HOPCIK INVESTMENTS (PVT) LTD
versus
MINISTER OF ENVIRONMENT WATER AND CLIMATE
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 1 June 2016

Correction of Judgment

P.C Paul, for the applicant
E. Furidzo , for the 1st respondent
R. Mhlanga, for the 2nd respondent

DUBE J: On 17 February 2016 I delivered judgment in this matter. Following this and on 1 March 2016, the applicant's legal practitioners brought to my attention a patent error or omission in my order by way of a letter to the court. The letter reads in part as follows,

> "We refer to the judgment of the learned judge dated 17th of February 2016. We believe that the order made by the learned Judge is ambiguous because paragraph 1 thereof does not specify the quantity of water to be supplied and although it provides for the supply of water to be made within a period of three months, it does not specify what supply is to be made thereafter and at what intervals. Would you please inquire from the learned judge as to whether she is prepared to correct, vary or amend her order *mero motu* in terms of Order 249 of the High Court Rules after giving the respondent an opportunity of being heard."

Following this letter, the court arranged for the parties to meet in chambers. At the meeting the court acknowledged the omission as highlighted and indicated its preparedness to correct the omission by correcting the order granted to reflect the true intention of the court. The applicant and the first respondent's counsel did not take issue with the correction of the order. Their view was that it was clear from the body of the judgment what the court's ruling was and the parties were happy with the court correcting the order *mero motu*.

Resistance came from the first respondent's counsel who was opposed to the suggestion. Counsel for the first respondent, Mr *Furidzo* requested to file written submissions articulating his

position. He requested that the court should dispense with the need for oral argument thereafter. The first respondent's counsel filed written submissions and the court proceeded, despite the spirited opposition, to correct the order by issuing a corrected version of the judgment and order. I have been requested for written reasons for my order. These are they;

Generally when a court has given a final order or judgment, it becomes *functus officio* and may not revisit the matter except in exceptional circumstances .The common law allows a court to rescind, vary or correct its own judgment or order . See *Harare Sports Club & Anor* v *United Bottlers Ltd* 2000 (1) ZLR 264 (HC) ,*Grantully (Pvt) Ltd & Anor* v *UDC* Ltd 2000 (1) ZLR 361 *(SC), Firestone SA Pty B Ltd* v *Genticuro AG* 1977 (4) SA 298 . At common law, the High Court derives the power to supplement, clarify or correct its judgments or orders from its inherent jurisdiction to regulate its own judgments in the interests of justice. This approach is based on the principle of certainty of judgments. The court is expected to do so immediately it becomes aware of the error or omission. This position is codified in Order 249 r449 of the High Court Rules which creates an exception to the *functus officio* rule.

Order 249 r 449 is worded on the following terms;

"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 substituted by S.I. 25 of 1993]"

. Rule 449 gives the court the power to interpret and clarify its own judgments by correcting, rescinding or varying any judgment or order it has made in two instances, either *mero motu* or on application of either of the parties. The rule also lays down the circumstances in which the rule may be employed. It permits a judge who wishes to correct an order *mero motu*, to do so on notice to interested parties, of the order proposed. The notice need not be in written

form. The requirement to give notice serves to advise all parties affected by the judgment or order of the intended action and the nature of the correction or variation sought to be made.

The **Free Dictionary**, an online dictionary, defines the term ex *mero motu* as follows:

> "mere motion of a party's own free will. To prevent injustice, the courts will *ex mero motu,* make rules and orders which the parties would not strictly be entitled to ask for"

Black's Law Dictionary Free On line Legal Dictionary 2nd ed defines a person who acts *mero motu* as doing so, 'Of his own mere motion, of his own accord ; voluntarily and without prompting or request'

A court will act *mero motu* where it intervenes to correct an irregularity without being formerly requested to reach such a decision by either party and which the parties are not strictly entitled to, but which action will prevent an injustice occurring. A court acting *mero motu* acts out of its own accord and free will. Reference in the definition in Black's Dictionary to the court doing it "without prompting or request" suggests a prompting or request by way of formal application. Where one of the parties has formally requested the court to vary its order by way of an application, the court may not proceed and correct the judgment or order *mero motu.* Where a court has gained knowledge that it has made an error, it matters not how it became aware of the error or omission. The fact that the court has learnt of the error from one of the parties does not debar it from making a decision to correct the error on its own accord where it is convinced that the judgment or order does not reflect its true intention. In the absence of a formal application from the parties, a judge whose attention has been brought to an error he made in his judgment or order may act *mero motu* and correct the error.

After the applicant wrote to the court, the parties were called to my chambers and given oral notice of the court's decision to correct its order and the nature of the correction sought to be made. Mr. Furidzo from the City of Harare fell into the error of supposing that he was entitled to oppose the court's decision to correct its own order. Once a court has decided to correct or vary its own order or judgment *mero motu,* a party aggrieved by such a decision has no entitlement to oppose the court. The intention of the legislature in providing that notice be given to the parties was simply a safeguard, to ensure that the parties would not be taken by surprise when they gained knowledge that the judgment or order has been corrected or varied. In no way did the legislature intent that a party aggrieved by a decision of a court to correct its decision *mero*

motu, file opposing papers against the court's intended action. The requirement to give notice in no way implies that either of the parties has any right to oppose the court. Such a scenario is unprecedented and undesirable. The applicant's recourse lay in an appeal against the court's decision.

