BENNY L. MOYO

Versus

MASIYEPHAMBILI SCHOOL TRUST

And

ISRAEL NDLOVU N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 JUNE 2021 & 24 JUNE 2021

Court application

K. Phulu, for the applicant
L. Nkomo, for the 1st and 2nd respondents

DUBEBANDA J: This is an application for contempt of court. Applicant seeks to hold the 1strespondent, Masiyephambili Schools Trust and its chairman in contempt of a court order. The order which forms the subject matter of the application was granted by the Labour Court and registered with this court.

This application will be better understood against the background that follows. 1strespondent is a school. Applicant was employed by the 1st respondent in the capacity of a headmaster. He was charged with acts of misconduct. He was found liable for misconduct and dismissed from employment. Aggrieved by the dismissal, he approached the Labour Court with an application for review. The Labour Court acceded to the application and ruled in his favour. The operative part of the judgment reads as follows: "In the premises the application for review is therefore upheld (and) the disciplinary proceedings are set aside. The respondent is to pay the costs of the application."

Applicant filed a court application with this court for the registration of the judgment of the Labour Court. The registration is for the purposes of enforcement. This court granted the registration application in the following terms:

It is ordered that:

A. The Labour Court judgement under case number LC/MT/49/17; XREF: LC/REV/MT/110/14 be and hereby registered as an order of this Honourable Court in the following terms:
    1. "The suspension of the Applicant without pay on the 2nd of June 2014 be and is hereby nullified and set-aside.
    2. The disciplinary proceedings conducted by the 2nd and 3rd respondents be and hereby reviewed and set aside.
    3. The decision to dismiss the Applicant from the employ of the 1st Respondent be and is hereby set-aside.
    4. The 1st respondent is to pay costs at an ordinary scale.
B. Costs of suit.

These are the orders that anchor the application for contempt of court. At the commencement of the hearing Adv. *Phulu,* counsel for the applicant made oral submissions on the merits of the matter. Adv. *Nkomo* counsel for the respondents, also made oral submissions on the merits of the matter and towards the tail end of his submissions took the point that the application for contempt of court is fatally defective for want of compliance with order 43 rule 389 of the High Court Rules of Zimbabwe, 1971 (Rules). Adv. *Phulu* argued, and the net effect of the argument was that this preliminary point was not taken timeously. It was not taken in the opposing papers. It was not taken at the commencement of the hearing. It was only taken when Adv. *Nkomo* was making opposing submissions.

My understanding is that a point *in limine* is a question of law can be taken at any time during the hearing of an application. I take the view that a failure to take a point of law timeously cannot in itself be a sufficient reason for refusing to give effect to it. No unfairness can befall the applicant as the facts upon which the legal point turns are common cause and are clear on the record. Again there would be no further evidence required in support of the point *in limine.* See: *Fanuel Mwayera v Molly Chivizhe & Others* SC 174/11; *Cole v Government of the Union of South Africa*1910 AD 263; *Paddock Motors (Pty) Ltd v Igesund*1976 (3) SA 16 (A) at 24 B-C; *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) @ 157A-B.Once a point *in limine*orpoint of law is taken in a hearing a court isenjoined to determine it and rule on its validity. A court cannot proceed to determine a matter on the

merits without first determining a point *in limine*. See: *Heywood Investments (Private) Limited T/A GDC Hauliers v Pharaoh Zakeyo* SC 32/13. Therefore, this court must determine this point in limine taken by Adv. *Nkomo.*

The point *in limine* taken by Adv. *Nkomo* is anchored on rule 389 of the Rules, which provides thus:

> ***389. Contents of notice and supporting affidavit***
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> Such court application shall set forth distinctly the grounds of complaint and shall be supported by an affidavit of the facts. Where proceedings are instituted at the instance of the court *mero moto* the notice shall be issued by the registrar and no affidavit of the facts shall be necessary.

