CAPITAL BRAKE COMPANY (PRIVATE) LIMITED
and
ROBERT DANIEL BENATAR
versus
COLLEEN BEATRICE BENATAR

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 27 October 2015, 13 January 2016

Opposed Application

S. Hashiti, for applicants
J. Wood, respondent

CHIGUMBA J: This is an application in which an order is sought for the setting aside of the relief granted in case number HC5257/11 on 15 July 2013. The applicants also seek the leave of this court, to file opposing papers to the chamber application filed by the respondent under the aforementioned case number. Applicants seek an order that the respondent pay costs on a legal practitioner client scale. This case will turn on the meaning, at law, of the phrase 'in the absence of one of the parties', for purposes of interpreting the provisions of r 449 of the rules of this court. Does 'absence' in terms of the rules, depict a deliberate and careless failure to file the requisite papers that set out one's side of the story after valid service? Or does it refer merely to physical 'presence' at the hearing of a matter either in person or through one's legal representative? The second applicant and the respondent were married to each other, and are now divorced. The second applicant is the deponent to the founding affidavit, in his capacity as managing director of the first applicant. The background giving rise to the relief sought in this matter is as follows;-

On 3 June 2011, respondent, under case number HC5257/11, filed a court application for the liquidation of various companies in which the first applicant had an interest. Opposing papers

to that application were duly filed. The second applicant avers that he was subsequently 'coerced' by the threat that damaging evidence would be used against him, and 'manipulated into signing a consent paper and settling with the respondent, on 11 June 2011, at the offices of her legal practitioners. He denies having had any authority to enter into any settlement agreements binding the first applicant, and denies having voluntarily entered into the two agreements. Respondent subsequently filed a chamber application for the registration of the record of settlement as an order of this court. On 1 September 2011, a query was raised by the Judge who dealt with the chamber application regarding the manner of its service. In the meanwhile, the second applicant instructed his legal practitioners to advise the respondent's legal practitioners that he was resiling from the agreements which he had entered into to settle certain matters because he had not signed the agreements freely or voluntarily.

It was averred on behalf of the applicants that, on 30 March 2012 (a year after it had been filed) the respondent was directed to serve the chamber application for registration of the orders on all interested parties through the Deputy Sheriff. This was not done and the respondent snatched the judgment. The respondent would be unjustly enriched if the order which she snatched is not set aside. The respondent is not a shareholder in the first applicant and has never been. In July 2013, the respondent managed to get the two orders which the applicant allegedly signed under duress registered as orders of this court. The applicant now seeks the setting aside of the order which registered those agreements as orders of this court. On 16 November 2013 the respondent filed opposing papers to this current application in which she avers that the applicant has failed to show good and sufficient grounds for having the order that he seeks to set aside, actually set aside, more particularly because this order was entered into by consent. She reiterates that both applicants were aware of her intention to have the agreements registered as orders of this court as far back as June 2012.

The respondent avers that; service of the application for registration by the Deputy Sheriff would not have affected the outcome of that application. The application was served twice on the applicants by the respondent's legal practitioners because the registration of a consent order was merely procedural. Applicant has no valid grounds for seeking to resile from the order by consent and his conduct is reprehensible. A number of meetings were held when negotiations were being done to settle the matter over a five day period from the date when the

applicants were served with the application for liquidation. Phone call attendances were recorded and the second applicant was cautioned to seek independent legal advice in front of witnesses. A criminal charge based on the same allegations of duress was withdrawn for lack of evidence. The order by consent and the settlement between the parties was not illegal, or prejudicial to the applicant, or skewed in the respondent's favour. Respondent agreed to transfer her interest in three companies in exchange for a share in the proceeds of sale of a property in Mutare which the second applicant had unlawfully sols without the respondent's knowledge or consent.

Mr *Mark Warhurst*, a partner in the firm of *Matizanadzo & Warhurst*, the respondent's legal practitioners of record, deposed to an affidavit in support of the respondent on 18 October 2013, and so did a Ms *Ethel Ndoro*, as well as a Ms *Marilyn Taylor*, both employees of the same firm. The affidavits support the respondent's assertion that the applicant signed the settlement agreement freely and voluntarily, and that he was not coerced or intimidated into it. They also confirm that the applicant declined to consult independent lawyers after being advised that he had a right to do so. On 23 June 2015, the respondent filed a supplementary affidavit after seeking, and being granted leave to do so in a chamber application filed under case number HC 9378/14. The supplementary affidavit was necessitated by the fact that heads of argument in this application had been filed in March 2014, and that subsequently, on 9 July 2014, judgment had been handed down in case number HC 7926/12. Respondent contends that this judgment touched on matters which are pending before this court. The judgment makes an order of court out of the issues agreed by the parties in the consent order which the applicant seeks to have set aside in these current proceedings. I do not propose to regurgitate the contents of the supplementary affidavit, which appears at record pp 174-175.

The applicant petitioned the court to set aside the order granted in case HC 5257/11 in terms of r 449 of the rules of this court which provides that;-

> ***"449. Correction, variation and rescission of judgments and orders***
> (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."

The purpose of r 449 is to enable the court to revisit its orders and judgments to correct or set aside any orders or judgments given in error where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and would destroy the basis on which the justice system rests. See *Tiriboyi* v *Jani & Anor*[1]. Rule 449 is an exception to the general rule and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the error or judgment. See *Grantully Private Limited* v *UDC Ltd* [2]. In the South African case of *Mutebwa* v *Mutebwa*[3] the equivalent rule to our r 449 was discussed and it was held that there are three requisites that have to be satisfied for relief to be obtained in terms of this rule;

(a) That the judgment was erroneously sought and granted
(b) That the judgment was granted in the absence of the applicant
(c) That the applicant's rights or interests are affected by the judgment. See also *Khan* v *Muchenje A Anor*[4], *Josephine Matambanadzo* v *Natu Lala Goven*[5], *Jonas Mushosho* v *Lloyd Mudimu & Anor*[6].

The applicants contend that the order they seek to be set aside, HC 5257/11 was erroneously granted in their absence, it was obtained by fraud, the second applicant was coerced into making it, the deed of settlement incorporated therein was unlawful, and that the explanation which they gave for their default was acceptable. Can it be said that in the circumstances of this case, the applicants were absent when the default judgment was sought, and granted? Absence for the purposes of r 449, in my view refers not only to physical absence as in not being before the Court or Judge when judgment is granted, but to absence in terms of the rules, as in being deliberately and intentionally not in attendance despite service of the papers in terms of the rules,

[1] 2004 (1) ZLR 470 (H) @472 D-E
[2] 2000 (1) ZLR 361 (S)
[3] 2001 (2) SA 193 cited with approval in Tiribhoyi v Jani & Anor
[4] HH125-15
[5] SC 23-04
[6] HH443-13

or despite notice that an order is being sought, in default. 'Absence' also means that a litigant was not before the court when the judgment was granted, as in not having filed the requisite papers, in time, despite having notice of intention of obtaining judgment.

It has been held that;-

> "…the court will normally exercise its jurisdiction in favour of an applicant who, through no personal fault, was not afforded an opportunity to oppose the order granted against him and who, having ascertained that such an order has been granted, takes expeditious steps to have the position rectified. This is in line with the common law position…a judgment procured by the fraud of one of the parties…cannot be allowed to stand…"See Herbstein & Van Winsen in *The Civil Practice of the High Courts of South Africa*[7]"

It has been held, in the following cases, that the South African equivalent of r 449 (a) does not apply where a party or his legal practitioner is aware of the proceedings and deliberately opts not to appear. See *De Wet & Ors* v *Western Bank Ltd*[8], *Nyingwa* v *Moolman N.O.*[9] The applicants admit in their papers that they were aware as far back as September 2011 that an application had been made to a Judge in Chambers, for the registration of the order entered into by the second applicant and the respondent, as an order of this court. It is common cause that the same application was served twice on the applicant's then legal practitioners of record. Order 32 r 226 provides as follows;-

> ***"226. Nature of applications***
> (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—
> *(a)* …
> *(b)* …
> (2) An application shall not be made as a chamber application unless—
> (*a*) ….
> (*b*)…
> (*c*) the relief sought is procedural or for a provisional order where no interim relief is sought only; or
> (*d*) the relief sought is for a default judgment or a final order where—
> (i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default; or
> (ii) …
> (iii) every interested party is a party to the application; or

[7] 5ed Vol 1-p930,939

[8] 1979 (2) SA 1031

[9] 1993 (2) SA 508

(*e*) …"

The respondents proceeded correctly in my view, in terms of Order 32 r 226 (c) because the registration of the order by consent was procedural and final, and the second applicant's legal practitioners had previously been served with a copy of the application. All the interested parties were cited as parties to the chamber application as provided by Order 32 rr 226 (2) (d) (ii).

Order 32 r 242 provides that;-

> "***242. Service of chamber applications***
> (1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default…"

In this case the chamber application was served twice on the applicant's legal practitioners of record, and the bone of contention is whether such service was proper service in terms of the rules, or whether the respondent was obliged to serve the chamber application in terms of the handwritten directive of a Judge who was initially seized with the chamber application, that it be served through the Deputy Sheriff. Order 5, r37 of the rules of this court provides for service of process as follows;-

> ***"37. Persons by whom process may be served***
> (1) Service of a summons, writ, warrant or order of court shall be effected by the sheriff or his deputy.
> (2) Service of any process, other than a summons, writ, warrant or order of court, may be effected by the sheriff or his deputy or by the party concerned or his legal practitioner or agent.
> (3)…"

My reading of Order 5 rr 37 (2) is that a chamber application may properly be served by the party concerned or by his legal practitioner. Only a summons, writ, warrant or order of court must be exclusively served by the sheriff or his deputy. The Court or a Judge however always has discretion to direct or order that any process be served in the manner that it prescribes. See Order 5 rr 36 (b).

Let us examine the directive given by the court for the manner of the service of the chamber application. Annexure 'G', at record page 75, is a letter dated 1 September 2011, addressed to the respondent's legal practitioners of record in which four queries to the chamber application were raised. None of the queries relate to the service of the chamber application on the applicants. On 7 June 2012 (annexue 'G1' p 76) applicant's legal practitioners acknowledge

that the chamber application had been served on them. They allude to their client's intention to resile from the agreement on the basis of undue influence and admit that their client was barred from opposing the application because he did not give them instructions to represent him before the *dies induciae* expired. Annexure 'G5', at p 83 is a letter dated 15 March 2012 from the respondent's legal practitioners to the Registrar of this court. On that letter appears some handwritten notes which on the face of it were penned by the Judge dealing with the chamber application. Part of those notes include the following; "…In line with discussions in chambers with Mr *Warhurst*, may the applicant serve the application on all the respondents preferably through the Deputy Sheriff and thereafter file proof of such service.' The note is dated 20 March 2012.

The first thing to note is that this handwritten note cannot be construed as a formal directive given by the Judge to the applicant, in its handwritten form. Judges make a lot of notes in the course of adjudicating over matters. The Judge's assistant ought to have transcribed that handwritten note into a formal letter requesting the applicant to serve the application in the manner directed by the Judge if indeed that note was a formal directive on the manner of service which fell within the discretion of the Judge as provided by r 36 of the rules of this court. In the absence of such written notification in my view the applicant was entitled to proceed in terms of r 37, which was done on 7 June 2012, and again on 22 November 2012. If the Judge was unhappy with the apparent lack of compliance with his order, he ought to have advised the applicant to serve the application according to his directive. If the Judge accepted service on the legal practitioners, by another set of legal practitioners, which is valid service in terms of the rules, again it was within the discretion of the Judge to do so. There was no court order directing service which the applicant can claim was not obeyed. A Judge's directive on manner of service is entirely discretionary, and falls short of a court order, and enforcing the directive is entirely up to the Judge who is at liberty to accept any other valid service in terms of the rules.

Turning back to r 449, in my view the merits of the application may only be dealt with after the court has satisfied itself that all the parties whose interests may be affected have had notice of the order proposed. In this case it is common cause that this application was served on counsel for the respondent in terms of the rules. Rule 449 (2) has been complied with. It is my considered view that the judgment which the applicants seek to rescind in this application cannot

be said to have been erroneously sought or erroneously granted in the absence of the applicants. The applicants had notice of the filing of the application for the registration of the consent order as an order of thus court. Service of the application was effected on the applicants twice, through their legal practitioners. Service was valid in terms of rr 36 and 37 of Order 5 of the rules of this court. There is no rule that stipulates that if service is effected a year after the application is filed adverse inferences ought to be drawn by the court that deals with the merits of the chamber application. There is no evidence that Mr *Warhust* counsel for the respondent received a letter instructing him to serve the application through the Deputy Sheriff and that he disregarded this instruction. The Registrar did not write to him to communicate the Judge's handwritten instruction, and in the absence of evidence of deliberate disobedience on his part, how can this court invalidate his service of the application on the applicants through r 37 of the rules of this court, when such service is itself valid service?

In light of the above I find that the applicants' 'absence' when the order by consent in HC 5257/11 was registered as an order of this court, was not such absence as is provided for or contemplated by the provisions of r 449. Applicants had notice of the filing of the application, through service of the application on their legal practitioners in June and November 2012. Applicants deliberately, and intentionally, chose not to respond to the application, within the prescribed time limits, despite such notice. There was no scope for physical presence as in appearing before the court to make oral submissions in a chamber application, but certainly 'presence' in the form of filing opposing papers was required. The judgment was correctly granted in the absence of the applicants because they chose not to file their papers on time despite valid service. The applicants cannot avail themselves to r 449. Their absence was deliberate and willful and intentional. Rule 449 does not apply where a party or his legal practitioners was aware of the proceedings and chose not to appear or to file the necessary papers within the prescribed time period.

Having found the statutory provision for rescission of judgment to be of no assistance to the applicant let us turn to the common law ground for rescission, fraud. There is nothing in the papers before me which constitutes *prima facie* evidence of fraud, let alone evidence of such fraud, on a balance of probabilities. There is no basis on which the judgment granted in default can be rescinded on the common law ground of fraud, which is a criminal offence with elements

which must be proved, which has not been done here. It is this court's considered view that the evidence does not support the assertion that duress or undue influence was brought to bear on second applicant when he signed the order by consent. The supplementary affidavit filed of record by the respondent shows that most of the relief sought in this application has been overtaken by events. As a mark of its displeasure for the callous wasting of its time, the court considers a punitive order as to costs to be appropriate. This application was entirely devoid of merit for the simple reason that the provisions of rr 449 (a) were not met from the outset. Coupled with the presence of subsequent orders that whittle away at the applicant's cause of action in trying to recover various properties which were lost in divorce proceedings, this case was a dog's breakfast.

For these reasons, the application be and is dismissed with costs on a legal practitioner and client scale.

Sawyer & Mkushi, applicants' legal practitioners
Matizanadzo & Warhust, respondent's legal practitioners