FRANCIS ROLAND HAISAID
versus
OLIVER MASOMERA
and
NATASHA MUZAMINDO
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS
and
BARBARA MUNAVA (N.O.)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 October 2021 & 20 April 2022

Opposed Matter

WP Mandimbe, for the applicant
R Mabwe, for the 1st respondent
N Munetsi, for the 2nd and 5th respondents

MANGOTA J: The applicant couched his draft order in the following terms:

" IT IS HEREBY ORDERED THAT:

1. Judgment granted by JUSTICE MANZUNZU on 15 October 2019 in favour of the first respondent under HC 6593/19 be and is hereby set aside.
2. The bar operating against applicant in HC 6593/19 be and is hereby uplifted.
3. The matter under HC 4323/19 be and is hereby reinstated.
4. Applicant be and is hereby granted leave to file his notice of opposition to the matter under HC 6593/19 within ten (10) working days of this order.
5. There shall be no order as to costs unless this application is opposed".

The above order which the applicant is moving me to grant to him is premised on the conduct of the third respondent who is the Master of the High Court. He, on 9 March 2013, appointed the applicant to the position of executor dative of the estate of the late Stephen Omar Hayisa who died in the United Kingdom on 13 July 2005. He subsequently removed the applicant

from his position of executor and replaced him with one Oliver Masomera who is the first respondent in this application.

Following the above-mentioned development, the applicant filed HC4323/19 in which he challenged the lawfulness of the Master's conduct. He filed it on 23 May 2019. He couched it in the form of a declaratur. He did so through Tafirei & Company who were his legal practitioners of record.

On 9 June 2019 the first respondent filed his notice of opposition to HC 4323/19. He served the same upon Tafirei & Company Legal Practitioners on 27 June 2019.

On a strict interpretation of r 236 (3) (b) of the High Court Rules, 1971 which were in operation when HC 4323/19 was filed, the applicant should have filed his answering affidavit or set HC 4323/19 down for hearing during the period which extended from 28 June 2019 to 28 July 2019. He did not. He also did not proffer any reason for not complying with clear provisions of the law. His inaction prompted the first respondent to apply under HC 6593/19 for dismissal of HC 4323/19 for want of prosecution. His application was successful. Default judgment was entered in his favour on 15 October 2019.

The judgment constitutes the applicant's cause of action. He remains of the view that the same was erroneously sought and/or granted. He applies under r 449 (1) (a) of the repealed High Court Rules, 1971. He is rescinding HC 6593/19 which he insists was erroneously sought and granted. His statement on the alleged error is that HC 6593/19 which the first respondent filed to dismiss his application for declaratur was served on Tafirei & Company legal practitioners on 9 August 2019 when they renounced agency on 2 August 2019.

The meaning and import of the rule upon which this application is premised are as clear and night follows day. It enables the court to revisit its orders and judgments. It allows the court to correct or rescind its orders and judgments which are given in error, in situations where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice which destroys the very basis upon which the justice system rests. It is an exception to the general rule. It must therefore be resorted to only for purposes of correcting an injustice that cannot be corrected in any other way. The rule, it has been enunciated, goes beyond the ambit of mere formal, technical and/or clerical errors. It may include the substance of the order or judgment. It is designed to correct errors made by the court: *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470 (H).

The above-cited *dictum* rhymes well with paragraph (a) of subrule (1) of r 449 of the repealed rules of court. It offers a discretion to the court or a judge to, *mero motu* or upon an application such as the present one, set aside or rescind any judgment or order that was erroneously sought or granted in the absence of the applicant where the latter is adversely affected by the judgment or order. For the applicant who applies under the repealed rule to succeed, he should establish, on a balance of probabilities, that:

i) the judgment was erroneously sought or granted;
ii) the judgment was granted in the absence of the applicant – and
iii) the applicant's rights or interests were adversely affected by the judgment.

