REPORTABLE (43)

TENDAI BONDE
v
NATIONAL FO-ODS LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & CHITAKUNYE JA
BULAWAYO, MARCH 24, 2021

Appellant in person

S. Chamunorwa, for the respondent

UCHENA JA: The applicant filed this application in terms of r 73 of the Supreme Court Rules 2018 as read with r 449 (1) (c) of the then High Court Rules, 1971, seeking the rescission of an earlier judgment of this Court handed down on 27 March 2020. After hearing both parties' submissions on preliminary issues, we granted the following order:

"It is ordered that:

1. The preliminary point raised by the applicant be and is hereby dismissed with costs on a legal practitioner and client scale.

2. The preliminary point raised by the respondent be and is hereby upheld.

3. The matter is struck off the roll with costs.

4. Reasons for judgment will follow in due course."

These are the reasons for the court's decision.

BACKGROUND FACTS

The facts of this case are common cause. The applicant was employed by the respondent as a laboratory technician quality control analyst in Bulawayo. In July 2015, the respondent introduced an incentive scheme in terms of which employees were to be paid a monetary incentive twice a year, in July and December. The respondent made it clear in its scheme that the incentives were non-contractual and non-obligatory. The respondent intended to motivate its employees in the performance of their duties. One of the conditions of the incentive scheme was that it was not payable to employees with misconduct records or pending misconduct cases. Further, the incentive was to be paid at the discretion of the respondent's Internal Remuneration Committee and had to be put before the Manager's Works Council for its input before it could come into effect.

Prior to the introduction of the incentive scheme, the applicant had in January 2015, received a written warning from the respondent for acts of misconduct. During the period between January and June 2016, some employees received payments from the incentive scheme. The applicant was not paid because he had been found guilty of acts of misconduct. The applicant was aggrieved by the respondent's decision. He raised an issue which went through the three stages provided for in the respondent's employment code of conduct. When the appellant's grievance reached the Managing Executive, he made a finding that the appellant's matter was still pending before the Works Council thus the grievance had to await its determination.

Aggrieved by the managing executive's decision, the applicant appealed to the Labour Court on the grounds that the respondent had erred in considering his past disciplinary record as a

basis for not paying him the incentive. He further averred that the incentive scheme was invalid and therefore the respondent had erroneously relied on a scheme which was yet to be approved. The Labour Court dismissed the application. It found that there was a contradiction in the applicant's appeal in that whilst the applicant was seeking an order for a payment in terms of the incentive scheme, he was at the same time impugning its validity. It further held that the appellant had an existing case of misconduct and that he did not qualify for the incentive bonus in terms of the conditions of the scheme. Lastly, the Labour Court was of the view that it could not impose an obligation on the employer to pay the incentive as it was not an entitlement and that it was non-contractual.

Aggrieved by the decision of the Labour Court, the applicant appealed to this Court in SC 599/19 for an order setting aside the Labour Court's decision and an order that the respondent pay him a bonus in terms of the incentive scheme. The appeal was opposed. On 20 November 2019 this Court granted the following order:

> "IT IS ORDERED BY CONSENT THAT:-
> The appeal is dismissed with costs."

Thereafter in SC 46/20 the applicant applied in terms of r 449 (1) (b) for the rescission of this court's order in SC 599/19 which he alleged had an ambiguity, a patent error or omission. The application was dismissed by another bench of this Court different from the one which gave the order in SCB 599/19 through Supreme Court judgment No 57/20. In determining the issue placed before it this Court at para 20 of its judgment said:

> "After carefully considering the present application, I am in no doubt that the applicant has not shown any ambiguity or patent error or omission in the order made by this court, with his consent, on 20 November 2019. The order is very clear and allows of no ambiguity. There

is no patent error or omission in that order. The order is clear that it is dismissing the appeal filed against the judgment of the Labour Court."

