CITY OF HARARE
versus
GORDON DUTTON THOMAS
and
MINISTER OF WATER RESOURCES DEVELOPMENT AND MANAGEMENT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 November 2015 & 14 September 2016

Opposed matter

R Kunze, for the applicant
P.C. Paul, for the first respondent

CHITAPI J: In this application, the applicant sought an order varying a consent order granted by this court in case No. HC5469/10. The content of the order sought in the application appears in the draft order and is couched as follows:

> "IT IS ORDERED:
> 1. That the order granted by the Honourable Court in case No. HC 5496/10, be and is hereby varied to read:-
> 'The applicant shall supply water to the first respondent as and when it is able to do so.'
> 2. That the first respondent pays the costs of this application."

The first respondent filed a notice of opposition and an opposing affidavit. The second respondent did not oppose the relief sought by the applicant and filed an affidavit setting out reasons why it supported the applicants' position.

When the matter was set down on 24 November, 2015, I heard argument from counsel for the applicant and the first respondent. After considering the arguments advanced and the nature of the issue requiring my determination, namely whether or not to grant a variation of a consent order executed by the same parties, I asked counsel whether there had been earnest and *bona fide* consultation between the parties with a view to agreeing to vary the order by consent. I suggested that counsel should try and get parties to engage because since the consent agreement had come about as a result of constructive engagement, it was best that the parties try and find each other on a without prejudice basis with regards the proposed variation.

The suggestion which I made was agreed to by the parties and with the consent of the parties' counsel, I issued the following order:

1. Judgment is hereby reserved to allow the parties time to engage and attempt to agree on an appropriate variation of the consent order granted in case No. HC 5469/10.
2. In the event that the parties reach agreement on the terms of the variation, they shall file the agreement with the court for endorsement of the variation by no later than 11 January, 2016.
3. Should the parties fail to reach agreement or to file such agreement by 11 January, 2016 and advise the court to that effect, the court will determine the application and give judgment thereon on the basis of the documents filed of record and argument presented by counsel today in support of the parties' respective cases.

It is my view that courts should endeavour to encourage and give judicial support to negotiated settlements between opposing parties. If parties settle their disputes amicably without the need for adjudication by the court, they basically enter into a compromise arrangement. A compromise puts an end to a law suit and would be on the same footing as a judgment because it renders the dispute *re judicata*. The court in the South Africa decision of *MEC for Economic Affairs, Environment Tourism* v *Kuisenga* 2008 (6) SA 264 (CK) at 284 C-E quoting Huber and Voet in their respective articles *Jurisprudence My Time* 3.15. 15 and 2.15.22 in the case of Voet stated

> "A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits." The South African Appeal Court in *Schierhout* v *Minister of Justice* stated as follows:
>
> > 'The, law in fact, rather favours a compromise (t*ransactio*), or other agreement of this kind for interest *rei publicae ut sit finis litium*."

There is no gain saying that compromise agreements invariably promote an orderly and effective system of justice administration. The litigants benefit from avoiding costs which are the hall mark of protracted and often acrimonious trials. The cases which have to be disposed of through trial are reduced hence reducing the case load on the judicial system. The court's resources including the judges are not clogged and stretched. This allows for a smoother and more efficient justice delivery system. Compromise agreements help the parties to retain an amicable relationship which is likely to last and from a logic point of view, parties are likely to abide by and perform the rights and obligations which they will have

created and/or imposed mutually on one another more readily that if the same are forced upon them.

Being a proponent of the alternative dispute resolution school and moreso as in this case where parties had previously reached a mutual agreement which one of them sought to vary, I was moved to suggest that the parties adopt such a course since they had not had the opportunity of holding a pre-trial conference as a condition precedent to the hearing as would be the case in action proceedings. The parties as already indicated agreed to attempt to negotiate and reach a compromise. I hoped that they did so. The hope unfortunately ended up being a forlorn one. The parties failed to agree. Such a failure to agree is part of the process of alternative dispute resolution and should not dampen the court or a judge's resolve to encourage alternative dispute resolution mechanisms especially in cases where prospects of settlement are positive. The court should however make a decision without being influenced negatively by the parties' failure to agree to settle.

