CLAWZY TRADING (PVT) LTD
versus
JONASI CHITSA
and
SABINA NYARAI CHITSA
and
MATAPOS PROPERTIES (PVT) LTD
and
REGISTRAR OF DEEDS N.O
and
THE DEPUTY SHERIFF N.O

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 30 May, 6 June and 3 August 2022

OPPOSED APPLICATION

Adv. T.O Mapuranga, for the applicant
Ms Chibaya, for the 1st & 2nd respondents
No appearance for 3rd- 5th respondents

NDLOVU J The applicant seeks an order setting aside the judgment, granted after a full trial, by my sister, CHIRAWU-MUGOMBA J, on 10 November 2021 in favour of the first and second respondents under case number HC 8317/10 and under Judgment number HH 627/21 on the grounds that the judgment in question contains a patent error. The judge's order reads as follows:

"IT IS HEREBY ORDERED THAT:

1. Deed of transfer No. 1271/2010 dated 30 March 2010 in favour of Matopos Properties Limited over a certain piece of land situate in the district of Salisbury, called stand 2465 Glen Lorne Township, measuring 5290 square metres is hereby set aside.

2. Deed of transfer No. 1741/2010 dated 29th of April 2010 in favour of Clawzy Trading (Pvt) Limited over a certain piece of land situate in the district of Salisbury, called stand 2465 Glen Lorne Township, measuring 5290 square metres is hereby set aside.

3. The Registrar of Deeds be and is hereby ordered to revive deed of transfer No. 8564/2004 dated the 14th of October 2004 in favour of Jonasi Chitsa and Sabinah Nyarai Chitsa within seven days from the date of service of this order.

4. The second Defendant's claim in reconvention be and is hereby dismissed.

5. Each party shall bear their own costs."

The present Applicant was the second Defendant in that case and the present Respondents, the first and second Plaintiffs. For the purposes of convenience, in this judgment the parties will be referred to as presently cited.

One Marisa Marinda is the deponent of the applicant's founding affidavit. The key components of the applicant's founding affidavit are that:

This is an application for rescission of the judgment of this court as afore described in terms of R29(1)(b) of the High Court Rules, 2021. A copy of that judgment is attached to the founding affidavit. The background to this application according to the deponent is that the judgment in question was a culmination of an action matter between the parties which was filed in 2010.

When the defence case was closed on 25 October 2021 the trial Judge directed that the two parties who were still contesting the trial, being the first Respondent and the Applicant, file their closing submissions by the 27th of October 2021. The applicant duly filed its closing submissions on the 26th of October 2021. A copy of those closing submissions is attached to the founding affidavit. The judgment in the matter was handed down on the 10th of November 2021 and the Judge stated that the second Defendant (Applicant in this matter) had not filed its closing submissions. (see para 1, p5 of the cyclostyled judgment HH 627/21).

According to the deponent of the founding affidavit on behalf of the Applicant

"the basis of the present application to rescind the judgment ….. is that there are patent errors (*sic*) in the judgment……" in that despite the applicant's closing submissions having been filed one day before the deadline somehow they did not find their way to the trial Judge.

According to the Applicant, the judgment must be rescinded and not varied or corrected because the extent of the patent error in it warrants it because,

i) it contains a patent error,

ii) the judgment was made without considering the Applicant's submissions, submissions which presented the case that it wanted determined.

iii) had the trial Judge seen the Applicant's submissions she would of importance have observed that

a) the central issue for contestation had become that of estoppel.

b) the Applicant was averring that the Respondents could not get judgment without rectification of the agreements at law.

c) the issue between the parties had been narrowed to only 3 in the amended joint P.T.C minute from the original 6.

According to the Applicant, in light of the above, the judgment must be rescinded and CHIRAWU-MUGOMBA J be allowed to reconsider her full judgment upon consideration of the Applicant's closing submissions that were timeously filed.

The first and second Respondents' opposing affidavit is sworn to by one *Valente Ferrao* a legal practitioner of this court and principal in the practice *Ferrao Law Chambers*. He is familiar with the matter between the parties and is fully acquainted with the facts relating to this application. In addition to the above, he deposed to the affidavit also on the basis that the matters relating to this application are procedural and legal in nature.

