FARMISCO PRIVATE LIMITED
t/a KYNOCH FERTILIZER PRIVATE LIMITED
versus
WINDMILL PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 12 September 2016 & 7 December 2016

Opposed Application

G. Majiriji, for applicant
E. R. Moyo, respondent

CHIGUMBA J: This matter came to life as a chamber application for correction of an order brought in terms of Order 49 r 449 of the rules of this court, in which judgment was entered against the applicant in the sum of USD$115 063-97 (one hundred and fifteen thousand and sixty three United States Dollars and ninety seven cents) together with interest thereon at the rate of 24 % per annum plus costs of suits on a legal practitioner client scale. The relief sought was opposed, resulting in the matter being referred to the opposed roll for proper ventilation of the issues.

The application was filed of record on 31 March 2016, the founding affidavit being deposed of by Ms *Brenda Matanga*, the applicant's legal practitioner of record. Both applicant and respondent are companies which are duly registered in accordance with the laws of Zimbabwe. The basis of the application is that on 10 February 2016 an application was filed in terms of Order 8 r 55 of the rules of this court for an order in terms of a deed of settlement which had been entered into by the parties. The application was granted on 1 March 2016, unopposed. The averments made on behalf of the applicant are that the outstanding debt which had been acknowledged in the Deed of Settlement, in the sum of USD$293 405-97 had been settled in the amount of USD$178 342-00. A sum of USD$102 362-97 remained outstanding. In para 5 of the Deed of Settlement it was agreed that in the event of default, the whole amount would immediately become due and payable, together with interest as claimed in the summons. The

application is for correction of the order granted in error. The correction is not prejudicial to the respondent.

The chamber application was opposed by the respondent on the 4th of April 2016. The opposing affidavit was deposed to by the respondent's legal practitioner of record Mr *E Moyo,* who disputed the contents of the founding affidavit, and averred that;- the applicant had overlooked a payment of USD$12 681-00 made by the respondent, thereby making the correct amount outstanding a sum of USD$102 362-97. It was denied that the rate of interest awarded had been as a result of an error. It was contended that applicant was seeking variation of the order as opposed to correction. Respondent insisted that it would be prejudiced. In the applicant's answering affidavit, filed of record on 28 April 2016, the applicant conceded that it had overlooked a certain payment but insisted that the agreed rate of interest was 24 percent per annum and not interest at the prescribed rate. In its heads of argument, it was submitted on behalf of the applicant that the application for correction of the amount claimed was properly before the court in order to address the question of quantum and the rate of interest.

The applicant submitted that there was an oversight on its part, in that it erroneously sought interest at the prescribed rate, when it was entitled to interest at the rate of 24% per annum as claimed in the summons. That rate on interest was agreed to by the parties in terms of s 4 of the Prescribed Rates of Interest Act [*Chapter 8:10*] see *Chikomo* v *Yehudah* [1]. The *a*pplicant persisted in its claim for interest and insisted that it was properly before this court in terms of r 449. I have previously expressed the following views, in similar applications before me, which are equally applicable to this application;-

> ""In order to qualify for relief under r 449(1) (a) of the rules of this court, a litigant must show that:
> 1. the judgment was erroneously sought or erroneously granted.
> 2. the judgment was granted in the absence of the applicant or one of the parties;
> 3. the applicant's rights or interests were affected by the judgment. See *Mutebwa* v *Mutebwa and Anor 2001 (2) SA 193* .
> 4. there has been no inordinate delay in applying for rescission of the judgment.
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> It is my view that, in order to qualify for relief under r 63, a litigant must show that:

[1] HH29-12

1. Judgment was given in the absence of the applicant under these rules or any other law.

2. The application was filed of record and set down for hearing within one calendar month of the date when applicant acquired knowledge of the judgment.

3. Condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment.

4. There is "good and sufficient cause" for the granting of the order. See *Viking Woodwork v Blue Bella Enterprises 1988(2) ZlR 249 (S) @ 251 B-D, Highline Motor Spares 1933 (Pvt) Ltd & Ors v Zimbank Corp Ltd 2002 (1) ZLR 514 (S) @ 516 C-E, 518A-B, Sibanda* v *Ntini 2002 (1) ZLR 264 (S) Pastor Jameson Moyo & 3 Ors* v *Reverend Richard John Sibanda & The Apostolic Faith Mission SC 6/10*

5. The phrase 'good and sufficient cause' has been construed to mean that the applicant must:

   (a) give a reasonable and acceptable explanation for his/her default;

   (b) prove that the application for rescission is bona fide and not made with the intention of merely delaying plaintiff's claim; and

   (c) show that he/she has a *bona fide* defense to plaintiff's claim. See *Songore* v *Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210)*

It is also my view that, in order to qualify for relief in terms of this court's common law power to rescind its own judgments a litigant must show that:

1. The court's discretion that it is being asked to exercise is broader than the requirements of both rr 449 and 63.

2. Whether, having regard to all the circumstances of the case, including applicant's explanation for the default, this is a proper case for the grant of the indulgence. See *Gondo & Anor* v *Stfrets Merchant Bank Ltd* 1997 (1) ZLR 201, and *de Wet & Ors* v *Western Bank Ltd* 1979 (2) SA 1031 @ 1043.

