WILFRED MBOMA
and
KUDA KAMBARAMI
versus
GAUTENG MINING SYNDICATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 16 July 2021 & 10 August 2022

Opposed Application

Mr *T Nyamakura*, for the applicants
Mr *CT Tinarwo,* for the respondent

MUSITHU J: The applicants seek the setting aside of a judgment granted against them in default on the 18 November 2020. The application was made in terms of r 449(1)(a) of the High Court Rules 1971 (the rules). The order sought is couched as follows:

> "IT IS HEREBY ORDERED THAT:
> 1. The default judgment granted under HC6577/20 on the 18th of November 2020 be and is hereby rescinded.
> 2. Respondent shall pay the Applicant's costs of suit on the higher scale of attorney and client."

FACTUAL BACKGROUND

The applicants are the principals of a mining syndicate called Two Giants Mining Syndicate operating at reserve number 1731DB1 Tatagura Cluster Mbedzi Farm. The respondent is a registered mining syndicate also claiming to have authority to do mining activities at the aforementioned mining reserve. The respondent approached this court on an urgent basis seeking a spoliation order and the order was granted in default on 16 November 2020.

The applicants claim that they were not served with the urgent chamber application nor the notice of set down, and for that reason, the order of 16 November 2020 was granted in error. The applicants only got to know of the order when they were ejected from the mining site on the 2 December 2020. They then decided to approach this Court seeking the rescission of the order as it was granted erroneously. The respondent opposed the application.

Applicants' Case

The applicants' contend that the order granted under HC 6577/20 was erroneously granted as the applicants herein were not served with the application for spoliation and the

notice of set down. They only got to know of the spoliation order when they were ejected from the mining site on the 2 December 2020. They explain their position as follows. On 3 December 2020 they learnt that the respondent had obtained a spoliation order against them in default. Their bone of contention is that they were not given an opportunity to defend the proceedings in HC 6577/20 as they were not served at all.

The proof of service under HC 6577/20 showed that the urgent chamber application for spoliation was served on a gentlemen only identified as Taku who was in the company of Boaz. The applicants deny having employees who go by such names. The only employee whose name resembled that of the said Taku was Takudzwa Muchemwa who deposed to a supporting affidavit denying having been served with any court process by the respondent. It is against this background that the applicants alleged that the order was granted in error as there was no proper service. If CHIKOWERO J had not been misled by the false proof of service, he would not have been inclined to grant the order.

Regarding the merits, the applicants averred that they had a strong case against the respondent. The mining site where the respondent claimed to have been despoiled was owned by Two Giants Mining Syndicate in which the applicants were the principals. The respondent was never in possession or occupation of the mine as it alleged in its application for a spoliation order. The applicants had always been in effective occupation of the mining site having been issued with a special grant certificate on 17 December 2019. On its part, the respondent was only issued with a special grant certificate on 13 August 2020, some eight months after the applicant had been authorised to extract minerals from the mining site.

Respondent's Case

The respondent raised a preliminary point. It held the firm view that the applicants had approached the Court using the wrong procedure. The application was made in terms of r 449 (1)(a) of the High Court Rules, 1971 (the rules). It was the respondent's contention that the application ought to have been made in terms of r 63. Rule 63 states as follows:

> " (1) A party, against whom judgment has been given in default, whether under these rules or any other law, may make a court Application, not later than one month after he has knowledge of the judgment, for the judgment to be set aside.
> (2) If the court is satisfied on application in terms of subrule(1) that there is good and sufficient cause to do, the court may set aside the judgment concerned and give the defendant to defend or to the plaintiff to prosecute his action, on such terms as to the costs and otherwise as the court considers just.
> (3) Unless an Applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he is presumed to have had the knowledge of the judgment within two days thereof."

The respondent averred that the applicants conveniently proceeded in terms of r 449 because they realised they were out of time. In terms of r 63(3), it was presumed that they were aware of the judgment on 18 November 2020. Even assuming that the presumption was rebutted, the applicants were duly served with a notice of removal on 24 November 2020. From that date, they ought to have filed their r 63 application for rescission by 23 December 2020. Seeing that they had no explanation to proffer for the delay, they decided to launch a r 449 application which was the most irregular thing to do. The application had to be dismissed on that score alone.

