Court below erred when stating that the Court below was functus officio when the appellant's summons premised on the judgment of the Court below of 11th of February 2016 that the respondent Defendant should pay the appellant severance allowance/gratuity and the calculation of severance allowance/gratuity was done by the respondent and not the Court. Secondly, the appellant asserts that the Court below erred by not awarding interest prayed for in the appellant's witness statement which the respondent never objected to during trial. Thirdly, the appellant contends that the Court below erred in not considering devaluation and inflation when the appellant pleaded in the statement of claim that he received \$235.84 payable in Malawi Kwacha. Finally, the appellant raised the general ground of appeal under Order 3, rule ... of the Supreme Court of Appeal Rules and imbedded right in Form ... in the Schedule to the Act that the judgment was against the weight of evidence

Reasoning

Starting with procedural issues, the Court below relied on this statement by the Canada Supreme Court in *Candlex v Alberta Association of Architects* [1989] 2 SCR 848 that, for that matter, clearly and succinctly states the principle:

The general rule (is) that a final decision of a Court cannot be re-opened ...The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions: where there had been a slip in drawing it up and where there was an error in expressing the manifest intention of the Court.

The general proposition that a judgment cannot be reopened applies where, as it must be, when "the formal judgment had been drawn up, issued and entered." My Lords, there is no evidence on the record just as there is nothing in the affidavit in support of the application that the order was drawn. Delivery, drawing up of orders, entry of orders is covered by Rules of Court.

The judgment or Order of the Court below was never drawn or lodged with the Court.

The Rules of Court have always provided the manner, content and Forms in which judgments or orders must, for purposes of the Rules of Court, be drawn and in this case there was nothing close to these stipulations. These requirements, except under default judgments and criminal proceedings, are actually more often than not obeyed in breach. Order 42, rule 4 (1) of the Supreme Court of Rules, 1965 provided:

Subject the paragraph (2) every order of the Court shall be drawn up unless the Court otherwise directs.

Order 42, rule 4 (1) of the Supreme Court Rules, therefore, required every order – not judgment - to be drawn up. Order 42, rule 4(2) of the Supreme Court Rules, 1965, lists orders needing no drawing: orders extending time; judgments or orders to do anything under the rules; orders granting leave to serve writs or other originating process outside the jurisdiction; and orders for filing. Order 42, rule 5 (1) of the Supreme Court Rules, 1965, provided for drawing and entry of judgments – not orders - :

Where a judgment given in a cause or matter in the Queen's Bench Division ... is presented for entry in accordance with the rules of the appropriate office, it shall be entered by an officer of that office in the book kept for that purpose.

Order 42, rule 5 (2) of the Supreme Court Rules, 1965, provides for drawing up and entry of judgments – not orders - :

The party seeking to have such a judgment entered must draw up the judgment and present and present it to the proper officer of the appropriate office for entry.

Order 42, rule 5(3) of the Supreme Court Rules, 1965, details the documents to accompany the order drawn: the originating process and a certificate, order or other document to satisfy entitlement to entry of a judgment. Order 42, rule 5(4) of the Supreme Court Rules, 1965, covers the manner of entering judgment, namely, the appropriate officer filing the judgment. Order 42, rule 5(5) of the

Supreme Court Rules, 1965, designates the one with the task of drawing up the order:

Every order made in the Queen's Bench Division required to be drawn up must be drawn up by the party having the custody of the summons, notice or other document on which the order is indorsed and if that party fails to draw up the order within 7 days after it is made any other party affected by the order may draw it up.

Order 42, rule 5(6) of the Supreme Court Rules, 1965, provides:

The order referred to in paragraph (5) must, when drawn up, be produced at the appropriate office, together with a copy thereof, and when passed by the appropriate officer, the order sealed with the seal of that office, shall be returned to the party producing it and the copy shall be lodged in that office.

All these rules in the Supreme Court Rules, 1965 were to be read together with the Queen's Bench Masters' Practice Directions (the general division) – there are similar rules for the Chancery Division, Commercial, Technology and Construction and Family Divisions). Paragraph 1 of the Practice Direction read:

Every summons, notice or other documents, on which any order required by the Rules of Court to be drawn up has been indorsed by a Judge or a Master, shall as soon after the making thereof as is reasonably practicable, or if the Judge or Master has directed that it be drawn within a specified time, within the time specified, be lodged and drawn up in the Action department by the party or a solicitor having the carriage of such summons, notice or other document. After the time (if any) has expired the matter shall be referred to a Master who made the order is drawn up. The reference shall be to the Master who made the order, if he is away such reference may be made in any other case in which it may appear desirable.

Paragraph 2 of the Practice Direction provides:

Every party or solicitor having the carriage of the summons, notice or other document, on which an order required by the Rules of the Supreme Court to be drawn up is endorsed, does not draw up the order in

accordance with these directions, any person affected by the order may by writing give a call upon such party or solicitor to lodge with the Action Department, or to deliver to him, the said summons, notice or document within two days and upon it being so lodged or delivered to him, he may draw up the order. If the party or solicitor to whom such notice is given does

not comply with it, the person giving the notice may apply by summons for the delivery up of the summons, notice or other document to him and for the costs of such application.

Paragraph 3 of the Practice Direction clearly prohibits sealing an order where this order is not lodged:

When any order is drawn up in the Queen's Bench Division by any party or Solicitor, such party or solicitor, shall lodge a copy in the office for filing, and no order shall be sealed until such order shall have been lodged.

Under the Rules of the Supreme Court, 1965, therefore, there was a duty, and under these Rules of Court, that duty lay on the one carrying the summons, notice or other document, to draw up, file and lodge orders after pronouncement of the judgment. The order or judgment could not be sealed without this lodgment. It is clear, on reading these provisions that the order or judgment drawn does not mean the judgment written or oral delivered by the court. The parties must read the judgment delivered by the court and draw up the judgment or order for lodging with the Court. The Rules of Court, if judgment or order meant, the judgment or order of the court, require it to be drawn, filed and lodged by the parties. All that the Rules of Court require of the judgment or order given by the Court is endorsement by the judge or Court. It is this endorsement that triggers the drawing, filing and lodgment of the order or judgment.

One problem arose with the Supreme Court Rules and the Practice Direction: the words 'order' and 'judgment' in the text of both the Rules of Court and the Practice Direction. This attracted comments from the authors of Supreme Court Practice, Sweet

& Maxwell, 1999, the last White Book under the Supreme Court Rules, 1965, Volume 2, paragraph

20/ –559, page 1693. This passage, appearing late in the judgment, repeats word for word in Civil Procedure, the current White Book, Sweet & Maxwell, 2022, under the Civil Procedure Rules, 1998.

