

DISTRIBUTABLE (57)

**TENDAI BONDE
v
NATIONAL FOODS LIMITED**

**SUPREME COURT OF ZIMBABWE
GARWE JA, BHUNU JA & MAKONI JA
BULAWAYO, 23 & 27 MARCH 2020**

Appellant in person

S. Chamunorwa, for the respondent

**Judgment No. SC 57/20
Civil Appeal No. SC 46/19**

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GARWE JA:

[1] This is a court application filed in terms of r 449 of the High Court Rules, 1971 in which the applicant seeks an order rescinding the order granted by this court on 27 November 2019. In terms of the Supreme Court Rules, 2018 the High Court Rules apply whenever there is a *lacuna* in the Rules of this Court. The application is opposed by the respondent.

THE BACKGROUND TO THE APPLICATION

[2] The applicant was employed by the respondent at its Bulawayo depot in the capacity of a laboratory technician quality control analyst, grade 3. In July 2015 the respondent

introduced an incentive scheme in terms of which employees were to be paid a monetary incentive half yearly. The scheme was non-contractual and was introduced by the respondent to improve the morale of employees at the workplace and to motivate the employees during the performance of their duties. The incentive was payable at the discretion of the respondent's Internal Remuneration Committee and was to be tabled before the Managers' Works Council for its input before it could be operationalised. One of the conditions of the incentive scheme was that it was not payable to an employee who would have been convicted of misconduct during the period covered by the scheme. The scheme was to be paid half yearly for the period January to June and thereafter from July to December. The company under-performed during the period July – December 2015 and, consequently, no incentive was paid for that period. The company however did a lot better in the period January – June 2016 and some employees were given an incentive bonus. The applicant was however not paid, the reason being that during that period he had been found guilty of misconduct and given a written warning.

- [3] The applicant raised a grievance in terms of the company's code of conduct, querying the decision not to pay him the incentive bonus. The grievance went through the three stages provided for in the employment code and eventually came up before the managing executive – stock feeds, who was the last hearing officer. He found that the matter was pending on the works council agenda and that, until the council resolved the matter, the policy was to remain operational. In the result the managing executive decided that the grievance was to await the determination of the works council and that Human Resources was to look into the cases of bonuses that had been paid in error.

[4] Unhappy with the decision of the managing executive – stock feeds, the applicant appealed to the Labour Court on two grounds. First, that the respondent had erred in considering his past disciplinary record in justifying its decision not to pay him the incentive bonus. Second, that the respondent had, in any event, erroneously relied on an invalid scheme which was yet to be debated at the level of the works council.

[5] The Labour Court found that the applicant had been convicted of misconduct and given a written warning which was valid for three months. This had happened in January 2016. The court found that for the period January – June 2016 during which the incentive bonus was payable, the applicant had an existing misconduct case and that he was therefore ineligible to get the incentive bonus in terms of the conditions of the scheme. The court also found that the incentive scheme was not an entitlement and that it was non-contractual. It therefore found that, as a court, it could not impose an obligation on the employer to pay the incentive bonus in all cases as that would be tantamount to rewriting the contract of employment for the parties. The court further found that there was a contradiction in that, whilst the applicant was seeking an order for the payment of the incentive bonus to himself, he was, at the same time impugning its validity. The court was therefore not persuaded by the argument that the scheme was invalid. Consequently, the court dismissed the appeal with costs on the ordinary scale.

APPEAL TO THIS COURT IN CASE SC 599/18

[6] Dissatisfied with the ruling of the Labour Court, the applicant, as appellant, appealed to this Court seeking an order setting aside the judgment of the Labour Court and

substituting the same with an order that the appeal succeeds and that the respondent pays him the incentive bonus. His grounds of appeal were formulated as follows:

- “1. The judge *a quo* erred and grossly misdirected herself when upholding disqualification of payment of an incentive bonus on the basis of disciplinary record whose evidence was not explained or presented in court.
2. The court *a quo* erred on a point of law when upholding an illegal contract.
3. The court *a quo* grossly erred when it ruled that the court could not intervene in an agreement between the parties whereas the agreement is not dictated by good law or by fairness or good faith thereby giving reasons that are bad at law constituting failure to hear and determine according to law.
4. The judge *a quo* erred and grossly misdirected herself when she allowed disciplinary issues to overarch remuneration.
5. The learned judge erred and grossly misdirected herself by not ruling on Negotiating Framework document, a decision that ignores other issues that bring it for resolution is unreasonable and does not achieve finality.”

