THE COMMISSIONER GENERAL OF POLICE

And

ASSISTANT COMMISSIONER MARECHA

Versus

SAMUEL KUFANDADA

And

CHIEF SUPERINTENDENT CHIZEMO

And

OFFICER IN CHARGE ZRP MAKOSA

And

SENIOR ASSISTANT COMMISSIONER CHENGETA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 SEPTEMBER 2021 & 7 OCTOBER 2021

Rescission in terms of rule 449(1) of the High Court Rules, 1971

D. Jaricha, for the applicants
Respondent in person

DUBE-BANDA J: This is an application for rescission of judgment in terms of Order 49 rule 449 of the High Court Rules, 1971.[1] The basis of the application is that the order in HC 2997/17 was erroneously sought or erroneously granted in the absence of parties affected thereby, i.e. the 1st and 2nd applicants. This application is opposed by the 1st respondent. 2nd, 3rd and 4th respondents did neither file opposing papers nor participated in the proceedings. I take it that they have taken a position that they shall abide the court's decision.

[1] Rules that were in force when this application was filed in this court.

Factual background

This application will be better understood against the background that follows. 1st respondent was a member of the Zimbabwe Republic Police (ZRP). On the 16 June 2014, he was convicted of the crime of contravening the provisions of the Police Act [Chapter 11:10]. He was subsequently transferred from Ross Camp Police Station, Bulawayo to Makosa Police Station, Mashonaland East Province. According to 1st applicant he noted that 1st respondent was not reporting for duty in his new work station. He then convened a Board of Inquiry [Desertion], the Board recommended that 1st respondent be discharged from the ZRP. He was then discharged from the ZRP on the contention that he was unfit for police duties and desertion.

1st respondent was aggrieved by his discharge from the ZRP. On the 8 December 2015, he filed with this a court a court application for review in terms of order 33 of the High Court Rules, 1971, challenging his discharge. The court application was filed under cover of case No. 3298/15. He sought an order to review and set aside the decision of the 1st respondent to discharge him from the ZPR. The court application for review was set-down on three occasions on the unopposed roll. The record in HC 3298/15 shows that on the 24 March 2016, the matter was struck off the roll; on 27 July 2017 it was removed from the roll; and on the 26 October 2017, it was again struck off the roll.

On the 14 November 2014, 1st respondent filed a chamber application for default judgment. The chamber application was filed under cover of case number HC 2997/17. The chamber application says:

> Take notice that, the applicant files its application for default judgment in terms of the court application for review filed under HC 3298/15. The application is made in terms of Order 32 rule 236(1).
>
> Further take note that the affidavit of Samuel Kufandada and attached documents will be used in support of this application.
>
> Dated at Bulawayo this 14 day of November 2017.

On the 22nd November 2017, the chamber application was placed before a judge of this court, who commented thus: "The relief sought affects the validity of the 5th respondent's decision, yet there is no proof of service in respect of that respondent." The 5th respondent in the chamber application is the 1st applicant in this application, i.e. the Commissioner General

of the Police. On the 21 December 2017, 1st respondent filed an affidavit of service, which says he served the 1st applicant by leaving a copy of the court application in HC 3298/15 at the gate of the Police General Headquarters, Harare.

On the 30 July 2019, the court granted in chamber application. The order reads as follows:

It is ordered that:-

1. The discharge of applicant from the Police Service by 5th respondent be and is hereby set aside.
2. A mandatory order, directing the respondents to disburse travelling and subsistence allowance towards applicant's transfer from Ross camp to ZRP Makosa within 14 days of granting of this order be and is hereby granted.
3. The declaration that applicant is a deserter and absent without official leave be and is hereby set aside.
4. The respondents shall pay costs of suit incurred by the applicant.

This is the same order that was sought in the court application for review HC 3298/15, and is the same order that was sought in the chamber application HC 2997/17. The net effect of it all is that the application for review was granted *via* a chamber application. This is the order that 1st and 2nd applicants seek this court to rescind in terms of rule 449 of the High Court Rules, 1971. It is against this background that applicants launched this application seeking the relief mentioned above.

Preliminary point

At the commencement of the hearing of this application, 1st respondent took what he referred to as a point *in limine.* The contention was that this application does not meet the requirements of rule 449, in that it was not served on all parties who may be affected by the order sought. The argument is that one Ennia, a police officer, who applicant refers to as the architect of the charges against him was not joined in as a party in this application. Applicant argued and re-argued that in terms of the Police Act, such a person must be joined in the proceedings as he is the originator of the charges. It was contended that the failure to join this Ennia renders this application fatally defective and it must be dismissed without a consideration of the merits.

Mr *Jaricha,* counsel for the applicants argued that the point *in limine* has no merit and must be dismissed. I take the view that this is an application for rescission for judgment of an order granted in HC 2997/17. In the application that is sought to be rescinded, 1st respondent did not join this Ennia, he is now contending that he must be joined in this application. In this application applicants joined all the parties 1st respondent joined in HC 2997/17. Applicants cannot in an application for rescission start joining parties who were not joined in the main application. The issue of non-joinder does not even arise in this matter. This is an ill-thought and ill-advised point *in limine.* It has no merit and is refused.