Before I deal with the merits of the application, there is an unfortunate development which happened in this matter which needs to be explained. There has been a delay in the handing down of this judgment. The respondents' legal practitioner complained to the Judicial Service Commission by letter dated 2 August, 2016 that judgment still remained undelivered since the date the matter was heard and judgment expected in January, 2016. The legal practitioner also pointed out in the complaint that he had written follow up letters on 31 March, 2016 and 3 June, 2016 but that nothing further transpired. When the issue was taken up with me so that the complaint could be addressed, I called for the court record and instructed my clerk to find it. When I perused the record, I then noted that both the first respondent and the applicant's legal practitioners had written letters in December, 2015 and January, 2016 respectively indicating that the parties had failed to resolve the matter. Regrettably due to the fact that there was a change of judges clerks without a proper handover/takeover process being carried out, the case record was not monitored and follow up letters on when judgment would be ready were not placed on record and consequently the matter was not continuously tracked by myself. My transfer to the Criminal Division with its congested court roll in January, 2016 kept me too engrossed with the Criminal Court matters and this matter was not attended to earlier for those reasons. The complaint made was received with an open mind by myself and was not without justification especially as there had been follow up letters which were not responded to.

In terms of s 165 (1) (b) of the Constitution Amendment (No 20) Act, 2013, justice should not be delayed and the judiciary is required to perform its duties with "reasonable promptness". In terms of s 162 of the Constitution, "judicial authority derives from the people of Zimbabwe and is vested in the courts". I would say that unexplained delays in handing down judgments have the potential effect of undermining public confidence in the judicial system in that the public will perceive courts as institutions which do not bother to expeditiously resolve disputes. The Judicial Service Code of Ethics 2012 was enacted to among other things set standards relating to the handing down of reserved judgements. I did not therefore consider that the complaint raised in this matter as aforesaid was improper. It was well received. An appropriate response to the compliant was in the circumstances called for. The fact that one of the parties filed a complaint should not and has not influenced the decision I will give in the application. As a word of caution, it is desirable where a party makes follow ups on a reserved judgement or indeed on any matter in which there is another litigant involved to also copy correspondence to the opportunity for openness. It should not appear as though the Judge has been influenced or pressured to act by one party without the knowledge of the other. The respondents' legal practitioner should in future be guided accordingly because he did not copy the follow up letters nor his complaint to the Judicial Service Commission to his opposite number.

Turning to the substance of the application, the matter has a long history. It is necessary to set out in brief some relevant background information.

1. At the centre of the dispute are the rights and obligations of the first respondent on one hand to be supplied with portable water by the applicant against the obligations of the applicant and the second respondent to supply the water. The rights and obligations arise from the Water Act [*Chapter 20:24*].
2. When the first respondent sued the applicant and second respondent in case No. HC 5469/10 to perform their obligations, the parties disposed of the matter through the court issuing an order by consent. The content of the order which was issued by CHIWESHE JP on 26 May, 2011 reads as follows:

   "IT IS ORDERED BY CONSENT THAT

   (a) Respondents shall take all necessary steps to ensure that there is a supply of water to applicants' property being 15 Dulwich Road, Greendale for a <u>minimum period of 2 days a week or such lesser period as may be agreed between applicant and respondent</u> with leave being granted to respondents to apply to this Honourable Court for the

variation of this order in the event that they maintain that respondent (sic) is unreasonably refusing to consent to any such variation" (own emphasis)

(b) The respondents to pay the costs of this application."

In considering this application, I will keep in mind the following points:

(a) That the order sought to be varied was granted as a court order by consent and that this court has jurisdiction which is inherent to ensure compliance with its order.

