CHRISTOPHER MURIMBA
and
LYNETTE MURIMBA
versus
DOMINIC SAUROMBE
and
THE SHERIFF OF THE HIGH COURT
OF ZIMBABWE N.O
and
MESSRS MAMBOSASA LEGAL PRACTITIONERS

IN THE HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 10 December 2021 and 26 January 2022

Opposed Application

Advocate *Magogo*, for the applicant
T Tanyanyiwa, for the respondent

BACHI-MZAWAZI J: This is an application, for the rescission of a portion of a judgment of this court in HC 9207/14, in terms of r 449(1)(c) of the High Court rules 1971 .

The applicants allege that the impugned part of the judgment was granted as a result of a mistake common to both parties, therefore it has to be expunged. In addition the applicants want the amount paid by the first respondent as legal tender in compliance with that portion of the order reimbursed.

The facts that give rise to this matter are that, the applicants and the first respondent purchased adjacent pieces of land, in Gletwin Township, Harare through a land developer, being stands 321 and 322 respectively. The second respondent has been cited in their official capacity and the third respondent mainly as a legal entity in possession of some funds which form part of the subject matter.

It is not in dispute that the first respondent, being the first purchaser, erroneously erected a structure covering 1 972m^2 at stand 322, genuinely believing it was his property. Upon discovering the *bona fide* mistake the parties engaged each other and entered into several agreements in an effort to resolve the issue amicably on a win-win basis.

At the time of the negotiations both the applicants and the first respondent, knew stand 322 was originally 2 100 m^2, of which 1 972m^2 had been effectively occupied by first respondent leaving a remainder of 108m^2, as well as, the whole vacant land in stand 321.

In the furtherance of the spirit of camaraderie and settling out of court, the parties reduced their initial agreement into writing by signing a mutual document on 20 December, 2013, termed, '*Commitment to rectify the error*'. Three distinct features appear in the 2013 agreement. Firstly, both parties acknowledged that the first respondent acted in error. Secondly, since the first respondent's construction consumed 1 972m^2, leaving a 108m^2, it distorted the original map or plan of that stand. Therefore there was need to regularize the plan or process through the engagement and involvement of the relevant Town planning authorities, in terms of the governing laws. Lastly, that, in order to facilitate the necessary changes both parties were to contribute agreed fees towards the payments to the relevant offices. However there was no breach or penalty clause in the initial contract. As such, both parties defaulted in paying the requisite fees to facilitate regularization.

Consequently, after numerous failed negotiations, the applicants issued summons against the respondents in case HC 9207/14 on 17 October 2014. In the summons, the applicants prayed for firstly, an order compelling the defendant to remove his structure encroaching 1972m^2 unto the plaintiff's property being Stand Number 322 Gletwin Township, Harare. Secondly, an **alternative** order that the defendant takes transfer of the 1 972m^2 of Stand Number 322 Gletwin Township, Harare against payment of the sum of US$39 440.00 to the plaintiff being the value of the encroached 1972m^2. (my emphasis)

Evidently, the summons excluded the agreement embodied in the 2013 document. Subsequently the respondent defended the matter up to the pre-trial stage. It was at the pre-trial stage that the parties once again the parities found each other agreed to settle. An elongated deed of settlement encompassing both the provisions for the subdivision requirements from the first agreement and the relief sought in the summons was signed and presented to MAWADZE J on 17

September, 2015 as having resolved the matter. However, the deed was not reduced to a court order which resulted in non-adherence once again. Despite the non-compliance parties continued engaging one another through their legal representatives to no avail.

On 17 of February 2016, the applicants filed a chamber application before MANGOTA J, to register the final deed of settlement so as to enable enforcement. The applicant took the matter a further step back by unilaterally severing the regularization clause. An effort to oppose that position by the first respondent was denied by the court resulting in the same order the applicants now want to resile from. The applicants now approach this in terms of Order 49 r 449 of the High Court Rules 1971, claiming that the remnants of the Final Deed of settlement which is now a court order granted at their instance was granted through an error common to both parties.

In light of the above state of affairs, it is clear that part of the order given by this court in case HC 9207/14 was through the initiative of the applicants.