[7] The appeal was opposed by the respondent who submitted that the payment of the incentive bonus was regulated by the staff incentive scheme. **Judgment No. SC 57/20**
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The applicant could not, therefore, seek to enforce an incentive bonus that was not part of his employment contract and which was payable at the discretion of the employer. The incentive bonus was not remuneration due to the applicant as a right but was a discretionary payment to those employees who were not disqualified by the set terms and conditions of the scheme. The respondent accordingly prayed for the dismissal of the appeal together with costs on the higher scale, arguing that the appeal was an abuse of court process.

[8] At the hearing of the earlier matter before this court on 20 November 2019, the applicant appeared in person whilst the respondent was represented by a legal practitioner. After hearing submissions from both parties, the court had made the following order:

“It is ordered, by consent, that:

The appeal is dismissed with costs.”

[9] I pause here to note that the order was by consent of the parties. Consequently there are no reasons for the order made by this Court on the day in question.

THE PRESENT APPLICATION

[10] The present application is for the rescission of the above order. The application states that it has been filed in terms of r 449 (1) (b) of the High Court Rules, 1971. In his draft order the applicant is seeking the following order:-

“Pending the finalisation of negotiations purposed on ratification of FY16 Staff Incentive Scheme following which either party may approach the court for the contract of employment.”

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[11] It is his further submission that the order by this court did not spell out the fate of the incentive scheme following the dismissal of the appeal. He further poses the question whether “negotiations are now in futility and the incentive scheme is binding to the extent that any subsequent impeachment of the incentive scheme is *res judicata*.” He further submits that the above order will interfere with the negotiations that are to be negotiated by a task force set up by the Works Council for purposes of negotiating the incentive scheme.

[12] The respondent opposes the application and the relief sought. It has submitted as follows. The application is incompetent and is an attempt to have this court review its previous decision. Further, there is nothing vague or ambiguous in the order that this Court made

in November 2019. The respondent therefore prays for the dismissal of the application with costs on the higher scale for the reason that the application has not been instituted with a genuine desire to seek justice but rather to harass the respondent.

- [13] In his answering affidavit, the applicant points out that he has approached the court to rescind its order because it is vague and ambiguous. It is “vague on the applicability of the incentive scheme and legality of the contract of employment”. He further avers that the order is vague “as to the future rights of the parties and their privies with respect to clauses of the incentive scheme” and that the order “omits to express a position on the binding nature of incentive scheme leaving parties to guess. That vagueness is surely a compelling reason for rescission.” He has further submitted that “the order is unspecific” and “creates vagueness and ambiguity and is sound ground for rescission.”

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PURPOSE OF RULE 449 OF THE HIGH COURT RULES

- [14] In general, once a court pronounces its decision it becomes *functus officio*, and cannot tinker with its decision except to correct typographical or other obvious mistakes. The High Court Rules however allow the court or a judge, under r 449 (1) (b), whether *mero motu* or on application of any party affected, to correct, rescind or vary any judgment or order in which there is an ambiguity or patent error or omission but only to the extent of such ambiguity.

- [15] The purpose of r 449 is to enable the court to revisit its orders and judgments, to correct or set aside its orders and judgments where, to allow such orders to stand on the basis that the court is *functus officio*, would result in an injustice that may 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 otherwise be corrected in any other way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment. It is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court- *Tiriboyi v Jani & Anor* 2004 (1) ZLR 470 (H), 472D-E

[16] An ambiguous judgment would be one that is unclear and capable of more than one interpretation. This can happen because of the language used by the court. In such a case relief can be granted where, because of the language, the ambiguity has the effect of obscuring the true intention of the court or judge. On the other hand, a patent error or omission is one which is clearly obvious to anyone reading the order. Examples include clerical errors on figures, dates or spellings- *Masamba v JSC and Another* HH 283/17.