Applying the above principles of law to the circumstances of this application, the following synopsis emerges. This is that the notice of renunciation of agency does not appear to have been served on the respondents. If it had been so served upon them, the first respondent would not have served HC 6593/19 on Tafirei and Company who are the applicant's esterwhile legal practitioners as he did. Equally, the notice of assumption of agency by Messrs Mubangwa & Partners legal practitioners was also not served upon the respondents. If it had been, the first respondent would not have served HC 6593/19 upon Messrs Tafirei and Company legal practitioners. He would have served it upon Messrs Mubangwa & Partners who had taken over the application which had been filed under HC4323/19.

The applicant's retiring and incoming legal practitioners are totally to blame for the mishap which befell the applicant. The first set of legal practitioners did not serve their notice of renunciation of agency upon the respondents. These had no way of knowing that Tafirei & Company terminated their relationship with the applicant on 2 August 2019. They, in the process, violated r 6 of the court's repealed rules which enjoin a legal practitioner who has renounced agency to give a reasonable notice to his client, the registrar and other parties to the proceedings. The applicant attached the notice of renunciation of agency to his application. He marked it Annexure C. The annexure appears at page 25 of the record. It gives the applicant's last known address as number 17 Woodland Avenue, Borrowdale, Harare.

It follows, from the above-stated matter, that, if the annexure had been served upon the respondents as it should have been, the first respondent would have served HC 6593/19 at the applicant's last known address. That form of service of process would have been compliant with

Rule 6(2) (b) of the repealed rules of court subject to such service having been verified by an affidavit. Service of HC 6593/19 on Tafirei & Company who renounced agency on 2 August, 2019 remains invalid. This is a *fortiori* the case given that the said service took place on 9 August, 2019. The service violated rule 6(2)(a) of the repealed rules of court. Service of the application for dismissal for want of prosecution would have been valid only if the same complied with Rule 6 (2) (c) of the repealed rules.

The second set of legal practitioners, Mubangwa & Partners, delayed in assuming agency. They remained in the doldrums until November 2019. They assumed agency in November 2019. They, it is observed, do not offer any explanation at all for their delayed assumption of agency. The applicant attached their notice of assumption of agency to this application. He marked it Annexure G. The annexure appears at page 80 of the record.

It follows, from the above-observed matter, that whatever work Mubangwa & Partners performed for the applicant before they filed their notice of assumption of agency is of no legal force or effect. They had not, at that stage, consummated their relationship of lawyer and client with the applicant. The answering affidavit, for instance, which they filed on behalf of the applicant on 28 August 2019 is therefore a non-event. It is improperly filed. This is a *fortiori* the case given that Mubangwa & Partners only assumed agency to perform work for, and on behalf of, the applicant only in November 2019. The answering affidavit should, therefore, be expunged from the record for its non-compliance with the rules of court. It is, accordingly, so expunged.

The question which begs the answer is: would the court have entered judgment for the first respondent if it had known that the application which the latter filed under HC 6593/19 to dismiss (for want of prosecution) the applicant's application for a declaratur, HC 4323/19, had been served on the latter's retiring legal practitioners who had not only renounced agency but had also provided the applicant's last known address at which process may be delivered. The answer is definitely in the negative. The court, it stands to reason, would not have entered judgment for the first respondent who filed HC 6593/19. It would have directed him to serve HC 6593/19 on the applicant at the latter's last known address in compliance with r 6 (2) (b) of the repealed rules of court where such service was to be verified by affidavit.

When HC 6523/19 was issued, MANZUNZU J was, no doubt, oblivious to the fact that service of the application for dismissal for want of prosecution was invalid. If he was aware of that

fact, he would not have entered judgment for the first respondent. It is therefore evident that HC 6593/19 was erroneously sought and/or granted. A judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment: *Naidoo & Anor* v *Matlala N.O. & Ors*, 2012 (1) SA 143 (GNP); *Nyingwa* v *Moolman N.O.*, 1993 (2) SA 508 (TK GD) at 510 D-G; Herbstein & Van Winsen, Vol 1 931.

It requires little, if any, debate to state that HC 6593/19 was granted in the absence of the applicant. He does not appear to have had sight of HC 6593/19 which the first respondent served on the applicant's retiring legal practitioners in violation of r 6 (2) (b) of the repealed rules of court. If the same had been drawn to his attention, the probabilities are that he would have opposed it. He, in fact, makes a statement to an equal effect.

