IGNATIUS MASAMBA
versus
SECRETARY – JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 January and 10 February, 2017

Opposed Matter

Applicant in person
Miss *F Chikwanha*, for the respondent

MANGOTA J: MUNANGATI-MANONGWA J had occasion to deal with an exception which the respondent raised in the matter of Ignatius Masamba and Secretary – Judicial Service Commission. The issue which related to the exception was heard and conclusively decided under case number HH 978-15. Both parties made submissions at the hearing of the exception. Judgment was entered in the respondent's favour.

MUNANGATI-MANONGWA J's judgment forms the basis of the present application. The applicant wants it rescinded. He says it contains ambiguities, patent errors and/or omissions. He invoked r 449 of the High Court Rules, 1971 in support of his application. He says the rule confers power on the court to rescind its own judgments and/or orders. He, in fact, couched his application in the words: 'Court Application for Correction/Rescission/Variation of Order'.

The respondent opposed the application. It submitted that the founding affidavit did not particularise the relief which the applicant was seeking. The affidavit, it said, lacked precision. It averred that the affidavit dwelt more on criticizing the judge who dealt with the exception and other members of the judiciary as well as political parties and their members. It stated that the applicant made baseless allegations which were riddled with accusations of corruption. He failed, it submitted, to provide a basis for the relief which he was seeking. It moved the court to dismiss the application with costs on a higher scale.

That rule 449 of the High Court Rules, 1971 confers power on the court to correct, vary or rescind its judgments or orders requires little, if any, debate. The rule reads:

> "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 a 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 interest may be affected have had notice of the order proposed."

The above rule was, in the court's view, inserted in the rules as a safety measure, so to speak. Those who drafted the rules acknowledged the obvious. They remained alive to the fact that men who mann court-structures were and are as fallible as any other human being. They acknowledged that these men and women – judges – do sometimes make errors in the decisions which they make; ruling in a particular way when it should have been in another way particularly when the totality of the evidence which is placed before them is taken account of. They, in such cases, allowed a judge to revisit his own decision so that it remains in consonant with the correct law and logic not only for the sake of it but also in the interest of dispensing real and substantial justice to those who would have appeared before, and presented evidence to, him.

It is reiterated that the rule was never meant to allow a judge to review his own work and correct it. The rule was also never meant to allow one judge to sit as an appeal court and offer constructive criticism to the work of a fellow judge of the same level as him irrespective of whether or not such work accords with sound legal principles and logic. Anything which relates to the work of a judge properly considered and conclusively decided lies in the domain of a review or an appeal. The court which has superior jurisdiction to that of the court of first instance deals with matters where a party is displeased with the decision of the court *a quo*.

It is in light of the above mentioned statements that the court will consider the present application. That will be so as the court cannot, at law, sit in judgment over its own decision.

The applicant was, for a start, not specific in regard to the relief which he was seeking. One was left to wonder whether he intended the court to correct or rescind or vary the judgment

for which he had filed this application. He, however, became clearer and more specific than otherwise when he addressed the court. He stated that he wanted the whole judgment rescinded. Paragraph 7 of his affidavit, in fact, said it all. It read:

"….. I want the whole judgment rescinded or set aside."

The court did not hear the applicant to suggest that the judgment which falls under case number HH 978/15 was ambiguous. What it heard him say was that HH 978/15 contained patent errors and omissions which entitled the court to rescind it in its entirety. He referred the court to portions of his affidavits wherein he alleged the errors and/or omissions were contained. The following are some of the portions which he relied upon in his application:

Founding Affidavit

"THE JUDGMENT STATES THAT OR SEEMS TO STATE THAT:

(a) There is no cause of action by dint of the dismissal of the matter – But indeed there is cause of action.
(b) I stated that the magistrate is employed by the defendant. This is not true. I stated that the magistrate is employed by the Judicial Service Commission which is presided over by the Defendant i.e. the respondent in this matter…….
(c) …….
(d) …….
(e) …….
(f) That I said at any stage that the defendant was barred. This is not true. This is a serious betrayal of my good name attributing me to things that I never said. This is why I say there cannot be too huge a gap between what I wrote in my pleadings and what I said in court. In my pleadings, I never stated that the defendant was barred. Where is it?
    (i) ….....
    (ii) My response to Request for Further and Better Particulars which in retrospect must have been aptly termed or titled the Response to Defendant's Application for Further particulars is dated 20.7.2015. Then followed a Defendant's Exception dated 6.8.2015 which is marked Annexure 'G' which was 19 days later thus filed out of time instead of within 10 days see court Rule 119.
    (iii) My Response to Exception is dated the 12th August, 2016 then we have the Excipient's Heads of Argument dated 2.11.2015 which is more than two months later instead of being filed within 10 days. The judge is biased because the Defendant replied to the Response to Exception more than two months later.
    (iv) …….
    (v) ……..
    (vi) The Defendant acted only more than two months later by filing the Excipient's Heads of Argument to preempt eventually being barred and this is supported by documentary evidence see Annexure 'O'. The Notice of Intention to Bar is dated the 26th October, 2015.
    (vii) …….

(g) The summons and Plaintiff's Declaration of course, these documents are complementary see Rule 115; do not disclose a cause of action. This is not true. The truth is that the summons in paragraph 5 and the Declaration in paragraphs 8-14 disclose a cause of action. Thus they are not invalid. And the hon judge arguably is biased thus probably granted the order improperly/deceitfully/fraudulently.

