BEAULAH MUTAMBANADZO
versus
AFRICAN BANKING CORPORATION ZIMBABWE LIMITED
and
CLAUDIOUS NHEMWA
and
THEREASA GRIMMEL

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 18 February 2020 & 4 March 2020

Application for recession of judgment in terms of rule 449 (1) of the High Court Rules, 1971

F. Nyamayaro, for the applicant
F. Mahere, for the 1st and 3rd respondents
M. Kavhumbura, for the 2nd respondent

DUBE-BANDA J: This is a court application for setting aside a judgment in terms of r 449 (1) (a) of the High Court Rules, 1971. Rule 449 (1) (a) provides 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. The order sought is drawn as follows:

1. The court order granted by this honourable court in case No. HC 1584/19 on the 29th day of May 2019 be and is hereby set-aside.
2. 1st respondent to pay costs of this application at the rate of attorney and client.

This application is opposed.

Factual background

Applicant is the widow of the late *Edward Mutambanadzo* and a beneficiary in the estate. First respondent is a creditor in the estate, second respondent is the executor of the estate, and third respondent is a Trustee of the estate.

First respondent motivated an application for the liquidation of the estate of the late *Edward Mutambanadzo.* The application was not opposed. The provisional order for liquidation was granted on 27 March 2019 and confirmed on 29 May 2029. The provisional order was granted and confirmed on the basis that the estate was insolvent in terms of Insolvency Act [*Chapter 6:07*].

Applicant, seeks in terms of r 449 (1) (a) the setting aside of the confirmation order granted on 29 May 2020. Applicant contends that she has *locus standi* to motivate this application on the basis that she is a party affected by the order in case No. HC 1584/19.

First, I deal with the points *in limine* raised by the litigants.

Preliminary points

First respondent contends that applicant has no *locus standi* to institute these proceedings. It is argued that in terms of s 25 of the Administration of Estates Act [*Chapter 6:01*], a deceased estate is represented by an executor or executrix appointed and issued with letters of administration by the Master of the High Court. A deceased estate has been defined as an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests with the executor, so that he alone can deal with them. He has no principal and represents neither the beneficiaries nor the creditors. See *Mhlanga* v *Ndlovu* HB 54/2004. I agree that the executor is legally vested with the administration of the estate, he is not a mere procurator or agent of the beneficiaries. However, in *casu* applicant is not suing on behalf of the estate. She is instituting these proceedings in her name. Her motive is to protect her own interests as a beneficiary to the estate. Correct, that in the process the estate might also be protected, but that is not her apparent motivation. She is not intending to usurp the functions and the role of the executor. Therefore, s 25 of the Administration of Estates Act has no application or relevance in this matter.

It is further contended that applicant has failed to show that she has a direct and substantial interest in the right which is the subject matter of the litigation in case No. HC 1584/19. It is said a financial interest is not enough to clothe applicant with *locus standi* to institute proceedings in this case. It is argued that a financial interest only establishes an indirect interest in such litigation, and hence falls short of the standard that would accord applicant

locus standi to litigate in this case. I do not agree. Applicant has a direct and substantial interests in case HC 1584/19.

Applicant locates her *locus standi* in r 449 (1) (a) of the Rules which says 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. It is argued that applicant is "any party affected" by the order granted in case No. HC 1584/19. First respondent argues that applicant does not qualify to locate her *locus standi* in the provisions of r 449 (1) (a), it is said this rule must be restricted to those individuals who have been parties in case No. HC 1584/19. Otherwise to extend it to incorporate any person who was not party to the original litigation would result in an absurdity. I agree that applicant is a party affected by the order in case No. HC 1584/19. The provisional order for liquidation called on interested persons to file opposing papers, she is one of those interested persons. To my mind any one, who can show an interest to the original case is "any party affected" in terms of r 499 (1) (a) of the Rules.

Thus, while I agree with first respondent that a party that was not privy to the original proceedings cannot seek to set-aside such an order, the facts of this case show that applicant was privy to the original case. The applicant is the widow of the deceased and she is a beneficiary in the estate of the late *Edward Mutambanadzo.* She was a respondent in the case of *African Banking Corporation of Zimbabwe Limited* v *Paul Edwards Shipping (Private) Limited and Edward Mutambanadzo and Beaulah Mutambanadzo and Frevo Investments (Private) Limited and Pasivate Investments (Private) Limited* HH 168/13. The applicant was among the respondents who were ordered to pay jointly and severally, each paying the other to be absolved the sum of US$280 961.94. This is the judgment debt that caused the liquidation of the estate of *Edward Mutambanadzo.*

The case that applicant seeks to be set-aside is a liquidation matter. Section 14 (2) of the Insolvency Act states that a Court granting a provisional liquidation order may simultaneously grant a *rule nisi* calling upon all interested parties and the respondent to appear on a date mentioned in the *rule nisi* and show cause why the debtor's estate should not be liquidated. The draft order in No. HC 1584/19 called on all persons intending to oppose the application to file a notice of opposition with the Registrar of this court. A court may grant a final order of liquidation upon being satisfied that section 14 (2) has been complied with.

My view is that applicant derives her *locus standi* from rule 449 (1) (a). She qualifies to be any other party as defined in the empowering rule. In these circumstances, it would be a

travesty of justice to deny the applicant *locus standi*. See *TelOne (Pvt) Ltd Communications v Allied Services Workers Union* 2006 (2) ZLR 136 (S). I find that applicant has *locus standi* to motivate this application. The point *in limine*, impeaching applicant's *locus standi* to institute this application is refused.

