OLIVER MASOMERA
(in his capacity as Executor Dative
of Estate late Brian James Rhodes)
versus
GIDEON HWEMENDE
and
HONEY AND BLACKENBERG
and
LOURENCE ERASMUS VERMAAK
and
TERENCE CORBEN RHODES
and
VALENTINE MUSHORE
and
ALFRED CHADEMANA
and
JOEL TENDERERE
and
OLIVER CHIBAGE
and
FARAI MUTIZWA
and
REGISTRAR OF COMPANIES
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,20 November, 2015 and 2 November, 2016

Opposed matter

S Hashiti, for the applicant
D Tivadar, for the 4th respondents'

CHITAPI J: I heard this matter on 20 November, 2015 and reserved judgment. The preparation of my judgment has taken longer than expected on account of my deployment to the Criminal Division of this court in January, 2016. The delay in compiling this judgement is therefore attributable to the sheer volume of work which I have had to contend with in the Criminal Division. I have also had to peruse reference records Case No's HC 1589/13, HC

9849/13 and HC 10625/13 which are quite voluminous as these cases bear on the determination of this application.

Turning to the matter itself, this is an application in which the applicant seeks the following relief as set out in his draft order

> "1. Application for rescission in terms of common law of the judgement by her Ladyship Tsanga J HC 1589/13 (HH 424/13) given in favour of the 4th respondent is hereby granted.
>
> 2. Alternatively application for rescission in terms of rule 449 (1) of the High Court Rules, of the judgment by Ladyship Tsanga J in HC 1589/13 (HH424/13) is hereby granted.
>
> 3. The respondent's (*sic*) be and hereby ordered to pay costs of suit on attorney client scale."

The gravamen of the application is to be gleaned from para 14 of the applicant's founding affidavit in which he stated as follows:

> "14. That, this is an application for rescission of judgment in terms of the Common Law in case no. HC 1589/13 (HH 424/13) on the basis that the original order was obtained by fraud perpetrated by the 4th respondent. Alternatively, this an application for rescission in terms of R 449 (1) of High Court Rules" High Court Rules."

The applicant's allegations of the fraud allegedly committed by the fourth respondent are set out in para 15 of the founding affidavit in the following wording;

> "15. That, the application for rescission of the judgement in HC 1589/19 (HC 424-13) in terms of common law is being sought because the applicant believes that the 4th respondent fraudulently misled the court into believing that the late Brian Jones Rhodes transferred shares of the two companies Beverly East Properties Pvt Ltd and Karoi Properties Pvt Ltd into Phoenix Trust, a fact which is not true."

It is therefore necessary in determining this matter to set out the background to the dispute.

In Case No. HC 1589/13 which was disposed of by Tsanga J, the applicant in the application before me was not a party. The fourth respondent *in casu* was the second respondent in HC 1589/13. It is convenient to briefly set out the issues which fell for determination by TSANGA J. In the said application, the applicant was a firm of legal practitioners, Honey & Blackenberg. The legal firm held a sum of US$70 000 in its trust account. The money had accrued on account of monies collected by that firm as rentals due to two companies namely Beverley East properties (Pvt) Ltd and Karoi Properties (Pvt) Ltd. The companies own certain immovable property which was being managed by Robert Root & Company Estate Agents. Robert Root & Company Estate in turn engaged Honey & Blackenberg to be its legal practitioners for purposes of collecting rentals accruing on the properties from various tenants leasing them. Robert Root & Company terminated its agency

for the companies, Honey & Blackenberg however remained accepting into their trust account payments made by some of the tenants. It is the accumulated payment which totalled US$70 000.00 which led Honey & Blackenberg to petition this court for a declaratory order as to whom the money should be paid. The legal firm was faced with claims from 9 persons who lay claim to the money. The 9 claimants who were cited by Honey & Blackenberg in its application for the declaratory order granted by TSANGA J were the first and third-tenth respondents *in casu*.

TSANGA J in the application for the declaratory order or interpleader granted an order in the following terms on 20 November, 2013.

1. That the second respondent, Terence Cobden Rhodes as claimant in his capacity as Trustee of Phoenix Trust in whom the companies are held, is the lawful shareholder of the two companies.
2. That the second respondent, upon lodging with this court a valid Trust document effected by the deceased during his life time transferring the properties to the Trust, shall be entitled to require the Registrar of this Honourable Court to release to the Trust, the sum of $70 000.00 deposited with him in terms of r 206 (1) of the High Court Rules 1971.
3. That the third to the ninth respondents shall pay the costs of the applicant and the first and second respondents.

The above stated order is the one which the applicant prays that it be rescinded on the grounds of it having been obtained through fraud committed by the second respondents as referred to in TSANGA J's order. If not falling for rescission on the basis of fraud, then it should be rescinded on the basis of r 449 (1) of the High Court Rules, so the applicant prays in the alternative.