It is quite clear though that it was intentional to distinguish between orders and judgments and the Rules of the Supreme Court apparently created different procedures for lodging of orders and judgments. The Civil Procedure Rules, 1998, clarify by streamlining the procedure for both judgments and orders. Rule 40:3 of the Civil Procedure Rules, 1998 provides for drawing of judgments and orders and the substantive provisions must be read together with the title – ‘Drawing and filing of judgments and orders. Rule 40:3 of the Civil Procedure Rules, 1998, reads:

(1) Except as is provided at paragraph (4) below or by any Practice Direction, every judgment or order will be drawn up by the court unless

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- (a) the court orders a party to draw it up;
- (b) a party, with the permission of the court, agrees to draw it up;
- (c) the court dispenses with the need to draw it up; or
- (d) it is a consent order under rule 40.6.

(2) The court may direct that –

- (a) a judgment or an order drawn up by a party must be checked by the court before it is sealed(GL); or
- (b) before a judgment or an order is drawn up by the court, the parties must file an agreed statement of its terms.

(3) Where a judgment or an order is to be drawn up by a party –

- (a) he must file it no later than 7 days after the date on which the court ordered or permitted him to draw it up so that it can be sealed(GL) by the court; and

(b) if he fails to file it within that period, any other party may draw it up and file it.

(4) Except for orders made by the court of its own initiative and unless the court otherwise orders, every judgment or order made in claims proceeding in the Queen's Bench

Division at the Royal Courts of Justice, other than in the Administrative Court, will be drawn up by the parties, and rule 40.3 is modified accordingly.

Rule 40:3 of the Civil Procedure Rules, 1998, unlike the predecessor Order 42, rule 4 of the Supreme Court Rules, 1965, requires all judgments and orders, but for the exception and orders to be drawn and, retaining the dichotomy judgments and orders, assigns one procedure for both. The judgment or order dichotomy attracts this comment from the authors of Civil Procedure, the current White Book, Sweet & Maxwell, 2022, under the Civil Procedure Rules, 1998, Volume 2, paragraph 9A-394, page 2479:

The definition of "judgment" as including a "decree" is not a general definition, but one for the purposes of the SCA 1981 only, per Chitty, J. *Burrows v Holley* (1887) L.R. 35, Ch.D. 123; per M.R., *Re Binstead* [1893] 1 Q.B. 199, 203, in which case it was held that a decree made in a suit for divorce was not a final judgment within s.4 (1) (g) of the B.A. 1883.

Judgments and orders are kept distinct by the SCA 1981 (as they were under the JA 1925, although they may be enforced in the same manner (*Ex p Chinery* (1884) 12Q.B.D. 342; see Vol.1, para 40.2.4, "Orders Enforceable like Judgments"). In *Jones v MacCabe* [1891] 1 Ir.R 104, it was held that a consent judgment staying proceedings could not be registered as a "judgment"; and cf *Shaw v Hertford CC* (1889) 2 Q.B. 282.

For purposes of an appeal a judgment means a decision obtained in action, and every other decision is an order (*Onslow v Commissioners etc* (1890) 25 Q.B.D. 465 at 466, adopting judgment in *Ex p Chinery; Austin Friars, etc. Co. v Strack* [1906] 2 K.B. 499, CA). And see *Tata Co v Bombay C.R.A.* (1923) 39 T.L.R 268.

The distinction for purposes of the Civil Procedure Rules, 1998, is non-consequential. Judgments and orders must be drawn and lodged as described and affirmed by Practice Direction 40B – Judgments and Orders, Drawing up and filing of judgments and orders. Paragraph 1 provides:

1.1

Rule 40.2 sets out the standard requirements for judgments and orders and rule 40.3 deals with how judgments and orders should be drawn up.

1.2

A party who has been ordered or given permission to draw up an order must file it for sealing within 7 days of being ordered or permitted to do so¹. If he fails to do so, any other party may draw it up and file it².

1.3

If the court directs that a judgment or order which is being drawn up by a party must be checked by the court before it is sealed, the party responsible must file the draft within 7 days of the date the order was made with a request that the draft be checked before it is sealed.

1.4

If the court directs the parties to file an agreed statement of terms of an order which the court is to draw up³, the parties must do so no later than 7 days from the date the order was made, unless the court directs otherwise.

1.5

If the court requires the terms of an order which is being drawn up by the court to be agreed by the parties the court may direct that a copy of the draft order is to be sent to all the parties:

(1) for their agreement to be endorsed on it and returned to the court before the order is sealed, or

(2)with notice of an appointment to attend before the court to agree the terms of the order.

My Lords, I cannot summarise all this better than the authors of Civil Procedure, Sweet & Maxwell, 2022, Volume 2, who at page1390, paragraph 40.3.1` state:

In paras. 1.1 to 1.3 of Practice Direction 40B (Judgments and Orders) the terms of paras.

(1) to (3) are narrated and by para 1.4 an omission in the rule is made good (see para.40BPD.1 below). The paragraph states, that, if the Court directs under r.40.3(2)(b) that the parties should file an agreed statement of terms of an order which the court is to draw up, the parties must do so no later than 7 days from the date the order was made, unless the court directs otherwise.

The Civil Procedure Rules, 1998, like their predecessor Rules of the Supreme Court, 1965, provide for Forms for judgments. This has always been done by Practice Directions. Paragraph 14.1 of Practice Direction 40B (Judgments and Orders) proposes Form No. 45 for judgments, like one under consideration, where trial was without a jury. The judgment to be entered must read, with necessary variation, as follows:

In respect of a stated claim which has been tried before a named judge without a jury, and terms of settlement having been agreed between the parties, it is ordered that the Defendant pay the Claimant a sum specified and agreed interest. If the claim is a personal

injury claims the damages will include a sum in respect of loss of future earning and/or earning capacity. If the judgment is to be paid by instalments, the total amount of the judgment, the amount of each instalment, and the number of instalments and date on which these should be paid, and to whom the instalments should be paid is set out. Further orders that the specified sum now in Court be paid to the Claimant's legal representatives in part satisfaction of the judgment debt and costs together with any interest accrued, and that the Defendant pay the Claimant's costs at a given sum or to be subject of detailed assessment if not agreed. Execution be stayed until a given date to allow for the possibility of appeal or further order. Warns that if payment is not

forthcoming, judgment may be registered which may make it difficult for the Defendant to obtain credit.

My Lords, in the matter in the application before the Court below and now before you, the duty, after the Judge in the Court below delivered judgment, under the Rules of the Supreme Court, 1965, and the Civil Procedure Rules, 1998, the Court below being the General Division, was foremost and always on the appellant to draw the judgment and in the form prescribed and lodge it with the Court. In fact, My Lords, this matter being a matter in the general division (the Queen's Bench), the duty to draw, file and lodge the judgment was always on the appellant and never on the Court. The appellant, most certainly, did not draw, file or lodge any judgment or order. The appellant having not done it, according to Practice Direction 40B (Judgments and Orders), the duty transferred to the respondent. The respondent never drew the order.