(b) That the parties gave the court jurisdiction to revisit its order at the instance of the respondents in limited circumstances. The circumstances are limited in that the applicant seeking a variation of the consent order by this court would need to prove it:

(i) there has been engagement with the first respondent with a view to having the first respondent agree to being supplied with water for a period which is less than 2 days a week

(ii) the first respondent has unreasonably refused to consent to the variation.

In terms of the consent order therefore, the variation if granted should be one which reduces the period when the first respondent should be supplied with water from 2 days a week to some period in excess of the two days a week. The variation cannot be one which extinguishes the obligation of the applicant and the second respondents to supply the first respondent with water. Further, the variation would be premised on the first respondents' unreasonable refusal to consent to the sought variation.

(c) That MATANDA-MOYO J on 11 May, 2016 in case No. HC2307/13 dismissed an application by the second respondent herein to vary the consent order in HC 5469/10. The variation sought from a reading of the draft order filed therein was intended to absolve the second respondent herein from the obligation imposed on him by HC 5469/10 to supply water to the first respondent herein so that the order only obligated the second respondent herein to carry it out. The application was however dismissed for want of prosecution and not on the merits. The point of interest with regards case No HC 2307/13 is that the basis for seeking the variation of the consent order did not lie in the second respondent's inability to comply with the order but the second respondent sought to argue that the responsibilities of the respondents in case No. HC 5469/10 were not clearly

identified. The second respondent had case No HC 2307/13 been determined on the merits would have argued that his duty was simply to supply water to the applicant herein in bulk. Thereafter it would be the applicant's responsibility to then supply the first respondent with water. In the instant application, the second respondent takes a different position from the one he took in case No HC 2307/13. He submits that the applicant should be absolved from compliance with the consent order on the basis of undue hardship in the form of the exposure to contempt of court orders. He also submits that the first respondent has unreasonably refused to consent to the variation. One would have thought that the second respondent should have left the issue of the variation and its reasonableness upon the applicant and the first respondent since the second respondents position at least as per his affidavit in case No HC 2307/13 had been that it was compliant with its obligations under the Water Act and should not have been saddled with any responsibility in regard to the supply of the water by the applicant to the respondent.

Turning to the facts of this application, the applicant avers in its founding affidavit the following material deposition as to why it consented to the order, in case No HC 5469/10 whose variation is seeks. I quote para 7 of the founding affidavit which states:

" 7

The applicant consented to the order on the basis that-:

(a) it genuinely believed that the financial woes and technical viability challenges it was facing at the time could be overcome and water could be pumped to a place like Dulwich Road in Greendale;
(b) it also believed that it could comply with the order being sought by the respondent at the time
(c) it took into consideration, the fact that the first respondent was a rate payer within the City of Harare and as such deserved to receive attention from the applicant in order to avail him with water whenever this was possible; and
(d) it genuinely believed that the order being sought by the first respondent could completely be granted to the first respondent and was practical."

The applicant averred further that it had been cited for contempt of court by the first respondent in case No HC10994/11 after it failed to comply with the terms of the consent order. On 22 June, 2012 the applicant requested the first applicant by letter written by its legal practitioners to the first respondents' legal practitioners to consent to a variation of the consent order. The letter aforesaid is attached to the applicants' founding affidavit as

Annexure 'A'. It is convenient to quote the letter full length or *extenso* with its grammatical errors. It read as follows:-