It is common cause that the two companies at the centres of the dispute were established by one, Brian James Rhodes who passed on at Harare, on 29 July, 2006. The applicant in the application before me is the executor dative of the estate of the said late Brian James Rhodes (hereinafter called "deceased". As I have already indicated, the applicant was not a party in case No HC 1589/13 determined by TSANGA J. The learned judge dismissed claims to ownership of the companies in issue by the third respondent Gideon Hwemende. This respondent is first respondent *in casu*. The first respondent had purported to appoint the fifth-tenth respondents as directors in one or other of the two companies to protect his

interests. With the dismissal of his claim, any claims which the fifth-tenth respondents may have sought to assert similarly fell through or suffered the same fate.

TSANGA J ruled that the lawful shareholder of the two companies was deemed to be Phoenix Trust whose assets included the corporate stock of those companies. Her ladyship also found that the fourth respondent herein was a Trustee in Phoenix Trust and a director in both companied owned by the Trust. She further adjudged that the fourth respondent in his capacity as Trustee of Phoenix Trust had legal title to the Trust property and that since the Trust was the holder of corporate stock in the two companies, any benefits accruing to the companied in turn accrued to the Trust as shareholder. In concluding her analysis of the facts, TSANGA J stated as follows;

> "Since the Trustee purports that the companies were transferred to the Trust some years ago by the late Brian James Rhodes, there must be in existence evidence which can be produced in support of this claim. Such Trust document was not part of the annexures in this application.
>
> As such; before the monies being held can be released, evidence of the Trust legally owning the companies must be furnished to this court through the Registrar of the High Court."

The learned judge then made the order which I have quoted (*supra*). This application is hotly contested and pits the applicant against the fourth respondent.

The applicant's contentions from a reading of his affidavit can be summarized as follows in subsistance

(a) That the fourth respondent as trustee of Phoenix Trust (hereinafter called the Trust) had in the application before TSANGA J "fraudulently alleged that the late Brian James Rhodes during his lifetime had transferred the entire shareholding of the two companies (Beverley East Properties and Karoi Properties) into the Trust"

(b) That he knew such fact to be untrue

(c) That the court had relied upon the fourth respondents' fraudulent allegation to hold that the fourth respondent as Trustee of the Trust was the lawful shareholder in the two companies and further ordering that "upon lodging with Registrar of the High Court, a valid Trust Deed effected by the deceased the late Brian James Rhodes during his lifetime transferring ownership of the two companies to the Trust, he shall be entitled to the sum of $70 000."

(d) That the fourth respondent knew that the Trust was not given any shareholding in the companies but only loan accounts as shown on the schedule of assets to the Trust Deed.

(e) That there is no documentary proof of any transfer of shares in terms of the Deed of Trust.

(f) That the fourth respondent deliberately misled the court and perpetuated a fraud because he knew that the two companies belonged to the deceased and consequently to his estate. He thus led false testimony which made TSANGA J rule that the said fourth respondent was entitled to the rentals from the two properties.

(g) That the estate had a vested interest in the case determined by TSANGA J as it was the one entitled to the rentals.

(h) That TSANGA J's judgement has the effect of dissipating a portion of the deceased's estate and affected its winding up and final distribution

(i) That further TSANGA J, would not have granted the judgement she gave had she not been misled by the fourth respondent. As such, the applicant therefore claimed rescission of that judgment at common law or in terms of r 449 (1) of the High Court Rules.

The applicant attached to his application a supporting affidavit of Elizabeth Anne Rhodes who is described as the widow of the deceased. Her purported affidavit was impugned by the fourth respondent for want of conformity with the requirements of an affidavit recognizable by the court. The affidavit did not comply with the provisions of the High Court (Authentication of Documents) Rules RGN 995/1971. The applicant objected to the affidavit on the basis that it was not properly authenticated since the purported notary public before whom it was signed was not sufficiently identified. The applicant did not present any argument against the invalidity of the purported affidavit. It is not necessary to dwell on this matter unnecessarily. The fourth respondent has submitted that the purported affidavit is a nullity and that it should be struck off the record. Counsel for the fourth respondent relied on the case *Mc Foy* v *United Africa Co. Ltd* 1961 (3) All ER 1169 (CPC) in which the celebrated British Judge LORD DENNING reasoned that a void act being a nullity necessarily meant that it was as good as not there. That being, it did not need to be set aside.

The purpose of having documents authenticated especially those executed in foreign countries is to ensure that they are genuine before the court can use them. With respect to affidavits, there is more to it than simply authenticating or certifying a document. An affidavit is a piece of evidence and because the person deposing to it is not before the court, such person is required to swear to his or his deposition before a lawfully appointed or authorised person to administer the oath or affirmation.