The principle in *Candlex v Alberta Association of Architects* hinges – expressed variously in different decisions (...) – on the order or judgment being drawn or perfected. The Court below, parties having not drawn and lodged judgment, could not have been functus officio. The Court below, and I would add Counsel, having properly recognised the principle, never investigated whether the parties had drawn, filed or lodged a judgment as required by the Rules of Court.

My Lords, had the parties proceeded to draw the order as required by the Rules of Court and the Practice Direction, they would have recognised that interest is built in Form 45. They would, as we see shortly, have agreed to its payment and the appropriate rate. The judgment, in as long as there was no lodgment of the judgment, was not perfected. The first question, based on the statement in *Candlex v Alberta Association of Architects*, was whether the judgment or order was perfected. The Court never determined that question and essentially because Counsel never raised the question. The bottom line is that neither the record nor the affidavits demonstrate that the appellant and, after the appellant failed, the respondent drew, filed and lodged the judgment. The lodged judgment was to follow the form prescribed and nothing close to that was before the Court below. The judgment was not, therefore, perfected and, applying the principle in *Candlex v Alberta Association of Architect*, the court was not functus officio because, until the judgment was perfected, the Court below could be called to include the order or allow the appellant, if the appellant applied, to amend either the judgment or pleadings to include interest that was clearly raised in the witness statement and countenanced, without objection, in the evidence before it.

The power of the Court to recall its judgment before the judgment or order is not perfected

My Lords, I have always understood the law to be that, as long as the judgment is not perfected, the

Court has jurisdiction to revisit or recall its judgment, jurisdiction which it does not, except to correct errors and omissions in the judgment, after the judgment or order is perfected (*In re Australian Direct Navigation Co, Miller's case* (1876) 3 Ch.D. 661; *In re St Nazaire Company* (1879) 12 Ch.D 88; *Millenstead v Grosvenor House Ltd* [1937] 1 K.B. 717; *Re Barrell Enterprises* [1973] 1 W.L.R. *Re Harrison's Shares, etc* [1955] Ch. 266; *Pittalis v Sherefettin* [1986] 1 Q.B. 808). These decisions, most certainly, were before the Civil Procedure Rules, 1998, and have not in any way ruffled by Rules of Court, including the Civil Procedure Rules, 1998.

In *Pittalis v Sherefettin* [1986] 1 QB 868, the following day, after delivery of judgment, the judge realized and decided that there was an error. The judge furnished the parties with grounds why there was an error and requested for a hearing to be addressed on the points of error and, persuaded,

altered the judgment. In the Court of Appeals, Fox LJ then said:

In the present case, the judge recalled the order the day after he had made it. It is not suggested that the landlords in any way, in proper reliance upon the order, acted to their detriment. We are dealing with a case where the judge, practically as soon as he gave judgment, decided that it was wrong. As a matter of sensible administration of justice and fairness between the parties, it seems to me proper in the circumstances that the judge should be at liberty to recall his order. The position can properly be called exceptional.

Dillon LJ said in *Pittalis* at page 882C:

It is submitted for the landlords that the decision of this court in [*Barrell Enterprises*] is to be regarded as a comprehensive exposition of the exceptional circumstances in which it is proper for a court or a judge to recall an order which has been pronounced orally but has not

yet been drawn up, registered or otherwise perfected. But I cannot regard *In re Barrell Enterprises* as overruling or qualifying the earlier decision

of this court in *Millensted v Grosvenor House (Park Lane) Limited* [1937] 1 KB 717, which apparently was not cited in *In re Barrell Enterprises*. In the *Millensted* case this court approved statements of the law in earlier authority to the effect that a judge can always reconsider his decision until his order has been drawn up or perfected, and more importantly, this court upheld the action of a High Court Judge, who had in an oral judgment awarded a certain sum by way of damages but then withdrew that judgment and substituted judgment for a lower figure, because before his order was drawn up, he was satisfied after serious further consideration that the sum he had originally awarded was excessive ...

In *Charlesworth v Relay Roads Limited* [2000] 1 WLR 230, decided after the Civil Procedure Rules, 1998, after judgment was given but before the judgment or order was drawn, a party applied for amendment of pleadings. Neuberger J said:

The first question to be addressed is whether the court has jurisdiction to accede to the defendant's application. Mr Mark Platts Mills, who appears with Mr Michael Tppins for the claimant, concedes that there is such jurisdiction. In my judgment, that concession is correct. There are a number of reported cases where it has been held that it is open to a judge who has given judgment to reconsider his conclusion and, in effect, to reverse his own decision, provided that the order recording his earlier decision has not been drawn up.

Stewart v Engel [2000] 3 All ER 518 was also decided after the Civil Procedure Rules, 1998. The judge distributed a draft judgment under Practice Statement (Supreme Court: judgments) [1998] 1 WLR 825 and the Practice Statement [1999] 1 WLR 1, inviting the parties to submit any list of typing corrections and other obvious errors in writing – which, my Lords, I have used once or twice, since 2013 – where the claim failed. The judge, in the course of hearing, implicitly asked the complainant to amend pleadings so as to sue in conversion. The complainant never amended the pleadings. After receiving the Court circulated final version of the judgment, the claimant, after advice from counsel, applied under rule 3.1 of the Civil Procedure Rules, 1998, for permission to amend to plead a conversion claim. The judge stopped the drawing of the order until the application was heard and, subsequently allowed amendment of pleadings. What the Court of Appeal, on appeal, said is very informative of the course of action that the Court below, in the absence of evidence that the order was drawn, should have taken. Slade, LJ, said:

For many years it has been accepted that a judge who has given judgment has the power to reconsider his conclusion and in effect reverse his own decision provided that the order recording his earlier decision has not yet been formally completed. A number of the authorities illustrating this principle were collated by Neuberger J in *Charlesworth - v - Relay Roads Ltd (in liquidation)* [2000] 1 WLR 230. Another leading case in which the existence of this jurisdiction was accepted, by the Court of Appeal, is *Re Barrell Enterprises* [1973] 1 WLR 19 which was apparently not cited to Neuberger J in the *Charlesworth* Case.

However, it appears that there is no authority binding on this court which establishes that this jurisdiction ("the *Barrell* jurisdiction") has survived the introduction of the CPR., which, as stated in Rule 1.1(1), are a "new procedural code with the overriding objective of enabling the court to deal with cases justly". Mr Salzedo cited the decision of this court in *Riguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 as authority for the proposition that the CPR. is a self-contained code and earlier authorities are no longer generally of any relevance once the code applies: (see *ibid.* at p. 1934 per Lord Woolf MR). He referred us to CPR. Part 40.7(1) which provides:

"A judgment or order takes effect from the date when it is given or made or such later date as the court may specify."

No such later date was specified in the Judge's order of 24th September 1999. Accordingly, it was submitted, that order took effect on the day when it was made and, once it had taken effect, the Judge had exhausted all his functions and had no jurisdiction to entertain any further application in the case, in particular an application to amend pleadings.