(h) The summons do not state whether I am suing in contract or delict. This is not true. The summons which are Annexure 'B' in paragraph 4 and the plaintiff's declaration which are Annexure C in para 16 state that the plaintiff is suing both in contract and in delict. Thus once again the judge is biased and the defendant's legal practitioner is a counterfeit or an unprincipled young woman…..

(i) I stated that the summons and the plaintiff's declaration are complimentary. This is not true. I used the word complementary as a logical inference of the practical technical adjusting dynamics consistent with rule 115. Complimentary as written by the hon judge entirely means something else than as stated by me using the word complementary.

(j) The Hon judge agrees with the Defendant's counsel that the summons and plaintiff's declaration are fatally defective. This is incorrect. The hon judge also wrote that she agrees with the defence counsel that my summons and plaintiff's declaration are non-compliant and inadequate which arguable is a bogus ruling perhaps representing an arguable highest point of dishonesty in a battery of misrepresentations of the true and fair view of what is in the documents which battery of falsehoods she used to then come up with the biased ruling.

(k-m) ……

(n) I am self–actor without a background knowledge of the law. I qualified as a management accountant and was professionally inculcated with cutting edge skills even in understanding the law to compete favourably against anyone even against most hon judges and lawyers, if not all, and rest be assured that I also have a natural ability arguably that is too prodigious to be eclipsed.

(o-p) ……

(q) My proceedings are not 'defective' as written by the judge. Arguable it is a sham ruling……" [emphasis added]

The above, and many other instances which have not been cited in this portion of the judgment, constitute the context in which the applicant invited the court to rescind HH 978/15. The rule upon which his application is based is clear and unambiguous. It enjoins the court to correct obvious errors or omissions only to the extent of such errors and/or omissions. Paragraph (b) of sub-rule (1) of r 449 does not, in short, confer power on the court to rescind the whole judgment which was properly considered as well as decided.

The matters which the applicant raised in his affidavits did not, in any way, show any significant patent errors or omissions. Some of the matters fell into the purview of a review process and others fell into the domain of an appeal. There was nothing which required rescission, variation or correction apart from the word complementary which he said was erroneously written in the judgment as complimentary.

The applicant misread the rule. He misunderstood its meaning and import. He failed to appreciate the fact that the rule can never be used as a substitute for a review or an appeal.

The below cited case authorities are, in the court's view, of immense benefit to the applicant. They illustrate the context in which r 449 of the High Court Rules, 1971was and can be properly applied:

1. In *Banda* v *Pitluk*, 1993 (2) ZLR 60 default judgment was entered against the applicant. His legal practitioner applied for rescission of the same. The Judge who dealt with the rescission application discovered that the applicant had in fact entered appearance to defend before the default judgment had been granted. He exercised his powers in terms of r 449 and rescinded the default judgment. His reasoning which was correct was that default judgment had been erroneously granted in the absence of the party who was affected by it.
2. GUBBAY CJ re-emphasised the principle which was laid down in *Banda*'s case (*supra*) when he remarked in *Grantully (Pvt) Ltd* v *UDC Ltd*, 2000 (1) ZLR 361 (S) at 365 G-H as follows:

   "If the court holds that judgment or order was erroneously granted in the absence of a party affected it may be corrected, rescinded or varied without further inquiry." [emphasis added]

3. In *Topol and Others* v *L.S. Group Management Services (Pty) Ltd*, 1988 (1) SA 639 (W) the court rescinded a judgment which had been granted on the premise that the defaulting parties had been given notice and were in wilful default whereas they had in fact not been given notice.

The patent errors which existed and were corrected in each of the above cited cases rested on the *audi alteram partem* principle. The effect of the decision of the court in each case was, or is, that where an order or a judgment is made against a party who should have been heard but was, for some reason or other, not heard the order or judgment is obviously given in error and, on the application of the affected party, such order or judgment would be rescinded or varied or corrected. The reasoning of the court, in each case, was in consonant with good law, logic and the dispensation of real and substantial justice.

4. In *Nyingwa* v *Moolman No,* 1993 (2) S 508 at 510 F WHITE J observed that:

> "The term erroneously granted would apply in cases … where the capital claimed has already been paid by the defendant" (emphasis added)

It is trite that the erroneously granted judgment would, if not rescinded, allow the plaintiff to double-dip, as it were. He would be paid in terms of the judgment when he has already been paid. The rescission would, under the observed circumstances, prohibit him from unjustly enriching himself at the expense of the defendant.

The above described circumstances and many more which have not be considered in this judgment are instances where r 449 remains properly applicable. The same cannot be said of the present application where a decision was reached after the parties had, in addition to their affidavits and heads of argument, made full submissions to the court.

The applicant was not seriously suggesting that the court should sit in judgment over HH 978/15. He was, in short, not proposing to have the court serve as an appeal or a review forum. The rules of court do not permit the route which he took *in casu.*

The applicant would have best served his interests if he had appealed against HH 978/15. His recourse, if any, lay more with the Supreme Court than it did with this court.

HH 978/15 was clear, cogent and to the point. It did not require any interference at all. The application was misplaced and, therefore, devoid of merit.

The applicant abused the court and its process in an inexcusable manner. His conduct should be visited with serious censure.

The court considered all the merits and demerits of application. It was satisfied that the applicant did not prove his case on a balance of probabilities. The application is, accordingly, dismissed with costs on a higher scale.

Kantor & Immerman, respondent's legal practitioners