ZIMBABWE POWER COMPANY (PVT) LTD
versus
SEBASTIAN MAGODO
and
THE PERMANENT SECRETARY MINISTRY OF MINES AND
MINING DEVELOPMENT MAZAI MOYO. N.O.
and
THE MINISTER OF MINES AND DEVELOPMENT
and
THE PROVINCIAL MINING DIRECTOR MIDLANDS PROVINCE N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 9 June 2021 and 15 February 2023

Opposed application

Mr A Moyo, for the applicant
*Mt T Deme.*for the respondent

CHINAMORA J:

Background facts

The applicant through its Business Performance Manager, one Bernard Chizengeya, filed the present application for rescission of the order granted under case HC 4169/20 dated 21 October 2020. The present application is filed in terms of rule 449 (1) (a) of the High Court Rules, 1971 ("the old Rules"). What had happened is that, sometime in August 2020, the first respondent petitioned this court on an urgent basis under HC 4169/20 for an interdict. He sought an interim order in two parts, firstly, authorizing him to resume his mining and allied operations at Special Grants 7667, 7668, and 7669. Secondly, he asked the court to bar the second, third and fourth respondents from interfering with his mining and allied operations and works. On 24 August 2020, this court (per PHIRI J) granted the provisional order. There is no dispute that the applicant was not a party to the proceedings under HC 4169/20 culminating in the provisional order. It is around this time that the applicant had knowledge of the provisional order and sought to be joined in the

application under HC 4169/20. To this end, he filed an application for joinder under HC 5788/20 and served it on the first respondent. I will not dwell much on that application except to state that its basis was that the applicant is the owner of a piece of land called Electrom Farm in the district of Gwelo, measuring 978.1304 morgen held under Deed of Grant 412/1956, on which the special grants in dispute are located.

The application for joinder was granted on 4 November 2020, and the applicant became a respondent to the application under case number HC4169/20. He was also directed to file a notice of opposition within ten (10) days of the date of the order. However, on 21 October 2020, and in default of the respondents, this court confirmed the final order in HC 4169/20 in these terms:

"IT IS ORDERED THAT

1. The terms of the interim order granted by the Honourable Justice Mr. Phiri on 24 August 2020 in case number HC 4169/20 be and are hereby confirmed as final.
2. The suspension of the applicant's mining and allied operations at Special Grants 7667, 7668 and 7669 by the third respondent through a letter dated 20 April 2020 be and is hereby declared unlawful and therefore null and void.
3. The first, second and third respondents shall cancel the applicant's Special Grants 7667, 7668 and 7669 except otherwise in terms of the law.
4. The first, second and third respondents jointly and severally be and hereby ordered to pay applicant's costs of this application on the attorney-client scale."

No doubt, it is at this stage that this court, under HC 4169/20, rendered its decision on the issues submitted to it. Consequently, the opposing papers filed by the applicant were not before the court at the time the default order was granted. It was only on 25 November 2020 that the applicant alleges that it became aware that a final order had been granted. The applicant has approached this court seeking rescission of the order granted in HC 4169/20 on the basis that it was erroneously sought and granted in its absence. Secondly, the applicant submits that the court under HC 4169/20 was not made aware of the fact that there was a pending application for joinder under HC 5788/20. Thirdly, the applicant submits that it is the registered owner of Electrom Farm where the special grants were issued. The contention was made that the order seriously affects the applicant as the area where mining operations are being conducted is for a solar power station. As a result, it was an interested and affected party by virtue of this as the issue for determination under HC 4169/20 related to the lawfulness or otherwise of the special grants.

The applicant further avers that the farm is a reserved area under the Mines and Minerals Act [*Chapter 21:05*] and a protected area under the Protected Places and Areas Act [*Chapter 11:12*]. Therefore, the special grants could not have been granted by the 2nd respondent without the authority of the Government Protective Security Inspectorate under whose purview all protection areas fall. On these facts, the applicant prayed for the following order:

"IT IS ORDERED THAT:

1. The court application for rescission of default judgment be and is hereby granted.
2. The order granted in case HC 4169/20 on the 21st of October 2020 be and is hereby set aside.
3. The first respondent shall pay the costs of suit on a legal practitioner and client scale."