In limine, applicant argued that the second respondent is barred. Second respondent was served with the application on 28 June 2019 and filed the notice of opposition on 23 July 2019. The notice of opposition was filed outside the time-limit of ten days provided for in the rules, in fact it was eight days out of time. Rule 233 (1) (2) and (3) says:

> "(1) The respondent shall be entitled, within the time given in the court application in accordance with r 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits.
>
> (2) As soon as possible after filing a notice of opposition and opposing affidavit in terms of subrule (1), the respondent shall serve copies of them upon the applicant and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with rule 42B.
>
> (3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

Therefore, failure to file a notice opposition within the time-line allowed by the rules of court, results in an automatic bar. Second respondent was barred for want of filing the notice of opposition within the ten-day time-line allowed by the rules. Second respondent could have filed a written application for the upliftment of the bar or make an oral application at the commencement of the hearing. Second respondent's counsel, Mr *Kavhumbura*, made a belated and half-hearted oral application, well in the middle of the hearing. This was done after I had asked him what he wanted the court to do following his filing of his papers out of time. That is when he said he was making an oral application for condonation. My view is that such an oral application must be made up front at the commencement of the hearing.

In an application for condonation, the court has a discretion, which it must exercise judiciously when considering all the facts and in essence, it is a matter of fairness to both parties. The factors that the court must consider are, amongst others the degree of non-compliance, the explanation therefor, the prejudice to other party, the importance of the case and the prospects of success in the main application. Second respondent did not even attempt to put its application, (if I can call it an application) within the requirements of the law.

Therefore, I find that second respondent had not made case for the uplifting of the automatic bar, and he remains barred.

The application of the facts

Rule 449 of the High Court rules provides: (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.

In *Unitrack (Private) Limited* v *Telone (Private) Limited* SC 10/18 the court said 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 *Banda* v *Pitluk* 1993 (2) ZLR 60 (HC) the court said that a rescission of a judgment under r 449 (1)(a) is entirely different and must therefore be distinguished from an application for rescission of a default judgment under r 63 which requires the court, before it sets aside a judgment under that rule, to be satisfied "that there is good and sufficient cause to do so". Nor is the court concerned with the issue of whether the defendant has "a good prima facie defence to the action." When considering the question of rescission of a default judgment under r 449 (1) (a) on the ground that it was "erroneously granted in the absence of any party affected thereby," once the court finds that the judgment was erroneously granted against the defendant, either because of an error on the part of the judge before whom the application for default judgment was placed in failing to observe the notice of appearance to defend contained in the court file or, as is much more likely, because of the absence of the notice of appearance to defend in the court file through delay on the part of the Registry staff in placing the notice in the court file, then that is an end to the matter and the court should rescind the judgment.

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."

Rule 449 is meant to correct 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."

Applicant accepts that the application in case No. HC 1584/19 was filed on the basis that the estate of the late *Edward Mutambanadzo* was insolvent. She contends that there was nothing attached to the application to support the contention that the estate was indeed insolvent. She says it appears that first respondent based its application on an unsigned report of the executor. She says in an application for liquidation, the motivator of such an application must prove that the entity it seeks to place under liquidation is indeed insolvent. She argues that first respondent did not prove that the estate of the late *Edward Mutambanadzo* was indeed insolvent. She contends that the assets in the estate are enough to settle the creditors with change remaining. The contention is that there was no evidence placed before the court to prove that the estate was indeed insolvent.

Applicant filed an answering affidavit, the argument is the same, that there was no evidence in case No. HC 1584/19 that the estate was solvent. He says the order was therefore erroneously sought.

For rule 449 to be engaged, the error must be procedural based. What amounts to an error has also been the subject of a number of decisions? In *Banda* v *Pitluk (supra)*, a default judgment granted against the applicant who had filed an appearance to defend but which appearance had not been brought to the attention of the judge entering the default judgment was held to be an error on the part of the court. In *Mutebwa* v *Mutebwa & Anor* 2001 (2) SA 193 a false return of service was filed by the Deputy Sheriff indicating that service had been effected personally when in fact no such service had been effected resulting in an order being granted. The court had no difficulty in coming to the conclusion that the order had been erroneously granted in the sense that had the judge been aware that the summons had not been served he would not have granted it. The authorities show that r 449 does not apply where the error complained of is on the merits. An error on the merits cannot be subject to rule 449 recession. See *Munyimi* v *Tauro* 2013 (2) ZLR 291 (S), *DA Weelson* v *Waterlinx Pool and Spa (Pty) Ltd* (13904/2007) [2013] ZAPGJHC 47 (1 March 2013).

In *casu*, the high watermark of applicant's case is that there was no evidence placed before court to prove that the estate of the late *Edward Mutambanadzo* was insolvent. This is a complaint on the merits, and as such rule 449 cannot be engaged. The fact that the Executor's report was not signed is irrelevant in this inquiry. The court was satisfied, on the papers before it, including the Master's Report that the estate was insolvent. I find that the order that was granted in HC 1584/19 was neither erroneously sought nor erroneously granted.

It is trite that the issue of costs falls within the discretion of the court. In light of the fact that the first respondent has been successful in the application, I see no reason to depart from the usual rule in relation to costs and consequently the first respondent is entitled to the costs of this application. First respondent sought costs on an attorney client scale. I find no reason to order applicant to pay on such a scale.

Disposition

In conclusion, I find that the order granted in HC 1584/19 was neither erroneously sought nor erroneously granted. Such order cannot be rescinded in terms of r 449 (1) (a) of the High Court Rules, 1971. In the result, this application I dismissed with cots of suit.

Farai Nyamayaro Law Chambers, applicant's legal practitioners
Gill, Godlonton and Gerrans, 1st & 3rd respondents' legal practitioners
C. Nhemwa & Associates 2nd respondent's legal practitioners