The approach of this court has been, where an error has been brought to the court's attention by one of the parties, in the absence of a formal application, to correct the error *mero motu,* where the court agrees with the observation made. *See Base Minerals Zimbabwe Pvt Ltd* v *Valentine and Ors HH 559/14.* In this case no formal application was made by either of the parties seeking correction of the order. Only an enquiry regarding the court's preparedness to correct its order was made. In the absence of a formal application requesting the court to correct its judgment or order, the court was entitled to *mero motu,* correct its own error. In this case he decided out of its volition to correct the order. I view that the court was entitled to act *mero motu* to correct its error.

Coming to the nature of the error made, Herbstein and Van Winstein in *The Civil Practice of the High Courts of South Africa*, Fifth ed at p 934, describe a 'patent error or omission' 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 authors state that the patent error or omission must be attributable to the court itself and that relief will only be accorded where the terms of the judgment or order do not reflect the true intention of the presiding judge. In the *Firestone case,* Trollip J held at p 304 DH, in a case involving correction of an order in terms of r 42 of the Uniform Court Rules of South Africa which is identical to our own r 449, that the court has the power to clarify its own judgments or orders so as to give effect to their true meaning and true intention of the court for as long as it does not alter the 'sense and substance' of the judgment or order. Further that the court's intention is to be ascertained primarily from the language or order as construed according to the usual rules. The same reasoning was followed in *Faheem Investsments Pty Ltd* v *The Attorney General and Ors* 2010 1 BLR 675 HC.

A patent error in the context of r 444 is apparent or clear from either the judgment or order. A court may only correct its judgment or order *moru motu* where it has made a patent error or omission as envisaged in terms of r 449. It is permissible for a judge who has made a patent error or omission in a judgment or order to clarify his order or judgment, of his own free will or

motion by correcting it so that it reflects the true intention of the court in circumstances where the error is evident from the face of the judgment or order. The court should endeavor to do so without altering the 'sense or substance' of the judgment or order and must ensure that it does not admit a different interpretation to the judgment or order. Consequently, this exception is limited only to the correction of the order. The r 449 (1) (b) (2) caters for mistakes attributable to the court. The correctness of the order or judgment originally issued is not an issue but rather whether the court made a patent error or omission and in addition whether the order granted reflects the true intention of the court. The court may not substitute its judgment or order for another one completely different. The rule is meant merely to facilitate clarification of orders or judgments.

In considering whether the particular facts of this matter give rise to an error as envisaged by r 49 (1) (b) (2), I now turn to interpret the last paragraph of my judgment. The concluding paragraph of my judgment reads as follows:

> "The applicant has asked for 15000 litres per week. The basis for such supply of such quantities of water was not established. The applicant is a company, its operations and number of people requiring water is unknown. It was not shown why it requires such large quantities of water per week. The respondents have not meaningfully challenged the quantities requested for or made any other suggestions. I have in the exercise of my discretion decided to accede to the request.
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> In the result it is ordered as follows,
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> 1 The first and second respondents jointly and severally shall ensure a supply of portable water to the applicant's premises being 3 Tynwald Close; Ballantyne Park within 3 months of this order
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> 2 Should the respondents through no fault of their own be unable to supply the water for any given period they may make an application to this court for a variation of this order during that period. Such a request shall not be made to the court unless such a request for such variation is first made to applicant and applicant has unreasonable refused to grant that request.
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> *3* ...''

On a proper reading of the judgment, the intention of the court is evident from the judgment. It is clear from the judgment that the court intended that there be continuous and fair supply of water to the applicant. The court expresse reservations regarding proof of the claim. It nevertheless decided to accede to the applicant's request for a supply of 15 000 litres. The order and the reasons given in the judgment for giving it, ought to be considered together to determine

whether the order reflects the true intention of the court. The order as originally issued does not record the litres to be supplied and the intervals at which the water is to be supplied. This is contrary to the intention of the court. An obvious error was made in the order by omitting to include the amount of water to be supplied and by failing to specify what supply is to be made thereafter and at what intervals. It was never intended that the supply be a once off event. The failure to specify the amount of water to be supplied and the intervals at which the water is to be supplied was through an oversight by the court and results in an ambiguity in the order. It is appropriate in the circumstances of this case for the court to amend or vary its order and reflect its true intention and to do so *mero motu* in the absence of any application to do so from either of the parties. All the court is doing is to amend and include the 15000 litres it awarded to the applicant and the intervals at which the water is to be supplied as part of the amended order. The court has simply clarified its judgment and order without altering the sense and substance of its judgment. There is no prejudice that the respondents stand to suffer as a result of the correction or amendment, as the award of 15000 litres has always been what the court did in fact award but omitted to record in its order.

Accordingly the order granted under HH 137/16 is amended to read as follows:

1. The 1st and 2nd respondents, jointly and severally, shall ensure a supply of potable water to applicant's premises, being 33 Tynwald Close Ballantyne Park, of 15 000 litres within three months of this order and thereafter to continue to supply such quantity of water on a weekly basis.
2. Should the respondents through no fault of their own be unable to supply the water for any given period they may make an application to this court for a variation of this order during that period. Such a request shall not be made to the court unless a request for such variation is first made to applicant and applicant has unreasonably refused to grant that request.
3. The respondents are to bear the costs of this application.

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Wintertons, applicant's legal practitioners
Civil Divisions, 1st respondent's legal practitioners
Kanokanga and Partners, 2nd respondent's legal practitioners