JOSEPH STEVE MANDIZHA
versus
CHEN WANG
and
TAWANDAMAVHUNGA
and
TAFADZWAMAVHUNGA
and
DARNEL ENTERPRISES (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 and 24, February 2015

Chamber application

P.C. Paul, for the 1st respondent

MANGOTA J: Pursuant to the judgement which Mathonsi J granted to the first respondent under case number HH 516/14 (ref HC 8415/13) the first respondent did, on 15 October 2014, issue an application out of this court. The application was filed under case number HC 9133/14. He cited the applicant, the second, third and fourth respondents.

The first respondent was served with opposing papers at the end of October, 2014. He did nothing from the mentioned period to the time that the applicant filed this application. The rules required him to have filed an answering affidavit or to have set the matter which related to the application down for hearing. He should have pursued either of the stated matters within one month which is calculated from the date that the opposing papers were filed with the court [emphasis added].

The record shows that:

(a) the applicant filed his opposing papers to the applicant's application on 28 October, 2014 – and

(b) the second and third respondents' opposing papers to the same were filed with the court on 30 October, 2014.

It is evident that the applicant should have complied with Order 32 r 236 in early December, 2014 or so soon thereafter. He did not do anything at all. He, in fact, remained inactive for the whole of November and December, 2014. He only reacted on 28 January 2015 when he filed his notice of opposition to the applicant's application for dismissal of application for want of prosecution.

The first respondent's opposing papers were not in the record when the court dealt with the application on 4 February, 2015. The court cannot tell where they were. It, accordingly, granted the order by default. The order is dated 4 February, 2015.

On 18 February, 2015 the first respondent's legal practitioners addressed a letter to the registrar of this court. The registrar received it on the following day and, with speed, placed it before the court for its attention.

The letter which the legal practitioners wrote read, in part, as follows:

> "RE: APPLICATION HC 271/15 BY JOSEPH MANDIZHA V CHEN WANG AND OTHERS
> We refer to the above in which the Chamber Application by Mr Mandizha was granted by the Judge on the 4th of February 2015. We understand from you that our Notice of Opposition to that application was not amongst the Judges papers and he therefore granted the order by default.
> However, we attach our Notice of Opposition which was filed timeously with the registrar on 28th of January 2015 and was served on other respondents. In the circumstances we believe that the default order was erroneously granted and we request the learned judge to set aside the order in terms of Rule 449 of the High Court Rules."

The first respondent attached to the letter his Notice of Opposition. The Notice was filed with the registrar on 28 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 r 499 of the rules of this court.

Rule 449 confers a discretion and power on the court to correct, rescind or vary any judgement or order that was erroneously sought or erroneously granted in the absence of any party affected by the judgement or order (emphasis added). It reads:

> "CORRECTION, VARIATIONAND RESCISSION OF JUDGEMENTS 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 judgement or order-
> (a) that was erroneously sought or erroneously granted in the absence of any party affected there by; or

(b) ……. or;
(c) …….

(2) The court or a judge shall not make any order correcting, rescinding or varying a judgement or order unless it is satisfied that all parties whose interests may be affected have had notice of the order proposed." [emphasis added]

There is no doubt that the order which the court granted to the applicant affected the first respondent's interests in an adverse manner. That order was, however, made with the full knowledge of the first respondent. The rule which the first respondent relied upon enjoined him to have filed an application with the court. He addressed a letter to the registrar. A letter and an application are two different pieces of paper altogether. An application falls into the realms of court process and a letter does not fall into that category of papers. It cannot, therefore, be stated that the first respondent complied with the rule when he wrote the letter as opposed to him having filed, on notice to other parties, an application with the court.

Subrule (2) of r 449 prohibits the court from making any order which corrects, rescinds or varies a judgement or order unless it is satisfied that all parties whose interests would be affected by its order have been notified of the proposed order. The first respondent did not state, in the letter, that other parties who are part and parcel to his case were notified of what he prayed the court to grant him. Admittedly, copies of the letter which he addressed to the court were apparently forwarded to the parties. It is not known if they saw the letter let alone took the trouble to read its contents. The mere fact that the first respondent showed underneath the writer's signature that copies were forwarded to the other parties is not enough. The first respondent should have done more than what he did in his effort to satisfy the court that adequate notice was served on the parties. Some form of stamp and signature of the served party, if such was attached to the letter, would have sufficed in the absence of certificates of service.

In his opposing papers, the first respondent admitted paragraphs A, B1, B2, B3 and B4 of the applicant's affidavit. He also admitted that he filed his answering affidavit out of time after which he proceeded to chronicle his reasons for the delay. He apologised for the late filing of his answering affidavit and he, quite correctly, stated that he remained liable for the payment of the applicant's costs.

For some unknown and unexplained reasons, the first respondent did not file any answering affidavit. He, instead, filed his Heads of Argument under case number HC 9133/14. He filed those on 14 February, 2014. As at the time of this judgement, no

answering affidavit of the first respondent was filed of record. The status *quo ante*, therefore, remained obtaining from the time that the applicant and others filed their opposing papers todate.

The court has considered all the merits and demerits of the matter which the first respondent placed before it through the letter. It is satisfied that the first respondent's case is devoid of any merit. The request which he made in the letter is not sustainable.

In the result, it is ordered that the order which the court granted to the applicant on 4 February, 2015 under case number HC271/15 be and is hereby not corrected, rescinded, varied or set aside.

F.G.Gijima and Associates, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners
T.K.Hove and Partners, 2nd and 3rd respondent's legal practitioners
Warara & Associates, 4th respondent's legal practitioners