> "Wintertons
> Legal Practitioners
> HARARE
>
> Dear Sir,
>
> Re: CITY OF HARARE v GORDON THOMAS DUTTON CASE NO. 5469/10
>
> We refer to the above matter.
>
> We write to confirm that an order was granted by consent in H.C. 5469/10 in which our client agreed to supplying water to your client's place of residence for a minimum period of two (2) days a week or such less time as may be agreed between the parties with leave being granted to our client to apply for variation of that order failure to agree our client would approach the courts for variation.
>
> It is common cause that our client has not been able to be consistent in supplying the water to your client at least two (2) days per week. When our client consented to supplying yours with water at least twice a week it was of genuine impression that it could do it. It is unfortunate that our client has found out that it cannot consistently supply water to your client's residence as agreed because of various factors such as the following;
>
> a. Power cuts/power failures;
> b. Plant breakdowns and pipe bursts mostly due to the ageing of equipment; and
> c. The positioning/location of your client's property when the water is supplied to the area where your client resides many residents up the stream would be taking water from the same line and pressure will be low and therefore it may not reach to your client's premises.
>
> Instead of the City of Harare to appear as if it is in continuous contempt of court (which is not wilful on their part) we have instructions to request for variation of the Court order which was granted with the consent of both parties.
>
> We have instructions to request as we hereby do for your consent to vary the Court Order granted in case NO. H.C. 5469/10 so that the **"the City of Harare will supply water to your client's residence as and when it is able to supply the water to your client"**. Our client does not want to continue appearing as if it is in contempt of court when in actual fact its failure to supply the water at the rate of two days a week is not wilful but a function of many factors. This means that your client will get the water supplied randomly without necessarily saying at the rate of two days per week.
>
> Kindly advise us of your client's attitude so that we know whether we should file our Court application seeking an order for variation or not. Further could you also bear in mind the provisions of the City Council's Bylaws as amended by amendment **164 of 1913** especially **section 4** which says that
>
> > **'City does not guarantee that it will supply water without interruptions and it is not liable for failure to supply water by reason of breakdowns and the like.'**
>
> Kindly let us have your response.

Yours faithfully

CHIHAMBAKWE MUTIZWA AND PARTNERS"

By letter dated 2 July, 2012, the first respondent's legal practitioners responded to Annexure 'A'. Again it is convenient to quote the first respondent's legal practitioner's response full length or *ex-tenso* with its grammatical errors. The response is attached to the applicant's founding affidavit as Annexure B

"Chihambakwe, Mutizwa & Partners
Legal Practitioners
8th floor, Regal Star House
25 George Silundika Avenue
HARARE

Dear Sir

RE: CITY OF HARARE v GORDON THOMAS DUTTON CASE NO. 5469/10

We are in receipt of your letter the 22nd June.

It is not common cause that your client has been unable to supply water to our client for at least two days a week. What is common cause is that your client has simply failed to do so.

At the time that the order was granted your client was well aware of the challenges, such as those which are set out in your letter. Council obviously thought that it could meet the challenges and could supply the water for the restricted period stated in the order. No explanation has been given to us why your client, with the considerable resources available to it, should be unable to overcome the challenges mentioned and it seems to us that Council is simply not making the effect.

It is not as though there has been no supply of power to your client. We believe that the records will show that there has been a supply of power to your clients pumps for at least 12 hours in each day. During the period that the power is on water can be pumped into the storage tanks. If the supply of power for 12 hours a day is insufficient your client in conjunction with the Minister, should take the matter up with ZESA. The supply of water is an essential service and we do not believe that your client is giving it the priority which it deserves.

Your client continues to supply water to some areas continuously where as other areas get no water at all. This is unacceptable and Council should ensure that there is an equitable distribution of whatever water is available. It cannot simply supply some areas simply because it's easy to do so.

The problem with broken pipes has been with us for many years and when Council consented to the order it had no reason to believe that the problem would vanish. The solution to the problem is to repair the pipes. Is it suggested that Council is incapable of doing this?

The location of our clients property has been known throughout. Our clients property is right next to a storage tank and there are no upstream residents.

On the basis of the inadequate information which you have given us our client is quite unable to agree to your client's suggestion.

In regard to Statutory Instrument 164 of 1913 your client and the Minster have a civic and legal duty is to supply water and that duty has already been confirmed by an Order of Court. That order which contains safeguards for the protection of your client in the event of it being impossible for your client, on occasions, not to supply water. It seems to us that the present application is premised on the incorrect view that Council has no obligation to supply water, rather than an ability to do so.

