JUDGES SYMPOSIUM PRESENTATION 4-7 APRIL 2019

By: Honourable Hlatshwayo JA

Re: Presentation on the topic "**Rule 449 of the High Court Rules, 1971 and Rule 40 of the Labour Court Rules – An interpretation of the two rules.**"

Introduction

The guiding principle of common law is the certainty of judgments. Once judgment is given in a matter, it is final. It may not thereafter be altered by the judge who delivered it. The judge becomes *functus officio* and may not ordinarily vary or rescind her or his own judgment (***Firestone SA (Pty) Ltd v Gentiruco A.G.*** 1977 (4) SA 298 (A) 306 F- G). That is the function of a court of appeal. There are exceptions to this general rule. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, *justus* error. Secondly, rescission of a judgment taken by default may be ordered where the party in default shows sufficient cause. Thirdly, there are also exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are for the most part, conveniently summarised in the headnote of ***Firestone SA (Pty) Ltd v Gentiruco A.G.*** *supra* as follows:

> '1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant.
>
> 2. The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.
>
> 3. The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

4. Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.'

The authorities also refer to an exceptional procedure under the common law in terms of which a court may recall its order immediately after having given it, or within a reasonable time thereof, either *meru motu* or on the application of a party, which need not be a formal application. See ***First National Bank of SA Ltd v Jurgens*** 1993 (1) SA 245 (W) 246; ***Tom v Minister of Safety and Security*** [1998] 1 All SA 629 (E) 637i – 638a. However, in each case, the error or mistake relied upon must be proved and in each case the court exercises a discretion. See ***Gondo and Anor v Syfrets Merchant Bank*** 1997 (1) ZLR 201

It is against this common law background, which gives finality to judgments in the interests of certainty, that rules 449 and 40 of the High Court Rules and the Labour Court Rules, respectively were introduced.

The Statutory Provisions in question

Rule 449 of the High Court Rules

"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 40 of the Labour Court Rules

"40. Applications for rescissions or alterations of judgments

An application for the rescission or alteration of a determination, order or judgment of the Court or Judge on any of the grounds specified in the Act shall be made within twenty-one days from the date after the party has had knowledge of the determination, order or judgment.

Provided that unless the contrary is proven, the party shall be presumed to have had knowledge of the judgment within two days after the date thereof."

The grounds referred to in rule 40 are provided for in section 92C of the Labour Act [*Chapter 28:01*] which reads;

"**92C Rescission or alteration by Labour Court of its own decisions**

(1) Subject to this section, the Labour Court may, on application, rescind or vary any determination or order—

(*a*) which it made in the absence of the party against whom it was made; or

(*b*) which the Labour Court is satisfied is void or was obtained by fraud or a mistake common to the parties; or

(*c*) in order to correct any patent error.

(2) The Labour Court shall not exercise the powers conferred by subsection (1)–

(*a*) except upon notice to all the parties affected by the determination or order concerned; or

(*b*) in respect of any determination or order which is the subject of a pending appeal or review."

Rationale

The above quoted rules give the courts a discretion to rescind or alter their determination, order or judgment, which discretions must be exercised judicially. Not every mistake or irregularity may be corrected in terms of rule 449 or 40. Rule 449 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission, or an order resulting from a mistake common to the parties; or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby'. Rule 40 has an additional circumstance where the Labour Court may rescind or alter its judgment, that is, where the judgment was made in the absence of the party against whom it was made.

In ***Tiriboyi v Nyoni & Anor*** HH 117/2004 the rationale of rule 449 was aptly captured as follows:

"The purpose of r 449 appears to me to (be to) enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will 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 be corrected in any other way." (my emphasis).

In ***Masamba v Secretary-Judicial Service Commission*** HH 79/17 the court had the following to say:

"The above rule was, in the court's view, inserted in the rules as a safety measure, so to speak. Those who drafted the rules acknowledged the obvious. They remained alive to the fact that men who mann court-structures were and are as fallible as any other human being. They acknowledged that these men and women – judges – do sometimes make errors in the decisions which they make; ruling in a particular way when it should have been in another way particularly when the totality of the evidence which is placed before them is taken account of. They, in such cases, allowed a judge to revisit his own decision so that it remains in consonant with the correct law and logic not only for the sake of it but also in the interest of dispensing real and substantial justice to those who would have appeared before, and presented evidence to, him." (my emphasis)

Interpretation of the provisions

1. *An order that was erroneously sought or erroneously granted in the absence of any party affected thereby*

The purpose of rule 449 (1)(a) is to correct expeditiously an obvious wrong judgment or order. In this regard the court in ***Bakoven Ltd v G J Howes*** 1992 (2) SA 466 € at 471E-H explained:[1]

"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is

'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' *(The Shorter Oxford Dictionary).* It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 *(2)(b)* or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide* defence. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31*(2)(b)* (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases).In both latter instances he must show 'good cause'. This pattern emerges from the decided cases."

