NKULULEKO MABHENA

Versus

PG INDUSTRIES (ZIMBABWE) LIMITED

And

PG ZIMBOARD PRODUCTS (PRIVATE) LIMITED

And

PG INDUSTRIES (ZIMBABWE) LIMITED – CEO, N.O

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 7 September, 15 November 2023 & 30 May 2024.

Application for Rescission

Applicant unassisted.

1st, 2nd & 3rd Respondent Barred.

NDLOVU J: This is a Court Application for Rescission of judgment granted under Case No: ***HC 292/2009*** [***HB 1/12***] under the hand of *Kamocha J [Rtd]* delivered on 12 January 2012. The application is made in terms of *Order 49 Rule 449 (1)(c)* of the then *High Court Rules 1971*. According to the Applicant, ***HC 292/2009*** is still live and the judgment was given as a result of a mistake common to all parties. The Respondents were opposed to this application and duly filed their opposition. However, they did not file their Heads of Argument and neither did they attend the hearing.

RELIEF SOUGHT

The relief sought by the Applicant is couched as follows:

"(1) The Order HB 1/2012 issued by Mr Justice Kamocha in Case 292/09 which matter is still live[sic], and such order issued as a result of mistake common to parties be and is hereby wholly rescinded in terms of Rule 449(C).

(2) There shall be no order of costs as the mistake is that of the Court, provided that whoever opposes this application shall bear the costs on punitive scale."

THE JUDGMENT IN QUESTION HB 1/12 Case No: HC 292/09. X REF HC 1713/09; HC 3793/04

In the main matter the applicant *[same applicant as in this present application]* sought the order that:

1] 1st and 2nd Respondents be hereby held to be in contempt of court orders HC8044/00; HH115/02; SC248/02 (X Ref SC363/02) and HC3793/04; and HB25-07 (sic)

2] 1st and 2nd Respondent (sic) be hereby ordered to pay a fine of US$50 000 for the contempt within five days of service of this order

3] The applicant be and is declared reinstated to his post of Marketing Director, job grade E4, Executive Head of Sales and marketing Department of 2nd Respondent effective from 28 February 2009 and his terms and condition of service as outlined in paragraph one (1) and 12 to 17 read with annexed documents.

4] That 1st and 2nd Respondents be and are hereby granted to expose 1st and 2nd respondents' assets in whatever from wherever they exist for attachment and disposal until the full effect of this order is achieved.

5] 1st and 2nd Respondents be and are hereby ordered to pay applicant a sum of US$49 498 867 (net) GBP1500 pounds (net) and ZA-Rand 60 000 up to 31 October 2009 as shown or summarized statements hereto respectively. See note book attached. And

further the respondents be and are hereby ordered to ensure that the applicant is paid his salary and benefits commensurate with his job description and job title with effect from 1st of November 2009.

6] The 3rd Respondent be and is hereby ordered to ensure compliance by 1st and 2nd respondents with the court orders set out in paragraph 1-5 above.

7] The respondents bear the costs of this application on an attorney-client scale.

The Applicant was in the main matter represented by counsel and so were the Respondents. The Respondents were cited as follows:

P.G. INDUSTRIES (ZIM) LIMITED

And

P.G. ZIMBOARD PRODUCTS (PVT) LTD

And

P.G INDUSTRIES (ZIM) LIMITED GROUP CHIEF EXECUTIVE OFFICER N.O.

The Applicant features as an unassisted litigant in this application for rescission.

Mr Mabhena, *[the Applicant in this and the main matter]* has had a long litigious relationship with the Respondents. The litigation is labor related. As can be gleaned from the order sought in the main matter captioned above, the main application was a by-product of previous matters that had been in this Court and the Supreme Court.

Albeit Kamocha J commenting that,

> ***"Paragraph 5 of the draft order is outrageous to the extreme and induces a sense of shock…… He, [Applicant] claimed to have earned these amounts from 1 June 2000 to 28 February 2009. These amounts would have made him the best paid executive in this country under the present economic environment. He does not end there, but claims to have earned further amounts of US$2 657 240 (net), ZAR60 000 from February 2009 to 31 October 2009 a period of 8 months. I reiterate that this would be the best paying job in this country under the current economic environment."***

The Applicant was substantially successful in the main matter resulting in the Court finding and ordering as follows:

> ***"The Respondents…… contended that the applicant was in fact paid a sum of $21 820 as a gesture to meaningfully compensate him. That was so because his entitlement by law amounted to US$0.64 which was his 8 billion Zimbabwe dollars entitlement…… [The] Respondents were not in contempt of judgment HB25/07 case number HC3792/04.***
>
> ***In SC248/02 the Supreme Court upheld the decision of this court declaring the termination of the applicants' contract of employment null and void and reinstating him without loss of salary and benefits from 1 June 2000 to the date of reinstatement. He was allegedly reinstated to the position of Customer Services Manager a grade D position. But the applicant's position before the purported dismissal was that of marketing Director Grade E4 (Executive Head of Sales and Marketing Department) of P.G. Zimboard Products (Pvt) Ltd. What the respondents attempted to do was not in terms of the court order as they were demoting the applicant to a lower grade. The respondents were clearly wrong……***
>
> ***But this court cannot go so far as holding that the respondents did so with disdain of the court order. They just seemed to have placed a wrong interpretation on the court order…… They had failed to seriously apply their minds to the issue before them. That may indeed be said to have verged on contempt of the court order but I would not go so***

far holding that they deliberately and intentionally intended to be contemptuous of the court order……

This court makes specific findings that (a) the respondents indeed paid applicant the sum of US$21820 when he was lawfully only entitled to $0.64, (b) His claim for the following amounts:- US$49 498 869 (net); GBP1500(net); ZAR404 000 (net); US$2 657 240 (net) and ZAR60 000, should be dismissed; (c) The respondents have re-employed the applicant from 28 February 2009 to date in an inferior position contrary to the order of this court; (d) the applicant should accordingly be replaced to his post of marketing director, job grade E4, Executive Head of Sales and marketing Department.