The first respondent opposed the application and, in essence, raised two preliminary points. The first was that the deponent to the applicant's founding affidavit lacked authority. According to the first respondent, the deponent did not establish beyond the mere say so, his authority to represent the applicant in the present application through a board resolution. Secondly, the first respondent argues that the applicant was not party to the proceedings under HC 4169/20 at the point when the judgment that it seeks to be rescinded was granted. On this point, the first respondent contends that rule 449 (1) (a) of the old Rules, is only available to those parties who were party to the judgment that is sought to be rescinded. This is not the correct position of the law, and I need only refer to the decision in *Mashingaidze* v *Chipunza & Ors* HH 688-15, where CHITAKUNYE J correctly, stated the law as follows:

> "Under r 449(1) (a) one does not need to have been a party to the application for default judgment for one to be able to apply for the setting aside of the judgment. The applicant is only required to show that it is affected by the judgment or order and that such order was erroneously sought or granted" **[My own emphasis]**

I say that this is the correct position of the law in this country, the Supreme Court had earlier in *Matambanadzo* v *Goven* 2004 1 ZLR 399 (S) court considered 449(1) (a) in the context of locus standi and held that:

> " .. a party affected by a judgement or order that was erroneously sought or granted in his absence may apply for the rescission of the judgment or order. To show *locus standi*, the applicant must show that he has an interest in the subject- matter of the order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the order was granted."

On the merits, the first respondent denies that the order sought to be rescinded was granted erroneously in the absence of the applicant. It was argued that the applicant was not a party to the matter under HC 4169/20. Also denied by the first respondent is the notion that the failure to cite the applicant constitutes a material non-joinder. In addition, the first respondent submits that applicant was aware of the proceedings under HC 419/20 from 6 August 2020, but did nothing to join itself to the cause, only electing to do so over a month into the proceedings. The first respondent asserts that the applicant has no substantial interest in the matter or in the way the special grants were obtained. It proceeds to submit that the solar panels project failed to take off in three years, thus giving the first respondent the right to be granted the special grants. The first respondent added that there is no legal requirement for the Government Protective Security Inspectorate to authorize the granting of special grants, since the object of special grants is to allow mining activities in reserved areas. The first respondent, therefore, prayed that the matter be dismissed with costs on the higher scale of attorney and client.

The applicant maintained that it had interest in the matter, and the interest relates to the fact that the applicant's special grants were not procedurally granted. On the preliminary objections, the applicant noted that it is not necessary to attach a resolution in every case. The applicant argues that the court must consider whether it is indeed the applicant who is litigating. Nevertheless, the applicant attached a resolution showing the requisite authority. Further, the applicant argued that the nature and purpose of rule 449 (1) (a) of the old Rules is to permit a litigant who was not a party to the proceedings, but who nonetheless is affected by the order to make an application to correct, vary or set aside the order or judgment in question.

Points in *limine*

It seems that the first respondent did not persist with his first preliminary point on lack of authority to institute proceedings. In my view, the first respondent correctly abandoned this preliminary point, since the defect complained of had been cured. It is trite law that once a party takes issue with absence of authority, and a litigant attaches it in the answering affidavit, the complaint is resolved. As regards the second preliminary point, my view is that it has been ill taken as it involves delving into the merits of the matter. I will address it when I deal with the merits, but before I do that, let me examine the law on the subject.