Valente Ferrao in the affidavit in opposition highlights the following:

1. That the Applicant brought up the issue of rectification for the first time in its closing submissions yet it never made reference to rectification in its plea in 2011, counter claim or in the issues, and that is unprocedural and in any case it has no relevance in the matter in HC 8317/10.
2. The judgment which is the subject matter of this application was in his view prepared and delivered on a clear and clinical analysis and assessment of the evidence before the court. It took into account all the issues before the court.

THE LAW

Rule 29(1)(b) of the High Court Rules, 2021 on which the Applicant relies in making this application, reads as follows:

> "29(1) The court or judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, ……. rescind……
> a) ……..
> b) An order or judgment in which there is …… a patent error ……. but only to the extent of such ……. error ……"

The applicant argues that it admits to no argument that the judgment sought to be rescinded was written without consideration of its closing submission and as such, that fact qualifies it for relief under R29. Applicant further argues that a reading of the Rule suggests that, to warrant a grant of the relief sought an Applicant must prove that, the judgement for which they apply for rescission has a patent error warranting rescission and the judgment was based on such a patent error.

The Applicant submitted that generally a court is not barred from writing a judgment in the absence of closing submissions, however there can be exceptions to this general rule. Although the court is not barred, so Applicant has argued, where submissions were filed on time, they must be considered and not considering same amounts to a major patent error as envisaged in terms of R29(1)(b) and an irregularity. Applicant further submitted that not giving regard to submissions timeously filed by a party in making a judgment breaches the principles of natural justice, particularly the principle of *audi alterum partem* which requires that a person must be heard before a decision affecting them is made and R56(16) provides for a right to be heard through closing submissions. It further argued that this is an unusual case, worsened by the fact that there is a drought of precedence dealing with a R29(1)(b) application for rescission in circumstances where a judgment was written without considering timely filed closing submissions by a party after a full trial. It was part of its submissions that a patent error can be in the order (operative part) or in the judgment (reasons behind the order) and because of its location in this case it is unique and deeper than the surface and probably the most serious error.

The Applicant argued that it had two options at its disposal upon receipt of judgment HH 627/21, either to apply for a rescission under R29 (1)(b) (which it did) or to appeal the decision, which it chose not to because the Supreme Court refuses to be a court of first instance and will insist that the High Court should comment on the issue(s) the Appellant is bringing on appeal as the Supreme Court does not allow an argument to begin on appeal. In any case, so Applicant has argued, if the judgment is rescinded, the trial judge will be at liberty to reproduce the judgment only expunging the part that says the applicant did not file its closing submissions.

For their part, the Respondents argued that applying for rescission is improper in the circumstances saying the applicant should instead have applied for correction or variation of

the judgment. They agreed with the Applicant that they too could not find appropriate authorities on the circumstances of this matter.

ISSUE

The issue for determination is whether there is a patent error in the judgment of this court delivered on 10 November 2021 necessitating this court to rescind that judgment. Understanding the nature of the error in question is important because it plays a critical role in answering the question whether this application falls within the scope of matters meant to be corrected in terms of R29(1)(b). The general principle of our law is that once a final order or judgment is made and pronounced correctly reflecting the intention of the court making it, that order or judgment cannot be altered by that court. That court becomes *functus officio*. R29 is therefore an exception to the general principle as it allows a court to revisit its order or judgment, in the interests of justice, but only in a restricted sense.
Munyimi v *Tauro* SC 41/2013.

A patent error or omission has been described as "an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it."

- *Rainbow Tourism Group Limited* v *Clovegate Elevators HH 616/16*
- *Seattle* v *Protea Assurance Co. Ltd* 1984 (2) SA 537.

A closer look at R 29(1) as a whole is of assistance.

> "Correction, variation and rescission of judgments and orders
>
> 29.(1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary
>
> a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
> or
>
> b) an order or judgment 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) an order or judgment granted as a result of a mistake common to both parties." My underlining.

In other words, in terms of R29(1)(b), the ambiguity or error or omission must be attributable to the court itself. The court is therefore not entitled to revisit the whole of its order or judgment (rescind) and its competence is limited to the interpretation of the judgment or order. The

powers of the court are therefore by the power of R29(1)(b) confined to the exclusion of the ambiguity, error or omission in the judgment or order hence the qualification "… but only to the extent of such ambiguity, error or omission…". My understanding of the Rule is that the requirements under R29(1)(a) are different from those under R29(1)(b) in that under R29(1)(a) the court is being asked to rescind a judgment and to succeed in that regard the applicant should show that:

1) the judgment was erroneously sought or granted
2) the judgment was granted in the absence of the Applicant
3) the Applicant's rights or interest are affected by the judgment.

