

LLOYD MAJAYA
versus
PATIENCE MUDONDIRO

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 25 January, 2022 and 30 March, 2022

OPPOSED MATTER

E.T Moyo, for the applicant
...*Nyangani*, for the respondent
No appearance for the 2nd and 3rd respondent

Correction of Judgment

BACHI MZAWAZI J: This is one of the matters that was before this court, on the opposed roll on 25 of January 2022. On the set down date it was observed that the first and second respondent had not appeared for the hearing. From the perusal of the record, this court was satisfied that the parties has been duly served on their respective addresses as evidenced by the return of service from the Sherriff which was on record. As a cautionary measure, the assistant registrar was instructed to call the first and the second respondents three times from outside. There was no response, as such it was noted that they were in default.

Counsel for the applicant made an application for an order in terms of the draft order. It was not opposed by counsel for the second respondent. As can be seen from the papers counsel for the second respondent has been in support of the applicants claim from the onset.

The summarized facts of the matter are that, the applicant purchased from the second respondent, a certain piece of land, situated in the district of Salisbury, called Stand 3950 Hayden Township measuring 1500 square meters through an agreement of sale in conjunction with that of cession of rights in the said immovable property which was signed on 6 November 2020. The first respondent claims to be in a relationship with the second respondent but are not married or staying together. The third respondent is a duly registered company which sold the property in question to the second respondent.

After the payment of the full purchase price applicant was given vacant possession of the said property but to his surprise, the first respondent, on 22 and 23 November 2020, moved onto

the stand and commenced some constructions which included the erection of a wooden cabin, the sinking of a borehole and the digging of the foundation of some structure. In addition she brought more building materials and paraphernalia onto the stand in preparation for further constructions.

The applicant confronted the first respondent, but she protested claiming an entitlement to the stand borne out of a tacit partnership with the second respondent. In dismay, Applicant approached the second and third respondent who in turn failed to restrain the first respondent's actions or remove her from the said piece of property. Subsequently, an urgent chamber application for an interdict against the first respondent was sought by the applicant resulting in a provisional order being granted by consent of the parties on in case HC 7041. On 31 December 2020 by CHIRAWU-MUGOMBA J.

The application which then came before this court was the application for the confirmation or the discharge of the said provisional order. Since, the first respondent who was the key player in the whole case had defaulted, on the return day of the original application that is the 25th of January 2022, I proceed to grant the order as per the draft order drafted by the applicant by filling in the requisite information and signing the draft order.

However, laboring under the misapprehension that the result slip was meant to record and capture all the details of what had transpired in court for future references, this court wrote some comments in relation to the default judgment and all what had taken place in court on the said slip.

As a result, although the result slip had not been endorsed with the words "it is ordered that" but made reference to the clause 'default judgment granted in terms of the draft order' the typist did not refer to the actual draft order. She proceeded to type the result slip and all the information recorded therein as the order of this court. The situation was further exacerbated by the fact that the judge is not given the opportunity to revisit, edit and proof read their work. The file is taken from the court room straight to the typing pool, via the registrar's office into the public domain.

Had it been that files particularly those on opposed roll, where the judge is in direct control and management of the same, are returned to the same judge for correcting, this mistake would never have happened as there will be room to spot the anomalies and address them. Nevertheless the result slip caused a furore when it was leaked to the social media, as the order of the court instead of the actual signed draft order which had been left in the file. As it where, what ended

leaving the institution as an order of the court is not a competent court order. So in order to issue the correct order there is need to now rescind the erroneously issued order.

Accordingly, in terms of the powers bestowed upon me in terms of Rule 29 of the 2021 High Court rules which state, the court or judge may, in addition to any other powers they have on its own initiative or upon the application of any affected party, correct, rescind or vary the judgment, I invited the parties explained the situation and proceeded to rescind the erroneously issued judgment.

There was a patent error. *Masamba v The Secretary Judicial-Service Commission & Anor* HH 283/17. Cilliers A. C, Loots C & Nel H C in Herbstein and van Winsen in their *The Civil Practice of the High Courts and the Supreme Court of South Africa* (5th edition, Volume 1) at page (934) defined a patent error as follows:

“ 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 this regard I am retracting the order issued by the registrar. It was issued in error as it was not the actual order. It is substituted by the actual order confirming the provisional order.

It is thus ordered

1. The order issued on 25 January, 2022 is hereby rescinded and substituted by the following:

IT IS ORDERED THAT:

- a) The provisional order be and is hereby confirmed into a final order.
- b) The applicant be and is hereby declared the right owner of the full rights, title and interests in the immovable property namely a certain piece of land situate in the district of Salisbury called Stand 3950 Haydon Township measuring 1 509 square metres.
- c) The first respondent, her assignees and employees are hereby interdicted from carrying out any construction activities, gaining access, erecting any structures of whatever nature, and she is also ordered to remove her cabin and any other construction material from the immovable property namely a certain piece of land situate in the district of Salisbury called Stand 3850 Haydon Township measuring 1509 square metres which was purchased by the applicant.

- d) The counter-application filed by the first respondent is improperly before court and is hereby struck off.
- e) The first respondent to pay costs on legal practitioner and client scale

Musara Legal Practice, applicant's legal practitioners