After a detailed judgment the court at paras 27 to 30 of its judgment commented on the applicant's abuse of court process as follows:

"[27] Whilst this court accepts that, as a self- actor the applicant is entitled to his day in court in appropriate circumstances, it is clear in this case that the applicant could not have held the genuine belief that he could properly use, r 449 in order to have the previous order of this court set aside. He had consented to the dismissal of the appeal with costs. That order cannot in any way be said to be ambiguous nor can it be said that it contains a patent error or omission. I am satisfied on the papers before me, that the application was intended to achieve a result not contemplated by r 449 of the High Court Rules.

[28] In the circumstances, whilst the courts are generally reluctant to mulct self-actors by ordering them to pay costs, and in particular costs on the higher scale, it seems to me that in a case, such as the present, where the self-actor, as applicant, abuses the rules of this Court in order to achieve his own purposes, an order that the self-actor pays costs on the higher scale is warranted.

[29] The applicant has not demonstrated any ambiguity or patent error or omission in the order made by this Court on 20 November 2019. It is apparent from the papers that the purpose of the application was not so much to seek a correction or rescission of the order but rather to have the order, granted by consent, set aside for the totally different purpose of having negotiations at the Works Council concluded on the incentive scheme. The application therefore is without merit and must fail.

[30] It is accordingly ordered as follows:

'The application is dismissed with costs on the scale of legal practitioner and client scale".

The applicant subsequently filed this application under SCB 73/20 seeking the rescission of this Court's judgment in SCB 57/20. In para 4 of his founding affidavit he gave the reason for his application as follows:

"The order was granted where there is a mistake of fact that is common to the parties. The order is not in the interest of justice. The rights and interests of applicant are negatively affected by a judgment that leap-frogs preliminary points. The order was given by a bench

that was improperly constituted. Rule 449 of the High Court Rules 1971 is not exhaustive and the court ought to consider relevant foreign law as well".

In para 23 of his founding affidavit the applicant in seeking the review of this Court's earlier judgments through the invocation of s 25 (1) of the Supreme Court Act said:

> "This is a proper case (sic) the Supreme Court ought to have invoked s 25 of the Supreme Court Act [Chapter 7:13] and can still do so in the interest of justice".

The applicant therefore sought the following relief:

"Wherefore the applicant prays that:

1. Application for rescission of judgment SC 57/20 be and is hereby rescinded
2. Judgment SC 57/20 be and is hereby rescinded
3. Final order SCB 599/19 is accordingly rescinded
4. The appeal that was filed pursuant of whole judgment under LC/MT/91/16 is allowed.
5. The whole judgment under LC/MT/91/16 is accordingly set aside.
6. Respondent to pay the costs"

The application is therefore intended to achieve the setting aside of all orders made against him by this Court and the Labour Court.

On 24 March 2021 we heard the parties on preliminary issues and issued the order quoted in full on page 1 of this judgment.

Submissions by applicant.

In his preliminary submissions before us the applicant argued that the respondent's defence that this court cannot review its decisions was vague and embarrassing. He further argued that the preliminary point raised by the respondent that his application was incompetent was not

clear. He also submitted that the respondent should not be given audience by this Court because it sought to execute the order granted against him in this court's judgment SCB 57/20 which was the subject of this application. He by urgent application applied for a stay of execution which was held to be not urgent. He made a further urgent application for stay of execution which was also held to be not urgent. He, when asked by the court whether there was an order preventing the respondent from executing an extant court order in its favour, conceded that there was no court order preventing the respondent from executing the court order.

Submissions by the Respondent's Counsel.

Mr *Chamunorwa* for the respondent, in his response to the applicant's preliminary issues and in presenting the respondent's preliminary issues, submitted that its defence was clearly that this Court having dismissed the applicant's previous application in SC 57/20 for the rescission of the order granted in SC 599/19 is *functus officio*. He submitted that the applicant was seeking the rescission of this court's decision in SCB 57/20 so that he can for the second time seek the rescission of this Court's order in SCB 559/19. He submitted that the applicant's application was incompetent and an abuse of court process. On the constitution of the bench in SCB 46/20 the respondent's counsel submitted that the applicant should have raised the issue during the hearing of SCB 46/20. He further submitted that the bench which heard the application was properly constituted as the judge who the applicant says should not have been part of the bench's panel had merely dealt with chamber applications which he granted in favour of the applicant but had not made the decision which the applicant was seeking to be rescinded. That decision had been made by a differently constituted bench which did not include the judge who heard the chamber applications. He argued that s 5 of the Supreme Court Act does not apply to the hearing of chamber

applications which merely facilitate the hearing of appeals. Hearing a chamber application does not constitute the hearing and determination of a case which the Supreme Court has to preside over on appeal.

