

ALPHA MEDIA HOLDINGS (PVT) LTD

And

THANDIWE MOYO

Versus

ROGER MUHLWA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 4 MARCH 2025

Opposed Application

N Mazibuko, for the applicants
L Nkomo, for the respondent

MANGOTA J

I heard this case on 11 October, 2023. I delivered an *ex tempore* judgment in which I struck the application off the roll with costs.

On 29 February, 2024 I received a memorandum from the Judge President. It is dated 26 February, 2024. Its contents read:

“SUPREME COURT APPEALS AWAITING RECORDS- BULAWAYO

1. Our records indicate that you have the following outstanding judgments where appeals were noted in the Supreme Court.
2. Please, prioritise these judgments”

Amongst the cases which were mentioned in the Judge President’s memorandum is this application which I completed in October, 2023. I was surprised to read that the memorandum referred to a completed case. None of the parties wrote requesting written reasons for my decision. If any of the parties who appeared before me on the date that I heard and determined the application wrote requesting reasons for my decision, the letter which he/she wrote did not reach me. I checked my portal to ascertain if any party wrote to me requesting full reasons for my decision. I found no correspondence from either party on the stated matter.

Be that as it may, I give full reasons for my decision in the following manner:

The application which the parties placed before me has everything to do with the scale of costs which the applicant was ordered to pay to the respondent. The respondent successfully sued the applicant for defamation damages, interest *a tempore morae* and costs of suit which, at the time of the order of the court *a quo*, were couched in the following words:

“Costs of suit on the client to client scale”.

The applicant appealed the decision which the court *a quo* entered against it in HB 66/19 (HC 2163/16). It filed its appeal under SC 288/19. The Supreme Court dismissed its appeal in its entirety. The dismissal was so notwithstanding the fact that the applicant raised, as one of its nine grounds of appeal, the issue of the scale of costs. Ground number 9 of its grounds of appeal is relevant in the mentioned regard. It reads, in part, as follows:

“9. The Honourable Judge erred in law and misdirected himself in the costs order in:

9.1 ...;

9.2 making a costs order the scale of which is impossible to determine”.

Following the dismissal of the appeal, the respondent wrote a letter to the registrar of this court alerting the Judge *a quo* of the error or ambiguity which was inherent in the order of costs. It suggested, in the letter, the wording in terms of which the order of costs should read. It did not copy its letter to the applicant.

The Judge who was seized with the case amended clause 3 of the order *a quo* to read as the respondent suggested to him in its letter of 3 August 2020. The learned Judge amended clause 3 of his order to read ‘costs of suit on attorney and client scale’.

The amended paragraph 3 of the court *a quo*’s order constitutes the applicant’s cause of action. It contends that the order, as amended, has the effect of affecting it adversely. It claims that the same was erroneously sought and granted in its absence. It, accordingly, filed this application to set aside the amended order. It filed its application under Rule 449 (1) (a) of the repealed rules of court. It couched its draft order in the following terms:

- “1. The order of the Honourable Justice Mabhikwa in HC 2163/16 made on 10th September, 2020 be and is hereby set aside.
2. Respondent shall pay the costs of this application on a scale of legal practitioner and client and *de bonis propriis*”.

The respondent opposes the application. Its statement is that the rescission application which is filed in terms of Rule 449 (1) (a) of the repealed rules of court is incompetent. It avers that the correction which Mabhikwa J made on 10th September, 2020 had the effect of giving the correct intention of the costs order which was patently erroneous or ambiguous. The Judge, it claims, corrected the order *mero motu*. The order, it insists, was not sought or obtained by it in the sense which is contemplated in Rule 449 (1) (a) of the repealed High Court Rules, 1971. It states that the letter which it wrote, through counsel, to the registrar of this court only alerted the Judge to the error which existed in the wording of the costs order. It avers that Rule 449 (1) (a) of the court’s rules does not apply to the *mero motu* order which the applicant seeks to rescind. It remains of the view that there was no issue of the parties being afforded a hearing before the wording of the scale of costs was corrected. It insists that the applicant’s complaint on the scale of costs should be addressed by way of an appeal to the Supreme Court. It states that the applicant’s contention which is to the effect that the letter which it wrote to the registrar of the court is an address to the Judge motivating the granting of a specific order is *mala fides*. It insists that the effect of the application is for the applicant to avoid paying costs which the

court awarded to it in the judgment *a quo*. It avers that the stated matter is evident in the applicant's draft order which seeks to set aside the corrected order of costs. The applicant's intention, it claims, is that the patent error should remain uncorrected so that it does not pay costs which the court granted to it. It insists that the conduct of the applicant is *mala fide* and should, therefore, be discouraged. The Judge, it claims, granted the order *mero motu*. It states that the rule under which the application is filed remains inapplicable to the circumstances of the applicant's case. It moves me to dismiss the application with costs which are at attorney and client scale.