The claimant's application to amend her pleadings was expressed to be made under Part 3.1 of the CPR. which lists the court's general powers of management and provides by sub-paragraph (7) that:

"A power of the court under these Rules to make an order includes a power to vary or revoke the order."

In my judgment this Rule, read by itself, gives little assistance to the claimant because it does not specify the circumstances in which the power to vary or revoke an order exists.

I accept that it is possible that the *Barrell* jurisdiction falls to be regarded as a rule of practice rather than law and was capable of being abrogated by the introduction of the CPR. Nevertheless, I am satisfied that there is nothing in the CPR, which obliges us to hold that it was so abrogated and that we should not reach any such conclusion. On the contrary, the jurisdiction, if very cautiously and sparingly exercised, in my judgment serves a useful purpose, fully in accord with the overriding objective of enabling the court to deal with cases "justly", as particularised in Rule 1.1 of the C.P.R.

Neuberger J. in *Re Blenheim Leisure (Restaurants) Ltd* (No 3) The Times 9th November 1999 gave some helpful examples of cases where the jurisdiction might justifiably be invoked before the order in question was drawn up:

"... a plain mistake on the part of the court; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider".

It is to be observed that in all these instances, if the court had no power to reconsider its order before it was drawn up, the only remedy open to the party prejudiced would be by way of appeal from the order. Though on such hypothetical facts an appeal would itself have

a good chance of success, common-sense suggests that in such cases the Judge who made the order should himself have the power to vary it before the appeal procedure has to be set in motion, with the likelihood of exposing all parties to far greater expense and delay than an application to the court of first instance. Consistently with the existence of the *Barrell* jurisdiction, RSC Order 59r.4(1) provides that the time for appeal from a decision of the High Court begins to run from "the date on which the judgment or order of the court below was sealed or otherwise perfected". Up to that date, in my judgment, the *Barrell* jurisdiction continues to subsist, though, as I will explain later, the discretion thereby

conferred on the court is in my judgment severely restricted. I would therefore decide Issue (A) in favour of the claimant.

Clarke, LJ, said:

This issue raises the question whether the judge had jurisdiction to give the claimant permission to amend her statement of claim after having orally made an order dismissing the action. I agree that he did have jurisdiction, but since my reasoning is not quite the same as that of Sir Christopher Slade, I set it out shortly. For my part, I do not think that decisions on the Rules of the Supreme Court ("RSC") by this or any other court are of any real assistance in deciding the extent of its jurisdiction since the coming into force of the Civil Procedure Rules ("CPR"). Such decisions are certainly not binding. The jurisdiction of the court now depends upon the CPR and not upon the RSC or cases decided under them. Rule 1.1(1) of the CPR expressly provides that the CPR are a "new procedural code with the overriding objective of enabling the court to deal with cases justly". In *Biguzzi v Rank Leisure Plc* [1991] 1 WLR 1926 Lord Woolf MR (with whom Brooke and Waller LJJ agreed) approved the following statements of the judge in that case:

... it is my firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this court, any more than looking back to the old rules to interpret the new should be so. This is a new regime... I very much doubt whether any of the old authorities can assist, although it is perfectly true, as counsel both pointed out to me, that in some of the later striking out cases, and I do not propose going through them for the reason I have just expressed, there were foreshadowings and expressions of view as to how things might be under the new order. I have to say that this court's view, after extensive training and a good deal of discussion and thought, is that the new order will look after itself and develop its own ethos and that references to old decisions and old rules are a distraction.

Counsel for the appellant sought to criticise those views, but Lord Woolf said at page 1932b:

However, I do not accept the criticisms of the judge with regard to his approach to the previous authorities. Indeed, far from criticising the judge. I would commend his approach. The amount of time which the deputy district judge had to spend in his judgment examining the old authorities indicates the disadvantage of having to look back, as the judge said, "over your shoulder" at those authorities.

It follows, in my judgment, that the instant case should be decided not by the application of principles adopted in earlier cases including *Re Barrell Enterprises* [1972] 3 All ER 631 but by reference to the CPR.

By rule 40.7(1) of the CPR a judgment or order takes effect from the day when it is made, which in this case was the 24th September 1999. Rule 40.3 then makes detailed provisions for the drawing up and subsequent sealing of the order. However, by rule 3.1(7):

A power of the court under these Rules to make an order includes a power to vary or revoke the order.

The original order sought by the defendants when they made their application under rule 24.2 was an order that judgment be entered in their favour. That is the order which the judge made orally on the 24th September. The judge described what followed in this way:

The consequence of the judgment was that on 24 September I ordered that there should be an order dismissing the action and as to costs. I determined the wording of the order. On 20 October the claimant issued her application for permission to amend. It stated: 'The Claimant, having taken leading counsel's advice, now wishes to pursue the claim in conversion of the assessment library materials.' On 22 October the order made on 24 September was sent to the court by the defendants' solicitors for stamping and issue. There was then correspondence as to whether it should be issued. I resolved that by directing that pending the hearing of the claimant's application the order should not be issued. If it had been issued, the action would have been at an end and the claimant's only way forward would have been by appeal.

By "issued" I think that the judge must have meant sealed, at which time (as Sir Christopher Slade has observed) the time for appealing would have begun to run under rule 59.4(1), which is the old RSC order 59 rule 4(1) now scheduled to the CPR.

In these circumstances the order made orally by the judge on the 24th September must I think have been an order within the meaning of rule 3.1(7) so that the court had power to vary it, at least until it was drawn up or sealed. It is not necessary for the purposes of this appeal to consider the difference (if any) for this purpose between the drawing up and sealing of an order. In the event the order was in effect varied because on the 10th December the judge ordered that "the defendants do have judgment against the claimant on the statement of claim in its unamended form". That order was sealed on the 13th December 1999.

In all the circumstances I agree that the judge had power to vary the order.

Lord Justice Roche said:

I agree with Sir Christopher Slade and Clarke LJ that a Court has power to reopen its judgment or order in the period between delivery of judgment either by the judgment being spoken or handed down, and the date on which the judgment or order is sealed or otherwise perfected, when the time for appealing begins to run under Order 59 Rule 4 (1). This will be so although the effect of the judgment or order may be immediate on the judgment or order being spoken, where the Court does not specify that the judgment or order should take effect at a later date, see CPR Part 40.7(1).

The Court has power at any given time to correct an accidental slip or omission in a judgment or order, see Part 40.12 (1) of the Civil Procedure Rules. With that exception the Court has no power to vary or amend in respect of a judgment or order that it has made once the judgment or order has been sealed and time for appealing has commenced to run. If that judgment is a final judgment then it can only be altered by a Court hearing an appeal from it.