In terms of the High Court (Authentication of Documents) Rules 1971 an affidavit properly sworn to outside Zimbabwe is admissible in court. It follows that if not properly sworn, it is inadmissible. The onus to prove that the purported affidavit of Elizabeth Anne Rhodes was in fact an affidavit and that it was admissible in evidence in court fell upon the applicant. See *Dique* v *Viljeon* 2007 ZAGPHC 206. He did not discharge the onus. I therefore hold that the purported affidavit of Elizabeth Anne Rhodes is not admissible and as I observed, no argument was advanced by the applicant to the contrary. I therefore disregard it.

Outside of the attack on the affidavit of Elizabeth Anne Rhodes, the fourth respondent has vehemently opposed this application on other grounds both procedural and on the merits. The fourth respondent took a point *in limine* that the applicant did not have *locus standi* to bring this application. The objection to the applicants' *locus standi* is twofold. The fourth respondent averred that the applicant was only a curator *bonis* of the estate of the deceased. Section 22 of the Administration of Estates Act [*Chapter 6:01*] provides for the appointment and powers of a *curator bonis*. The section provides as follows:

> "22. (1) In all cases where it may be necessary or expedient to do so, the Master may appoint a curator *bonis* to take custody and charge of any estate until letters of administration are granted to executor testamentary or dative for the due administration and distribution thereof.
>
> (2) Every such curator *bonis* may collect such debts and may sell or dispose of such perishable property belonging to the estate as the Master shall specially authorize.
>
> (3) Every appointment made by the Master of any curator *bonis* shall, upon the application of any person having an interest in such estate be subject to be reviewed and confirmed or set aside by the High Court or any judge thereof; and the High Court or judge by whom such appointment is set aside may appoint some other fit and proper person to be curator *bonis*."

The fourth respondent's counsel submitted that the powers of a curator *bonis* are limited. The powers which he may exercise are clearly set out in s 22 (2) as quoted above. A curator *bonis* is a caretaker of a deceased estate. He protects estate and I would say that he ensures that the estate is preserved as it is until the executor testamentary or dative takes over. During this period of taking care of the estate, the curator *bonis* may collect debts or dispose of perishable assets of the estate. The curator *bonis* powers in this regard are exercised under the specific authority of the Master.

In this application the applicant in para 1 of his affidavit deposed to the fact that he was acting in his capacity of executor dative. He attached to the affidavit what he called

"Annexure 'A' being letter of administration". Annexure 'A' aforesaid is however "letters of confirmation" of the applicants' appointment as curator *bonis* in the estate of the deceased.

TSANGA J's judgment was delivered on 20 November, 2013. The letters of confirmation of the applicant as curator *bonis* were issued on 1 November, 2013. Quite clearly the applicant could not as at 20 November, 2013 have had power to engage in the court case HC 1589/13 before TSANGA J. The applicant's powers would only have derived from s 22 (2) of the Administration of Estates Act. Even if a wide interpretation was to be accorded s 22 (1) that the applicant as curator *bonis* had custody and charge of the estate, the money in question which formed the basis of the application before TSANGA J was not estate property but would have accrued to the companies as separate legal entities with a separate existence at law. I therefore find merit in the objection that the applicant would not have had *locus standi* to seek the rescission of TSANGA J's order.

In response to the fourth respondent's point *in limine* on *locus standi* the applicant in para 3.1 of the answering affidavit simply denied the allegation that he lacked *locus standi*. He then attached letters of administration appointing him executor dative of the estate of the late Brian James Rhodes. The appointment was made on 26 February, 2014. Judgment HC 1589/13 had already been handed down on 20 November, 2013. The applicant has argued in his heads of argument that he erroneously attached the letters of his appointment as *curator bonis* to his founding affidavit instead of the letters of appointment as executor dative attached to his answering affidavit. He did not explain how the mistake arose. He is required to do so. He argues that there is no prejudice to the fourth respondent caused by the error because when the applicant instituted the present application on 23 January, 2015, he was already the duly appointed executor dative.

The parties are agreed on the legal position regarding the fact that only an executor of a deceased estate is reposed with authority and power to represent that estate. The remarks of KUDYA J in *Nyandoro & Anor* v *Nyandoro & Ors* HH 89/08 in which he referred to the case of *Clarke* v *Bernade N.O & Two Ors* 1958 R & N 358 (SR) to the effect that the executor of a deceased estate is the only person with *locus standi* to bring a vindicatory action relative to the property alleged to form part of the estate are correct. The fourth respondents' counsel referred to these authorities. The applicants' counsel referred to Wille's *Principles of South African Law*, 8th ed though the precise page from which he quoted as follows was not provided. Counsel quoted as follows:

> "It follows that the executor alone can sue and be sued in respect of estate matters. Legal proceedings are brought or defended by him in his capacity as executor for he is the legal representative of the deceased".

