

DISTRIBUTABLE (9)

UNITRACK (PRIVATE) LIMITED
v
TELONE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & MAVANGIRA AJA
HARARE, SEPTEMBER 1, 2014

T. Mpofu, for the appellant

L. Matapura, for the respondent

MAVANGIRA AJA: After hearing the parties on 1 September 2014 this Court pronounced:

“It is the unanimous view of this Court that the appeal has merit and ought to succeed. Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

‘The application is dismissed with costs.’

Reasons for this judgment will follow in due course.”

The following are the reasons.

BACKGROUND

The appellant obtained an arbitral award dated 31 December 2008 requiring that the respondent pay it an amount equivalent to US\$70 719,00 multiplied by the parallel market rate obtaining on the date of payment and within 48 hours of the uplifting of the award.

Concerns arose regarding whether or not the award did not conflict with the public policy of Zimbabwe insofar as it referred to the parallel market rate.

On 3 June 2013 the arbitration panel amended the award by severing the offending words such that the relevant portion of the award now read:

“Tel One is to pay Unitrack an amount equal to US\$70 719.00 obtaining on the day of payment, which is to be within 48 hours of the uplifting of this Award.”

The award was not complied with. The appellant then applied, under HC4641/13, for the registration of the arbitral award as an order of the High Court for purposes of enforcement. The application for the registration of the arbitral award was served on the respondent’s legal practitioners. The respondent’s legal practitioners wrote a letter to the appellant’s, indicating that the application was premature and unnecessary at that stage. No opposition to the application was filed with the court.

The application was granted by the High Court. Notably, in addition to the registration of the arbitral award, the order of the High Court further provided for the payment of interest. The arbitral award itself made no such provision. The order also provided for the costs of the application to be borne by the respondent on a legal practitioner/client scale.

The respondent thereafter applied, in terms of Order 49 r 449 of the High Court Rules, 1971, for the rescission of the judgment on the premise that it was granted in its absence. Furthermore, that the order was erroneously sought and erroneously granted as the initial award had not made any provision relating to the payment of interest and costs. The High Court granted an order, in HC154/14, in the following terms:

“IT IS ORDERED THAT:

1. The order issued by this Honourable Court under HC4641/13 dated 10th July 2013 be rescinded and or varied by the deletion from the order of that part of paragraph 2 thereof requiring applicant to pay interest on the sum of US\$70 719,00 calculated at the rate of 5% per annum calculated from the 1st December 2008 to the date of payment in full.
2. The respondent shall pay the costs of this application.”

THIS APPEAL

The appellant has now appealed to this Court on the singular ground that the High Court in HC154/14 erred in finding that the order made by the same court in case No. HC 4641/13 was erroneously granted and that consequently it was liable to be rescinded or varied in terms of r 449 (1) of the High Court Rules, 1971.

The appellant’s contention before this Court was that when the learned Judge in HC154/14 set aside the order in HC4641/13 and substituted it with what she thought was the correct order, she did so on the basis that the judge in HC4641/13 was wrong. It was contended that this constituted an incompetent review of the judgment or order of a judge of parallel jurisdiction. It was also argued that r 449 was not intended for and is not applicable in situations where a party who knows about proceedings instituted against it chooses to ignore them. It was further submitted that it was substantively wrong for the learned Judge in HC154/14 to find that there was no legal basis for the judge in HC4641/13 to accede to the application made for payment of interest.

The respondent on the other hand contended that r 449 can be used to rescind judgments that are substantively wrong. It was submitted that in terms of r 449 a High Court judge can review the judgment or order of another High Court judge of parallel jurisdiction.

ISSUE FOR DETERMINATION

The issue for determination by this Court is whether the court *a quo* erred in applying r 449 to set aside the decision given earlier by another judge of the same jurisdiction.

THE LAW

Rule 449 of the High Court rules provides:

“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;” (my emphasis)

This appeal relates to the propriety of the application of r 449 by the court *a quo* in HH154/14.

It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him, it or he lacks any power or legal authority to re-examine or revisit that decision. Once a decision is made, the term “*functus officio*” applies to the court or judicial officer concerned. Rule 449 is an exception to that principle and allows a court to revisit a decision that it has previously made, but only allows it in restricted circumstances. In *Tiriboyi v Nyoni & Another* HH117/2004 the following was stated:

“The purpose of r 449 appears to me to (be to) enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It 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.” (my emphasis).