Yours faithfully
……..
P.C. PAUL
WINTERTONS"

The applicant further averred in para(s) 14 and 15 of its founding affidavit as follows and I quote the contents of the paragraph

" 14

It is the applicant's position that it is unable to comply with the Order granted in Case No H.C. 5469/10 because:-

a) the first respondent's place of residence along Dulwich Road, Greendale, Harare is at one of the most elevated points within the Greendale area, despite the fact that the township of Greendale itself is already on a high altitude, such that pumping water to Greendale requires new pumps or pumps which are in perfect working order and are pumping water consistently;
b) in order to get water to the first respondent's place of residence the applicant has to pump the water from Morton Jaffray treatment plant in Norton to Warren Control station, and from, Warren Control Station to Letombo Reservoir, and from Letombo Reservoir to Greendale Reservoir, and from Greendale reservoir to the respondent's home along Dulwich Road, Greendale, Harare, and the problem with this entire process is that along this entire chain the applicant is operating with fewer pumps than are required for the entire process in that:-

    i) Morton Jaffray requires six (6) operational pumps and two (2) on standby, but it only has six (6) pumps with no standby pumps and of the six (6) available pumps, three (3) of the pumps are 37 years old and two (2) of the pumps are 18 years old even though all the pumps have a ten (10) year life span which makes them prone to frequent breakdown;
    ii) Warren Control requires three (3) pumps and one (1) which is on standby but it is running on only three pumps which are fourteen (14) years old with no standby pumps; and
    iii) Letombo Reservoir is literally running on two (2) functional pumps, all of which are at least fourteen (14) years old and a limited runner third pump when it requires three (3) pumps and a standby pump;
c) all the pumping stations, control areas and reservoirs mentioned above cannot operate fully at their current limited capacity because they are all affected by frequent and regular power cuts which halt production for long periods of time and these power cuts are even

more detrimental in that after any power cut a lot more time is required start up the pumps that the period time during which the power was off;

d) the applicant is virtually bankrupt and as such it is not in a position to buy new pumps or backup power generators for its pumps; and
e) Of the limited amount of water which eventually gets to Greendale the applicant is mandated to supply the following state institutions with water, from Greendale Reservoir, as a priority:-
   i. Chikurubi Maximum Prison;
   ii. Chikurubi Prison Hospital;
   iii. Chikurubi Female Prison;
   iv. Chikurubi Support Unit (Police); and
   v. Chikurubi Prison Farm.

15

Since water gets to Greendale in very limited quantities, and the applicant is required to prioritise supply to the above mentioned State Institutions, it is no longer possible for the applicant to supply the respondent with water even for one (1) day a week, let alone the two days a week, required by the Order in Case No. HC 5469/10."

The applicant lastly averred that the first respondent's residence and its surrounds in Greendale are on a "very high attitude which cannot be reached after factoring in the applicant's limited pumping capacity at Greendale Reservoir". It pleaded that it has demonstrated sufficient grounds for variation of the consent order on the basis of "impossibility".

The first respondent in his opposing affidavit denied that he had unreasonably refused to consent to a variation of the consent order. He averred that since his legal practitioners had responded to the request for a variation and set out his grounds for his refusal therein, it could not be said that he had unreasonably withheld his consent. Consequently he argued that the applicant had no right to approach the court for a variation. I disagree that the applicant has no right to approach the court as alleged by the first respondent. In my reading of the consent order sought to be varied, the 1st and 2nd respondents or one or other of them are free to approach the court for a variation of the consent if they consider that the first respondent is unreasonably refusing to consent to the variation. The fact that the first respondent responded to the request for a variation would not debar the applicant from approaching the court. Annexure B clearly shows that the first respondent refused to accede to the variation requested. The applicant considered such refused to be unreasonable. Once the applicant reached such decision whether rightly in its view or wrongly in the view of the first respondent, the condition precedent to be fulfilled before seeking the intervention of the court was fulfilled.