Nyahondo Farm & others v *Birketoft HH 214/18*

Under R29(1)(a) the court is only obliged to decide if the judgment was entered in error or not. If it was erroneously entered, the Applicant is entitled to rescission. It is a question of fact and not analysis.

Banda v *Piluk* 1993(2) ZLR 60

Moonlight Provident (Pvt) Ltd v *Sebastian & others* HB 254/16.

Under R29(1)(b) however for the Applicant to succeed in seeking a rescission of the judgment, he or she must go further than pointing out the patent error or omission or ambiguity in the judgment. The Applicant must also allege and prove that the patent error impacted on the judge's intention in such a manner and extent such that the resultant judgment does not reflect the judge's intention. That is so because a distinction must be made or drawn between an error or omission that is clerical or arithmetical in nature which calls for a mere correction or variation so that it reflects the true intention of the Judge without however, altering the sense of the substance of the judgment or order on one hand and an error or omissions that impact on the intention of the judge, in the sense that , but for the error, the Judge would not have arrived at the judgment or order he or she did. An example of the latter would be where in the analysis of the evidence after trial, the Judge has mixed or misallocated the evidence of the Plaintiff's witnesses with that of the Defendant's witnesses. Clearly in that scenario the Judge's appreciation of the facts or the case before him or her would have been distorted leading to an erroneous judgment on the part of the Judge concerned and calling for the rescission of the judgment. In the matter at hand the Applicant has chosen R29(1)(b) and not R29(1)(a) and

therefore has to show more than that the Judge wrote the judgment under a mistake that the Applicant had not filed it closing submissions, yet it had.

In the case before me, there is no patent error in the judgment in the form of a clerical or arithmetical mistake, or mix up or mistake as to which witness said what in favour of or against which party. The judgment is complete and clear. The Respondents are correct on that score. What the Applicant is complaining about is a matter of a procedural nature in that the trial Judge did not have regard to Applicant's closing submissions on the assumption that they were not filed yet the contrary is true.

The error in my view is not in the judgment, it is only recorded in the judgment. Assuming that this error is an irregularity vitiating the right to be heard as argued by the Applicant, does that irregularity qualify as a patent error within the meaning a purview of the provisions of R29(1)(b) capable of being one of the exceptional circumstances under which a court may revisit a judgment in which it is otherwise *functus officio*?

In deciding the above question, it is pertinent to have a regard to the nature and purpose of closing submissions in a trial. Closing submissions generally speaking, are a critical part of a party's case. They are a medium through which a party argues to the court how and why both the facts and the law support a decision in its favour. Closing submissions are an instrument or vehicle of persuasion, and of critical importance, they are not evidence. Unlike Heads of Argument in an Application matter, non-filing of the closing submissions does not change the status of a matter and the manner of approach the court will have towards a case if they are not filed. This position makes the case of *Nyahondo Farm and other*s v *Birketoft (supra)* which the Applicant sought reliance on distinguishable from the matter before me. Closing submissions do sometimes assist the court in deciding a matter but that is as far their usefulness can go. They beam light for the benefit of the trial court on the facts (already before the court) and the applicable law. With or without closing submissions a judgment can be written and that judgment will be legitimate and enforceable.
Minister of Transport & Communication v *Chitate* SC 14/06.

The trial in this matter was heard fully to its logical conclusion. At the close of the Defendants' case, the judge was bound by law to deliver judgment and the judge did deliver a written judgment. It must be assumed in the absence of a patent error or omission in the

reasoning of the trial judge, that the judgment reflects the intention of the Judge who wrote and delivered it.

DISPOSITION

In my view the unfortunate omission or error by the Judge's Assistant not to place the closing submissions that were timeously filed before the Judge before the preparation of the judgment is not the patent error or omission meant to be addressed through R29(1)(b) of the High Court Rules, 2021 and therefore.

IT IS HEREBY ORDERD THAT:

1. The application for rescission of the judgment under HC 8317/10 delivered on 10 November 2021 be and is hereby dismissed.
2. There shall be no order as to costs.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners.
Ferrao Law Chambers, 1st and 2nd respondent's legal practitioners