It seems to me that r 449 is meant for the correction of orders erroneously sought or erroneously granted and not orders that are erroneous in substance. In the South African case of *DA Weelson v Waterlinx Pool and Spa (Pty) Ltd* (13904/2007) [2013] ZAPGJHC 47 (1 March 2013), the court was dealing with r 42 (1) (a) whose provisions are similar to those of our r 449. At para [5] the court stated:

“Rule 42 (1) provides that a court may of its own accord or upon application of any party affected by the order grant a rescission of the order or vary the order or judgment which has been erroneously sought or erroneously granted in the absence of any party affected thereby. The rule was introduced to cater for errors in judgment which are obviously wrong and are procedurally based.” (my emphasis)

The order that was granted in HC4641/13 was not sought erroneously and was not granted erroneously, in the absence of the respondent. The respondent chose not to oppose the application preferring to complain to the appellant that the application was prematurely filed.

The question whether a judge can alter the decision of another judge has been discussed in a number of cases. In *Pyramid Motor Corporation (Pvt) Ltd v Zimbabwe Banking Corporation* 1984 (2) ZLR 29, the court had this to say:

“When Goldin J decided that case he was a judge of the High Court. As a judge of parallel jurisdiction, I think I can only refuse to follow his decision. To make a declaration that he wrongly decided the **Rhostar** case would I think, be treading on the prerogative of the Supreme Court.”

On the facts of this case the court *a quo* in HC154/14 altered the decision of the court in HC4641/13 in circumstances where r 449 was inapplicable. The learned judge *a quo* stated at p 7 of the judgment:

“It is common cause that the arbitral award did not provide for payment of interest. Therefore, the High Court order of 10 July 2013, which provided for payment of interest from 31 December 2008, was erroneously sought, and erroneously granted. There was no legal basis for acceding to that application for interest, in an application for

registration of an arbitral award for purposes of execution in the absence of provision for interest in the award itself.”

The quoted excerpt shows that the judge *a quo*'s decision was based on her assessment that the decision of the judge in HC 4641/13 was substantively wrong. It is possible that her assessment could be sound at law especially if regard is had to case authorities, as in *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H) at 540D where the following was stated:

“I agree that a court should not interfere with the Arbitrator's Award so as to alter it to accord with what the court thinks the Arbitrator actually decided.”

This Court is however not seized with the determination of the correctness or propriety of the decision in HC 4641/13. This Court is rather faced with the issue of the propriety of the decision of the High Court whereby a judge of the that Court reviewed an earlier decision by a judge of the same Court and therefore of parallel jurisdiction, and substituted the earlier order with one that she felt the earlier judge ought to have made, for the reason that she disagreed with the earlier court's decision.

The High Court had no power to so act. It trod on the prerogative of the Supreme Court.

In *City of Mutare v Mawoyo* 1995 (1) ZLR 258 (HC) at 266E – 267C it was said:

“In *Parker v Parker & Ors supra* SCOTT J was asked to alter an order by SANDURA JP directing that an exception in case HC 3196/84 and an application in case HC 1108/85, both cases involving the same parties, be heard together on the same occasion. Declining jurisdiction, SCOTT J said at 85B:

‘The whole thrust of the reasons advanced by Mr O'Meara seems to point to an assertion that in his view the order was wrongly made. As a judge of the High Court, it is not up to me to vary or alter an order of a judge of parallel jurisdiction, short of expanding on it.’

Mr Wernberg's argument was that the court has inherent powers to vary its orders. No authority was cited for this general proposition. Rule 449 (1) of the Rules of the High Court of Zimbabwe 1971 does not cover variations of the orders in the manner suggested

by the applicant in this case. The order by BARTLETT J was not erroneously applied for or erroneously granted. The variation applied for does not involve the correction of an error or omission in the order so that it accurately expresses the intention of the court. I am being asked to delete ss 1 and 2 of the original order and substitute in their places the declarations requested by the applicant, without it being said what is to happen to the default judgment on which the order sought to be mutilated now stands. Although called an amendment, what is being applied for is to all intents and purposes a complete substitution of the terms and content of one order with those of another order. Can one set aside an order and substitute in its place a completely different matter without doing violence to the sense and substance of the judgment or the intention of the court that granted the order? The sense and substance of the original order will be changed....”

The facts that confronted the court in HC154/14 do not fall within the kind of facts that are contemplated by r 449 or would justify the invocation of the rule. Even if the court in HC154/14 was substantively correct in its views on the issue of the provision for the payment of interest, and the court in HC4641/13 was wrong, the proper remedy available to the respondent in that situation would have been an appeal and not rescission as was sought herein. However, as indicated earlier, the substantive correctness of the decision of the court *a quo* in HC4641/13 is not for this Court to determine in these proceedings. It is the propriety of the application of r 449 in HC154/14 that is.

It is for these reasons that we found that the appeal had merit and proceeded to grant the order that we did as recorded at the beginning of this judgment.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Gill, Godlonton & Gerrans, Appellant's Legal Practitioners

Dondo & Partners, Respondent's Legal Practitioners.