The above sentiments were captured in ***Munyimi v Tauro*** SC 41/2013, where the court stated that:

> "Further it is also established that <u>once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry.</u> There is no requirement that an applicant seeking relief under r 449 must show "good cause" – Grantually (Pvt) Ltd & Anor v UDC Ltd 2001(1) ZLR 361at p 365, Banda v Pitluk 1993 (2) ZLR 60 (H), 64 F-H; Mutebwa v Mutebwa & Anor 2001 (2) SA, 193, 199 I-J and 200 A-B." (Emphasis my own)

The below cited case authorities illustrate the context in which r 449 (1) (a) of the High Court Rules was properly applied.

1. In ***Banda* v *Pitluk***, 1993 (2) ZLR 60 default judgment was entered against the applicant. His legal practitioner applied for rescission of the same. The Judge who dealt with the rescission application <u>discovered that the applicant had in fact entered appearance to defend before the default judgment had been granted</u>. He exercised his powers in terms of r 449 and rescinded the default judgment. His reasoning which was correct was that default judgment had been erroneously granted in the absence of the party who was affected by it.
2. GUBBAY CJ re-emphasised the principle which was laid down in *Banda*'s case (*supra*) when he remarked in ***Grantully (Pvt) Ltd* v *UDC Ltd***, 2000 (1) ZLR 361 (S) at 365 G-H as follows:

"If the court holds that judgment or order was erroneously granted in the absence of a party affected it may be corrected, rescinded or varied without further inquiry." [emphasis added]

3. In ***Topol and Others* v *L.S. Group Management Services (Pty) Ltd***, 1988 (1) SA 639 (W) the court rescinded a judgment which had been granted on the premise that the defaulting parties had been given notice and were in wilful default whereas they had in fact not been given notice.
4. In ***Nyingwa* v *Moolman NO***, 1993 (2) ZLR S 508 at 510 F WHITE J observed that: "The term erroneously granted would apply in cases … where the capital claimed has already been paid by the defendant" (emphasis added)

2. *An order in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.*

According to Cilliers A C, Loots C & Nel H C in Herbstain and Van Winsen in their book ***The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*** (5th edition, Vol 1) at page 934 a 'patent error or omission' is described as an error or omission as a result of which the judgment or order granted does not reflect the intention of the judicial officer pronouncing it. The patent error must be attributable to the court itself. In ***Masamba v The Secretary- Judicial Service Commission & Anor*** HH 283/17 Chitapi J had the following to say:

"**A patent error or omission as the expression implies is one which is clearly obvious to anyone reading the judgment or order**. It does not appear to me that the expression should present difficulties of interpretation. **Examples of patent errors may relate *inter alia*, to clerical errors with regard to figures, dates or spellings**. For good measure, a court may have ordered that an order be complied with by a certain date but when the judgment is typed and signed, it gives a date which had already passed through clerical error or an impossible date like 31 June yet the month of June ends on the 30th. **A court or judge may for example in making an order requiring a party to do a certain act or refrain from doing so mistakenly omit to name the party who should so comply in circumstances where there are several parties in the judgment**. Such an omission can be said to be patent and in my view can properly be corrected and the judgment or order varied to make it explicit." (my emphasis)

In ***Estate Garlick v Commissioner for Inland Revenue*** 1934 AD 499 DE VILLIERS JA at 502 observed that:-

> "To this general rule there are certain exceptions, which are stated by the writers referred to; for instance an order after having been pronounced may be amended or added to where through some mistake it does not express the true intention of the Court; or where it is ambiguous; or where the Court through an oversight has omitted to include in its order something which is accessory to the principal, such as interests, fruits, or costs."

In ***Moodie v Industrial Steel & Pipe Employees Trust (Private) Limited*** SC 165/97 the learned judge omitted to mention in the concluding paragraphs of her judgment that the defendants were jointly liable to the plaintiff for the payment of the said amount together with interest and costs. That order was corrected to include that statement.

In ***City of Harare v Cinamon*** 1992 (1) ZLR 361, rule 449 was invoked because there was a clerical error made by the Court or Judge.

