PAMELA RUSERE
versus
PHILLIP CHIYANGWA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 9 and 10 February 2022

Urgent Chamber Application

K Siyeba, for the applicant
M Ndlovu, for the respondent

MANYANGADZE J: The applicant seeks, by way of an urgent chamber application, variation or correction of a judgment handed down by this Court on 14 January 2022, under Case No. HC 7099/21, Judgment No. HH 39-22.

In that judgment, the court ordered a stay of execution of an order granted by this court on 2 November 2021 per KWENDA J, MUCHAWA J and CHILIMBE J, under Case No. CIV "A" 77/21. Execution of this order was suspended pending the determination of an application for its rescission filed under Case No. HC 9097/21. The application for rescission was filed in terms of s 29(1)(b) of the High Court Rules, 2021, it being alleged that the order was granted in error.

In the instant application, the applicant is alleging that there was an erroneous omission in the order for stay of execution.

The respondent has raised four points *in limine*. These are that:

(i) The application is improperly before the court in that it has no basis in r 29(1) (b).
(ii) The application is improperly before the court in that it has been brought as a chamber application instead of court application.
(iii) The draft order is defective in that it contains no provisional order.
(iv) The matter is not urgent.

No basis for variation in terms of r 29(1) (b)

The respondent's averment on this aspect is captured in para 3.1.1. of his opposing affidavit, wherein it is stated:

> "3.1.1 The application is improperly before the Court. The applicant purports to have made the urgent chamber application in terms of Rule 29(1) of the High Court Rules 2021 on the basis that the order made by the Honourable Justice Manyangadze under case number HC 7099/21 requires a variation. The respondent strongly denies that there exists a factual, legal or procedural basis to warrant the said application."

The essence of the respondent's contention on this point is that the court's judgment is clear, comprehensive and complete. It requires no variation. Any attempt to correct or vary it is tantamount to an improper review by the court of its own judgment.

During oral submissions, Mr *Ndlovu*, for the applicant, expressed this point in the following terms:

> "You have made a pronouncement on this matter. Your judgment is extant. The application seeks you to revisit your own judgment. That is contrary to law.
>
> This is a disguised appeal or review."

Further to that, Mr *Ndlovu* contended that if the applicant was not happy with the judgment in question, her remedy was to note an appeal with the Supreme Court and seek to have it set aside. In doing so, she would have another legal hurdle to surmount, it being an interlocutory judgment. She would have to first seek leave to appeal from the judge who issued the judgment.

In countering the respondent's submissions, the applicant averred that she is not asking the court to revisit its judgment in the sense alleged by the applicant. She is simply asking the court to rectify an error in the judgment. The operative part of the judgment must include an order that the respondent pays maintenance in terms of the Magistrates' Court Order under Case No. M577/20. In this regard, Mr *Siyeba*, for the applicant, argued during oral submissions:

> "The applicant is seeking the correction of an order made by this court. The Court has omitted to mention that maintenance be paid in terms of the Magistrates' Court Order M577/20.
>
> The court can even *mero motu* point out an error, and proceed to correct it even-if no party has made an application.
>
> This court cannot be held to be *functus officio*. The court is simply being called upon to vary its order."

I am unable to uphold the applicant's contention. The correction it seeks is not the one envisaged in r 29(1)(b). Rule 29(1)(b) reads:

> "(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) …

(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) …"

From the papers filed by the applicant, elaborated in oral submissions made on her behalf, the basis of her application would be, in terms of the cited provisions, that there was a patent error or omission in the judgment. Does the judgment reflect any such error? The operative part of the judgment, which is the one applicant is concerned with, reads as follows:

"1. The application be and is hereby granted.
2. Execution of the order issued in Case No. CIV 'A' 77/2021 be and is hereby stayed pending determination of the application for rescission filed under Case No. 9097/21.
3. Each party bears its own costs."

The cited order reflects the relief that the respondent (then applicant) in that matter sought. It completes the judgment, granted after consideration of the submissions made by both parties. It shows no error or omission that can be a ground for an application in terms of r 29(1)(b).

In her draft order, the applicant wants the order corrected to read as follows:

"1. The application for correction and variation of an interim order granted by the Honourable Justice Manyangadze under case number HC 7099/21 be and is hereby granted.
2. The interim order under case number HC 7099/21 be and is hereby varied and corrected by adding paragraph 1.1 which shall read as follows:

1.1. The applicant be and is hereby ordered to pay monthly maintenance in the sum of RTGS$8 000.00 per month and school fees for the minor children until the application for rescission under case number HC 7097/21 is finalised." (emphasis added)

In particular, the applicant wants the addition of sub-paragraph (1.1). The result of that addition is a new order which cannot, by any stretch of the imagination, be taken to be a correction of the order in question. Clearly, the court would have revisited its order and not corrected it as contemplated by r 29(1) (b). This is legally untenable. See *Unitrack (Pvt) Ltd* v *Tel One (Pvt) Ltd* SC 10/18. It would have effectively incorporated the order made by the Magistrates' Court under Case No. M577/20, making it an order of this Court.

From submissions made on behalf of the applicant, it appears there was confusion on the effect of the order for stay of execution granted in Case No. HC 7099/21. The applicant was apparently advised that the order suspended everything to do with the payment of maintenance for the minor children concerned. That is not correct.

What was stayed by the order is execution of the order granted by this Court, sitting in an appellate capacity in Case No. CIV "A" 77/21. The legal effect of that is that the parties revert to the *status quo ante*, which is the position in terms of the Magistrates' Court order of 12 April 2021, which was granted in default of applicant's appearance. That order reads:

> "Maintenance order is varied downwards to $8 000.00 per month plus school fees as per the draft order."

The order in Case No. CIV "A" 77/21 had dismissed that order i.e. the Magistrates' Court Order of 8 April 2021. The order staying execution of the order in CIV"A" 77/21 means that the Magistrates' Court Order becomes extant and executable. Its fate now hangs on the outcome of the application for rescission pending under Case No. HC 9097/21.

In the instant application, the applicant seeks to import the Magistrates' Court order into an order of this Court, so that it can be enforced as an order of this court. That is improper. The Magistrates Court order is a stand-alone and extant order of a court of competent jurisdiction, whose enforceability is not derived from an order of this Court.

For the avoidance of doubt, in the meantime, nothing prevents the applicant from executing the said Magistrates Court order, through any one of the methods legally available for the enforcement of maintenance court orders.

The present application, as already indicated, seeks relief which this court cannot competently grant. It can only do so at the risk of reviewing its own judgment. The point *in limine* has merit and must be upheld. I note that the submissions made on this aspect also traversed the merits of the matter. The preliminary point impugned the very basis of the application, whether or not the variation sought is within the scope of r 29(1) (b). It has been shown that it is not.

If upheld, as it has been, the point *in limine* is dispositive of the matter. It renders it unnecessary to delve into the other points raised. The proper course of action is to order that the matter be struck off the roll.

In the result, it is ordered that:

1. The application be and is hereby struck off the roll.
2. Each party bears its own costs.

Bherebhende Law Chambers, applicant's legal practitioners
Mutamangira & Associates, respondent's legal practitioners