The applicants' counsel further referred to the cases of *Snyman* v *Basson N.O* 1995 TPD 368 @ 374A and *Greenberg* v *Estate Greenberg* 1955 (3) SA 361 to buttress his submissions on the same point. The legal position is therefore properly ventilated.

The applicant has submitted that his annexing of correct letters of appointment as executor dative in the answering affidavit should be taken as having cured the defect or mistake in the founding affidavit. Counsel for the applicant cited the case of *Baeck & Co SA (Pty Ltd* v *Van Zummeren & Anor* 1982 (2) SA 112 @ 119 (W) as authority that a deficiency in authority can be cured in retrospect through the filling of an answering affidavit. GOLDSTONE J as quoted on p 119 C-D stated:

> "the right to move for the dismissal of the application on the ground of lack of *locus standi* is with respect hardly what one would envisage as constituting a vested right .. If in law the deficiency in his authority can be cured by ratification having retrospective operation, I am of the opinion that he should be allowed to establish such ratification in his replying affidavit in the absence of prejudice to the first respondent. It is clear that in this case, subject to the question of ratification and retrospectivity, the first respondent would not be prejudiced by such an approach."

The applicant further relied on various other South African decision namely,

Evangelical Lutheran Church in Southern Africa (Western Diocese) v *Sepeng & Anor,* 1980 (3) SA 958 (B) and *Merlin Gerin (Pty) Ltd* v *All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 659C. The two decisions make the same point made in the *Baeck & Co SA (Pty) Ltd* v *Van Zummeren & Anor* that where an applicant lacks authority to institute proceedings which he will have commenced, he can cure the defect by providing proof through ratification and further providing proof of pre-existing authority.

The applicant has submitted that this court should adopt the same reasoning and approach and hold that the defective or invalid authority erroneously filed by the applicant with his founding affidavit was ratified by the filing of proper letters of administration annexed to the answering affidavit.

The fourth respondent's counsel has argued that to allow the correction of a defective founding affidavit through the introduction of new matter in an answering affidavit would go against the accepted practice of this court. He submitted that this court has always followed the practice that in considering applications in application proceedings, the applicants' case is built upon the founding affidavit. If on the founding affidavit, no cause of action is disclosed,

then the application must fail. Counsel has cited a plethora of cases including *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (HC) and quoted the court's pronouncement therein as follows at p 70 C-D:

> "It is a well-established general rule of practice that new matter should not be permitted to be raised in an answering affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading* 1930 CPD 81 at 82" and *Air Zimbabwe & Ors* v *Zimbabwe Revenue Authority* HH 96/03 wherein a number of decisions are quoted, being authority that in application proceeding", an applicant stands or falls on his or her founding papers and may not raise a different cause of action in his or her answering affidavit."

It is necessary in my view to just refresh on what a cause of action is. In simple terms a cause of action would be constituted by a totality of facts necessary to be proved by the applicant or the plaintiff to justify a right to sue or enforce a right against the opposing party being the respondent or defendant as the case may be. Malaba JA (as he then was) in the case *Traude Alison Rogers* v *Elliot Grenville Kern Rodgers and Master of High Court* SC 64/07 quoted the case of *Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 H 54 E-F, thus:

> "A cause of action was defined by LORD ESTER MR in *Read* v *Brown* (1888) 22 & B 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court.
>
> In the same case LORD FRY at 132-133 said the phrase meant everything which if proved gives an immediate right to judgment. In *Letang* v *Cooper* (1965) QB 232 at 242-3 DIPLOCK LJ (as he then was) said a cause of action is simply a factual situation, the existence of which entitled one person to obtain from the court a remedy against another person."

The learned judge also referred to the cases of *Patel* v *Controller of Customs & Excise* HH 216/89, *Hodgson* v *Granger & Anor* HH 133/91, *Dube* v *Banana* 1998 (2) ZLR 92 (H). I would also add the instructive judgment of MAKONI J in *Meikles Limited* v *Zimbabwe Stock Exchange & Alban Chirume* HH 66/16.

Having defined a cause of action, the next question to be addressed is whether the applicant established a cause of action on the founding affidavit. A person or juristic entity which lacks *locus standi* cannot in my view be said to have established a cause of action. This is so because an applicant lacking in legal capacity is not recognizable by the court. The applicant in this case averred in the founding affidavit that he was the executor dative of the Estate Late Brain James Rhodes. He averred that he derived his powers from annexure 'A' being his letter of administration. Annexure 'A' as is common cause is a letter, not of administration but of confirmation as curator *bonis*. The applicant did not give any other

details of his appointment. Had the applicant alleged facts pertaining to the details of his appointment as executor dative, then the court could have appreciated that there was a mix up between the details of his appointment asn the alleged wrong annexure. The correction sought to be made by a different annexure in the answering affidavit could then have made sense. Annexure 'A' to the answering affidavit could in such circumstances have been properly condoned.