As regards the merits, the respondent averred that the default judgment was not granted in error. The applicants were duly served and chose not to oppose the application for spoliation. They also chose not to appear on the date of hearing having been served with a notice of set down by the Sheriff. Moreover, the respondent held a valid special grant to mine issued on 13 August 2020. The respondent had taken occupation of a vacant piece of land and made extensive developments on site. When it took possession of the mine, it had had serious disputes with the owner of the farm, one Dominic Mandere. The dispute was only settled after the respondent ceded 20% of its shares to the said Mandere.

The respondent further averred that it did not cite Two Giants Mining Syndicate in its application because it was the two applicants that despoiled it. Further, when the two despoiled the respondent from the site, they never referred to Two Giants Mining Syndicate. The respondent's officials had no way of knowing that the applicants fronted the said syndicate. The respondent was rightfully in occupation of the mining site.

The respondent further averred that at any rate, the relief sought by the applicants was incompetent. A rescission of a default order or judgment did not restore possession.

Submissions and the Analysis

At the hearing of the matter, Mr *Tinarwo* for the respondent began by motivating his point *in limine* that the application was made using the wrong procedure. In its heads of argument, the respondent argued that a r 449 application was only competent where there was no other remedy available but to rescind the order. In the present matter, a r 63 provided sufficient remedies to the applicants.

In his reply, Mr *Nyamakura* argued that the issue before the court was about the validity of the service of the application on the applicants. If it was established that there was no valid service, then that anomaly was rectifiable through a r 449 application. It also meant that any subsequent proceedings after the defective service were null and void. The defective service

meant that the parties that were required to attend court could not appear. Such a scenario was not covered by r 63.

In his brief response, Mr *Tinarwo* submitted that service of process was governed by Or5 r 39(2)(b) of the rules. The certificate of service of the urgent chamber application, and the sheriff's return of service of the notice of set down were all served on one Boaz, a responsible person in the employ of the applicants. Counsel further submitted that the applicants conveniently avoided r 63 because they would have been expected to seek condonation to apply for the rescission of judgment out of time. That process required them to explain their delay in filing the application for rescission.

Rule 449 (1)(a) in terms of which the application was launched states as follows:

> ***"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; or
> (*b*) ……"

The purpose of a r 449 application was explained by MAVANGIRA AJA in *Unitrack (Private) Limited* v *Telone (Private) Limited*[1] as follows:

> "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."[2]

Having underscored the importance of r 449, the next step is to determine whether on the evidence before it, this court can rescind the order granted in default on the basis that it was erroneously granted. In *Munyimi v Tauro*[3] GARWE JA (as he was then), explained the position of the law as follows:

> "Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference in rule 449 to a judgment or order granted "in the absence of any party affected thereby" envisages a situation where such a party may be able to place facts

[1] SC 10/18

[2] At p4 of the judgment. See also *Tiriboyi v Jani & Ano* 2004 (1) ZLR 470 at p 472 D-F where the court held:
> "The purpose of r449 appears to me 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 purposes of correcting an injustice that cannot be corrected in any other way……"

[3] SC 41/13

> before the latter court, which facts would not have been before the court that granted the order in the first place – see *Grantually (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361(S), 364H – 365 A-B." (Underlining for emphasis).

It follows that where a party petitions the court to set aside an order on the basis that it was erroneously granted in the absence of that party, then that party is permitted to place before the court facts or evidence which tend to prove that the order was indeed erroneously granted. The effect of such additional information should be such as to leave the court in no doubt that had it been aware of the correct facts, then it would not have granted the order in default.

In the present matter, the alleged error pertains to the non-service or defective service of the application and the notice of set down of that application on the applicants herein (the respondents in HC 6577/20). The certificate of service of the urgent chamber application for spoliation states that the application was allegedly served on *"Taku who was in the company of Boaz, both of whom refused to give me their full names and sign for the Application but are in the employ of the 1st and 2nd Respondent by handing a copy of the said document"*.[4] The service was made at 1731DB1 Tatagura Cluster, Mbedzi Farm, Mazowe on 11 November 2020. Prior to that, and on 3 November 2020, a letter of demand had been addressed to the two applicants and served *"on Boaz who refused to sign and give me his full name"*.[5] That letter demanded that the applicants herein should vacate the mining claim within 48 hours from the time of service of the letter, failing which legal action was to be taken against them.