The first respondent maintained that he was a reasonable person. I did not read anywhere in the applicant's papers where the applicant described the first respondent as being an unreasonable person. The applicant's contention is that the first respondent's refusal to consent to the variation is unreasonable given the circumstances or facts deposed to by the applicant in support of the variation which it seeks. The first respondent avers that the applicant should have shown him the steps which it had taken and intended to take to overcome its difficulties and to consult with the first respondent in this regard and "come up with a more effective system of water rationing".

The first respondent also took issue with the applicant's assertion that it lacked financial means to overcome the challenges which made it impossible to supply water to the first applicant. He averred that the applicant could not be taken on its word in the absence of furnishing the court with proof that "it is bankrupt." The applicant queried that the first respondent had not supplied "financial figures" to back up its claims to financial inability. Further the first respondent averred that the applicant was "supposed to budget for its necessary expenditure so that it can overcome any financial difficulties which it may have "and that it had not advised what it was doing in this regard. He queried that Annexure 'B' had not been responded to.

The first respondent took issue with the applicant's reference to S.I 164 of 1913 as quoted in Annexure 'A'. He described the statutory instrument as ancient. He however did not deny that the by-law remains extant until repealed. I have acquainted myself with s 4 of the said by law as quoted, that is:

> "City does not guarantee that it will supply water without interruptions and it is not liable for failure to supply water by reason of breakdowns and the like."

Whilst acknowledging that the by-law was enacted in 1913 which is over 100 years ago. I confess that I do not find the provision to be unreasonable. The quoted provision simply seeks to absolve the applicant from guaranteeing the uninterrupted supply of water in the event that there is a systems breakdown or a related cause. The provision does not give the first respondent the right not to supply water. It only provides that the uninterrupted supply of water cannot be guaranteed in the event of a breakdown in the system of water supply. I have considered s 77 of the Constitution which entrenches the right of every person to "safe clean and potable water." I do not find that the so called ancient law detracts from the safeguarding or enjoyment of such right. It is a matter of common sense that when there is a systems break down, there necessarily arises an interruption until at least the system is

brought back on line or repaired. I do not find that the applicant was unjustified to quote the existing by-law. I must however hasten to add that it will always remain important that in cases such as the one *in casu*, no immutable rule can be or should be laid out and each case must be looked at or considered on its own facts.

The first respondent continued in its opposition and submitted that the variation sought is "one which no reasonable person could consent to because it effectively gives the applicant the opportunity not to deliver any water to my property when it is unable to do so because of its bad management and ineptitude." The applicant in its replying affidavit disagrees and states that the variation it seeks is genuine and that it does not intend that it be exonerated from its obligation. It maintains that if the consent order is not varied as prayed for, the applicant will be left in a position where it will continue to be in contempt of the consent order. It further averred that it had put in place a "water Demand Timetable" in terms of which it supplies different areas or suburbs with water on specified days. However in the case of high altitude areas, the first respondents' residential area being one such high altitude area, water may not reach such areas on account of low pressure driving the water.

The first respondent lastly averred that before he sought an order in case No. 5469/10 in August, 2010, there had been no water supply to his property for 3 years. After the order was granted the applicant "by and large complied with it but thereafter defaulted resulting in contempt of court proceedings being instituted against it and a finding of guilt returned. He stated "I believe that this Honourable Court can take judicial notice of the fact that council is failing to carry out its other functions properly. The deplorable state of our roads is but one example. Given the above track record I don't believe that Council has any intention to supply water when it should be able to do so" (own emphasis) I do not quite understand what the first respondent intends to convey when he says that the applicant has no intention to supply water even when it is able to do so. No reason is advanced as to why such a scenario should obtain. On the issue of taking judicial notice of applicant's failure to carry out its other functions like road maintenance, it is common cause that there are many roads which require attention and repair. There are also some roads which have been attended to though the bulk of roads are in a state of disrepair. I am however unable to hold that the applicant's failure to repair the roads is a choice issue. I would need to be addressed on the issue. The judicial notice which I will take into cognisance is the State of disrepair of the roads. As to why the applicant is not repairing the roads must remain an open issue for debate.

