

IGNATIUS MASAMBA
versus
THE SECRETARY – JUDICIAL SERVICE
COMMISSION
and
MERCY GORONGOZA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 May, 2017

Chamber Application In Terms Of Rule 449 (1) (b)

CHITAPI J: The papers filed as constituting this chamber application typify what has been colloquially referred to as a dog’s breakfast both as to content and form. One has to painstakingly read through the papers several times to try and make head or tail of what the applicant’s cause of action is. I have read through the founding affidavit of the applicant several times as it is the document on which a judge can hopefully make out what the cause of action is. The founding affidavit is confusing and deals with unrelated or irrelevant matters to the relief sought. I will try and be simple and methodical in my judgment in the hope that the applicant will stand properly advised and directed.

On 7 November, 2016, the applicant filed this chamber application. It was referred to me on 3 January 2017, It should have been disposed of long back but for the fact I had to read it over and over again to try to decipher to merits as already pointed out. I was also in criminal trial court and could not devote time to prepare this judgment. I am now able to do so as the court is on vacation.

The nature of the application

The chamber application purports to be founded on r 449 (1) (b) of the High Court Rules, 1971. The rule provides as follows:

“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 application of any party affected, correct, rescind or vary any judgment or order
 - (a)
 - (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)
 - (d) 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 Law

I consider it important to briefly deal with the interpretation which the courts have given to r 449 (1) (b). Firstly, it must always be borne in mind that when a court or judge is seized with a matter, once it or he pronounces judgment or an order on the matter, it or he becomes *functus officio*. The court or judge as the case may be will have discharged it or his function, rightly or wrongly and may not revisit or change the determination or decision. A party who is not satisfied with the decision of the court or judge must subject to any rule relative thereto take up the decision on appeal to the Supreme Court. I would say that at its simplest extrapolation, this is the procedure which a litigant who is not satisfied with a decision of the court or judge should follow or be guided by.

Rule 449 recognizes the fallibility of the court or judge inasmuch as decisions of the court are made by human beings. As human beings judges are not infallible. The rule in addition to the common law inherent power of this court to supplement, clarify or correct its judgment, which power does not concern this judgment, allows the court or judge to revisit its judgment in which it or he is *functus officio*. The revisitation and the powers which the court or judge may exercise are not open ended. The powers which may be exercised and the circumstances allowing for the revisitation are circumscribed in the rule. The court or judge will do so either on its or his accord or upon application by any affected party which means that in addition to the parties to the judgment, a party who was not party to the litigation can utilize the rule if such party is affected by the judgment or order concerned where it was given in such party's absence. See *Mashingaidze v Chipunza & Ors* 2015 (2) ZLR 362;

Before the court or judge can correct, rescind or vary any judgment or order based on the provisions of r 449 (1) (b) at the instance of a party, such party is required to point out to:

- (a) the ambiguity; or

- (b) patent error; or
- (c) the omission

sought to be relied upon to move the court or judge to exercise a discretion to make alterations to the judgment or order as the case may be.

In *Wector Enterprises (Pvt) Ltd v Luxor (Pvt) Ltd* 2015 (2) ZLR 57 (S) the learned ZIYAMBI JA gave an overview of the rationale behind r 449 generally in the following extract at 60 H – 61 C:

“Rule 449 of the Rules has been invoked among other instances, where there is a clerical error made by the court or judge (see *City of Harare v Cinamon* 1992 (1) ZLR 361 (S); where entry of appearance had been entered but not in the file at the time default judgment was entered (See *Banda v Fitluk* 1993 (2) ZLR 60 (H); where at the time of issue of the judgment, the judge was unaware of a relevant fact namely a clause in an acknowledgement of debt (see *Grantually (Pvt) Ltd & Anor v UDC 2 000* (1) ZLR 361 (S)).…….

Where applicable, the rule provides an expeditious way of correcting judgments obviously made in error. It envisages the party in whose absence the judgment was granted being able to place before the court the fact or facts which were not before the court granting the judgment. There is no need for the applicant to establish good and sufficient cause as required by r 63 of the Rules (See *Banda v Pitluk*) (*supra*).

However, in each case, the error or mistake relied upon must be proved and in each case, the court exercises a discretion. See *Gondo & Anor v Syfrets Merchant Bank Ltd* 1997 (1) ZLR 201 (H).....