My lords, apart from the different approaches on the Civil Procedure Rules, 1998, all the Justices of Appeal are agreed that, until the judgment or order is drawn, filed and sealed according to the Rules of Court, a judge can recall the judgment

and revisit it for all purposes, including amendment of the pleadings, order or judgment. The applicability of the Civil Procedure Rules by Clarke and tepidly by Lord Roche, after taking a cue from Lord Woolf, can only occupy your Lordships, if the power derives from the Rules of Court. This power derives from the inherent power of the Court at common law and under the duty of the court to do justice in all circumstances of the case before the otherwise lengthy, costly and tenuous recourse to the appeal process. Legislation, where it replaces the Common law, must be clear. Nowhere in the Civil Procedure Rules, 1998, or predecessor Supreme Court Rules, 1965, is that clarity exuded. It is not surprising, therefore, that Woolf, LJ, reneged on the criticism of the judge's approach.

My lord, this power, as we have seen, exists to amend pleadings after judgment is delivered and not perfected. A party, can, therefore, amend pleadings by introducing a new cause of action or amending the cause of action. In *Attorney General v Masauli* your Court properly opined that interest must be pleaded. What your Lordships never decided or discussed fully were the consequences of an omission or failure to plead.

Order 18, rule 8 (4) of the Rules of the Supreme Court, 1965, like rule ... of the Civil Procedure Rules, 1998, required that the claimant to plead interest:

A party must plead specifically any claim for interest under section 35A of the Act or otherwise.

My Lords, there is nothing in this rule that suggest, as ... suggests, that interest is not recoverable if not pleaded. This rule is not about recoverability. In fact, the rule premises on recoverability. It is because interest is recoverable that this rule, to avoid surprise and clarify what is claimed, requires that it be pleaded. The law, then, was exactly as Lord Denning stated it in

It cannot, therefore, be stated, as was stated in ... that it is trite law that interest must be pleaded for it to be recoverable. So much so that rules 16 (2) (1) (cc), 16.4.(1) (b) and 16.4 (2) of the Civil Procedure Rules, 1998, was probably a reaction to Lord Denning's assertions. These rules now require an interest claim to be stated both in the claim form and the particulars of claim. Rule 16.2(1) (c), and (e) dealing with the claim form, provides:

The claim form must ... contain a statement of the interest accrued on that sum, where the only claim is for a specified sum; and contain such other matters as may be set out in a practice direction.

Rule 16.4(1) (b) of the Civil Procedure Rules, 1998, dealing with contents of particulars of claim, now provides:

Particulars of claim must include ... if the claimant is seeking interest, a statement to that effect and the details set out in paragraph (2).

Rule 16.4 (2) of the Civil Procedure Rules, 1998 provides:

If the claimant is seeking interest they must— (a)state whether they are doing so— (i)under the terms of a contract;

(ii)under an enactment and, if so, which; or (iii)on some other basis and, if so, what that basis is; and

(b)if the claim is for a specified amount of money, state—

(i)the percentage rate at which interest is claimed;

(ii)the date from which it is claimed;

(iii)the date to which it is calculated, which must not be later than the date on which the claim form is issued;

(iv)the total amount of interest claimed to the date of calculation; and

(v)the daily rate at which interest accrues after that date.

It is correct that, if the matter is not pleaded, there should be no judgment given on it but that is only if there has been no amendment by application or otherwise and there was no evidence before the court on the matter. In the past, the Court took a rather rigid view. In *Attorney General v Masauli* the Court held that failure to plead was fatal to the case. The judgment was before introduction of prior service of witness statements and skeleton arguments. The judgment is silent on whether evidence was available and if available rejected or undermined by cross-examination. But that was on the assumption that a cause of action can only be made in the actual pleadings. Indeed, both the Civil Procedure Rules, 1998, and

predecessor Supreme Court Rules, 1965, require interest to be mentioned both in the originating process and the pleadings. The modern rule is that, if not in the originating process and pleadings, a cause of action will be sustained if, from the witness statement, skeleton argument or evidence, a party is aware of the case against one as to show that there was no surprise or unfair trial.

Lombard North Central plc v Automobile World (UK) Limited ([2010] EWCA Civ 20 (26 January 2010) was a case where, the matters (including interest claims), not pleaded, the Court looked at the skeleton arguments and witness statements. The only reason the appeal failed was that the witness statements and skeleton arguments were unclear about the claims. The Court had actually advised the defendant to amend the pleading and the defendant, not represented by counsel, never amended the pleadings. Rix, LJ, in the Court of Appeals said:

It may be true that in a perfect world, Judge Langan must have zeroed in on the reservations at the end of the Case Summary, and possibly have connected it to various references to (among other things), misrepresentation and/or misdescription in Mr Mulhall's second witness statement and/or witness statements and/or witness statements: and so might have raised with the parties right at the start what exactly might have been between the parties as to the proper issues for trial. That, however, would be asking too much. It was really for Mr Mulhall to clarify such matters at the start of the trial. He knew, as the Judge was not, what had happened before Judge Behrens. He knew that he had always formally recognised the possible need for him to plead his misdescription point, and this continued to be reflected in what was said in his skeletons and to the Judge in his oral submissions. He knew that the bone of contention was which was reflected in the final paragraph of the Case Summary. As it was, the judge began the trial by seeking to get Mr Mulhall to identify his principal points. This was important especially in a case where Mr Mulhall's approach was a scatter-gun defence of innumerable points. Yet Mr Mulhall failed to identify the misdescription point then and there as one which he wanted to raise...

Rimer, LJ, added:

In saying this, I make clear that I am not suggesting that courts must adopt an inflexible approach to the question of whether or not a particular unpleaded issue may or may not be the subject of investigation at a trial. There will be cases in which it will be obvious that it is unjust

for the court not to entertain and decide on a non-pleaded issue: for example, when it is apparent that both sides have come to court ready to deal with it as an issue in the case despite its omission in the pleadings.

In *Whalley v PF Development and another*, the claimant never, as required by Rule ... of the Civil Procedure Rules, included damages in the claim form. In the “Brief Details of the claim” in the claim form, the claimant stated the claim to be “for a declaration and other relief as set out in the Particulars of Claim served.” On the “Value” part of the claim form the claimant said, “This claim is primarily for a possession and a declaration and other reliefs.” The claim form, therefore, never claimed for damages specifically. Paragraph 9 of the particulars of claim stated that “The Defendant’s said actions have caused the Claimant loss and damages.” Paragraph 13 claimed interest “on the sums found due.” Paragraphs 1 to 4 of the prayer for relief sought declarations on the claimant’s title, possession and an injunction. The Court, on being informed that the claimant will claim interest – not the statutory interest, ordered that the parties issue witness statements and that the witness statements would be used as evidence in the trial. The Court refused judgment on other claims not pleaded albeit caricatured in the witness statements and particulars of claim. The Court of Appeal allowed the appeal on all matters, including interest, excluded in the claim form but included in the particulars of the claim and witness statements. Lewison, LJ, said:

The purpose of a statement of case is to define the issues and to warn each party what will be dealt with at the trial, but the flexibility of modern procedure is such that, provided the mechanics are fair, adequate notice of matters to be dealt with at trial can be given under the direction of the court otherwise than through the formal medium of a statement of case. Under CPR Part 12.7, when the court enters judgment for an amount to be assessed by the court it will give directions. The same point is made in the practice direction accompanying Part 12. In the present case the district judge directed sequential service of witness statements. He could have directed service of a pleaded schedule of loss, but he did not. It is plain in my judgment that the witness statement was to stand as a statement of loss. As Rimer LJ has explained, there was no prejudice to the defendants in responding to that witness evidence, and they did in fact do

so. No objection to the evidence was taken at the assessment hearing apart from a half-hearted query raised in the skeleton argument. In fact, as my Lord has explained, the judge had refused to allow an adjournment

to require the claimant to produce amended Particulars of Claim on the ground that the defendants knew every detail of the claim.]