The notice of set down was served by the Sheriff at Mbedzi Farm Mazowe on 13 November 2020. The remarks on the return of service by the Sheriff read as follows:

> "A copy of NSD for UCA application served on Boaz, the respondent's worker who accepted service on behalf of the 1st respondent at 1558 hrs"[6]

The return of service by the Sheriff on the second respondent reads pretty much the same, as the return of service on the first respondent. The applicants herein contend that they do not have a person by the name Boaz in their employ. They also deny that they employ a person by the name Taku. Instead, they had an employee called Takudzwa Muchemwa who denied receiving service of the urgent chamber application. The applicants further averred that while the mine was indeed located at Mbedzi farm in Mazoe, the mine was not the entire farm. The farm was expansive in size, and service on a person at the farm could not be presumed to

[4] p50 of the record
[5] p51-52 of the record
[6] Pages 81-82 of the record

be service at the mine. The applicants further argued that there was no proof that the applicants or their employees were served with the court papers.

The question that still lingers is whether the error alleged by the applicants is the kind of error for which r 449(1)(a) can be invoked. In the *Munyimi* v *Tauro*[7] judgment, the court said the following about errors envisaged under r 449(1)(a):

> "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 an applicant who had filed an appearance to defend court 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 *Mutubwa v Mutabwa* (*supra*), 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 made. 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 on the applicant he would not have granted it."

The circumstances of the cases referred to in the *Munyimi* v *Tauro* case are different from the present case. The certificate of service of the urgent chamber application showed that service had been effected on Boaz and Taku at 1731DB1 Tatagura Cluster within the Mbedzi farm at Mazoe. Similarly, the letter of demand served on Boaz made reference to the same address within the farm. Although the certificate of service did not state that service had been effected at 1731DB1 Tatagura Cluster, Mbedzi farm, still the notice of set down was served on Boaz. This is the information that was placed before the learned judge before he granted the default order.

In my respectful view, the court can only make an error based on what it sees before it. The court relied on the certificate of service of the application and the Sheriff's return of service and granted the order. The error alleged by the applicants herein is not in my view, the kind of error envisaged under r 449(1)(a). If it were to be accepted that such queries constitute errors for purposes of r 449, then it means courts or judges would probably need to interview the persons who effected service just to be certain that service was properly made on the intended recipient of the process, before granting an order or judgment.

Further, it would have been a different scenario if for instance the court had used a wrong return of service that had no bearing to the case. The name of Boaz featured prominently in the proof of service before the learned judge. First it was in respect of the letter of demand, then the urgent chamber application and lastly the notice of set down of the urgent chamber application. Nothing has been placed before this court by way of additional evidence to suggest

[7] *Supra* at p6 of the judgment

that the said Boaz does not exist at all at the mining location. Indeed, based on the information before him, the learned judge who granted the default order would not have known that Boaz does not exist.

As correctly submitted by Mr *Tinarwo*, the applicants did not explain why the Sheriff, an official of this court, would have served the notice of set down on the same Boaz on whom the letter of demand and the urgent chamber application were served. Nothing short of collusion, perhaps between the Sheriff and the respondent herein would explain that coincidence. On the papers before the court, there is no evidence of such collusion. This is one classical case in which the applicants ought to have proceeded in terms of r 63 of the rules. The court is tempted to accept the submission by the respondent's counsel that the reason why the applicants shied away from r 63 was because they knew that their application was already out of time and they needed to approach the court for condonation first.

For the foregoing reasons, the court finds merit in the preliminary objection raised by the respondent. The court finds that the default order was not erroneously sought or erroneously granted in the absence of any party affected thereby, within the contemplation of r 449(1)(a). The application is not properly before the court.

COSTS

In its notice of opposition and heads of argument, the respondent urged the court to dismiss the application with costs on the higher scale. No justification was given for the award of costs on such a scale. Ordinarily costs of suit follow the event. I see no reason to depart from this general principle.

DISPOSITION

Resultantly it is hereby ordered that:

1. The application be and is hereby struck off the roll.
2. The applicants shall pay the respondent's costs of suit.

Mushoriwa Pasi Corporate Attorneys, applicants' legal practitioners
Zimudzi and Associates, respondent's legal practitioners