

K AND G MINING SYNDICATE

Versus

RONALD MUGANGAVARI

And

PROVINCIAL MINING DIRECTOR (MIDLANDS)

And

MINISTER OF MINES AND MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULWAYO 17 AND 30 JULY 2020

Application in terms of rule 449 of the High Court Rules, 1971

T. Zishiri, for the applicant
D. Mwonzora, for the respondents

DUBE-BANDA J: This is an application in terms of Order 49 rule 449 of the High Court rules, 1971 to correct a judgment of this court handed down on the 1st June 2017. The basis of the application is that the judgment of this court under cover of No. HB131/17 was made on the basis of a mistake that was common to all the parties; that the correction sought herein will not change the substance of the judgment but only the citation of the third respondent so that it properly reads Minister of Mines and Mining Development N.O. and that no party will be prejudiced by the correction sought therein. In this application the applicant seeks an order:-

1. That the judgment handed down under case number HC 2031/15 be and is hereby corrected in the citation of the third respondent by deletion of the Ministry of Mines and Mining Development N.O. and substitution thereof with Minister of Mines and Mining Development N.O.
2. That the first respondent shall pay costs of suit on an attorney and client scale only in the event of opposition.

The application is opposed by the first respondent. The second and third respondents filed a notice notifying the court that they are not opposed to the order sought by the applicant.

At the commencement of the hearing, Mr *Mwonzora* for the first respondent objected to Mr *Zishiri*, counsel for the applicant appearing as counsel on the grounds that he deposed to a supporting affidavit to the application. The objection was that he cannot be counsel and witness at the same time. Mr *Zishiri* conceded the point and asked the court to expunge the supporting affidavit he deposed to. Mr *Mwonzora* accepted that once the offending affidavit was expunged, he will have no objection in Mr *Zishiri* continuing to represent the applicant. Therefore, by consent of the parties, I expunged the supporting affidavit deposed by Mr *Zishiri* and no further reference shall be made to it. As a result he continued to represent the applicant in this matter.

The background

On the 26 July 2016, applicant issued out a court application for review against three respondents, being Ronald Mugangavari (first respondent in this application), Provincial Mining Director - Midlands and the Ministry of Mining and Mining Development N.O. The application was heard on the 1st February 2017 and a judgment under cover of HB 131/17 was handed down on the 1st June 2017. The operative part of that judgment reads as follows: in the result, it is ordered that:

1. The determination by the 3rd respondent dated 17 July 2015 cancelling Midway 21 Mining registration certificate held by applicant be and is hereby set-aside.
2. The first respondent to pay costs of suit.

Applicant launched this application to substitute the Ministry of Mining and Mining Development N.O. with the Minister of Mining and Mining Development N.O. The net effect of the applicant's argument is that the substitution sought is merely a matter of form, not substance. As alluded to above the application is opposed by the first respondent.

The law and the facts

The general principle now established in our law is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. The other

equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order. See Herbstein and Van Winsen *The Civil practice of the High Courts and the Supreme Court of Appeal of South Africa* (Juta) 5th ed. 926.

Rule 449 of the High Court Rules, 1971, on correction, variation and rescission of judgments and orders provides an exception to the general rule, .Rule 449 provides that:

- (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
 - (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
 - (c) that was granted as the result of a mistake common to the parties.
- (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.

This application is anchored on the basis that the judgment sought to be corrected was granted as the result of a mistake common to the parties. When a correction is sought on the ground of a mistake common to the parties two broad requirements must be satisfied: first there must have been what would in the law of contract be termed a common mistake, which occurs when both parties are of one mind and share the same mistake (usually a mistake of fact) and, secondly, there must be a causative link between the mistake and the granting of the order or judgment. This requires that the mistake relate to and be based on something relevant to the question to be decided by the court at the time. These requirements will be satisfied when evidence that becomes available to the parties after judgment shows that the factual material on which the court's decision was based was, contrary to the parties' assumption, incorrect.

In its founding affidavit, applicants makes a number of contentions, in particular it avers that:

1. Bearing the aforesaid in mind, applicant sought to execute the court's judgment under case number HC 2031/15 but realised that there was an anomaly in the citation of the third respondent cited as Ministry instead of Minister.
2. The face of the application filed by applicant under case number HC 2031/15 cited the third respondent as "Ministry of Mines and Mining Development N.O." but

however, in the founding affidavit on paragraph 4, he was described as, “Minister of Mines.”

3. I am advised that in terms of the State Liabilities Act, it is improper to cite a ministry. One must cite the Minister. A perusal of the court application filed under case number HC 2031/15 reveals that there was a mistake on the face of the application where it ought to have read Minister of Mines and Mining Development N.O. instead of Ministry of Mines and Mining Development N.O.
4. Be that as it may, this mistake was never picked up by any of the parties. All parties were working under the impression that third respondent referred therein was the Minister of Mines and Mining Development N.O.
5. As a result of the anomaly highlighted above and also the need to enforce the judgment in case number HC 2031/15, it has become necessary to file this application.
6. I am advised that in terms of rule 449 of this court’s rules, this court is clothed with jurisdiction to correct or vary its own orders if such order was granted as a result of a mistake common to both parties.
7. I verily believe that this mistake as is apparent on the face of the application under case number HC 2031/15 was common to both parties.

Applicant contends that in case HC 2031/15 the citation of the Ministry, and not the Minister was a mistake common to all the parties. The outside cover cites the third respondent as the Ministry of Mines and Mining Development N.O., the court application itself cites third respondent as Ministry of Mines and Mining Development N.O. In the founding affidavit, it is averred that the third respondent is the Minister of Mines.