In any event r 449 is not mandatory but confers upon the court, a discretion to act in terms thereof.....”

The decisions in *Mashingaidze v Chipunza* (*supra*) and *Vector Enterprises (Pvt) Ltd v Luxor (Pvt) Ltd* (*supra*), specifically dealt with applications brought under r 449 (1) (a). This notwithstanding the cases stand as a guide with respect to the overview of the purport of r 449 generally.

In *Mpansi & Ors v Dube & Ors* 2015 ZLR 1 (S), the learned HLATSHWAYO JA dealt with an application for correction or variation of a Supreme Court order pursuant to r 58 of the Supreme Court Rules, 1964 as read with r 449 of the High Court Rules, 1971. He corrected a costs order in which costs had been granted against the executor of a deceased estate in his personal capacity. The order of costs had not specified that the costs of appeal be borne by the estate. The order had simply read inter-alia that “The appeal is allowed with costs”. Since the executor had been a party to the appeal which was allowed as a co-respondent, it was argued that

the order of costs was ambiguous unless corrected because it gave the impression that both the executor and the estate had to bear costs. The learned judge clarified the costs order.

In my view an ambiguous judgment or order must be construed as one that is unclear and capable of various interpretations. This may usually come about as a result of the language used by the court or judge. The ambiguity will therefore be attributable to the court or judge in how it or he has expressed himself or herself in the language used. In such a case it has been held that relief should be granted where from the language used, the ambiguity resulting therefrom has the effect that the true intention of the court or judge is not clear. See *First National Bank of South Africa Ltd v Surgens* 1993 (1) SA 245 (w) at 246.

A patent error or omission as the expression implies is one which is clearly obvious to anyone reading the judgment or order. It does not appear to me that the expression should present difficulties of interpretation. Examples of patent errors may relate *inter alia*, to clerical errors with regard to figures, dates or spellings. For good measure, a court may have ordered that an order be complied with by a certain date but when the judgment is typed and signed, it gives a date which had already passed through clerical error or an impossible date like 31 June yet the month of June ends on the 30th. A court or judge may for example in making an order requiring a party to do a certain act or refrain from doing so mistakenly omit to name the party who should so comply in circumstances where there are several parties in the judgment. Such an omission can be said to be patent and in my view can properly be corrected and the judgment or order varied to make it explicit.

I should mention that I have read the views expressed by the celebrated authors Herbastein and Van Winsen in *The Civil practice of the The Courts of South Africa*, Vol 1, 5th ed at p 935 where they rely on the judgment, *Isaacs v Williams* 1983 (2) SA 723 on the interpretation which has been given to r 42 (1) (b) of the South African Uniforms Rules of Court which reads the same as r 449 (1) (b). The Authors state that “an order that has been correctly made but incorrectly typed cannot be corrected or amended in terms of this rule, although a court has the inherent competence to correct the order so that it corresponds with the one made by the court.” A typing error in my view is an error which should be covered by r 449 (1) (b) because if the court has made an order and it is say handwritten or verbal and it is recorded, an error in typing becomes patent by comparison between the actual handwritten or recorded order

and the typed error. I do not see why the rule would not cover such a situation. Even if I am wrong in my reasoning I would think then that r 449 (1) (c) which allows for a variation, rescission or correction of a judgment or order on the basis of a mistake common to the parties would cover the situation. The distinction is too fine to call because what in essence is the judgment or order of the court would be the untyped judgment or order. The act of typing is merely there to reduce the judgment or order to a typed version and if the typed version does not reflect the untyped script then in my view it is patently erroneous to the extent of the mistyped error. I therefore respectfully disagree with the said authors for the reasons I have set out. In disagreeing with them, I do so in the hope that I did not misunderstand or misconstrue what they intended to convey.

Analysis of the application

Having set out the law and expressed the difficulties I have encountered in comprehending the applicant's founding affidavit I proceed to analyze as best I can the application in *casu* in the understanding that the applicant must make out a case for relief under r 449 (1) (b) of the rules of this court. He must point out to the ambiguity, patent error or omission which he alleges that the court made in its judgment in case No HC 6970/16. Once he has done this, he must satisfy me that the ambiguity or patent error or omission is such that I should be persuaded to exercise my discretion to exercise to set aside the judgment as prayed for by the applicant in his draft order. The discretion which I am empowered to exercise as with any judicial discretion must of course be exercised judiciously which connotes that the discretion must be based on what is fair in the circumstances of the case whilst applying rules and principles of law. By giving the court or judge a discretion to exercise the powers given in r 449, the applicant must understand as a corollary that he has no right or entitlement to demand the relief as of right.