Applicant's Response

In his response the applicant submitted that when his first urgent application for stay of execution was held to be not urgent, he made another urgent application under SCB 121/2021 which was also held to be not urgent. He conceded that there was no court order preventing the respondent from executing its judgments in SCB 599/19 and 57/20.

The Issues

The preliminary issues raised by the parties raise two issues for determination which are:

1. Whether the respondent is barred from defending itself against the applicant's application.
2. W*hether or not* the applicant's application is competent.

The Law

Decisions of the Supreme Court are final except in cases involving constitutional matters. Section 26 (1) of the Supreme Court Act [*Chapter 7:13*] provides that no appeal can be noted against them. Section 26 (1) provides as follows:

"26 (1) There shall be no appeal from any judgment or order of the Supreme Court."

It should therefore be noted that un-procedural applications for the rescission or setting aside of this Court's final judgments should not be entertained as this offends against the principles of finality and *functus officio*.

In terms of s 25 of the Supreme Court Act the Supreme Court's review powers are limited to reviewing proceedings of inferior courts, tribunals and administrative authorities. Section 25 (1) provides as follows:

> **"**(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.

It is therefore trite that the Supreme Court's decisions are final and cannot be reviewed. The Supreme Court itself has no power to review its own decisions. After determining a matter it becomes *functus officio.* The law that underlies the principle of *functus officio* was summarized in *Unitrack (Private) Limited v Telone* (*Private*) limited SC 10/18 as follows:

> "It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him it or he lacks any power or legal authority to re-examine or revisit that decision. Once a decision is made, the term "*functus officio*" applies to the court or judicial officer concerned. Rule 449 is an exception to that principle and allows a court to revisit a decision that it has previously made, but only allows it in restricted circumstances."

It is trite that r 73 as read with r 449 (1) (a) to (c) of the 1971 High Court Rules empowers the Supreme Court to correct, vary and rescind its judgments and orders.

Rule 73 of the Supreme Court Rules S.I 84 of 2018 provides as follows:

"In any matter not dealt with in these rules, the practice and procedure of the Supreme Court shall, subject to any direction to the contrary by the court or a judge, follow, as closely as may be, the practice and procedure of the High Court in terms of the High Court Act [Chapter 7:06] and the High Court Rules."

Rule 449 of the 1971 High Court Rules provides as follows:

"449. Correction, variation and rescission of judgments 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 judgment or order—
   (*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
   (*b*) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
   (*c*) that was granted as the result of a mistake common to the parties.

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

Rule 449 (1) (a) to (c) provides for the instances when this Court may correct, vary and rescind its judgments and orders. It can only do so if:

1. The judgment or order was erroneously sought and granted in the absence of an affected party or
2. there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
3. If the order or judgment was granted as the result of a mistake common to the parties.

It is therefore trite that judgments and orders of the Supreme Court cannot be altered other than through the limited exceptions provided for by r 449 (1) (a) to (c).

In terms of s 5 of the Supreme Court Act a judge of the Supreme Court cannot preside over an appeal against a case he or she will have presided over and determined in a lower court. This includes cases he or she will have dissented to or concurred with or had been formally

consulted on. This means a judge of the Supreme Court cannot preside over cases he or she will have determined or participated in, in arriving at the decision which will eventually be brought on appeal. Section 5 of the Supreme Court Act provides as follows:

> **"5** A judge of the Supreme Court shall not sit as a judge on the hearing of an appeal to the Supreme Court from any judgment given by himself or in which he has concurred or from which he has dissented or in respect of which he has been formally consulted."