Lord Justice Rimmer said:

The ground upon which the judge refused to award damages under heads (i), (ii) and (iv) [which included a claim for interest] and upon which Mr Davis, for the respondents, seeks to uphold her decision is, as I follow it, that all such heads of damage were in the nature of special damage that needed to be expressly pleaded if they were to be recoverable, whereas none of them was. Although the judge does not put it quite like this, that

seems to me to have been the real basis of her decision. That such basis was in principle well founded can be said to be supported by the helpful guidance of this court in Perestrello E Companhia Limitada v United Paint Co Ltd [1969] 1 WLR 570, 579 to 580.

I agree with the judge and with Mr Davis that strictly heads (i), (ii) and (iv) did need to be the subject of an express pleading. But I respectfully disagree with the judge as to the perhaps somewhat disciplinarian line that she took in this respect. We were not referred to any authority to the effect that in an inquiry as to damages under a judgment in default the ambit of the inquiry is limited by the ambit of the original pleading as to damages, nor was any such submission made to us. I understood Mr Davis to recognise that even after the default judgment, it would have been open to the claimants to seek to amend their Particulars so as to widen their claims for damages. In the event, they did not take that course. What instead happened is that the court gave directions for a trial as to quantum, including directions for the sequential service of evidence, and such

evidence was sequentially served. Mr Whalley's second statement made crystal clear the heads of damage that the claimants were claiming and Ms Thomason in her evidence did not suggest that it was not open to the claimants to advance such claims. Nor, as I have said, was any such assertion clearly advanced at the trial itself. If it had been, the judge would have had to rule upon it, and no doubt it would have provoked an application by the claimants for permission to amend their Particulars of

Claim so as formally to plead the case of which the defendants had had the clearest notice for nearly five months.

Mr Davis accepted, as I have said, that had such an application been made it could well have succeeded. The point is that, by their June 2011 evidence in support of the quantum claim, the claimants had given the respondents full notice of the nature of the heads of loss that they were asserting. The respondents were not taken by surprise, or at any rate no suggestion to that effect appears ever to have been raised. They took no steps to strike out those parts of Mr Whalley's evidence that were claiming to advance heads (i), (ii) and (iv), and the claims under those heads were argued on the merits before the judge. The judge, however, then dealt with the matter by a reserved judgment delivered over five months later by throwing the case out on a pleading point that had not been clearly articulated, let alone argued, following a trial at which the claims had been the subject of submissions from both sides on the merits.

With respect to the judge, I consider that she was wrong to decide the case on what was in effect an unargued point. Her decision was, as I understood her to have accepted in the post-judgment exchanges, in part influenced by the fact that she had either forgotten or misunderstood that there had been a direction for a sequential rather than a simultaneous exchange of evidence, so that in fact the defendants were in no manner disadvantaged in answering the claimants' case. This was, in the event, a trial in respect of which the state of the claimants' pleaded case reflected at most a formal shortcoming. What is clear is that by the time of the trial both sides knew exactly what case as to damages they were respectively making and meeting, and neither side was disadvantaged with regard to the presentation of their respective cases. That point is best supported perhaps by an observation that the judge herself made in response to an application by Ms Thomason for an adjournment of the trial on 14 November in order that an amended pleading could be served upon her and she could respond to it by way of a defence. The judge refused that application, saying, as is recorded in the transcript, that Ms Thomason was "fully aware of every detail of this claim".

My Lords, it is very important that matters like the present are pleaded. These decisions, however, hold that it suffices if the issues are raised in witness statements or skeleton arguments. These decisions obviously deprecate austere

approaches about whether an issue should be determined depending on whether it is pleaded or unpleaded. The matter turns out on the circumstances of the case and on a broader concept of justice and fairness envisaged in Order 2, rule 3 of the Supreme Court Rules, 1965, and the Civil Procedure Rules, 1998. Under Order 3, rule ... of the Supreme Court Rules, a failure to comply with the rules does not nullify. It is an irregularity that must resolve by ... Under the Civil

Procedure Rules, 1998, failure to comply with the rules is subject to that a Court must ...

The power of the Court to recall and revisit and alter and amend its judgment or order before the judgment is perfected is overarching and determined more by the circumstances of the case. The Court, before the judgment is perfected can do whatever it regards as the right and just thing. The requirement for exceptional circumstances – suggested by Fox, LJ, in *Pittalis v Sherefettin* – is unwholesome. It is an invitation to each time consider what exceptional circumstances are and to that question there can be as many answers as there are askers. In any case, any listing of such circumstances may not be exhaustive. In *Noga v Abacha* [2001] 3 All ER 513, Rix LJ said:

Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the flood gates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straight-jacket pending the formality of the drawing up of an order, ...

Provided that the formula of "exceptional circumstances" is not turned into a straight-jacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional. An exceptional case does not have to be uniquely special. "Strong reasons" is perhaps an acceptable alternative to

"exceptional circumstances". It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."

In *Robinson v Fernsby and another* ([2003] EWCA Civ 1820, [2004] WTLR 257), May, LJ, said:

So perhaps the uninformative label "exceptional circumstances" needs to be appended to the exercise of the jurisdiction. I personally prefer Rix LJ's "strong reasons", but that again is only a label. The question whether to exercise the jurisdiction can only depend on the circumstances of the particular case.

These principles apply to the need to plead interest. Interest, if not pleaded or particularized, will be awarded if covered by witness statements or skeleton arguments or evidence at trial. It must be taken, therefore, my Lords that, by stating the claim for interest in the witness statement, it sufficed for not pleading. The generality of the power to recall or revisit a judgment before perfection is very broad and is not limited by that the matters were pleaded or not. Critically, it includes power to amend the claim form and particulars of the claim more so where, like here, the issues, in this case, interest, was raised in prior served witness statements and the other party had opportunity to strike them out for failure for inclusion in the claim form or the particulars of claim, adduce contrary evidence, or contest the evidence during the hearing. The Court below was never *functus officio* as long as there was no judgment or order perfected. The Court, moreover, on the facts of this case, if the judgment or order was perfected, under its inherent jurisdiction and Rules of Court to correct errors and omissions in the judgment after it was delivered and in doing so the court is not *functus officio*.