In support of the point *in limine*, Adv. *Nkomo*equated rule 389 to rule 259 of the Rules. Both these rules require a court application to set forth distinctly the grounds of complaint. It is contended that the jurisprudence is that failure to comply with rule 259 renders the court application irregular and invalid, and by parity of reasoning such must also apply to failure to comply with rule 389. See: *Pasalk and Another v Kuzora and Others* SC 5/03; *Festor Chineka* **v** *Pro-Vice Chancellor and National University of Science and Technology and Student Disciplinary Committee* HB 81/16; *James Stewart Drynan v Magistrate N. N Kuture and Zimbabwe National Roads Administration* HMT 45/19.

Adv. *Phulu* conceded that the court application does not comply with the provisions of rule 389. It is contended that such non-compliance is not fatal to the application. It was submitted that this is a typical case where the court can use its discretion and come to the rescue of the applicant *via*the route of rule 4C and permit the matter to be determined on its merits. The net effect of Adv. *Phulu's* argument is that rule 4C brings forth an invaluable element of flexibility of the rules to remedy situations where a rigid adherence to the rules would result in an injustice to the affected party. It is contended that it will be in the interests of justice to allow the matter to be decided on its merits rather than on a point *in limine.* I respectfully disagree. It is correct that rule 4C allows a court to condone a departure from the rules if satisfied that the departure is required in the interest of justice. However, this is a substantial departure from the rules. Rule 389 espouses a peremptory requirement and must be complied with. It says "such court application shall set forth distinctly the grounds of

complaint," this requirement must be complied with. In my view, rule 4C cannot come to the rescue of a litigant in such a case. See: *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101(H); *Fanuel Mwayera v Molly Chivizhe & Others* SC 174/11.

Rule 389 demands that the grounds of complainant must be distinctly stated in the court application itself. The internet library defines the word *distinctly* to mean readily distinguishable; clearly; very noticeable or apparent. This means the grounds of the complaint must be readily distinguishable; clearly; very noticeable or apparent on the face of the application. The court and the respondents must not look in the affidavit for the grounds upon which the application is based. The affidavit must only provide facts in support of the grounds stated in the application itself. This is what rule 389 speaks to.

I take the view that a party seeking to hold an opponent in contempt of a civil court order must comply with the rules of court. The rules require that up-front, in the court application itself the contemnor must be alerted distinctlyof the grounds upon which his contempt of court is sought. This requirement serves a useful and important purpose in such litigation. To accuse someone of contempt of court is a serious indictment. The Constitution of Zimbabwe Amendment (No. 20) Act, 2013recognises the supremacy of the rule of law as one of the core value upon which the State is founded. Civil contempt is the crime of disrespect to the court and the rule of law. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced. See: *Moyo v Macheka SC 55-05*; *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 at *para* 1.An accusation of contempt of court is serious and the accuser must equally take it serious by complying with the rules of court. The contemnor's right to freedom and security is at risk. In appropriate cases an application for contempt might result in imprisonment. Compliance with rule 389 is important. Therefore, it is important that in filing such an application, the rules of court be observed without fail. Without trying to hide behind rule 4C.

This is neither too much to ask, nor elevating form over substance. It is what the rules require and for a purpose. The Supreme Court in *Pasalk and Another v Kuzora and Others* SC 5/03 to emphasising the importance of the equivalent rule 257held that legal practitioners

are warned that they risk not only being non-suited but also being ordered to pay costs *de bonis propriis* for failure to comply with the rule. The non-compliance with the peremptory requirements of rule 389 should dispose of this application without delving into the merits. This application is fatally defective. It cannot be rescued by rule 4C.

Costs are always at the discretion of the court. The applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result.Accordingly, the applicant must bear the respondents' costs. The elephant in the room remains the poorly drafted court application.

Disposition

In the result, I order as follows: (1) the point *in limine* is upheld. (2) This application is struck off the roll with costs of suit.

Mesdames Vundhla-Phulu & Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st and 2ndrespondent's legal practitioners