In my view, a distinction should be made between ratification of questioned authority and a substitution of different legal persona. In this case the applicant cannot be said to have ratified the defective or invalid authority. If annexure 'A' to the founding affidavit suffered from some defect, one could then seek to authenticate it by ratification. Ratification cannot be achieved through substitution. This is what the applicant seeks to do. Annexure 'A' to the founding affidavit which the applicant presented as granting him powers to bring this application does not suffer from any legal defect. No ratification of the same is required. It is a valid document which however precludes the applicant from making a claim as the one *in casu*. The document allows the applicant to make certain defined claims. The South African authorities cited by the applicant in support of his assertion that he can properly remedy the defect through ratification do not cover a scenario as the one before the court. The applicant wore two hats as curator *bonis* and as executor dative. Both hats provide for defined powers under the Administration of Estates Act. The applicant chooses which hat to wear in order to exercise his powers. He chose a hat to wear in exercising powers outside the parameters of that hat. This rendered his actions nugatory. I am persuaded that the remarks of Lord Denning in *McFoy* v *United Africa Co Ltd* (1961) 3 ER 1169 being a case quoted by the fourth respondent's counsel to the effect that a void act is in law a nullity and that a nullity as the word connotes means that there is nothing, are apt in this case. One cannot cure a nullity. See *Hativagone & Anor* v *CAG Farms (Pvt) Ltd* SC 42/2015.

Another way of looking at the issue of *locus standi* raised by the fourth respondent is to consider it as an exception that the applicant lacks *locus standi* and consequently no cause of action arises from his papers. An exception that there is no cause of action if upheld cannot be cured through substitution in order to found a cause of action. This would be tantamount to allowing the applicant to bring a new cause of action through a replying affidavit. In this case, the applicant was not without recourse. Having realised that he had relied on a valid legal document which however did not permit him to exercise the powers he sought to invoke, he should have simply withdrawn his application and commenced it afresh dorning

the correct hat of executor dative and attached the correct legal authority. If the matter had commenced not by application but by action, the applicant could have applied to amend his pleadings or papers see *Arafas Mtausi Gwarazimba* v *AKA Jutie Panagiota Mercuri N.O and Master of the High Court* HH 168/15. In application proceedings an answering affidavit seeks to answer factual averment made in the opposing affidavit. The answering affidavit should not be used to cure a legal defect and build a case which on the founding affidavit is not established. I am no persuaded to accept that the applicant could properly cure the defect in his founding affidavit on *locus standi* through the production of what he purports to have been the authorising document for his case in the replying affidavit. The applicants' case must therefore fail.

Apart from my findings for dismissing he application as set out above, I would still have dismissed the application on the merits. The applicants' case is grounded in the common law right of an affected party to seek rescission of judgment granted in default and the corresponding power of this court to rescind its judgment. Alternatively, the applicant seeks to rely on r 449 (1) the rule reads as follows in part:

> "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) …….
>
> (c) …….

The Supreme Court judgment in *Austin Munyimi* v *Elizabeth Tauro* SC 41/2013 reported in 2013 (2) ZLR 291 provides guidance on the interpretation and purport of the rule. The learned judge GARWE JA stated as follows at p 294 F-295 A:

> "It is the general principle of our law that once a final order is made, correctly reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of proceedings in deciding whether a judgment was erroneously granted. The specific reference in r 449 to a judgment or order granted in the absence of any party affected thereby envisages a situation where such a party may be able to place facts before, the latter court, which facts would not have been before the court that granted the order in the first place – see *Grantully (Pvt) & Anor* v *UDC Ltd* 2000 (1) ZLR 361 (S) at 364 H- 365 A-D. Further, it is also established that once a court holds that a judgment was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause": *Grantully (Pvt) Ltd & Anor* v *UDC Ltd supra* at 365, *Banda* v *Pitluck* 1993 (2) ZLR 60 H at 64 F-H, *Mutebwa* v *Mutekwa & Anor* 2001 (2) SA 193 (TK*) at 1991 – J and 200 A-B."*

The learned judge drawing on and adopting the remarks of JAFA J in *Mutebwa* v *Mutebwa supra*, proceeded to point out that a distinction had to be made between the approach to be adopted by the court in instances where the court or judge revisits its or his judgment *mero motu* to correct, vary or rescind it in terms of r 449 and where the judgment is revisited on application of an affected party who was absent when the judgment or order was made. Where the court or judge revisits the judgment *mero motu*, the court or judge is limited to the four corners of the record of proceedings. Where however the rule has been invoked upon the application of an affected party who was absent when the judgment or order being revisited was made, the court or judge is not bound to the four corners of the record. The court is enjoined to take into account the facts set forth in the affidavits filed with the application. The error in such a case does not necessarily have to appear *ex faci*e the record.

