DEPOSIT PROTECTION CORPORATION
(in its capacity as the Provisional Liquidator of
TRUST BANK CORPORATION LIMITED)
versus
RIOZIM LIMITED

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 23 November 2016 and 20 June 2017

Opposed application

Adv *L. Uriri,* for the applicant
Adv *F. Girach,* for the respondent

CHIWESHE JP: This is an application for rescission of judgment in terms of Rule 449 (1) (a) of the High Court Rules, 1971. Rule 449 (1) (a) provides as follows:

> "449 Correction, variation and rescission of judgments and orders
> (1) The court or a judge may, in addition to any power it or he may have, *meru 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) …….
> (c) ……..."

The requirements for such an application to succeed are clearly spelt out in the wording of the rule; the judgment must have been erroneously granted, being granted in the absence of the applicant where the applicant's rights or interests must be affected by the judgment. See *Motor Cycle Pvt Ltd v Old Mutual Property Investments Corporation Pvt Ltd* HH 45/07 and *Kaiser Engineering Pvt Ltd v Makeh Enterprises Pvt Ltd* HB 6/12. In *Theron NO v United Democratic*

Front and others 1984 (2) SA 532, wherein the South African equivalent of our Rule 449 (1) (a) was under consideration, Vivier J had this to say at p 536 E:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were before the order was granted."

And at p 536 G the learned judge proceeded to explain that the court has a discretion whether or not to grant the application:

> "In my view the court will normally exercise that discretion in favour of any applicant where, as in the present case, he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified."

In *Banda v Pitluk* 1993 (2) ZLR 60 (H) at 64 D – F Robinson J distinguished an application for rescission made under Rule 449 (1) (a) and an application for rescission of a default judgment under Rule 63. The latter requires the court, "before it sets aside a judgment under it, to be satisfied that there is good and sufficient cause to do so," whilst the former enjoins the court, once it finds that the judgment was erroneously granted against the defendant, to rescind the judgment without further ado. Similarly in HH 309-15 it was stated at p 5 of the cyclostyled judgment as follows:

> "In the case of *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* CJ Gubbay ably and lucidly outlined the purpose of r 449 when he ruled that once it is established that a relevant fact which ought to have been placed before the court was not placed before it, there is no need for further inquiry for there is no requirement for an applicant seeking relief under r 449 to establish good cause.
>
> In my view r 449 is availed to cater for situations were a judgment erroneously sought or issued in error if allowed to stand would occasion on injustice."

Does the applicant meet the requirements for an order premised under r 449 (1) (a)? The facts upon which the test must be applied are as follows. The founding affidavit is sworn to by the applicant's Chief Executive Officer, one John Mafungei Chikura. It is to the following effect. On 12 March 2014 under case number HC 1405/13, Trust Bank Corporation Limited

obtained a court order against the respondent in terms of which the respondent was ordered to pay the sum of $1 824 505.05 plus interest on this sum, being the amount outstanding in respect of a loan which Trust Bank had advanced to the respondent.

On 8 October 2014, Trust Bank was placed under provisional liquidation by order of this court given under case number HC 2636/14. The applicant in the present case, represented by its Chief Executive Officer, the deponent to the founding affidavit in *casu*, was appointed the provisional liquidator in terms of s 57 (1) (b) of the Banking Act [*Chapter 24:20*].

On 7 May 2015, the respondent, without leave of court, filed an application for variation of the court order which Trust bank had earlier obtained against it to recover the sum of $1 824 505.05. The application for variation cited Trust Bank and the deponent to the founding affidavit in *casu*, John Mafungei Chikura. The applicant in *casu* was not cited, despite according to Mr Chikura, it having a direct and substantial interest in the matter, moreso as it was the duly authorized representative of Trust Bank. A default judgment was subsequently obtained on 27 May 2015, in the absence of the applicant, varying the order as prayed. The original order was varied by the deletion of the sum of $1 824 505 .05 and the substitution thereof with the sum of $634 336.14 and by the deletion of interest at the rate of 45% per annum and the substitution thereof with interest at the rate of 25%.

The applicant avers that in terms of s 213 of the Companies Act, [*Chapter 24:03*] "no action or proceeding shall be proceeded with or commenced against a company in liquidation or provisional liquidation except by leave of court and subject to such terms as the court may impose." Accordingly, so argues the applicant, the application for variation having been made against a bank which was under provisional liquidation without leave of the court, the resultant order was, for that reason, *void ab origine* and therefore of no legal force or effect. If the respondent had informed the court that the bank was under provisional liquidation, and that leave of court had not been obtained, the variation order would not have been granted. For that reason the variation order was issued in error and must in terms of r 449 (1) (a) be set aside accordingly. I agree with that submission.

The error that the applicant relies on relates to an application filed against Trust Bank when it was under provisional liquidation. Specifically the error arises because leave of court

had not been obtained to so file process against Trust Bank. In addition the deponent alludes to a further error, namely that the applicant in *casu* had not been cited in that process. It should have been cited because it is the provisional liquidator, and that the deponent, though appointed provisional liquidator, was only so appointed in a representative capacity, representing the applicant. The deponent insists that he was not appointed in his personal capacity. In short the argument advanced by the applicant is two-fold, *viz*, the respondent filed the court application for variation without the leave of the court and the applicant was not cited as the provisional liquidator. Had these facts been disclosed to the court, the application for variation would not have been granted. Accordingly the variation order was granted in error. Further the deponent correctly observes that the Master of the High Court should have been cited because the respondent company was under provisional liquidation thus placing it under the supervision of the Master.