In my view the purport of the variation clause in the consent order boils to nothing more than that in the event of the parties failing to agree to a variation at the instance of the respondents, with such variation being bench marked on a reduction of the frequency at which the applicant must supply water to the first applicant, the court should determine the matter. The envisaged variation does not extend to or encompass the discharge of the applicant from its obligation to supply water to the first respondent. I am therefore not persuaded by the submission by the applicants' legal practitioner as set out in para 3 of his heads of argument that this application falls for determination by reason of the provisions of r 449 of the High Court Rules. Rule 449 reads as follows:

> "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 a 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 interest may be affected have had notice of the order proposed.

Rule 449 serves to correct patent errors or mistake and exists as acknowledgment of the fallibility of human nature by allowing for corrections. In other jurisdictions the rule has been called the slip rule – see *Lakhamshi Bros Ltd* v *Raja & Sons* 1966 EA 313 quoting from *Raniga* v *Jivray* 1965 EA 700 where the court said:

> "A court will of course only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or in the case of a matter which was overlooked, where it satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention."

It must always be appreciated that once a court has pronounced its order, it becomes *functus officio*. Rule 449 should be interpreted strictly and should not offend the *functus officio* doctrine. The submission that there was a common mistake between the parties that the consent order could be fulfilled lacks merit. There was no common or mutual mistake between the parties which has been submitted. In fact, the first respondents' unchallenged assertion is that the applicant by and large complied with the order before it stopped doing so. Matters intended to be covered by r 449 are those which are uncontentious and will not invite argument. A classical example of an uncontentious matter arising from the consent order in case No. HC 5469/10 relates to the word "Respondent" in reference to the refusal to consent

to a variation. The word should read "Applicant" because it is the applicant's refusal to consent to a variation which would cause the respondents to seek a variation through the court. When I quoted the consent order, I indicated (*sic*) in brackets after the word Respondent because I had noted the error which is clearly patent and common to all the affected parties.

The variation sought in this application is rooted in the consent order itself. By providing for variation, it can only be reasoned that the parties contemplated that circumstances may change warranting a revision of the agreed terms relative to the frequency with which the applicant could supply the first respondent with water. I carefully considered the heads of argument filed by Mr *Paul* for the first respondent. He basically raises two issues which I considered of material significance. The first point he took was that the variation sought was open ended. I am in agreement with his submission that to give an order which reads that "the applicant shall supply water to the first respondent as and when it is able to do so" will leave the first respondent in a position where he would not be able to challenge the applicant's inability to supply the first respondent with water. The applicant would simply plead that it is not yet able to supply the first respondent with water. Such an order would in my view have the effect of indirectly discharging the applicant from the mandamus which was granted by consent. It is clearly a veiled attempt at circumventing the consent order. If the applicant is intent on seeking to be absolved from the mandamus, this cannot be sought through an application for a variation but for a discharge of the order.

The variation embodied in the consent paper is one that seeks to decrease the frequency of supplying water. The consent order gave definite frequencies and allowed for a variation of those definite frequencies. It cannot have been the intention of the parties in incorporating the variation clause that such variation would take the form of a discharge of the applicant's responsibilities to an undefined time that it cannot commit to and leaving the fulfilment of the obligation to the unknown. Case No. HC 5469/10 was an application to force the applicant to perform its obligations reposed by statute or law. The consent order granted is a court order which in fact obligates the applicant to perform. To give an order that the applicant should perform when it is able to do so renders the consent mandamus nugatory.