Under the Rules of Court the judgment is perfected when in compliance with r40.2 (2) (b). Until perfection, the principles in *Re Barell* apply and a court can make substantial alteration to the judgment. My Lords, in this matter, as long as the judgment was not perfected, the Court was not *functus officio*. It was imbued with jurisdiction to even *suo motu* vary the order completely, including of pleadings to the effect that the appellant claimed interest in the claim and the Court, without a *scintilla* of objection allowed evidence to be given on the interest claim.

Even accepting that the judgment or order was perfected the Court has power under its inherent jurisdiction or under the Rules of Court to correct errors and omissions in its judgment

The law and practice now, as I understand it, is that the Court below, just like this Court, can correct errors and omissions in its judgment after the judgment is sealed and perfected and is, therefore, not functus officio by the fact of the judgment having already been delivered. This power, inherent to a court, has been, in relation to the Court below, up to the Courts (High Court) (Civil Procedure) Rules, subject to the rules of Court (Order 20, rule 11 of Rules of the Supreme Court, 1965 (and Order 28, rule 11 of the predecessor Rules of the Supreme Court), Order 20, rule 11 of the Supreme Court of Appeal Rules and Part 40.12

(1) of the Civil Procedure Rules, 1998. Order 20 rule

11 of the Rules of the Supreme Court, 1965, read:

Clerical mistakes in judgments or orders, or errors in arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons Part 40.12 (1) of the Civil Procedure Rules, 1998, provides:

The court may at any time correct an accidental slip or omission in a judgment or order.

Part 40.12 (2) of the Civil Procedure Rules, provides: A party may apply for correction without notice.

“Any time” under both Rules means any time. There is no restriction based on whether a judgment was or was not perfected. There is no time indicated for when a party can request for correction. The matter, therefore, is covered by section ... of the General Interpretation Act. Otherwise, the doctrine of laches does not apply to application to amend or correct judgments and orders under its inherent power and rules of court. It is never too late. In *Hatton v Harris* [1892] A.C. 56, where a 39-year-old error was amended, Macnaghten, L.J., said, ‘Lapse of time has nothing to do with the matter.’ In *Shipright v Clements*, 38 W.R. 746, the court corrected a 29 year old error. In this matter, the appellant applied to vary or amend the order of the Court below within 4 months of the order.

The question for the court was not as it was suggested by the Court below, to wit whether the Court below was functus officio and, therefore, lacked jurisdiction. For jurisdiction it had to affect the judgment. The question, rather, was, as it should have been, whether the error or omission was one curable under the rules of court or under its inherent powers.

The general rule is that, after a court pronounces judgment, errors of law and fact, where a right of appeal lies, must resolve by appeal from the judgment. This avoids unnecessary prolongation of dispute resolution in the court determining the matter. On the other hand, recourse to the right to appeal cannot be or should not be on matters, accidental or of oversight by the court, parties or their counsel overlooked. In relation to courts, the general rule can be an opportunity for a court to have a second look and limitlessly. That is impermissible. Once, therefore, a court has pronounced its judgment and a judicial order is entered or filed, the matter must be resolved by appeal. It is for this reason that judgments or orders must be properly drawn. The general rule, however, is tapered by another rule to be able to correct errors arising from accidental omissions that do not alter, whether from the point of view of parties or reliefs, the substance of the judgment.

The court has an inherent power to vary errors and defects to better propound and elucidate its judgment (*Lawrie v Lees* (1881) 7 App Cas 19; *Milson v Carter* [1893] A.C. 638; *Kay & Lovell* [1941] Ch 420; *City Housing Trust* [1942] Ch 262; *Pearlman (Veneers) SA (Pty) v Bernhard Bartels* [1954] 3 All ER 659; and *Thynne v Thynne* [1955] P 272). A judgment is the correct rendition of what a court wanted cannot be corrected under this rule (*Stephens v. Commissioner of Railways* (1908), 10 W.A.L.R. 43). The court under its inherent jurisdiction can amend an order for the order to comply with what the order actually pronounced (*Christie v. Newson* (1894), 20 V.L.R. 28; *Ivanhoe Gold Corporation Ltd. v Symonds* (1906), 4C.L.R. 642).

Resolution depends on a subtle distinction between an error or omission that is accidental and clerical and one that has the effect of altering the substance of the judgment. A court will order correction in case of the former (*Harrison v Harrison* (1887) 12 P.D. 130; *Re Army and Navy Hotel* (1886) 31 Ch.D. 644; *Re Rudd* (1887) W.N. 251; *Chessum v Gordon* [1901] 1 K.B. 694; *Re Inchcape* [1942] Ch 394; *Adam and Harvey Ltd v Continental Maritime Supplies Ltd* [1967] 1 W.L.R. 445; *Ladруп v Saleh*, April 20, 1982 (unreported); *Evans v Main Colliery*

Ltd (1915) 31 TLR 228; *Sutherland v Hanevig* [1921] 1 K.B. 336; *Armitage v Persons* [1908] 2 K.B. 410; *Doswell v Norton* (1902) 18 T.L.R. 228; *Websdell v Jenkins* (1902) 46 S.J. 484; and *Bund v Green* (1875) W.N. 213; *Re an Application by Marly Laboratory Ltd.*, [1952] 1 All E.R. 1057; *Cartmill v. Gollet; Ex parte Cartmill*, [1960] Q.W.N. 33; *Phillip v. Phillip*). The Court will not do so to the former (*Glasier v Rolls* (1889) 62 LT 305; *Oxley v Link* [1914] 2 K.B. 738.

A Court can correct omissions or miscalculation of interest

There are many instances of the use of this power and two that were, like in the matter before your Lordships, specifically on interest. In *Flack v. McCowan*, [1923] Q.W.N. 5 the judgment was varied to include a certificate for costs. In *Warren Tea Co. Ltd. v. Reinglass*, [1928] St. R. Qd. 29 it was for order for injunction limited as to time). In *Lovett v. Rimington*, [1932] Q.W.N. 11 the Court added to a judgment for specific performance of stipulations as to transfer and declaration for stamp duty). In *Re Kinsey*, [1903] Q.W.N. 68 the Court amended the numbers of lots in a vesting order. In *Melhol/rne Harbour Trust Commissioners v Cuming, Smith & Co. Pty Ltd*, [1906] V.L.R. 192 the Court corrected an omission to provide for costs reserved until trial. In *Ford v. Newton*, [1949] St. R. Qd. 119, Mansfield, S.P.J., who reviewed authorities on the matter, added to the word "costs" the words "including reserved costs," which were part of the order on an unsuccessful application for an interlocutory injunction for which the defendant had not asked at the trial of an action for recovery of land and an injunction. In *Ninnis v. Miller*, [1905] V.L.R. 669 a miscalculation of interest on entering up judgment was corrected. In *Barker v Purvis* (1887) 56 LT 131 the court corrected the amount of interest. It is the case of *Tak Ming Co v Yee Sang Metal Suppliers Co* [1973] 1 All ER 569 is all four walls with this case.