1. ***In the result the order of this court is as follows:-***

It is ordered that:-

1. ***The applicant be and is hereby declared re-instated to his post of Marketing Director, Job grade E4, Executive from 28 February 2009 as per letter by the respondent dated 27 February 2009;***
2. ***The prayers in paragraphs 1, 2, 4, 5 and 6 of the draft order on page 5 supra be and are hereby dismissed; and***
3. ***The respondents shall pay costs of this application on the ordinary scale.”***

THE BASIS FOR THIS APPLICATION.

A reading of the Applicant’s Founding Affidavit in paras- 51 and 52 establishes an understanding that according to the Applicant, there was a “failure to hand down the “true Court order” in HC 1713/2009 after hearing on 16 – 17th February 2011 by KAMOCHA J…” and that “…has caused Applicant irreparable harm.”

According to the Applicant, he has great chances of success on the merits in the main matter and that the success of the application *in casu* will compel a handing down of a reserved judgment in

HC 1713/09 and the Respondents will be forced to comply with the orders in HH 115/2002 and HB 25/2007. According to the Applicant Case Number HC 292/09 which resulted in judgment number HB 1/2012 was never set down for hearing and the Court and the parties proceeded with the hearing mistaken of the fact of the none set down of the matter, and therefore HC 292/2009 is still "live".

My understanding is that the "mistake common to the parties" the applicant makes reference to is that, according to him, HC 292/09 was not set down for hearing on the day it was argued and therefore there can be no valid judgment born out of those proceedings which were not subsequent to a Notice of Set Down. In any case, so I understand him, there is a "true matter" [HC1713/09] in which a judgment was reserved [coincidentally by the same person of the Judge who heard and determined HC 292/09] and if the judgment in HC292/09 is rescinded and the reserved judgment in HC 1713/09 released he will get the full relief he had sought in HC 292/09, which outcome will be better than the partial success he stands having scored in HC 292/09 aka HB1/12.

THE LAW

Order 49 Rule 449 [1] [c] provides as follows:

[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]…………

[b]…………

[c] that was granted as the result of a mistake common to the parties.

[2]…………

The requirements which should be satisfied for Rule 449[1][c] to avail an applicant are the following.

1. A mistake common to the parties.
2. The parties must be agreed as to the nature of the mistake.
3. There must be a causal link between the mistake and the grant of the order or judgment, the latter must have been the result of the mistake relevant to what was to be decided and due to that relevant mistake the Court made the decision it made at the relevant time.
4. The mistake must be sufficiently proven.
5. The order or judgment must be obviously incorrect.
6. One cannot subsequently create a retrospective mistake by means of fresh evidence which was neither present nor relevant at the time the order or judgment was made.

See ***Gondo Vs Syfrets Merchant Bank 1997 [1] ZLR 201 @ 207.***

City of Bulawayo Vs Megalithic Marketing [Pvt] Ltd HB 41/17.

APPLICATION.

It must be stated that at the hearing, the Applicant chose to alter or at least attempt to change his cause of action founding this application. He argued that HC 292/09 was not only not set down for hearing but was not heard as well. He went on to say that the Respondents appearing on the judgment HB 1/2012 are not the ones he cited in Case Number HC 292/09. He labelled them fictitious created to frustrate his legal victories attained in the battlefields of both the High and Supreme Court. Without naming the culprits, it was his contention that these Respondents were smuggled into the case resulting in an order granted in under a mistake common to the parties.

What the Applicant was clearly achieving in his oral address was to violate the hallowed principle in this jurisdiction that says in motion proceedings the Applicant's case stands or falls by the contents of the Founding Affidavit.

Can it be said that the non-release of the judgment in ***HC 1713/09*** was a mistake common to the parties? Clearly not. That non-release clearly had no bearing in the judgment and order by *Kamocha J* in case number **HC 292/09**. The Applicant has not proven his allegation that the hearing of arguments in HC 292/09 was not preceded by the sending out a Notice of Set Down. I am of the view that a Notice of Set Down is a creature of the Rules of this Court designed principally for the diarization of work and the convenience of the parties, the Court and the Registry. It plays no magic in the hearing of a matter once the role players are gathered and all are ready for the hearing of the matter. The procedures that are provided for in the Rules sign-posting the various steps in litigation are all designed with the sole purpose of ensuring that the litigation comes to the hearing stage and the dispute is heard and resolved. A notice of set down is therefore designed to ensure attendance by the parties and witnesses at the hearing. It informs the Judge of the matter to be heard and enables the Judge to prepare.

In this case all the parties were present. The matter was heard resulting in a judgment and order in which the Applicant was partially successful. Ironically the Applicant went on to try and enforce the resultant Court Order on 14 February 2012. To then turn around after 8 years and allege a mistake that he cannot prove and is not admitted by the other parties is a futile attempt to create a retrospective mistake. I find nothing incorrect in or about the judgment warranting its rescission.

DISPOSITION

The application for the Rescission of the judgment therefore fails and I order as follows:

ORDER

The application for the rescission of judgment given by *Kamocha J* under case number ***HC 292/09*** judgment number ***HB 1/2012*** be and is hereby dismissed with costs.

NDLOVU J.

30 MAY 2024.

Mr. N. Mabhena. Unassisted Litigant
Messrs Mawere & Sibanda, 1st – 3rd Respondents' legal practitioners.