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WHETHER THERE WAS AN AMBIGUITY OR PATENT ERROR OR OMISSION IN THE ORDER OF THIS COURT DATED 20 NOVEMBER 2019

[17] In its decision of 20 November 2019, this Court was asked to determine the appeal noted against the decision of the Labour Court that had in turn dismissed the appeal noted by the applicant. That decision by the Labour Court had dealt with the applicant's complaint that he had been improperly excluded from benefiting from the incentive scheme and that the scheme was in any event unlawful. The Labour Court had found that the decision to exclude the applicant was not improper. The Labour Court was not persuaded that the scheme was invalid and noted that the two reliefs sought by the applicant in the appeal were contradictory.

[18] The appeal from the Labour Court to this Court raised three basic issues. First, that the Labour Court had misdirected itself in upholding the decision to disqualify the applicant from getting the incentive bonus. Second, that the court erred in upholding an illegal contract. Third, that the court erred in not ruling on the negotiating framework document. These were the issues that fell for determination **Judgment No. SC 57/20** sat **Civil Appeal No. SC 46/19** on 20 November 2019.

[19] When this Court dismissed the appeal on 20 November 2019, the findings and order previously made by the Labour Court remained extant. In other words the findings that the incentive scheme was not unlawful and that the applicant was not eligible to be paid the incentive bonus in terms of the incentive scheme's terms and conditions remained extant.

[20] 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.

[21] The present application has not been filed in order to correct an ambiguity or a patent error or omission. To the contrary it seeks to re-argue the issue of the incentive scheme (which was one of the issues that fell for determination before this Court on 20 November 2019) and also to introduce new issues. The draft order to the application seeks an order that:

“the whole order of court under SCB 599/19 dated 20 November 2019 is hereby rescinded till notification of finalization of ~~Civil Appeal No. SC 46/19~~ ~~Judgment No. SC 57/20~~ or ratification of FY 16 Staff Incentive Scheme. Consequent to those negotiations the court will convene to rule on the contract of agreement” (my emphasis).

[22] The draft order therefore evinces an intention to have the order set aside, not because it is ambiguous or contains a patent error or omission, but because the applicant considers it necessary that it be rescinded until the negotiations before the Works Council are finalised after which this Court can then sit again and rule on the legality of the scheme. It is apparent from the submissions made by the applicant and from the draft order that he believes that the order of this Court of 20 November 2018 has short-circuited negotiations that are pending before the Works Council.

[23] In paragraph 5 of his founding affidavit, the applicant states:-

“... the final order usurps the statutory rights of the parties in the negotiations and interferes with the decision making process of the Works Council. It is for this reason that the final order must be rescinded to give effect to the statutory rights of the Works Council following which the final order may take effect.”

In paragraph 15 of his founding affidavit he states that:-

“... the final order interferes with negotiations. The order may even trammel the outcome of the negotiations. The earlier final order is therefore not in the interests of justice.”

In paragraph 18 of the same founding affidavit, he says that the order:-

“... gives effect to a unilateral draft document with no signatures and the document contains patent error in duties (as observed by the justice) with clauses yet to be negotiated at later dates while other clauses are expressly illegal.”

[24] I agree with the respondent’s submission that the gravamen of the complaint by the applicant is that he is unhappy with the order of this Court **Judgment No. SC 37/20 and Civil Appeal No. SC 46/19** and that the intention is to change the complexion of that order.

[25] There can be no doubt that, in these circumstances, the applicant has not demonstrated that there is any ambiguity or patent error or omission in the order made by this Court on 20 November 2019. What the applicant is seeking therefore is an order setting aside the previous order of this Court and substituting in its place an order that any decision of this Court should await the conclusion of the negotiations taking place before the Works Council.

[26] Clearly r 449 (1) (b) was not intended to cater for the above situation. The issues now raised should more properly have been raised in the appeal that was heard by this Court on 20 November 2019. Indeed the allegation that the incentive scheme was unlawful was made in the grounds of appeal but, as already noted, the appeal was, by consent, dismissed, thereby bringing to an end the argument that there was something wrong with the scheme.

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COSTS

[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.

DISPOSITION

[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 **Judgment No. SC 57/20** The **Civil Appeal No. SC 46/19** application therefore is without merit and must fail.

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[30] It is accordingly ordered as follows:

“The application is dismissed with costs on the scale of legal practitioner and client.”

BHUNU JA I agree

MAKONI JA I agree

Applicant, in person

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

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