HB 41/17
HC 430/15
X REF HC 1814/12

CITY OF BULAWAYO

Versus

MEGALITHIC MARKETING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 30 JANUARY, 9 FEBRUARY & 2 MARCH 2017

Opposed Court Application

Advocate T. Mpofu for applicant
Advocate H. Moyo for respondent

KAMOCHA J: City of Bulawayo hereinafter referred to as "applicant" sought for an order in the following terms:-

"It is ordered that:

(1) The operative part of the court order of the 15th January, 2015 is amended as follows:
   (a) By the deletion of the last paragraph of that order which reads:
   "City of Bulawayo is hereby ordered to carry out the tender process to completion and to carry on with the processes that were still to be completed to their final conclusions."
   And its substitution with the following:-
   "The City of Bulawayo is hereby ordered to:
   (a) Determine within 60 (sixty) days of the delivery of this order whether is needs Parking Management System for the City of Bulawayo and the parameters (*sic*) of the same;
   (b) Should it determine that it does not need such a Parking management System, it must immediately refer the matter to the State Procurement Board who must deal with the matter as a fresh Tender for the Parking Management System as required by the City of Bulawayo;
   (c) Should it determine that it does not need a Parking Management System that should be the end of the matter."
(2) That there be no order as to costs unless respondent opposes this application."

In case number HB-8-15 this court concluded thus:-

> "In the light of the above findings it admits of no doubt that the respondent's decision to re-tender is reviewable. In the result, the decision of the Council to order a re-tender is hereby set aside.
>
> City of Bulawayo is hereby ordered to carry out the tender process to completion and to carry on with the process to completion and to carry on with the processes that were still to be completed to their final conclusions."

The foundation of this application was a double pronged one. The first leg was that it was an application for directions in terms of Order 23 Rule 151 *mutatis mutandis*. The second prong was that it was an application in terms of Order 49 Rule 449 for the variation of the court order.

It is important to examine the two grounds on which the application is founded in order to establish whether or not one or both of them are firm.

Application for directions Order 23

Rule 151 provides as follows:-

> "(Application for directions after pleadings closed: notice to opposite party)
> (1) In any action after pleadings are closed, or by leave of a judge after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required."

An analysis of the above provisions reveals that an application for directions is made after pleadings have been closed in an action when appearance to defend has been entered. This means that it is at the preliminary stages of a trial where appearance to defend would have been entered and pleadings closed. It is only then that either of the parties may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required. The application ought to be a chamber application for directions relating to any matter which is interlocutory in nature to the decision sought to be determined.

The Supreme Court in the case of *Registrar General of Elections* vs *Tsvangirai* 31/03 cyclostyled judgment had this to say:-

> "Order 23 of the High Court Rules provides for a chamber application for directions in respect of any interlocutory matter on which a decision may be required."

In the matter of *Matanhire* vs *BP Shell Marketing* SC 5-05 the Supreme Court concluded that:-

> "It is quite clear that Rule 151 provides for an application for directions in respect of matter pending before the High Court …"

The High Court added its voice on the matter in the case of *Moon* vs *Moon* HB-77-06 cyclostyled judgment per BERE J and stated thus:-

> "This rule requires no interpretation. It is couched in simple grammatical terms. It presupposes that if directions are to be sought in terms of this rule pleadings would have been closed or appearance to defend would have been entered. It is my appreciation that it is only at this stage that a chamber application for directions in respect of any interlocutory matter can be sought. There does not appear to be provision in this particular order for a party seeking fresh litigation to seek directions from the court …"

What admits of no doubt *in casu* are the following facts:

(a) this is a court application and not a chamber application;
(b) it does not relate to an action but to an application;
(c) it was not brought after pleadings were closed where appearance to defend had been entered;
(d) the application is not for directions in respect of an interlocutory matter on which a decision is required; but
(e) it is a fresh court application for the court to revisit a court application in which a final judgment had been pronounced.

Quite clearly the court is *functus officio* and has no authority to deal with the matter in terms of Rule 151 which provides for interlocutory matters on which decisions may be required.

This court has no difficulty in concluding that this is not an application for directions in terms of Order 23 Rule 151 of the Rules of Court.

Was the application brought in terms of Order 49 Rule 449? The provisions of Rule 449 of Order 40 are recited as follows:

> "449 Correction, Variation and rescission of judgments and orders
>
> (1) The court or 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 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 applicant in casu did not state the specific sub-rule or paragraph in the above quoted rule on which it based this particular application. It, however, stated in its answering affidavit that, "from the reading from (*sic*) the founding papers, it is apparent that the judgment was granted as a result of a mistake common to the parties in that certain facts occurred, after the matter had been argued which necessitate direction from the court in order to properly implement the court order."