It therefore clear in my reading of the authorities cited above that in either case, that is whether the court acts *mero motu* or an application, there should exist an error to be corrected. It is this error which must be established by the applicant. The next issue is to define what amounts to an error. In the *Munyimi* v *Tauro* case, *supra*, the learned GARWE JA stated that:

> "what amounts to an error has also been the subject of a number of decisions."

He then gave examples of the *Banda* v *Pitluk* case wherein a default judgment had been granted against a defendant who had entered appearance to defend. The appearance to defend had not been brought to the attention of the judge meaning that had the existence of the appearance to defend been brought to the attention of the judge, he would not have granted judgment in default of appearance to defend. In the *Mutebwa* v *Mutebwa* case, a false return of service purporting that the Deputy Sheriff had affected personal served was used to obtain judgment. In the *Munyimi* v *Tauro* case, there was a discrepancy between the sale agreement which had been attached to the summons and declaration with respect to the parties identifications and the alleged witnesses. GARWE JA held that the discrepancies were such that had the judge who granted judgment been made aware, he would not have granted judgment against a witness to the sale agreement.

The question as to what amounts to an error was not addressed directly by the Supreme Court in the *Munyimi* v *Tauro*'s case. The learned judge in fact gave examples of errors which would pass to satisfy the requirements for correcting, rescinding or varying a judgment. An error is a mistake. A judgment granted in error or erroneously would mean that

the court or judge committed a mistake or mistakenly granted the judgment. Put in another way, the enquiry should be that the applicant needs to establish the existence of a fact or material which influenced or moved the court to grant judgment. It must be shown that the court would otherwise not have granted judgment but for that fact or material that becomes the error.

Rule 449 (1) (a) as quoted above comes into play where the judgment sought to be revisited was either erroneously sought or erroneously granted. See *Machoto* v *Mudimu & Anor* HH 443/13. A judgment in my view is erroneously or mistakenly sought by a aprty who seeks a judgement whilst labouring under a mistaken belief that he can properly seek judgment. A simple example is like the one given by GARWE JA in the *Munyimi* v *Tauro* case whereby he quoted the case of *Banda* v *Pitluk*. If the plaintiff or the applicant applies for default judgment oblivious of the fact that appearance to defend or notice of opposition has been filed, such application will have been erroneously made and if the court grants the application it will have granted it in error too. I do not find that TSANGA J granted the application in case No HC 1589/13 in error as envisaged in r 449 (1). What was the error if one may ask? The parties presented argument and the learned judge considered the papers filed before her and the arguments put forward in support thereof. The learned judge then delivered her judgment with reasons for the order which he made. It is noted that none of the losing claimants or respondents appealed against the judgment.

The applicant avers that the judgment in question was granted after the court had been fraudulently misled into believing that the deceased had transferred shares into his two companies into Phoenix Trust. A fraud and an error are two different legal concepts. I believe that within the context of r 449 (1) (a) the state of affairs as argued by the applicant cannot ground a setting aside of the judgment under that rule. I agree and endorse the remarks made by MAKARAU J (as she then was) in *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470 (H) at 172 E-H that:

> "Rule 449 is a step to correct an obviously wrong judgment or an order. The power given the court under the rue is discretionary and, like all such powers, must be exercised judiciously. …. A review of the authorities would appear to suggest that the rule is designed to correct errors made by the court itself and not an omnibus through which new issues and new parties are brought before the court for trial"

The applicant in this case is clearly seeking to bring in new issues which were not before TSANGA J. He seeks to argue that the deceased never transferred any shares in the two companies to the Trust.

TSANGA J's judgment is clear in that she had to determine competing claims made to Honey and Blackenberg by various parties, to rental monies from the two properties as earlier described. She made a determination that the Trust represented by the fourth respondent herein was the lawful shareholder in the two companies. The judge then issued a conditional order that the fourth respondent herein was required to lodge a valid trust document and evidence of proof of transfer of the properties to the Trust with the registrar before the US$70 000.00 could be released to him. There was clearly no error committed as envisaged in r 449 (1). The applicant seeks to demonstrate that no shares were ever transferred by the deceased. The court did not grant a judgment in error because TSANGA J directed that proof be furnished. The order sought by the applicant in terms of r 449 (1) must fail.

It leaves me to deal with the other ground for seeking the rescission of the court judgment in issue. The applicant seeks to rely on the powers of the court to rescind its judgment under the common law. The applicant avers that the fourth respondent fraudulently alleged that the late deceased during his life time transferred the entire shareholding of the two companies to the Trust represented by the fourth Respondent. The applicant in support of his claim to the alleged fraudulent misrepresentation by the fourth respondent relied as outlined in para 19 of his affidavit on copy of the Trust Deed which lists the schedule of assets to be received by the Trust as two loan accounts as detailed therein. The applicant alleged in para 20 of his founding affidavit that "there is no documentary proof of any transfer of shares in terms of which the Trust obtained ownership or control of the properties held by the two companies."