This is the same order the applicants are ironically alleging was entered into through an error common to both parties. Their argument is that the Alternative part of the order, incapable of fulfillment in the absence of compliance with subdivision laws and regulations. They assert that s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*] has to be complied with first before compliance with the alternative order.

It is the applicant's case both in their oral and written submissions that the failure by the parties to expressly spell out what was to become of the remaining 108m^2 was a common error fatal to their whole agreement. Therefore even if it were to be accepted that the payment made by the respondent in compliance with the part of the order in dispute was to be accepted as legal tender, the issue of the 108m^2 will remain stickingly an unresolved issue making transfer impossible.

The respondents countermanded by stating that there is no error in the order of 3 March, 2016, in HC 9207/14, as it was the order that had been sought for by the applicants at the deliberate exclusion of important provisions that spoke to all the pertinent requirements in terms of governing laws and authorities.

In denying the existence of a common error between the parties the first respondent further, postulates that, the applicants cannot seek the rescission of an order which had been inserted from the onset by both parties reflecting the true intention of the parties. Further, the respondent

attacked the reasons behind the relief sought as an effort by the applicants to close the stable door after the horse has bolted, in that, the order they now seek to rescind has already been complied with by the first respondent. They argue that the applicant elect to terminate an existing order which they themselves enforced twice. It was only after hitting a brick wall that they are now resorting to have a competent order of this court terminated.

In light of the above facts and arguments, first issue to be determined is whether or not the judgment by MANGOTA J in case number HC 9207/14 was granted in error common to both parties? In terms Order 49 r 449(1) (c) of High Court Rules 19971 rules now r 29, High Court Rules 202/2020, the court is empowered, on its own initiative or upon the application of any affected party , to correct, rescind or vary, an order or judgment granted as a result of a mistake common to the parties. Rule 449 (1) (c) reads as follows.

> "**449. Correction, variation and rescission of judgments and orders**
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> (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.
> (b) in which there is an ambiguity or a patent error or omission, or
> (c) that was granted as the result of a mistake or common to the parties."

This rule recognizes that humans are fallible and prone to make errors as such those errors can be rectified in order to minimize unintended harm or prejudice. For as long as those errors fall within the ambit of r 449 or current r 29 of the High Court rules, they can be corrected, varied or rescinded in the manner the court deems judiciously fit. This was pronounced in the South African case of *Da weelson v Waterlink Pool and PSA (Pty) Ltd* (2013) ZAPGJHC 47 in dealing with r 42 (1) (a) whose provisions are similar to those of r 449 at para 5 where it stated that:

> "This was introduced to cater for errors in judgment which are obviously wrong and procedurally based."

The cases of *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 and *Tiriboyi v Janin & Anor*, 2004 (1) *ZLR* 470 all speak to the application of r 449 and its likes in applicable situations.

In analysis, the court is being asked to rescind a portion of the judgment which is the alternative clause. It is clear that in assessing both the facts and oral and written submissions of the parties the court is of the view that there was no error let alone a mistake common to the parties.

Tracing the history of the alternative order from the facts and submission made in this case reveals that it was a clause agreed to by the parties. Initially, the clause was the brain child of the applicants as evidenced by their summons, meant to be a penalty clause after they realized that the 2013 agreement lacked the same. It was later on out of lengthy discussions between the parties and their legal representatives agreed that both clauses the impugned clause and the 2013 agreement lacked the same. It was later on out of lengthy discussions between the parties and their legal representatives when it was then agreed that both clauses, the impugned clause and the 2013 provisions be juxtaposed and concretized into a mutual deed of settlement lodged with this court in 2015. It leaves no doubt that when the applicants sought the same order they now seek to rescind, they did deliberately exclude the clauses reflecting the true intentions of the parties in their draft order addressing the provisions of s 39(1) of the Regional Town and County Planning Act [*Chapter 29:01*] and retained the now impugned clause cum alternative order..