I proceed to briefly outline the material facts arising or discernible from the judgment of this court prepared by my sister CHIGUMBA J in case No HC 6970/16 (ref HH 660/16) which judgment the applicant seeks to impugn in this application. On 1 September 2016, Case No. HC 6970/16 in which the applicant therein was the applicant was listed on the unopposed roll following several postponements by other judges who raised various queries. CHIGUMBA J in her

judgment HH 660/16 which the applicant has annexed to his present application dismissed that application on the basis that:

- “(a) there is no cause of action thereof and the relief sought is incompetent.
- (b) the papers are defective in that they do not comply with order 32 of the rules of this court.”

The applicant as evident from the judgment wrote several letters complaining about the dismissal of his application and requesting, if not demanding for reasons for the order. I have gone through the actual court record in case No HC 6970/16 because in this application, the applicant has just bundled together annexures in the form of documents whose relevance and purport is not clear to me.

I should at this stage indicate that the present application was opposed by the first respondent which filed its opposing affidavit on 17 November, 2016. In para 3 of the opposing affidavit, the deponent to the second respondent’s affidavit states that he has “read and understood the applicant’s founding affidavit” I do not purport to deny his assertion that he has understood it save to state that I unfortunately have not understood it especially reading it in the context of an application purportedly being made under r 449 of the High Court Rules. The contents of the founding affidavit are convoluted, twisted and difficult to follow. The applicant attacks the learned CHIGUMBA J as being careless, abusing authority and going on a frolic of her own in how she dealt with the application HC 6970/16. He then speaks about distress suffered by the second respondent which compels her to beam. He speaks of politics creating difficulties in his love affair with the second respondent more particularly that ZANU (PF) is blocking him from marrying the second respondent.

In paras 14 and 15 of his founding affidavit, the applicant states as follows:

- “14. The (i) beaming which is the act complained of, and (ii) the failure or omission to clarify about whether or not there is political meddling blocking the love affair going right to marriage and (ii) the failure or omission to clarify or confirm whether or not I can marry her by the second respondent are the acts of carelessness or negligence which judge Chigumba fails to come alive to. See paragraph 37 of the applicant’s founding affidavit on page 61. The civil wrong is negligence or carelessness.
- 15 the 2nd respondent was careless or negligent, in the failure to clarify about the acts or omissions that are complained of about which were specified or itemized in paragraph 37. The negligence or carelessness or failure or omission to clarify by the second respondent as itemized in paragraph 37 of the applicant’s founding affidavit in case no: HC 6970/16 is the civil wrong or delict or tort or common law breach of the duty of care complained of.”

From the above paragraphs, I got the impression that the applicant was arguing that the learned judge failed to understand or appreciate the cause of action in case No HC 6970/16. The applicant then attempts to extrapolate the cause of action which the learned judge failed to appreciate or discern. If I am correct in so holding, then, the applicant is ill advised to seek recourse in terms of r 449 (1) (b). Rule 449 (1) (b) is not intended to circumvent the process of appeal. A person who is dissatisfied with the judgment of this court as would appear to be apparent in this application, if one has regard to the applicant's quoted and other averments should have the judgment tested by a higher court on appeal rather than seeking to have the *functus officio* court or judge review its or his or her judgment and setting it aside as prayed for by the applicant.

The applicant's thought pattern has left me wondering whether he is *compos mentis*. I have already indicated that his documents are convoluted. This equally applies to his thought pattern. For example in para 24 of his founding affidavit which he has typed in bold, he states:

"24. As I write this applicant's founding affidavit: next door neighbours at 7223A, 25th Street Western Triangle, High Field are emitting alternately both chemical and herbal very pungent smokeless smells. Which means it is just, I am having to deal with a probable political malevolent confederacy of a behemoth nature. And the second respondent is booming/beaming."