The relevant law

Rule 449 (1) (a) of the old Rules provides as follows:

> "(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…"

There is no need to reinvent the wheel in interpreting the above provision, as it has been discussed in various judgments of this court. I can safely say that rule 449 is clear and unambiguous. In fact, the provision enables the court to revisit its own decisions on its own or upon application where the order was erroneously sought or erroneously granted in the absence of any party affected thereby. In this context, in *Muvungani v Newham Financial Services (Pvt) Ltd* HH 57-17 the court held that:

> "The requirements for setting aside a default judgment in terms of r449 are settled. The applicant must satisfy
> 1. that the default judgment must have been erroneously sought or erroneously granted.
> 2. such judgment must have been granted in the absence of the applicant and
> 3. applicant must be affected by the judgment"

The question that arises is whether the order in question was erroneously sought and granted in the absence of the applicant. Two important realities need require consideration. Firstly, on the papers before this court, it can never be in dispute that the applicant was not a party to the proceedings under HC 4169/20 when the provisional order was granted on 24 August 2020 and subsequently confirmed on 21 October 2020. Secondly, before this court confirmed the order dated 24 August 2020 on 21 October 2020, the applicant filed an application under HC 5788/20 seeking to be joined in the case under HC 4169/20. It is clear from the papers and submissions made that the court under HC 4169/20 was not made aware of the fact that there was a pending interlocutory application under HC 5788/20. If its attention had been drawn to the fact that there was a pending application for joinder, in my view, it would not have proceeded to confirm the provisional order. It is settled law that once an applicant is able to point to an error in the proceedings he is, without further ado, entitled to rescission of the judgment in issue. See *Tshabalala and Another* v *Pierre* 1979 (4) SA 27 (T) at 30 C-D; *Wector Enterprises (Pvt) Ltd* v *Luxor (Pvt) Ltd* SC 31/15. In *casu*, the applicant managed to point to the fact that the order it seeks to be rescinded was granted in error

in that the court was not made informed of the pending application for joinder by the first respondent who had knowledge of it. In *Munyimi* v *Tauro* SC 41-13, the Supreme Court held that:

> "…Further, it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry".

In its submissions, the applicant made a point that it is the registered owner of Electrom Farm where the special grants were issued. The applicant further submitted that the area where the mining operations were taking place was reserved for solar power station and that there were several open cast mining and shafts. I consider that there is no interest that surpasses the above, because in *Matambanadzo v Goven supra,* the court held that:

> "I entirely agree with these comments. In my view, they apply to Rule 449 (1) (a) of the High Court Rules with equal force. The issue which I now wish to consider is what the applicant for an order rescinding a judgment or court order ought to show in order to establish that he has the requisite *locus standi in judicio*. That question was answered by CORBETT J, as he then was, in *United Watch and Diamond Company (Pty) Ltd and Ors* v *Disa Hotels Ltd and Anor,* 1972 (4) SA 409 (c) at 415 A-C, as follows: in my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi* …"

I am satisfied that the applicant's submission that the question of whether or not the applicant had interest in the matter under HC 4169/20 was resolved by this court under HC 5788/20 which ordered the joinder of the applicant to the proceedings under HC 4169/20. In an application for joinder, an applicant must necessarily establish that he has a real and substantial interest in the matter before the court. It is my view that these proceedings could have been avoided if the first respondent had advised the court of the pending application for joinder under HC 5788/20. The first respondent was aware of the aforesaid pending case, but proceeded to petition the court to confirm the provision order in the absence of the applicant. In *Mudzimu* v *Municipality of Chinhoyi and Samuriwo* 1986 (1) ZLR 12 (HC) REYNOLDS J found that one party was put through considerable inconvenience by virtue of respondent's unreasonable objections and behaviour. As a result of that, the court awarded punitive costs against the respondent. I believe that the same rings true in the present litigation since, undoubtedly, the applicant was put through considerable inconvenience by the first respondent. My inclination is that the application ought to succeed with respondent bearing the costs on a punitive scale.

In the result I make the following order:

1. The application for rescission of default judgment be and is hereby granted.
2. The order granted in HC 4169/20 on 21 October 2020 be and is hereby set aside.
3. The first respondent shall pay the costs of suit on a legal practitioner and client scale.

Kantor & Immerman, applicant's legal practitioners
Thoughts Deme Attorneys, first respondent's legal practitioners