Section 5 refers to appeals and does not extend to chamber applications a Supreme Court judge may hear to facilitate for the hearing of appeals. It is restricted to decisions being appealed against and does not extend to any other decision. It is in fact trite that judges of the Supreme Court can in terms of r 449 hear and determine applications for the correction, variation or rescission of their judgments and orders. It is therefore clear that s 5 of the Supreme Court Act does not bar Supreme Court judges from hearing applications for purposes of correcting, varying or rescinding their judgments or orders.

Application of the law to the facts.

1. **Whether the respondent is barred from defending itself against the applicant's application.**

The applicant raised preliminary issues on the respondent's defence not being clear and his belief that it was not supposed to be heard because it had sought to execute an extant order of this Court while this application was pending. During the hearing he conceded that there was no court order barring the respondent from executing an extant order granted in its favour. Counsel for the respondent argued that the respondent's defence was clear and that respondent was entitled to execute an extant court order in the absence of a court order staying execution. The applicant

conceded that he did not have a court order staying the execution. There was therefore no basis on which the respondent could be denied audience by this Court.

2. Whether or not the applicant's application is competent.

The applicant's application seeks the rescission of a judgment of this Court in SCB 57/20, which dismissed his earlier application for the rescission of an earlier decision of this Court in SCB 599/19. The applicant's application in SCB 46/20 which resulted in this Court's judgment in SCB 57/20 was in terms of r 449 (1) (b) which empowers this Court to rescind its judgments in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission. In this application the applicant seeks the rescission of SCB 57/20 in terms of r 449 (1) (c) on the basis that the court did not take into consideration the fact that there was a mistake common to the parties. That issue was not placed before the court in SCB 46/20. The court could therefore not have dealt with an issue the parties had not placed before it. It is not competent for an applicant to apply for rescission of a court's judgment for not determining an issue which had not been placed before it. Rule 449 is applicable if an issue arises for determination in terms of an allegation made in the applicant's application. It is therefore not competent for the applicant to seek the rescission of a court's judgment for not taking into consideration an issue or fact which was not placed before it. The applicant's attempt to seek rescission for reasons which cannot be related to this Court's decision in SCB 57/20 demonstrates the incompetency of the application and the applicant's deliberate abuse of court process.

The incompetency of the application renders it a nullity which should be struck off the roll. It was apparent to us that the applicant in spite of this Court's comments in SCB 57/20 on his abuse of process was continuing in his abuse of court process.

In SCB 57/20 this Court clearly stated that the applicant was seeking the review of SCB 599/19 and abusing the process of the court. The fact that applicant seeks rescission on an incompetent basis means he is again seeking a review of this Court's judgment in SCB 599/19 when this Court is *functus officio* as the rescission of SCB 599/19 was dealt with in SCB 57/20.

The applicant continues through the current application to seek what the court in SCB 57/20 said is not permissible. He even sought to persuade the court that it is not confined to the provisions of r 449 as it can rely on other statutes and foreign law. He ignored the law on the finality of decisions of this Court and the review powers of this Court. It was apparent to us that the applicant had resolved to continue to abuse court process and was disregarding the law to achieve his un-procedural intention to set aside this Court's order in SCB 599/19 in respect of which the applicant's earlier application for rescission had been dismissed. He ignored the principle that once a court determines a matter it becomes *functus officio*.

The applicant's attempt to rely on one of the judges in the panel which rendered SCB 57/20 being disentitled to preside because he determined his chamber applications is based on a clear misconception of the law. Section 5 of the Supreme Court Act refers to appeals and not applications. In any event the decision the applicant had applied against was not made in any of the chamber applications but is the determination of an application heard by the full bench of this

Court. We were satisfied that the applicant's application was not properly before us. It had to be struck off the roll.

It was for these reasons that we dismissed the applicant's preliminary issues with costs on the legal practitioner and client scale. It was also for these reasons that we upheld the respondent's preliminary issues and struck the applicant's application off the roll with costs.

GUVAVA JA: I agree

CHITAKUNYE JA: I agree

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners