CHEN WANG
versus
JOSEPH STEVE MANDIZHA
and
TAWANDA MAVHUNGA
and
TAFADZWA MAVHUNGA
and
DARNEL ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 30 May 2016 & 14 September 2016

Opposed matter- r 449 (1) High Court Rules 1971 - correction of a judgment entered in default

P C Paul, for the applicant
F G Gijima, for the respondents

MUSHORE J: This is an application for rescission of a default judgment handed down in Chambers by my brother JUSTICE MANGOTA in case number HC271/15.

The facts leading up to the judgment being granted have been laid down for my benefit at my behest by applicant's counsel because the events leading to the default judgment being sought and granted are rather convoluted. In essence I have before me many court records, and judgments in a trail of litigation which began at High Court level and eventually ended up at the Supreme Court. The Supreme Court made a determination and granted the applicant an order entitling him to re-approach this court to determine whether the applicant is entitled to rescission. The current application is the applicant's re-approach.

This is the narrative I have been provided with by the applicant's counsel which I have to say has made matters somewhat clearer.

> "**EXPLANATION OF THE VARIOUS CASES**
>
> Applicant made application for joinder of Respondents in case number HC 9133/14
>
> First Respondent made a Chamber application under HC 271/15 for the dismissal of Applicant's application for joinder for want of prosecution.
>
> That application came before Mangota J on the 4th February 2015, where in ignorance of the fact that opposing papers had been filed, and in the belief that the Chamber application was not being contested, he granted the Chamber application for default (First order)

Mangota J was asked to set aside the default order, *mero motu*. He declined to do so but then went on to make a judgment (the second order) in which he seemed to indicate that he was dealing with the merits of the First Respondent's Chamber Application in case number HC 271/15

Applicant treated the second judgment as a nullity and made the present application under case number HC 1838/15 for the default judgment granted in case number HC 271/15 to be set aside.

The matter came before Muremba J who dismissed the present application in case number HC 1838/15 under judgment numbered HH 517/15. She dismissed the application because she did not accept the argument that the second judgment was a nullity.

That decision was taken on appeal and the Supreme Court upheld the appeal and they declared the second judgment to be a nullity.

In paragraph 3 of the Supreme Court Order Muremba's judgment (HC 517/15) was set aside but was not replaced by another order. Therefore the default judgment given by Mangota J (the first judgment) stands and the application to set aside that judgment needs to be disposed of- hence the remittal.

DATED etc ".

The present application for rescission is premised on error as submitted by the applicant in para 5 of his founding affidavit where he says:-

"5. In the circumstances the order granted by Mr Justice Mangota was granted in error because he was not aware that opposing papers had been lodged and I request that the default order which was erroneously granted be set aside in terms of Rule 449 of the High Court Rules."

Rule 449 reads as follows:-

"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 the party affected, correct, rescind or vary any judgment or order-
   (a) that was erroneously granted in the absence of any party affected thereby; or
   (b) ……"

The learned judge accepts that the respondent was absent when he granted judgment. However his focus for having refused to rescind when approached by the applicant's lawyers informally and by request at applicant's instance seems to have been premised upon his having relied on sub rule 2 of r 449 which reads as follows:-

"(2) the court or a judge shall not make an order correcting rescinding or varying a judgment or order unless it is satisfied that all the parties whose interests may be affected have had notice of the order proposed"

It was then that he wrote a judgment in circumstances where there was no argument or opposition on the merits but a mere request. There having been no formal argument,

application or opposition I fail to see why there was a judgment at all, and more particularly I fail to understand how the merits and demerits of the matter were determined in the absence of a formal opposed application being argued by the parties. In fact in the learned Judges own words the believed that the fact of a letter written by the applicant with a notice of opposition attached to it being presented constituted an opposed application on the merits in circumstances where a request had been made and papers furnished to the Judge demonstrating that the matter was opposed and nothing more.

I am in respectful disagreement with my brother Judge MANGOTA's final pronouncement whereby he states:-

> "in the result, it is ordered that the order which the court granted to the applicant on 4 February 2015 under case number HC 271/15 be and is hereby not corrected, rescinded varied or set aside."

As far as I myself know, a pronouncement, such as this one which he made (*supra)*and is not catered for at all by r 449.I have never heard of an order which pronounces an emphatic denial of relief.

In the present case, what ought to have happened is that once the learned Judge became aware that there was an intention to oppose the grant of an order by default in Chambers, he ought to have treated the chamber application as an opposed matter, and referred to the unopposed roll without further ado.

I will state again that I have been approached for an order of rescission premised upon an error. The question which thus falls for my determination is a technical one so-to-speak and one which does not require an application of my discretion on the common law grounds for rescission. My attention and focus merely are, whether or not the matter was opposed at the time when the default judgment was granted. In my view the letter which was written to the court by the applicant noting his intention to oppose the application ought to have prompted the court to refer the matter to the opposed roll. It would appear to have been so even when reading the judgment rendered by MANGOTA J which was declared to be a nullity by the Supreme Court. Although MANGOTA J seems not to have seen the opposing papers when he dealt with the application for a default judgment for want of prosecution on the 4th February 2015, he was aware of the applicant's intention to oppose the matter. In any event the applicant had well before that date and on the 28th January 2015 filed a notice of opposition which was stamped by the High Court registry before the default judgment

application was determined. MANGOTA J accepts that this indeed was so when on p 2 of his judgment under query he wrote:-

> "The first respondent (applicant here) attached to the letter his Notice of Opposition. The Notice was filed with the registrar on 28th January 2015. It was therefore, filed before the default order was granted to the applicant. It is on the mentioned basis that the first respondent submitted that the order was granted in error and should therefore be corrected in terms of rule 499 of the rules of this court"

In the result therefore, I am satisfied that the matter was an opposed one when default judgment was granted. In fact, whether or not the Judge was aware that it was opposed is really neither here nor there. The fact remains that as far as the applicant was aware and the rules provide, this was now an opposed application.

Messrs Herbstein and Van Winsen in their book on '*The Civil Practice of the Supreme Court of South Africa*' Fourth Edition JUTA 1997 at p 697 comment on the approach to be adopted by a court dealing with such applications such as the one which was determined by the learned Judge. The renowned authors write on the manner in which their r 42 (1) (a) {which is worded in the exact same way as our r 449 (1) (a)} is applied:

> "An applicant who seeks to set aside in terms of rule 42 (1) (a) a judgment granted in his absence is not required to establish good cause. If the court holds that an order or judgment was erroneously granted in the absence of any party affected by it, the order should without further enquiry be rescinded or varied"

See: *Tshabalala and Another* v *Peer* 1979 (4) SA 27 (T) pp 30 [D-E]

In conclusion therefore, it falls for me to rectify the error which occurred. Accordingly I make the following order.

1. That the default order in Case No HC 271/15 be and is hereby set aside in terms of r 449 of the High Court Rules 1971 on the grounds that it was erroneously granted.
2. First and fourth respondents are ordered to pay the costs of this application, jointly and severally, the one paying and the other to be absolved.

Wintertons, applicant's legal practitioners
F.G.Gijima & Associates, 1st respondent's legal practitioners
T.K. hove & Partners, 2nd & 3rd respondents' legal practitioners