WILD KINGDOM SAFARIS
versus
KATIE TURNER
and
RYAN CHENEY

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 10 and 26 January 2022

Opposed Application

K.E Kadzere for the Applicant
O Chieng for the 1st Respondent
2nd Respondent in person

BACHI-MZAWAZI J This is a contested application for variation or correction of an order of this court in case HH 712/19 brought in terms of O 49 r 449 (1) (c) of the 1971 High Court rules.

Applicant, a duly incorporated company contends that the property it seeks in the draft order was erroneously granted as part of a divorce settlement in case HH 712/19 through a common error of the first and second respondent. The facts of the matter are that the first and second respondents instituted divorce proceedings in case HH 712/19 where in the first respondent was awarded items she had listed as hers in the matrimonial property distribution list. The second respondent did not dispute nor challenge the distribution list save in respect to a Mercedes Benz vehicle. A divorce order was subsequently granted after a trial. At one point, during the course of the divorce proceedings the second respondent made a failed attempt to amend the plea reneging from his initial position as to the distribution of the property. That application for amendment of plea was denied by the presiding judge in case HH 712/19.

Concerted efforts to retrieve some of the awarded matrimonial assets were made by the second respondent's parents in separate suits. Applicant is a business enterprise owned by both the second respondent and his parents. In a similar suit the father of the second respondent representing a sister company Tiger Construction Private Limited, sued for the recovery of the

of the said property and failed in case No HH 572/21. This present case is an identical suit to that dismissed by CHINAMORA J in HH 572/21. The only distinction is that *in casu* it is a sister company now being represented by the mother of the second respondent.

At the commencement of the hearing the second respondent made an application for the recusal of the court. He stated that since my assistant shares office with MUNANGATI J'S assistant then my decisions would be influenced by MUNANGATI J with whom he intended to sue.

This application was rejected on the basis that the second respondent did not establish any bias imminent or perceived on our part. Since the allegations were a misapprehension and the said judges do not share any offices:

MAFUSIRE J in the case of *Manjenje* v *TBIC Investments (Pvt) Ltd & Anor* HH 510-14 outlined instances where a judicial officer may step down upon on application for recusal. He pronounced that the apprehension or bias must be expressed in the light of true facts presented before the court.

In the main case it is the applicant's contention that the property claimed herein was erroneously distributed as part of marital property in the divorce suit by agreement between the first and second respondent. They argue that the inclusion of the property, in the first place was an error common to both parties. This is all the averment borne by the applicant's affidavit.

However in their heads of argument they allege errors in three dimensions. Firstly they advance that there is a causative link between the mistake and the granting of the order as the parties were acting in error by including property belonging to applicant. Secondly, that the applicant was not present when the judgment was granted. Finally the order which was granted affected his rights and interests in the property.

In support of their argument they cited the case of *Mushosho* v *Mudimu and Anor* HH 433-13 CHIGUMBA J stated that, in order to qualify for relief under r 449 (1) (a) a litigant must show.

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. Applicant's rights and interest were affected by the judgment
4. There has been no inordinate being in applying for recession of judgment.

The pertinent Rule r 449 of High Court Rules 1971 now r 29 of 2021 rules provides that,

1. The court or judge may, in addition to any other power it or he may have *mero motu* or upon the application of any party, correct, rescind, or vary any judgment or order that was omitted, ambiguous *inter alia* and erroneously granted but only to the extent of such error or omission or ambiguity.

In response the first respondent raised the defence of estoppel arguing that the current case is in all fours with that in case HH 572/21, as well as, several others wherein the second respondent under the guise of the applicant and his parents had instituted failed court proceedings in an attempt to retrieve property from the matrimonial distribution list.

First respondent further counteracted that there was no error common to both parties when the order was sought and granted. They assert that the only challenges on the distribution of the property in question was that of a motor vehicle and that is on record in case HH 712/19. They therefore prayed for dismissal of the application. First respondent also argued that the applicant is being used by the second respondent who had the option to appeal against the decision in case HH 712/19 but did not. In his submissions the second respondent did not dispute that he agreed to have all the property claimed by the first respondent awarded to her, but blames his then legal representatives. In actual fact, he does not dispute that there was no common error when the judgment was granted. His argument was, basically that he was ill advised and does not have the resources to appeal all the judgments entered against him.

Rule 449 as has been alluded to *supra* is an avenue whereby court judgements made by mistake, omission inter alia can be varied, corrected or rescinded to the extent of the alleged mistake and omission See SC 34/16 the case of *Rogerio Barbosa DE SA* v *Herlander Barbosa De SA*.

It is crucial to note at this juncture that the application was made in terms of r 449(1) (c). Conjuctively the founding affidavit speaks to r 449 (1) (c). Nowhere in the founding papers has a basis been laid to rely on the other provisions of the rule in issue.

A grounded legal principle in pleadings is that an application should stand or fall on its founding papers. In *Bush* v *GMB and other* HH 326 of 2017 amongst others states that as a general rule which has been laid down repeatedly is that an application must stand or fall by the founding affidavit and the facts alleged in it and that although sometimes its permissible to supplement the allegations contained in the affidavit, still the main foundation of the application is the allegation of facts outlined in it.

Interestingly applicant seeks to make fresh submissions in its heads of argument. Even if the arguments in the applicant's heads of argument were to be taken into account there was no proof produced before this court to show that the property in question did belong to it. Hence entitling them to be part of the proceedings. In turn warranting it to be itemized under r 449(1) as having affected their rights and interests. Applicants in reiteration failed to proffer proof that the said property was registered in their names or belonged to them. Erring at the side of caution and in light of the Bush case above I find no exception in the applicant's case to sway me to depart from that settled position. Accordingly the submissions in the heads of argument cannot be sustained. HLATSHWAYO J in the case of *Ragero Barbosa De SA* v *Herlander Barbosa De SA* SC 34/16 noted that points of law raised in heads of arguments need to be considered even if excluded in the founding affidavit.

The cases of *Tshivane Road Counci* v *Tshivane* 1992 (4) SA 852 (L) outlined the requirements of a South Africa rule equivalent to r 449(1) (c) as follows: for the rule to be successfully invoked it should illustrate that,

i) There must have been a mistake common to the parties in the sense that there should be *ad idem* on a particular matter.
ii) There must be a causative link between the mistake and the meeting of minds see *Gwasira* v *Sibanda & Ors* HH 496/17 and *Sachiti & Anor* v *Mukaranda* HMT 38/2021

In the final analysis it is crystal clear from the papers on record, oral submissions that there was a concurrence between the two then divorcing parties, first and second respondent that the property in question amongst the listed others is matrimonial property and thus should be awarded to the first respondent. Therefore the order granted was as a result of a mutual agreement by the first and second respondent and was not in error.

Both the applicant and the second respondent failed to show this court when asked to present any form of proof, or registration documents to support their argument that indeed the property belonged to the applicant.

As a result the court is of the opinion that the applicant has not succeeded to establish that the judgment it seeks to rescind was granted in any error let alone that common to the parties. Therefore the application lacks merit and is denied.

IT IS ORDERED THAT:

The application is dismissed with costs.

Kadzere, Hungwe & Mandevere, applicant's Legal Practitioner
Atherstone and Cook, 1st respondent's Legal Practitioners
2nd respondent in person