Advocate *Magogo,* the applicant's counsel stated that they deliberately left the terms of the initial contract because of the exhibited non-compliance by the first respondent. The applicants had approached the court under the guise that they wanted the deed of 2015 reduced to a court order but then decided to expunge some elements of the deed of settlement. It is absurd that they now want to rely on those sections they unilaterally severed as incapacitating the clause they had initially preserved. In the case of *N.O Theron* v *United Democratic Front* (*Western Cape Region and Others)* 1984 (2) SA 532 (C) at 536g it was stated that the court must be satisfied, that there must have been a mistake common to both parties in order to grant an application for recession under r 42(1) the South African equivalent of r 449 of the old rules 1971, now 29 of new rules of 2001.

It is clear that the part of the order given by this court in case HC 9207/14 was through the applicants' initiative. Ironically this is the same order they now allege was granted through an error common to both parties, arguing that it is incapable of performance.

In the premises, I am not convinced that the judgment was entered in error common to both parties. Evidently the order in question was granted on 3 March 2016, the applicants did not seek to challenge the decision by way of review nor appeal. One cannot be faulted to think as suggested by counsel for the first respondent that this application is an afterthought as the period

within to pursue either of the above has lapsed. See *Sachiti and Anor* v *Mukaronda and Anor* HMT 38/2021.

The applicants ought not to have severed the original Deed of Settlement of 2015 registered before MAWADZE J in case HC 9207/14, in the summons case. I am therefore not persuaded that the order giving rise to the dispute in question was by consent as it had unilaterally been mutilated to the tune of the application is bidding. On the faith of the authority in *Thutha* v *Thuta 2008(*3) SA 494 TKH where it was observed that a Deed of settlement filed with the court is a record of settlement, I am i to conclude that, the deed of settlement filed before MAWADZE J in September 2015 in case HC 9207/14, was legally binding and should have been presented in the original form. Further, in my view the applicants have not demonstrated that their application falls within the ambit of r 449(1)(a) of 1971 Rules.

On further analysis, it seems like the applicants want to have their cake and eat it. They issued a writ of execution on the faith of the same order they want rescinded. They instructed the Sheriff of this court, the second respondent not only once but twice to execute the first part of that same order. The first respondent's swift response to the pending execution was to comply with the same order, the offensive, alternative clause by paying the agreed amount into the trust funds of the applicant's then legal practitioners, the third respondent hereto. The amount paid was legal tender. Even though the first deposit was at law fulfilled through the doctrine of fictional fulfiment as stated in the case of *Gowan* v *Bowern* 1924 AD 550 by INNES CJ, *Ndlovu* v *Marandu* 199 (2) ZlR and *Gasela* v *Malinga and 2 Ors* HH 736-20.

It is crucial to note that an amount of US$39 440.00 was deposited into the third respondent's account way back in 2018 and it is still with the applicants. One needs not go further to ascertain the applicants' true motive behind this application than their letter from their then lawyer (third respondent), dated 9 April, *Mambosasa*, addressed to *Mushoriwa Pasi Corporate Attorneys*, the then first respondent's lawyers which reads:

1. Our clients remain of the view that your client has not performed the terms of our spirit behind the court order. They are not prepared to cede their rights and interests in the property in question to your client against a payment US$39 449.00 for the simple reason that the current market value is way above that amount.

2. In the event that your client is not inclined to agree on fair compensation, we are instructed to return the amount which your client transferred into our client's trust account Accordingly, we request your bank details. (my emphasis.)

In a nutshell, the extracts of the above letter summarizes the true reasons behind this application to frustrate the payments already done whose value is no longer attractive to the applicant. The court is thus satisfied that the judgment was not entered in any error nor an error common to both parties.

As regards the issue of costs I am inclined to allow the first respondent's submission that they be at a higher scale. There is ample evidence on record showing that the first respondent wrote to the Secretary of the Ministry of Government and Public Works in the form of letters dated 8 April 2016 and was responded to on 13 June 2013. These letters are part of the record marked annexure "A" 1 and" B" illustrates the commitment on the first respondent's part to have all the peripheral issues surrounding this dispute resolved. Whereas the applicant want the order rescinded because of pecuniary reasons that it now fetches more than the agreed price.

DISPOSITION

It is accordingly ordered that:

1. The application is dismissed.
2. Applicants to pay party to party costs.

Makuwaza & Magongo, applicant's legal practitioner
Messrs Tanyanyiwa Gapare, first respondent's legal practitioner
Messrs Mombesasa Legal Practitioners, third respondent's legal practitioners