This application has its roots in Rule 58 (3) of the High Court Rules, 2021. The rule enjoins a party who is moving the court for a relief to file, with his application, a draft of the order which he (includes she) is seeking. The rule is peremptory. It reads:

“(3) Every written application shall contain a draft of the order sought”.

Whilst the rule remains applicable to motion, as opposed to action, proceedings, its meaning and import remain alive in an action as it is in an application. They remain alive in the sense that the plaintiff is enjoined to state clearly and concisely the relief which he is moving the court to grant to him. He cannot successfully issue out a summons and declaration or particulars of claim without stating in the same the relief which he is moving the court to grant to him.

Invariably therefore all proceedings-action or motion- which the plaintiff or the applicant files at court carry with them the component of costs of suit as part of the claim of the plaintiff or the applicant. It is, in short, the intention of the plaintiff or the applicant in any suit to want to recover from the defendant or the respondent his costs of suit. He therefore includes in his prayer for judgment a component which relates to him recovering his costs from his adversary.

It is for the above-mentioned reason that the plaintiff or the applicant includes in his statement of claim the issue of costs. Until the court adopts his draft order, the same remains his order which, in legal parlance, is known as a draft order. Such a draft, because of it being only a draft, is not binding on anyone let alone on the defendant or the respondent. Its binding nature only arises where and when the Judicial Officer adopts it as his order. The moment that occurs, the order ceases to be a draft order. It assumes the status of an order of court. From the stated moment onwards, it is enforceable against the defendant or the respondent, as the case may be, and against anyone else who may want to temper with it.

It is for the mentioned reason, if for no other, that Judicial Officers of whatever level of the justice delivery system are encouraged to read and appreciate the meaning and import of the draft order which the plaintiff or the applicant is inviting them to adopt in any matter which is before them. They can glean the meaning and substance of the order from a reading of the pleadings of the plaintiff or the applicant.

Where the draft order is couched in terms which render the order meaningless or ambiguous, the Judicial Officer should re-couch the order so that it remains in consonant with what the plaintiff or the applicant is seeking from him as a relief. Where the Judicial Officer fails to apply his mind properly and adopts a draft order which is devoid of meaning, the order which he issues out becomes difficult, if not impossible, for the plaintiff or the applicant to enforce it.

The above-described set of circumstances places the current application into context. The draft order which the respondent who was the plaintiff *a quo* is couched in a manner which renders its meaning devoid of meaning. The order, as couched, was incapable of enforcement, so to speak. Its unenforceability eluded the attention of both the applicant and the respondent. Because the respondent proceeded on the basis of an action, the parties could easily have picked up the defectiveness of the order of costs at the stage of the pre-trial conference, if not at an earlier stage. They did not. The defective order of costs also eluded the attention of the learned Judge who was seized with the case of the parties. The judgment which he delivered on the observed aspect of the case bears evidence of the fact that the learned Judge did not remain alive to the defects which were inherent in the order of cost.

The only time that one of the parties, the applicant, awoke from its slumber on the aspect of the case which is under consideration is when it filed its notice of appeal against the judgment of the *court a quo*. It is at that time, and not before, that it included, in its grounds of appeal, the issue of the defective order of costs. Reference is made in the mentioned regard to ground number 9.1 of its grounds of appeal. This appears at page 14 of the record wherein it impugns the decision of the court *a quo* for making a costs order the scale of which is impossible to determine.

The applicant, for some unexplained reason, does not appear to have pursued the issue of costs during its appeal. The probabilities are that it did not. Its application remains silent on the stated matter. All it alleges on the same is that neither the respondent nor it ever made any concession before the Supreme Court to the effect that the issue of costs be remitted to the Judge *a quo* for correction. Reference is made in the mentioned regard to paragraph 7.5, page 8 of its founding papers.

The respondent's statement on the same point is to the contrary. It is to the effect that the patent error or ambiguity in the wording of the costs order was, by consent of the parties' counsel, liable to be corrected by the Judge *a quo* in terms of Rule 449 (1) (a) of the repealed rules of court. It claims that the issue was not an issue for appeal to the Supreme Court.

The applicant, it occurs to me, is not candid with me on this aspect of its application. It would not have failed to pursue the matter which it appealed if it did not agree with the respondent. The possibility that it agreed with the respondent that the same be shelved to a future date and before the court *a quo* is more probable than it is fanciful. This is *fortiori* the case when its assertion is placed within the context of the respondent's answer as stated by the latter in paragraph 13.1, page 46 of the record.