It is argued that the citation of the Ministry was a typographical error on the face of the application. It anchors its argument on the fact that the founding affidavit in case number HC2031/15 refers to the Minister, and not the Ministry. It is argued that what matters is what is in the founding affidavit, not in the court application form 29. Applicant contends that an application stands or falls on its founding affidavit. So it is the affidavit that matters. It is argued that the reference of the Ministry and not the Minister is an error that should be corrected in terms of rule 449 of the rules.

First respondent contends that what applicants calls an error, is not an error that is envisaged by rule 449. It is argued that what applicant seeks is not a correction but a substitution of a party. It is argued that rule 449 cannot be invoked in instances where a party out of its own design and failure to follow strict provisions of the law seeks to introduce a totally new party to concluded proceedings. It is argued that rule 449 can only be properly construed to correct an error involving only the parties that were before court when the judgment was given. Not to introduce a new party to concluded proceedings.

Furthermore, third respondent argues that the citation of the Ministry, which is not a *legal persona*, instead of the Minister who made the decision was fatal to the application. It is said all applicant attempts to do is to smuggle in a party to completed proceedings, without affording that party, i.e. the Minister an opportunity to be heard. It is argued that the relief contemplated by rule 449 is the one which is procedural, meant to restore the parties to the position they were prior to an order being erroneously granted. It said the Minister was never a party to the proceedings, and cannot be a party now when the matter has been concluded. It is contended that this application was filed after a realisation by applicant that it could not execute against a non-existent party, hence the need to substitute the Minister.

Is the Ministry of Mines and Mining Development a *legal persona*? In terms of section 3 of the State Liabilities Act [*Chapter 8:14*] in any action or other proceedings which are instituted by virtue of section two, the plaintiff, the applicant or the petitioner, as the case may be, may make the Minister to whom the headship of the Ministry or department concerned has been assigned nominal defendant or respondent. Applicant concedes that in terms of this provision, it is incorrect to cite the Ministry, the proper third respondent in case HC 2031/15 must have been the Minister, not the Ministry. The Ministry is not a *legal persona*, capable of being sued.

Applicant argues that what is important is that the founding affidavit refers to the Minister and not the Ministry. My view is that this argument does not solve applicant's problem. The citation of the parties is not to be found in the founding affidavit, but in the application i.e. Form 29. I will use an example of a summons to illustrate this point, in a summons the identities of the parties must appear *ex facie* the face of the summons. A party cannot be heard to argue that it did not cite the correct *legal persona* on the summons, but referred it correctly in the declaration. Such an argument is unattainable and cannot avail such

a party. Like in an application the identities of the parties must appear *ex facie* on the face of the application.

In Fadzai John v Delta Beverages SC 40/17 the court observed at page 4 that: “In *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H) it was stated as follows: ‘A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*.’” In this case number HC 2031/15 the applicant cited a non-existent third respondent. See *Amos Makono & 32 Others v Freda Rebecca Gold Mine* HH 400 / 18, *Masuka v Delta Beverages* HB 2012 (1) ZLR 112, *Masukume v Treston Enterprise (Pvt) Ltd* HH 416/15, *Nuvert Trading (Pvt) Ltd v Hwange Colliery* HH 791/15, *CT Bolts (Pvt) Ltd v Workers’ Committee* 2012 (1) ZLR 363 (S), *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H) all referred to by the applicant; *Marange Resources (Private) Limited v Core Mining & Minerals (Private) Limited (in liquidation) & Ors* SC 37/16 and *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S).)

In case number HC 2031 / 15 applicant cited a non-existent third respondent. Can it now deploy or invoke rule 449 to substitute that non-existent third respondent with a *legal persona* in the form of the Minister of Mines and Mining Development. If something is void *ab initio* it is in law a nullity. It is not only bad but incurably bad. See *MacFoy v United Africa Co. Ltd* (1961) 3 All ER 1169 at 1172 and *Muchakata v Nertherrbum Mine* 1996 (2) ZLR 153(S). Applicant cannot attempt to use rule 449 to turn a nothing to a something. Rule 449 is not for that purpose. Whether the citation of the Ministry of Mines and Mining Development instead of the Minister of Mines and Mining development was a typographical mistake makes no difference. The point is that applicant in case number HC 2031/15 cited a non-existent third respondent. That non-existent third respondent cannot be substituted for a *legal persona*, i.e. the Minister of Mines and Mining Development. The Minister was not a party at the commencement of the proceedings and cannot be a party after the proceedings have been concluded.

I do not accept that the citation of the Ministry of Mines and Mining Development was a mistake common to all parties. If it was a mistake, it was a mistake made by the applicant and it must live with it. The substitution applicant is seeking is not a matter of form, but a matter of substance. Such a substitution of a party cannot be achieved through the vehicle of rule 449.

I take the view that nothing turns on the fact that the second and third respondents herein do not oppose the relief sought by the applicant in this application. On the facts of this case, this court cannot invoke rule 449 for the purposes sought by the applicant, even if second and third respondent are not opposed to the order sought. A party cannot confer jurisdiction to this court which it does not have. The *onus* is on the applicant to make a case for the order it seeks. The applicant has failed to discharge such *onus* in this case.

The applicant has failed to obtain the relief it sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The first respondent is therefore entitled to his costs of suit.

Disposition

In result, I order as follows: the application is dismissed with costs of suit.

Garikayi & Company, applicant's legal practitioners
Mwonzora & Associates, first respondents' legal practitioners