The fourth respondent has denied the allegations of fraudulent misrepresentation of facts and attached to his opposing affidavit copies of share certificates, resolutions by the companies, the share registers and statutory returns which show the shareholding of the said two companies as being Phoenix Trust. The applicant in the answering affidavit questions the authenticity of the documents. He alleges that the documents are fraudulent and intended to defraud the Estate which he represents. He however makes a startling allegation that the proof of the fraud lies in that the records of the two companies have disappeared from the Companies Office a government department. Proof that the Companies Office lost the documents was not produced. In short the applicant does not have and cannot produce records to back his claims. In my view, this put paid to any claims which the applicant may seek to advance. How does he claim falsity of documents without producing authentic documents to counter the alleged fraudulent documents. What the applicant is doing is simply

to make allegations which are not backed by any documentary evidence as to what he claims to the court to be the correct shareholding of the companies. Ownership of companies is evidenced through documents of ownership in the form of share certificates, share registers, accompanying returns and other such officially recognised documents which collectively or individually prove ownership. What the applicant is simply saying is that he does not have proof of the existing ownership of the two companies by the deceased. He cannot lay his hands on any of the company records at the Companies Office because the documents are missing. In his view and dispute his handicap, he avers that anyone purporting to hold ownership of the companies is doing so fraudulently though he does not have any counter documents. One wonders on what basis even if the judgment were to be set aside, the applicant would prove to assert the existing ownership of the companies by the deceased.

The applicant also appears to approbate and reprobate at the same time. I have considered case records HC 10573/13 and HC 10625/13 referred to by the fourth respondent in his opposing affidavit. In case No HC 10573/13, the applicant as curator *bonis* filed an affidavit in which he sought the joinder of the Estate of the deceased, and the Master of the High Court as 11th and 12th respondents in case No. HC 1589/13 being the same case whose judgment he now seeks to have set aside. He withdrew the application on 18 July, 2014. In his founding affidavit in paras 4 and 5 thereof, he averred that one Laurence Erasmus Vermark and Terrence Cobden Rhodes (the fourth respondent herein) were Trustees of Phoenix Trust. He described the said the Trust as a sham which was not registered and non-existent. He averred that it was purportedly created by the deceased. The applicant in the same application HC 10573/13 sought that the estate be joined as a respondent to case No HC 9849/13. Case No HC 9349/13 was an application by the first respondent in this application for rescission of the judgment by TSANGA J in HC 1589/13. The first respondent claimed to own 60% of the two companies' shareholding. Case No 9849/13 was dismissed with costs on the higher scale by MATHONSI J on 21 May 2015.

When I further perused the documents in HC 10573/13, I noted that one Laurence Erasmus Vermark had deposed to an affidavit on 20 May, 2013. He made various allegations of how he had been intimidated and threatened if he did not resign as a director of the two companies. What attracted my interest as being relevant to this application is that the said deponent to the affidavit confirmed that all the issued share capital in the two companies in issue were held the Phoenix Trust and that he was a trustee of Phoenix Trust until 25 January 2012 when he resigned. He confirmed that the fourth respondent was and is a trustee of the

said trust together with one Ken Regan. The secretaries of the companies according to the deponent were Accounting Executor Services (Pvt) Ltd. The applicant in the application before me does not say anything about this information which he is aware of. He only states that the fourth respondent misrepresented that the Trust owned the shareholding in the companies. In yet another case, HC 10625/13 filed on 10 December, 2013, the applicant as curator *bonis* of the estate aforesaid, made an urgent application seeking in the interim, a stay of execution of TSANGA J's judgment and for an order that the Master of the High Court should run the affairs of the two companies pending the determination of the joinder application which as has already been noted, he subsequently withdrew. The applicant in his affidavit in HC 10625/13 alleges that he carried out a forensic audit which revealed that Phoenix Trust was a sham and non-existent. He averred that TSANGA J had granted her judgment in error.

I agree with the submissions made by the fourth respondent's counsel that the applicant seeks to mislead the court by making conflicting depositions in the affidavits in various cases which he has filed in this court. None of the previously filed cases have seen the light of the day. The applicant appears to be clutching at straw. He has no information or documents relating to the two companies to back up his claim. He refers to a forensic audit of the companies having been carried out. The forensic audit has remained a secret document. He did not attach it to the present application nor to the cases to which my attention was drawn and which I have noted in this judgment. The applicant appears to be on a fishing expedition. When the trust deed for the Trust was produced, he then created another angle to seek the re-opening of TSANGA J's judgment. He changed from his position that he had carried out a forensic audit which showed that Phoenix Trust is a sham. In my judgment, the applicant is involved in a stalking exercise whereby he waits by the shadows and each time a document pertaining to the two companies comes to his attention, he tries to and devises ways to attack and nullify it. The applicant himself has no contra evidence or documentation to back his position.