HC 6593/19 affected the applicant's rights and/or interests in a very adverse manner. He had been appointed executor dative of his late father's estate. He had been removed from the same in circumstances which, in his view, were/are a violation of the law. He, therefore, intended to test the correctness of the decision of the Master of the High Court whom he believed acted outside the law. That stated matter constituted his cause of action when he filed for a declaratur under HC 4323/19. His application under HC 4323/19 was not to be because HC 6593/19 did away with it altogether.

It follows from the above-analysed set of matters that:

i) HC 6593/19 was erroneously sought and/or granted;

ii) In the absence of the applicant who sought to challenge the lawfulness of the decision of the Master (of the High Court) to remove him from, and replace him with the first respondent in, the office of the executor of the Estate of the Late Stephen Omar Hayisa.

The applicant's right to challenge the decision of the Master cannot be meaningfully contested. This is a *fortiori* the case when regard is had to letters of administration, Annexure H, p 49 of the record, which the Master issued on 9 May 2013 appointing him executor.

The respondents' statement which is to the effect that the applicant who became aware of the order under HC 6593/19 on 6 December 2019 should have rescinded HC 6593/19 under r 63, and not under r 449, of the repealed rules of court is without merit. The applicant states that he applied to rescind under r 63 but he withdrew his application in preference to re-applying under r

449 of the repealed rules of court. He gave his reasons for the withdrawal. Whether or not the reasons which he advances are valid is not the issue. The issue is that both courses of action remained open to him. He could have filed under r 63. He could equally have filed under r 449 as he did. Nothing prevented him from following the course of action which he adopted. He did not have to apply for condonation. Nor did he require to show good cause when he filed this application. He stated, correctly, that the application which he filed under r 449 is not time bound. It is, in fact, open-ended. It does not therefore, thrive on such matters as an application for condonation. Nor does the applicant have to show good cause before his application for rescission which he files under r 449 is successfully considered.

As the court correctly stated in *Tiriboyi* v *Jani* (*supra*), once the applicant establishes, on a balance of probabilities, that:

a) the judgment was erroneously sought or granted;
b) in his absence – and
c) his rights and/or interests were adversely affected by the judgment, he is entitled to succeed and the court which is seized with such an application shall not inquire into the merits of the matter to find what is normally referred to as good cause upon which to set aside the order or judgment.

In casu, I associate myself fully with the remarks which VIVIER J was pleased to make when he commented on the meaning and purpose of r 42 (1) of the South Africa's Uniform rules which rule is the equivalent to our repealed r 449 (1) (a) in *Theron NO* v *United Democratic Front & Ors*, 1948 (2) SA 532 (C) at 536 D-F wherein the learned Judge stated:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted 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 in before the order was granted. The court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and… it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only".

HC 6593/19 was entered for the first respondent on the basis of an invalid certificate of service. The court made an error when it issued it in circumstances where it should not have done so. HC 6593/19 was issued in the absence of the applicant. Its existence adversely affects the rights and/or interests of the applicant. It is not of an academic interest at all. It spells of an irregularity of a very serious magnitude. It stands on no leg. It cannot therefore stand. This is so

notwithstanding the need on the part of the court to endeavor to achieve finality in litigation. Finality can never be achieved where a litigant such as the applicant was not accorded the opportunity to ventilate issues which are of paramount importance to his heart. Decisions should, at any rate, not be based on technicalities. They should, as a matter of preference, be concluded on the merits more than on a technicality.

The applicant remained alive to the folly of para 3 of his draft order. He realized that, once his rescission application is granted, that fact restores his position *vis-à-vis* the respondents to the status *quo ante* the issuance of HC 6593/19. He moves that the para be expunged from the record. I agree. It is so expunged as prayed. The application is, in the result, granted with costs.

Maseko Law Chambers, applicant's legal practitioners
Tendai Biti Law, second & fifth respondents' legal practitioners