Apart from the above deposition not having any relationship with the alleged ambiguity or errors or omissions in CHIGUMBA J's judgment, one cannot make out the content of the same. It is for this reason that I have found myself questioning the mental composure of the applicant. I will among other further meaningless paragraphs quote para 29 in which the applicant avers:

"29. Possibly the Judge is complicity. Isn't she? In the postulated most-likely scheme of ZANU (PF) of wanting me to die of AIDS than marry as a targeted person by my political most inveterate adversary, Mr Mugabe, the president of Zimbabwe. What motivated the dismissal. All it does is to seem to confirm my allegations. So where have I lied against ZANU (PF). What motivates the Judge? Is she really incompetent?"

I note that CHIGUMBA J described averments made by the applicant's in his founding affidavit in HC 6970/16 *inter alia* as jumbled, garbled and insensible and that no useful purpose could be served by repeating them. I find myself after painstakingly trying to make head or tail of the applicant's averments, having to say that the pattern observed by CHIGUMBA J has been repeated.

Although the first respondent has filed opposing papers on the merits, I cannot fathom why the respondent has been made a party to this application. No relief is sought against the first respondent and it is mind boggling why the first respondent would be cited as a party in an application based on r 449 of the High Court Rules. To add salt to injury the applicant in his draft order prays for the setting aside of the judgment in HC 6970/16 with costs against the first respondent. Whilst r 449 (2) enjoins the court or judge to satisfy it or himself that all parties whose interests may be affected by an exercise of the powers set out in the rule, are made aware of any application made under r 449 (1), it is not apparent as to how the first respondent is an affected party whether explicitly or implicitly. The Judicial Service Commission does not supervise the content of a judge's judgment nor does it superintend or influence judgments. It was also not a party to case No HC 6970/16. There is also no reason advanced by the applicant to support or justify a costs order against the first respondent.

I do agree though with the first respondent when it states as follows in para 16 of the opposing affidavit:

“16. The applicant has engaged in paranoid delusions throughout his Founding Affidavit, initially accusing everyone from the President, the Judges of the High Court, political parties, alleged members of the Central Intelligence Organisation and even the second respondent whom the applicant alleges to love of having a sinister plot against him simply because a judgment was entered against him.”

In particular the applicant has made unmitigated and virulent attacks on the judge of this court, CHIGUMBA J without substantiation. He among other expletives and profanities accuses the judge of corruption, carelessness and negligence in an open demonstration of contempt of the judge and court's authority simply because his unopposed application was dismissed for want of merit.

Whilst it is the right of every person to petition the courts, with the courts having a corresponding duty to adjudicate on all matters which come before them, the right does not include the right to abuse the courts and judicial officers. This application is not only devoid of merit but lacks *bona fides*. It was filed by a delusional applicant who simply considered that the court or judge was wrong to dismiss his application. He then went into attack mode and mounted a sustained attack on the judge and anyone whom he thought in his delusional state to be against him. Courts have a duty to guard the abuse of the court process and where there is unmitigated abuse as in this case, it is only reasonable, expected and indeed proper for the court to shut its

doors to the abuser and/or place such abuser on terms with regards how he may be allowed to exercise his rights of access to the courts.

There is nothing ambiguous in the judgment delivered by CHIGUMBA J by any stretch of imagination. There is no error or omission discernible let alone proven by the applicant. The only error is the applicant's perception which is ill conceived that he should have been granted the order which he sought. He now seeks to argue why the judge should be held to have been in error by making all sorts of baseless, unintelligible arguments and accusations which clearly fall outside the scope of r 449. I have already indicated that if the applicant had been properly advised, he should have noted an appeal.

Before rounding off my judgment I need to comment on a point *in limine* taken by the first respondent in para 9 of the opposing affidavit that the applicant adopted a wrong procedure in filing a chamber application for rescission of judgment instead of a court application. The first respondent argues that because r 449 (2) requires that interested parties be served, an application under r 449 should be brought as an ordinary court application. I do not agree. The first respondent should seek guidance from not only r 226 (2) but should also have regard to rr 241 and 242. It is not a correct statement of the law to hold that where a chamber application to a judge is to be served on other interested parties, such application should be brought as a court application or becomes a court application. The correct statement of the law as I understand it is that all chamber applications unless excepted in terms of the exceptions in r 242 should be served on all interested parties. This is clear from a reading of r 242 (1) of the Court Rules. Thus, reverting to r 449 the applicant or a party seeking to utilize the rule for relief can file a chamber application to a judge or a court application. The fact that the party has to notify interested parties does not work to convert the chamber application to a court application. It is on this basis that I have dealt with this chamber application albeit it being opposed. I also note that in terms of r 229 C, the adoption of an incorrect procedure between a court and chamber application does not ground dismissal of the application. I thus refused the relief of dismissal which the first respondent had prayed for in para 11 of its opposing affidavit.

To conclude my judgment, it is my considered view that this application for reasons I have pointed out lacks merit and *bona fides*. It is as already alluded to a clear abuse of the court process. The matter cannot just end with its dismissal because there is no gainsaying that the

applicant will relent his abuse of the court processes. He is the kind of person who is so litigious over frivolous and baseless issues that a sanction is necessary as proposed by the first respondent to stop him from abusing the court process. See *Munonyara v CBZ Bank Ltd & Ors* HH 91/15.

The first respondent has cited the judgment of this court in *City of Harare v Tendai Susan Masamba* HH 330/16 to the effect that courts will shut their doors justifiably to curb abuse of their processes see also *Mhiri v Mapedzamombe* 1999 (1) ZLR 561. I have also noted from the judgments of MAKONI J involving the applicant in *Ignatius Masamba v Director of Zimsec* HH 701/16 and *Ignatius Masamba v ZTEDC* HH699/16 that the learned judge noted in both cases that the applicant was given to dwelling on irrelevancies which were incomprehensible to a great extent. In both cases which the learned judge dismissed, the applicant was debarred from issuing any process out of this court without first seeking the leave of the court. The two judgments were delivered on 9 November, 2016. The application before me was filed on 7 November, 2016. The learned judge's order did not affect process already filed before the court. This notwithstanding, I consider that it is proper for me to take into account the two matters as clear evidence that it is within the applicant's disposition to institute vexatious and frivolous proceedings and to abuse the process of court. There is need to protect other litigants from abuse as well.

In my judgment, the application in this case bordered on contempt of the judge and the courts. It is clear that there was no basis for a rule 449 let alone r 449 (1) (b) invocation which was apparent or proven. CHIGUMBA J's judgment is clear as crystal. There is nothing to correct or clarify. That the applicant disagreed with the judgment is a different matter which is not remedied by r 449. The judgment however clearly shows that the applicant's claim was not sound at law. For abusing the judge and court as well as for unnecessarily citing the Judicial Services Commission in circumstances where the reasons thereof are not clear other than to bring it to the Commission's attention how the applicant had little regard for the judge, a punitive costs order as prayed for by the first respondent will be justifiable.

I also propose to issue a decree of perpetual silence against the applicant. Such an order is drastic in its nature and effects as in essence I have to order the applicant to abandon this *action causa*, that is, the one dismissed by CHIGUMBA J in case no. HC 6970/16. It is akin to an order for permanent stay of proceedings; compare *Sibanda v Attorney General & Anor* SC 44/07. The case is frivolous and vexatious and without legal basis.

See *Ashman (Private) Limited v Harare Car Breakers Sales & Repairs (Pvt) Ltd & Bobby Maparanyanga* HH 26/2004. Admittedly, this court plays a central role in marriage dissolutions and consequential relief. The court cannot however be expected to nor is it empowered to set conditions under which a man who wishes to marry should pay lobola. For the avoidance of doubt, in the application dismissed by CHIGUMBA J in HC 6970/16, the applicant had sought the following relief as set out in his draft order:

“IT IS ORDERED THAT:

1. The applicant be and is hereby granted his wish to be allowed to pay lobola at his own convenience on a date to pay that he will request from the in laws, only if the respondent is a virgin.
2. The respondent is ordered to stop her part in the beaming.
3. With no order as to costs.”

The applicant has no right of action under any cognizable law in this jurisdiction and it is therefore justiciable to order him to abandon the action by issuing a decree of perpetual silence.

Disposition

In the result, I make the following order.

1. The chamber application be and it is hereby dismissed.
2. A decree of perpetual silence is hereby granted against the applicant with regards any claim which the applicant may make seeking an order of court to permit him to marry the second applicant and any consequential or alternative relief.
3. The applicant shall pay the first respondent’s costs on the legal practitioner and client scale.

Kantor & Immerman, 1st respondent’s legal practitioners