The applicant which was alive to the defective order of costs as far back as 23 May, 2019- which is the date that it filed its notice of appeal- would not, in my view, have allowed the issue of costs not to be addressed by the Supreme Court if it had not entered into an agreement with the respondent in respect of the correction of the defective order of costs. Its purported challenge of the agreement which it reached with the respondent on the issue at hand is misplaced. It is not telling the truth when it alleges that it did not agree with the respondent to shelve the issue of costs and have the same referred to the Judge *a quo* for resolution. Having appealed the matter at hand as it did, nothing prevented it from pursuing its appeal on the same unless it entered into the agreement with the respondent not to do so but to refer it to the court *a quo*. Its non-pursuance of it with the Supreme Court supports the respondent's claim which

is to the effect that the parties agreed between them to refer the same to the Judge *a quo* for resolution. The respondent was therefore correct when it wrote to the registrar drawing the Judge's attention to the defective order of costs and requesting him to breathe meaning into it.

The rule upon which this application rests is clear and straightforward. It offers a discretion to a court or a judge which/who observes an error or ambiguity in the order or the judgment which the court has made to correct, vary or rescind the order or judgment in question. The court or judge may act on its/his own volition (*mero motu*). Alternatively, it or he may act upon an application of any party who is affected by the order or judgment which the party is impugning. It reads:

- “(1) The court or a judge may....*mero motu* or upon an application of any party affected, correct, vary or rescind any judgment or order-
- (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby....”.

The applicant's statement is that the respondent wrote a letter to the Judge through the registrar of this court. The letter, it submits, influenced the Judge to correct the order of costs in a manner which adversely affects its interests. Its complaint is that the respondent did not copy to it the letter which it wrote to the Judge. The order of costs, it argues, was corrected without it having been heard.

The contents of the letter which the respondent wrote might have influenced the Judge to correct the order in the manner which he did. The question which begs the answer, however, centers on whether or not the letter which the respondent wrote is synonymous with an application. The answer is definitely in the negative. The two documents mean different things in the legal parlance. A letter is what its name suggests. An application, on the other hand, is a process of court. The letter and an application are therefore two different documents.

The rule states, in clear and categorical terms, that a party who moves the court to correct, vary or rescind an order or a judgment must file an application. It does not say that he must write a letter. The rule does not, therefore, apply to a situation where, as in *casu*, the respondent wrote a letter. The application would have held if the circumstances of the case of the applicant were/are that the respondent filed an application for correcting or varying the order of costs which was/is defective. Relevant portions of the rules of court, for instance, define what an application is, The definition excludes a letter. Rule 57 (1) of the High Court Rules, 2021 is relevant in the mentioned regard. It refers to a court application and a chamber application which it respectively defines as follows:

- “57 (1)all applications made for whatever purpose in terms of these rules or any other law; other than applications made orally during the course of a hearing, shall be made-
- (a) as a court application, in writing to the court on notice to all interested parties having a legal interest in the matter; or
- (b) as a chamber application, that is to say in writing to a judge”.

It follows, from the above-stated rule, that if the respondent had filed an application under paragraph (a) of sub-rule (1) of Rule 57 of the rules of court moving the Judge to correct the defective order of costs, this application would have found a sound footing for its existence as well as its favourable consideration by the court. It cannot, however, be favourably considered on the basis of the letter which the respondent wrote to the registrar.

The mismatch which exists between the letter which the respondent wrote and the provision of Rule 449 (1) (a) {now Rule 29 (1) (a) of the High Court Rules, 2021} which requires an application, and not a written letter, to have been filed with the Court or a Judge renders this application to be incurably defective. It remains defective for the simple reason that the applicant placed the letter which the respondent wrote on an equal footing with an application. The difference of the two documents have already been explained in the foregoing paragraphs of this judgment. The net result is that the rescission application which is premised on the letter which the respondent wrote is misplaced. It is misplaced in the sense that it seeks to impugn a decision which emanated from a letter and not from an application.

It is a fact that the judgment which the court *a quo* entered for the respondent carries with it an order of costs. The order could easily have been corrected if the applicant had pursued the same in its appeal. Its motion in this application is that the amended order should be set aside. In asserting as it is doing, it is moving me to deny the respondent what the court *a quo* granted to it. It does not suggest the manner in which the issue of costs should be addressed if its application to set the order aside succeeds. The best option for it was to proffer a possible solution to the issue of costs which it is impugning. This is yet another fatal defect which remains inherent in its application.

The defects which are inherent in the application make the same fatally defective. The applicant failed to prove its case on a balance of probabilities. The application is, accordingly, struck off the roll with costs.

Masiye -Moyo & Associates applicants' legal practitioners

Webb, Low & Barry, respondent's legal practitioners