The opposing affidavit is sworn to by Gerry Mubata, the respondent company's group financial controller, duly authorized to do so by a company resolution dated 9 May 2016. The respondent has raised points *in limine*. The first point *in limine* has no merit and may be dismissed off hand. The respondent alleges that the return date for the provisional liquidation order was given as 4 April 2015 and that there is no evidence to show that it was extended to cover the period under review, specifically the 27 May 2017 when the variation order was granted. However the truth of the matter is that the provisional order was confirmed by Mafusire J on 19 May 2016 under case number HC 2636/14. The order is filed at p 35 of the record. The second point *in limine* raised by the respondent is that the applicant has no *locus standi* to bring the present application because there is no order filed of record that confirms its position as liquidator. This point too has no basis as the final order does appoint the applicant as the liquidator. For the same reasons the third point *in limine* also has not merit as it is based on the erroneous view that Trust Bank had not been liquidated.

The respondents have challenged Mr Chikura's authority to despose to the founding affidavit in the absence of a resolution from the applicant conferring authority to so act on its behalf. The respondent also challenges the *locus standi* of the applicant to bring the present application. It is also contended that because of the conduct of the parties under case numbers

HC 4155/15 and HC 4456/15 the requirement for leave of court to be sought was waived by consent of the parties! Further it is argued by the respondent that the applicant has no direct and substantial interest in the proceedings and therefore there was no need to cite it. It was sufficient to cite the Provisional liquidator, Mr Chikura himself, so argues the respondent.

A look at s 57 (1) of the Banking Act [*Chapter 24:20*] will shed light as to the validity of the respondent's arguments *vis a vis* whether Mr Chikura has authority to represent the applicant and whether the applicant has *locus standi* to institute the present proceedings. Section 57 of that act reads:

> **"57 Special provisions relating to winding up or judicial management of banking institutions**
> (1) Notwithstanding anything to the contrary in the Insolvency Act [*Chapter 6:04*] or the Companies Act [*Chapter 24:03*]—
>
> (*a*) the Reserve Bank shall have the right to apply to the High Court for —
> (i) the winding up of any banking institution; or
> (ii) an order placing any banking institution under judicial management or provisional judicial management in terms of the Companies Act [*Chapter 24:03*]; and the Reserve Bank shall have the right to oppose any such application made by any other person;
> (*b*) the Reserve Bank shall appoint the Deposit Protection Corporation as the provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution;
> (*c*) the claims of—
> (i) depositors; and
> (ii) the Reserve Bank and the Deposit Protection Corporation, in respect of any fees and expenses incurred in the exercise of their functions under this Act or any other enactment; against a banking institution that is being wound up shall enjoy such priority as may be prescribed"

The powers bestowed upon the Reserve Bank are wide and far reaching. Most importantly for purposes of this application, the Reserve Bank is required to appoint the applicant as provisional liquidator, provisional judicial manager, liquidator or judicial manager of a banking institution. The provision is mandatory. The Reserve Bank must appoint the applicant to act in those capacities. It cannot appoint any other person. It is clear therefore that the applicant will always have *locus standi* in all matters involving the liquidation or judicial management of all banking institutions that fall under the purview of the Banking Act. Indeed the orders of this court of 8 October 2014 (Provisional liquidation) and 19 May 2016 (Confirmation of Provisional order)

confirm this position. The respondent's argument to the contrary must be dismissed in the face of these clear statutory provisions.

Mr Chikura is the Chief Executive Officer of the applicant. By virtue of holding that appointment, he must be deemed to be authorised to act on behalf of the applicant. In any event his authority was confirmed by order of this court dated 8 October 2014 in terms of which he was appointed provisional liquidator representing the applicant. (See case No. HC 2636 /14) That provisional order was confirmed on 19 May 2016.

The respondent's opposition to this application has no merit. The applicant has satisfied the requirements set out under Rule 449 (1) (a). The application for variation of the order under case number HC 4155/15 was made without leave of court as required under s 213 of the Companies Act [*Chapter 24:03*]. That provision is peremptory and cannot, as suggested by the respondent, be waived away. As a result the application for variation was not properly before the court, rendering the resultant order a nullity. If the court had been informed that leave had not been sought to issue the application, it would have declined to entertain the matter. Clearly the variation order was granted in error and thus liable to being set aside.

That the variation order was granted in the absence of the applicant is a fact beyond dispute. It was a default judgment! Further, given the provisions of s 57 of the Banking Act, there is no doubt that the applicant's rights and interests as the liquidator would have been affected one way or the other. Put differently, the applicants, by virtue of their statutory rights and obligations, are an interested party. The applicant should have been cited in the application for variation.

As stated in the *Grantully* case supra, the applicant need not establish good cause in order to obtain relief. The explanation by the respondent as to the merits is therefore irrelevant.

For these reasons the application must succeed. It is ordered as follows:

1. The order of this court granted in favour of the respondents on 27 May 2015 under case number HC 4155/15 be and is hereby rescinded.
2. The Respondent shall pay the costs.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners
C. Kuhuni Attorneys, respondent's legal practitioners