The law and the facts

This application was brought in terms of rule 449 (1) of the High Court Rules1971. It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted, it or he lacks any power or legal authority to re-examine or revisit that decision. He or it becomes *functus officio.* The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that once such a decision has been given, it is final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not an absolute rule. The instrument from which the decision-maker derives his adjudicative powers may empower him to interfere with his own decision. However, this power is exercised very sparingly, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded. See: *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) para 29; *De Villiers v BOE Bank Ltd* 2004 (3) SA 459 (SCA) *paras* 7, 8 and 16.

Rule 449 is an exception to that principle and allows a court to revisit a decision that it has previously made, but only in very restricted circumstances. Rule 449(1) of the High Court Rules, 1971 provides in part that:

> (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 thereby; or
(b) ……

To preserve the principle of finality in litigation, rule 449(1) provides a narrow ambit upon which a court or a judge may revisit an order or decision it or he has rendered. 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.

In *Munyimi v Tauro* SC 68/11 it was stated that it is established that once a court holds that a judgment or order was erroneously sought or erroneously granted in the absence of a party affected, it may correct, rescind or vary such order without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause" – *Grantually (Pvt) Ltd & Anor v UDC Ltd*, supra at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa v Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B.

The court application for review in case No. HC 3298/15 was on the 26 October 2017, struck off the roll. The Practice Directive 3/13 provides:

> That in accordance with the decision in *Matanhire v BP* & *Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLA 147 (S) and *S v Ncube* 1990 (2) ZLR 303 (SC), if a court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the court. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned. Provided that a judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.

In *Bindura Municipality v Mugogo* SC 484/14 the court said a litigant who wished to pursue his matter after it had been struck off the roll is granted a limited time within which to apply to cure the defect failing which the matter would be deemed abandoned.

HC 3298/15 ceased to be before court on the 26 October 2017. No application was filed for its reinstatement. It was therefore deemed abandoned. It was incompetent for 1st respondent to file a chamber application seeking a default judgment in respect of a matter that had been abandoned and not before court. The order sought to be rescinded was erroneously sought and erroneously granted, i.e. if the judge who granted the order had notice of the fact that the court application for review had been struck off the roll, and no application for its reinstatement was filed, he would not have granted such an order.

Again, the affidavit of service filed by the 1st respondent on the 21 December 2017, could not have been the basis of granting the default judgment on the 30 July 2019. I say so because the affidavit says he served the court application of the 1st applicant on the 11 December 2015. The file shows that the application was struck off the roll because of the absence of proof of service of the application. Why did he not produce his affidavit of service on the 24 March 2016, when the matter was struck off the roll for the first time, on 27 July 2017 when the matter was removed from the roll; and on the 26 October 2017, when it was again struck off the roll for the last time? If the judge had notice of the fact that the affidavit of service filed by the 1st respondent was flawed, he would not have granted the default judgment.

There is no requirement that an applicant seeking relief under r 449 must show "good cause." In his submissions 1st respondent was conflating the requirements for rescission under rule 63 and rescission under rule 449(1). In terms of rule 449 (1) it is not a requirement that the court be satisfied "that there is good and sufficient cause to do so" to rescind the judgment. See: *Banda v Pitluk* 1993 (2) ZLR 60 (H). In terms of rule 449(1) once the court finds that the judgment was erroneously granted against a party, either because of an error on the part of the judge before whom the application for default judgment was placed or because of the actions of the party seeking judgment, that must signal the end of the matter and the court should rescind the judgment.

In passing I mention that 1st respondents conduct in the prosecution of his application for review is not beyond reproach. He files an application for review in HC 3298/15, he attempts on three occasions to get an order on the unopposed roll. On two occasions the matter is struck of the roll, and one occasion it is removed from the roll, the reason being the non-service of the application on the respondents, particularly the Commissioner General of Police. Instead of serving the application on the respondents, makes a turn and files a chamber application for default judgment in respect of the same review application. In the chamber

application he does not disclose to the court that HC 3298/15 has been struck off the roll for non-service of the application. He attaches an affidavit of service, which says he served the court application HC 3298/15 on the 11 December 2015, which cannot be the truth. Had he served the court application on the 11 December 2015, the application would not have been struck of the roll on the 26 October 2017, on the basis of non-service. Such underhand tactics undermine the integrity of the processes of this court and serve no useful purpose in litigation.

Costs

The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. 1st respondent must pay the costs of suit.

Disposition

In the result, I order as follows:

1. The default judgment erroneously sought and erroneously granted on the 30th July 2019, in case No. HC 2997/17 be and is hereby rescinded.
2. 1st respondent pay the costs of this application.

It is so ordered.

A-G's Office Civil Division, applicant's legal practitioners