The question I then address is whether in such circumstances, I should be persuaded to set aside TSANGA J's judgment using the court's common law powers. It is settled law that the onus is on the applicant who seeks rescission of judgment granted in default at common law to demonstrate sufficient cause for the relief to be granted. See *Shinga Express (Pvt) Ltd* v *Hubert Davies (Pvt) Ltd* 1998 ZLR, *Uzande* v *Katsande* 1988 (2) ZLR 47; *Kaiser*

Engineering (Pvt) Ltd v *Makeh Enterprises Ltd* HB 6/12. In *Mudzingwa* v *Mudzingwa* 1991 (4) SA 17 (ZS) GUBBAY JA stated as follows:

> "Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which restitution in integrum would be granted, such as fraud or some just cause, including Justus error …. Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission – see *Voet* 2.4.14; *Gorenewald* v *Gracia (Edms) Bpk* 1985 (3) SA 9687 at 972 C-D and G-H. See also *Jones* v *Strong* SC 67/03 and *Yeng Goo Chao* v *Stalin Man Man* SC 3/15."

In my judgment, the court does not enjoy an inherent discretion to rescind its judgment under the common law outside the parameters of ground upon which *restitutio intigrum* would be granted. See *Childerly Estate Stores* v *Standard Bank of SA Ltd* 1924 OPD 163. It is important in cases where rescission is sought under the common law to appreciate that the court which granted the judgment being revisited will have become *funtus officio* after having considered the merits of the dispute and given a definitive judgment thereon. The ordinary and accepted way to revisit the judgment is by way of appeal so that a higher authority considers the judgment. A court faced with an application to revisit its judgment as *in casu* must approach the application mindful of the fact that it will have exhausted and exercised its authority which it cannot do twice.

In casu the applicant alleges fraud as the ground for seeking the setting aside of the judgment. The fraud alleged to have been committed by the respondent and which influenced TSANGA J to grant the order which she gave was said to have manifested itself in the fourth respondent misrepresenting that Phoenix Trust of which he was a trustee held the issued shares of the two companies. The applicant on his own does not provide evidence or proof of the correct position regarding the shareholding. Fraud cannot be proved by a mere say so. The applicant in order to show good cause should at least have provided tangible evidence that the correct shareholding of the companies is otherwise different from that which the fourth respondent gave it out to be. The fourth respondent has in the opposing affidavit gone into detail to prove his assertions and produced official documents which prove that Phoenix Trust owns the entire shareholding in the companies. To simply then attack the authenticity of the produced documents without providing any contra proof to controvert the fourth respondent's evidence is an exercise in futility.

As I have pointed out, the applicant simply does not have evidence of the shareholding of the companies. TSANGA J's judgment must stand because it has not been shown that she relied on any fraudulent evidence in assessing the facts before her in so far as

the evidence of the forth respondent was concerned. Rescission under common law is granted under exceptional circumstances. Such circumstances have not been demonstrated to me on a balance of probabilities in this case. The relief sought must stand refused.

Turning to the question of costs, the fourth respondent has applied for costs on the higher scale and against the executor *bonis* or dative as the case maybe being Oliver Masomera. Costs are in the discretion of the court albeit the general rule being that costs follow the result. Counsel for the fourth respondent did not seek to mount any spirited argument regarding the level of costs other than to submit that this application is in an abuse of the court process which merited a dismissal with costs on the attorney and client scale. The applicant on the other hand submitted in his heads of argument that the applicant was seeking costs on the same scale of attorney client scale because the fourth respondent perpetrated a fraud against the estate of the deceased. It was submitted that the fourth respondent did not have authentic legal documents to support his claim. This was a startling submission because the applicant himself did not produce the documents which otherwise show that the fourth respondent is misrepresenting facts.

Having carefully considered this application, it is clear to me that the applicant judging by the previous applications which he has filed and lost or withdrawn, is determined to ensure that the estate of Brian James Rhodes does not lose what may be due to it. Unfortunately, the applicant appears to be ill advised. He needs to gather facts which would support the claims he is making. He is just groping in the dark. Already the estate has been saddled with costs of related matters and continues to incur additional costs. Coming to court should not be viewed as an excursion in the park. The applicant needs to be properly advised and put together the evidence he has including getting proper advice on evidence. I reluctantly concluded that the applicant has not acted *mala fide* in this application. He however must introspect and be properly advised lest another court may rule that he is abusing the court process if he files endless unmerited applications. I will not penalize the applicant nor the estate with punitive costs.

I make the following order:

The application be and is hereby dismissed with costs to be borne by the Estate of the Late Brian James Rhodes.

C Nhemwa and Associates, applicant's legal practitioners
Kevin Arnott, 4th respondent's legal practitioners