The fortification of applicant's case in its answering affidavit is impermissible. For instance Herbstein & Van Winsen, *Civil Practice of the Superior Courts in South Africa* 3rd ed at page 80 says;

> "The general rule however which has been laid down repeatedly is that an applicant must stand or fall by its founding affidavit and the facts alleged therein … If the applicant merely sets out a skeleton case in his supporting affidavit, any fortifying paragraphs in his replying affidavits will be struck out." Emphasis added

It only became clear in the answering affidavit that the applicant sought to base its application in terms of Rule 449 (1) (c) which permits the court to rescind, vary or correct a judgment that was granted as a result of a mistake common to the parties.

The requirements which should exist in order for Rule 449 (1) (c) to avail an applicant were stated in broad terms in the case of *Gondo* vs *Syfrets Merchant Bank* 1997 (1) ZLR 201 @ 207 as follows:

(a) There must be a mistake common to the parties.
(b) The parties should be ad idem as to the nature of the mistake.
(c) There must be causal link between the mistake and the grant of the order or judgment the latter must have been the result of the mistake relevant to what was to be decided and due to relevant mistake the court arrived at the decision it made at the relevant time.
(d) The mistake must be proved.
(e) The judgment must be incorrect and the incorrectness should be obvious.
(f) One cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made.

In case number HC 1814/12 the present respondent had filed an application seeking an order compelling he present applicant to reverse its decision not to award the tender to it and that the court should award the tender to it.

The present applicant's sole contention at the relevant time was that its decision not to award the tender to the then applicant was not reviewable by the court hence it could not be compelled to reverse its decision.

The parties argued at some length the issue whether the then respondent's decision was reviewable or not. The court then arrived at the conclusion that the decision was reviewable. The parties were not labouring under any common mistake as they presented their arguments. Quite clearly the final judgment of the court was not granted as a result of a mistake common to the parties. There was no mistake at all. Accordingly the provisions of Order 49 Rule 449 (1) (c) do not apply in this matter.

Similarly the common law jurisdiction of the court which applicant sought to rely on at the hearing does not also apply *in casu* when regard is had to the facts of the case. Circumstances in which common law applies were stated in the matter of *Firestone South Africa (Pty) Ltd* vs *Genticuro AG* 1997 (4) SA 298 at 306H-309A as follows:-

> "Under its common law powers a court may "supplement" its judgment or order in respect of accessory or consequential matters, for example, costs or interest of the judgment debt, that the court overlooked or inadvertently omitted to grant, or "clarify" it, if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the sense and substance, thereof or, 'correct' a clerical arithmetical, or other error, so as to give effect to its true intention without altering its intended sense or substance or it may correct, alter or supplement a costs order made where the costs have not been argued. In so far as a court may have a general discretion to correct, alter or supplement its judgment or order in appropriate other cases, such discretionary power, is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded …"

In casu the applicant seeks a total obliteration of the original court judgment and replace it with a complete new one. That is alien to the discretionary powers that the court can exercise at common law. Accordingly the submission that this court should exercise its common law discretionary powers, is untenable and cannot be acceded to.

Costs

The applicant purported to bring this matter as an application for directions in terms of the provisions of Order 23 Rule 151 which apply to chamber applications in respect of interlocutory matters on which decisions may be required. The applicant knew very well that a final judgment had been granted in case HC 1814/12. Applicant also sought at the same time to rely on the provisions of Rule 449 of Order 49 without specifying the sub-rule on which it relied on. Further, it ought to have known that there was no mistake common to the parties which led the court to arrive at the decision it did because the parties vehemently argued in court about whether or not the local authority's decision was reviewable.

Finally, applicant ought to have known that it was not competent for the court to exercise its common law jurisdiction to replace its original judgment with a new one.

The Chamber Secretary of the applicant who deposed to the founding affidavit stated that she was a registered legal practitioner of this court. The applicant was legally represented from the onset. This matter was handled in a manner that leaves a lot to be desired. It is a proper case for an award of costs on a punitive scale.

In the result the points *in limine* are upheld and the need to consider the matter on the merits does not arise. The applicant is accordingly dismissed wit costs on attorney and client scale.

Messrs Coghlan & Welsh, applicant's legal practitioners
Joel Pincus, Konsons & Wolhuter respondent's legal practitioners