The question is, what sort of error will suffice to bring an applicant squarely within the ambit of r 449(1)(a). Is it an error of fact, an error of law, or both? An "error" in common and ordinary parlay, is defined as: a mistake, fault, blunder, boo-boo, slip, slip-up, inaccuracy and miscalculation. The law is settled, on the issue of if or when and whether this court ought to grant rescission of its own judgments in terms of r 449. In South Africa,

In *Bakoven Ltd* v *G J Howes (Pty) Ltd* 1992 (2) SA 466 (E), at 471 F, ERASMUS J said of the almost identically worded r 42(1) (a) of the South African Uniform Rules:

> "It is an abuse of the process of the court to bring such an application some five years and eight months later. Matters must have some finality and r 449 was not designed to let defendants have a second bite at the cherry by raising a defense which should have been raised when the summons was issued."

The Zimbabwean courts have followed some aspects of the South African position and rejected others.

In Grantuilly (Pvt) Ltd & Anor v *UDC Ltd* 2000 (1) ZLR 361 (SC) the court held that,

> "the judgment had been granted because at the time of its issue the judge was unaware of a relevant fact, the provisions of the clause in the acknowledgment of debt. Had he known of the clause, he would not have granted the judgment he did. There was ample precedent for the proposition that a court to which application is made for rescission is not confined to the record of proceedings in deciding whether a judgment was erroneously granted. The wording of r 449(1)(a) of the High Court Rules made it clear that a party against whom default judgment had been granted was entitled to place before the correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It was held, further, that it is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry. The court also found that rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is functus officio and has itself no authority to correct, alter or supplement it… *See Firestone South Africa (Pty) Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) at 306 F-G*; Stumbles & Rowe* v *Mattinson; Mattinson* v *Stephens & Ors* 1989 (1) ZLR 172 (H) at 174 D-F; *Tshivhase Royal Council & C Anor* v *Tshivhase & Anor; Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A) at 862 I-J."

> It is clear that, to qualify for relief under r 449(1)(a), mistakes of fact are not precluded, although it is apparent that the mistakes referred to are not trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who grants it, and the

> applicant ought to show that he was prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defense on the merits, judgment was given against him in error, as a result of such mistake. The law is also clear, that any fact which was not brought to the attention of the court at the time judgment in default was given, may be placed before the court dealing with an application to rescind judgment in terms of r449." See *Jonas Mushosho* v *Lloyd Mudimu & Anor* [2].(my underlining for emphasis), *Madzorera* v *Shava* [3] , *Zindi* v *Farmers Development Cmpany Limited* [4]

The Supreme Court has given the following guidance on rescission of judgments by this court in terms of r 449;-

> "…The High Court is a superior court with inherent jurisdiction to protect and regulate its own process and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of court business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue.
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> Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by LEVY J in *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481, at 492 as follows:
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> > "Under the common law the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)…"

The first thing to note is that r 449 does not require that there be 'good and sufficient cause' before the judgment or order is set aside. It merely requires that the applicant show evidence of prejudice of a legal right that was affected by the judgment or order, or that the applicant show that there was a miscarriage of justice which resulted when the judgment or order was granted in his/her absence. It is my view that a finding of prejudice or miscarriage of justice by necessity involves an assessment of the circumstances to determine whether the applicant has a genuine legal right that was affected. In other words, a consideration of the merits of the applicant's claim.

It was submitted on behalf of the respondent that the court had finalized the matter and was now *functus officio.* The court was referred to the case of *Matanhire* v *BP Shell Services*

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[2] HH 443-13
[3] HH 3-11
[4] HH 309-15

Private Limited [5], as authority for this proposition. In the case of *Kassim* v *Kassim*[6] the court stated that;-

> "In general the court will not recall, vary or add to one of its own judgments once it has made a final adjudication on the merits. The principle is stated in *Firestone South Africa (Pty) Ltd* v *Genticuro Ag* 1977 (4) SA 298 (a) @ 306 where TROLLIP JA stated;
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> 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio,* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased".

The question that arises for determination is whether the order will reflect the intention of the Judge after it has been corrected. The error in this matter is not patent or clerical or inconsequential. I must agree with the submission made on behalf of the respondent that correcting the error relating to the rate of interest from the prescribed rate which is 5 % to 24% will result in prejudice which is significant because the amount due will be materially altered. This is not a proper case for the exercise of this court's inherent jurisdiction, its power to regulate its own process. The respondent is likely to be prejudiced in a material manner. The applicant must have regard to other remedies provided by the law and by our rules.

For these and other reasons aforestated, the application be and is hereby dismissed, with costs on an ordinary scale.

B Matanga IP Attorneys, applicant's legal practitioners
Scanlen & Holderness Legal Practice, respondent's legal practitioners

[5] SC 5-05
[6] 1989 (3) ZLR 234 (H) @p 242 C-D