Tak Ming Co v Yee Sang Metal Suppliers Co

The Privy Council, there, corrected a judgment, in a case like the present, where interest pleaded, to include interest on the amount recovered. The facts are succinctly in the judgment of Pearson, LJ, who delivered the unanimous decision with Wilberforce and Dilhorne LJJ. The temptation, to avoid diluting the tenor, is to state the facts by quoting Lord Pearson's statement. A summary for our purposes suffices. The respondents sued the appellant and another for balance of payments on a construction contract. The statement of claim was for \$367, 645.75 and interest thereon at the rate of 8 per centum per annum from the commencement of the action to payment. The Court split the trial, starting with the question of liability first, and found the appellant liable. The judgment was not read but was handed out in open court and did not include the order for interest. The Court, on an application of both parties, appointed an expert to assess the losses. At this application, the respondent informed the Court that it will apply for interest at an appropriate time. Eventually, the respondent applied by summons for the appellant to pay interest. The summons was dismissed. Nine months later, the respondent applied that the judgment should be corrected by the inclusion of interest. The Court corrected the judgment. The appellant appealed unsuccessfully to the Hong

Kong Supreme Court. The appellant appealed to the Privy Council of the House of Lords, now the United Kingdom Supreme Court. The House of Lords dismissed the appeal.

The power in section 11 can be invoked directly with or without a judgment and independent of powers of correction under the Rules of Court

Pearson, LJ, after laying the statutory history of the power of a court to order interest – an equivalent of our section 11 of the Courts Act – said:

There was thus in 1970 the possibility of making an application under section 30 A. But the respondents, presumably for tactical reasons – seeking to avoid the plea of *res judicata* – did not adopt this course and preferred to apply under the “slip rule” for correction of Pickering J’s judgment of January 3, 1969. The “slip rule,” in Hong Kong just as in England, was at all material time covered in Ord. 20, r. 11...

A litigant, once interest is not included in a judgment, can, as happened in this case, apply directly under section 11 of the Courts Act for an award of interest and/or apply for correction of judgment under the slip rule under the Rules of Court. In neither case does *functus officio* apply. And on the facts of the *Tak Ming Co* case, the doctrine of *res judicata*, never applied because the matter, right in the statement of claim, was never litigated on:

In effect there is a finding of fact by both courts below that Brigg’s J.S reasons for rejecting the application was that he had no jurisdiction to entertain it. He did not decide whether on some different application – e.g. an application for correction of the judgment – he would have no jurisdiction to decide whether or not interest should be awarded. There was no adjudication on the merits of the claim for interest ... there was no *res judicata*. The claim for interest had not been adjudicated on by Briggs J.

The maxim *nemo debet bis vexari*, moreover, on the facts in the *Tak Ming Co* case, never applied:

The wider principle is not properly applicable in the present case. It would have applied if Briggs J had adjudicated on the claim for interest and respondent’s counsel, having omitted to rely in the pleadings before Briggs J upon some fact or argument, had afterwards sought in other

proceedings to rely on that fact or argument. In this present case there was simply a refusal to adjudicate on the ground of lack of jurisdiction.

The upshot is that, if in the same proceedings, applications to correct judgments are not subject to plea of *res judicata* and the maxim *nemo debet bis vexari*. And for the *Tak Ming Co* case the threshold for correction had been reached:

The requirements for acting under the slip rule were satisfied. Pickering J. said:

A most important matter for me to consider is what I would have done at the time I gave the judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned me to no small difficulty, my mind was on the issue of liability rather than upon the figures. But had I thought the matter through further, as I should have done, I am in no doubt whatever, having a very clear recollection of the case and at the evasiveness of Mr. Cheng, witness of the second defendant company, that I would have made an award of interest. Unfortunately, for the plaintiff firm, I did not read the lengthy judgment in court but handed it down so that the omission was not obvious to counsel for the plaintiff before I had left the court.”

On the basis of that explanation, it can be said both that there was an accidental omission by the judge to order interest in his judgment of January 3, 1969, and that there was an accidental omission by counsel to ask for it. Under the slip rule an accidental omission by counsel can suffice to bring the rule into operation: *In re Inchcape* [1942] 394, 399

In the application before the Court below, the Court below never considered whether it could correct the judgment under its original jurisdiction or under Order ..., rule ... of the Supreme Court Rules or Rule ... of the Civil Procedure, 1998. Equally, the Court below never considered whether the judgment or order was perfected in which case it was still open to the Court below to recall or reconsider its judgment. The Court below, if it investigated whether the judgment or order was perfected, would have found the judgment in Form 45 and that, as a matter of


course, have alerted it of an award of interest that the appellant, although unpleaded, requested in the witness statement and gave evidence on without contradiction. The Court, as it turned out discussed the jurisdiction of the Court, after judgment was delivered, to make the order the appellant's applied for on a matter which in its estimate was not pleaded. On both aspects, the Court's position was incorrect. A court has jurisdiction before, as was here, a judgment or order is perfected to recall and vary a judgment or order; after judgment is given, a court has jurisdiction any time after to correct its judgment or order. For exercise of this power pleading the matter is necessary and, if it is, it suffices if the claim is in the witness statement and/or evidence before the court which has not been opposed.

The appeal, therefore, must be allowed with costs on all grounds the appellant raised. The interest will be at the investment rate. It will be at simple interest annually. The respondent should within 14 days of the delivery of judgment lodge with your Court with the bill of costs.

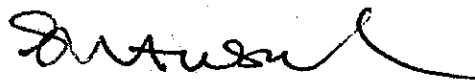
Pronounced at Blantyre this 15th day of December, 2022



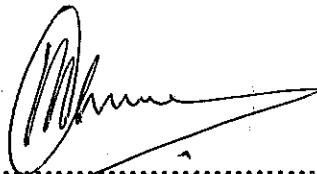
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HONOURABLE CHIEF JUSTICE A.K.C. NYIRENDA, SC



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HONOURABLE JUSTICE E.B. TWEA, SC JA



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HONOURABLE JUSTICE DR. J.M. ANSAH, SC JA



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HONOURABLE JUSTICE R. R. MZIKAMANDA, SC JA



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HONOURABLE JUSTICE A.C. CHIPETA, SC JA



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HONOURABLE JUSTICE L.P. CHIKOPA, SC JA



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HONOURABLE JUSTICE F.E. KAPANDA, SC JA



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HONOURABLE JUSTICE D.F. MWAUNGULU, SC JA



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HONOURABLE JUSTICE A.D. KAMANGA, SC JA