3. *An order that was granted as the result of a mistake common to the parties*

The approach to be taken when rescinding a judgment that was granted as the result of a mistake common to the parties was outlined by NEDSTADT JA in ***Tshivhase Royal Council*** **v** ***Tshivhase; Tshivhashe*** **v** ***Tshivhase*** 1992 (4) SA 852 (A); where at page 859 E-F he stated that:-

> "I agree with the statement of Vivier J in Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) SA 532 (C) at 536G that the Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In relation to subrule (c) thereof, <u>two broad requirements must be satisfied</u>. <u>One</u> is that <u>there must have been a 'mistake common to the parties'</u>. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see Christie Law of Contract in South Africa 2nd ed at 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on

the facts of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been 'as the result of' the mistake. This requires, in the words of Eloff J in Seedat v Arai and Another 1984 (2) SA 198 (T) at 201D, that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time. Other cases which illustrate this are Ex parte Barclays Bank 1936 AD 481 and Van Zyl v Van der Merwe 1986 (2) SA 152 (NC). The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect. Here one would have the type of situation envisaged by Rule 42 (1) (c)." (emphasis supplied)

4. *An order granted in default*

Rule 40 of the Labour Court Rules as read together with section 92C (1) (a) of the also provides for rescission of judgments and orders granted in the absence of the other party. This rule is the sequel to rule 63 of the High Court Rules. A default judgment can be rescinded only if the applicant "presents a reasonable and acceptable explanation for default, and that on the merits she or he has a *bona fide* defence which *prima facie*, carries some prospect or probability of success." See Hebstein & Van Winsen's Civil Practice of the High Courts of South Africa 5th Ed Vol. 1 at page 938

An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and the accompanying conduct by the defaulters, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*. The court`s discretion to rescind its

judgments is therefore primarily designed to do justice between the parties. The court should exercise that discretion by balancing the interests of the parties.

The Procedure

Correction, variation and rescission of judgments and orders can be done by way of application by the parties or at the instance of the judge who can *mero motu* rescind, correct or vary his or her judgement or order.

Where a court is presented with an application for rescission of a default judgment in terms of rule 63 of the High Court Rules, the court should *mero motu* invoke rule 449 if the judgment was erroneously granted in the absence of any party affected thereby. In ***Mukambirwa & Ors v The Gospel Of God Church International*** 1932, SC 8/14, the Supreme Court upheld the setting aside of a default judgment in terms of r 449, when the application to set it aside in terms of r 63 had been unsuccessful. In that case, Gowora JA at page 12 of the cyclostyled judgment said:

> "In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, **either on its own motion or upon the application of a party** affected by the judgment in issue. … Under the rules **the judge is empowered to invoke r 449 *mero motu*, or upon application,** and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449." (emphasis added)

The court in ***Rogerio Barbosa De SA v Herlander Barbosa De SA*** SC 34/16, explained the same position as follows;

> "I agree with the submission made by Mr *Magwaliba*. A judge has the power to *mero motu* premise his decision on r 449(1)(a) where it is clear from the papers that default judgment was granted in error despite the application having been made in terms of r 63. The circumstances *in casu* are similar to those in *Mukambirwa & Ors v The Gospel of God Church International* 1932 SC 8/14."

In the Labour Court, the application for the rescission or alteration of a determination, order or judgment must be made within 21 days from the date after the party has knowledge of the determination.

Where rule 449 and rule 40 are inapplicable

1. Where an order or judgment is wrong in substance and at law, it cannot be corrected, varied or rescinded in terms of rule 449 or rule 40 of the High Court rules and the labour Court Rules. In the South African case of ***DA Weelson v Waterlinx Pool and Spa (Pty) Ltd*** [2013] ZAPGJHC 47 the court was dealing with r 42 (1) (a) whose provisions are similar to those of our r 449. At para [5] the court stated:

   > "The rule was introduced to cater for errors in judgment which are obviously wrong and are procedurally based." (my emphasis)

2. It must be reiterated that the rules are not meant to allow a judge to review his own work and correct it and have a second bite of the cherry.
3. The rules are also not meant to allow one judge to sit as an appeal court and offer constructive criticism to the work of a fellow judge of the same level as him irrespective of whether or not such work accords with sound legal principles and logic. Anything which relates to the work of a judge properly considered and conclusively decided lies in the domain of a review or an appeal. The court which has superior jurisdiction to that of the court of first instance deals with matters where a party is displeased with the decision of the court *a quo*.