The second point which Mr *Paul* makes is that the applicant does not anywhere in its papers indicate what remedial measures it is putting in place to surmount its stated challenges. I agree that this point has substance. When I asked the parties to make an attempt to resolve the matter, I recall that I specifically zeroed in on this point. I indicated to the

applicant's counsel that he needed to bring the applicant's mind to bear on the issue of what was in the offing with regards attempting to overcome the challenges which the applicant said it was facing. A reading of the applicant's papers shows that they are replete with stated reasons for failure to supply the first respondent with water. In annexure A, the applicant's legal practitioner stated that water would be supplied randomly. The first respondent in annexure B suggested solutions like engaging the second respondent and the Zimbabwe Electricity Supply Authority (ZESA) so that power supply to the water pumps could be prioritized. He also suggested that burst pipes be repaired and that a more equitable pattern of water distribution be put in place. He also submitted that his residence was next to a water reservoir and that if there could be uninterrupted pumping of water for 12 hours, water could be pumped into the reservoirs. The first respondent stated that the information which had been availed to him by the applicant was inadequate and that he could therefore not consent to the variation.

Mr *Paul* further submitted that the first respondent appreciated the problems which the applicant faced in complying with its duty and that he would be sympathetic to a proposal which would resolve the problem. I understand his submission to be that an appropriate variation would be one which results in a win-win situation for the protagonists or litigants rather than for the applicant to seek to resile from the consent order or seek its variation on the basis of challenges for which it was not proffering a solution either in the short or long term.

Having carefully considered the papers filed of record and the parties arguments, I am not persuaded that the applicant's sought variation has been properly ventilated or justified. It cannot be said that the first respondent has been unreasonable in refusing to consent to the variation. There is just a paucity of information from which one could reasonably consent to the variation let alone in the terms sought. The applicant is under statutory obligation to provide the first respondent and indeed all persons within its jurisdiction or polity with water subject to its bylaws. A mandamus was given by this court compelling the applicant to perform its statutory function. The applicant seeks to vary the consent mandamus to say that it will comply when it is able to. It is like a debtor saying I cannot get a job and I will only pay when I am able to. Surely such an attitude is not reasonable or acceptable. The applicant cannot be allowed to abrogate its statutory functions by being left to perform them when it is able to. The determination of whether it is able to do so or when would remain that of the applicant unmonitored. This would negate the purport of the order.

In terms of r 240 of the High Court rules, the court has power to refuse or grant the order prayed for with variations. In this case I would have considered granting the order with a suitable variation because the first respondent does not refuse to consent to a variation *stricto sensu.* He states that the variation as sought would put him in a position where he cannot compel the applicant to fulfil its obligations because it seeks to be left to perform when it is able to which is an open ended order. I am left in the same position as the applicant in that I do not have facts as to what remedial measures have been put in place or are contemplated to arrest the challenges. No time lines are given as to when it is expected that the situation will have resolved. A court cannot grant a variation of an order where facts are insufficient.

I have agonised on the appropriate order to give in this application. The first respondent accepts that the applicant has challenges but avers that the applicant is coy on what measures it has taken or intends to take to overcome the challenges. The applicant has not laid out sufficient evidence from which the court could find for it.

Fortunately, the nature of the consent order sought to be varied remains open to continued negotiations between the parties and an approach to court in the event of a deadlock. In other words *res judciata* will not apply should the applicant be advised to seek another opportunity to move the court to indulge it.

In passing I note that this is a matter where parties should ideally reach a compromise and this can be achieved by both parties being open and frank with each other. The bona fides of the applicant appears to be key and needs to be demonstrated by giving the first respondent hope rather than gloom. I am not however directing the parties on how the matter should be resolved and my suggestions herein do not form part of the ratio decidend of this judgment and are an aside.

On the merits I however dismiss the present application with costs.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners
Wintertons, respondent's legal practitioners