

REMIGIYO MAVATA

Versus

PROVINCIAL MINING DIRECTOR, GWERU

And

MINISTER OF MINES AND MINING DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 October 2023 & 19 October 2023

A. Mutatu, for the applicant
S. Jukwa, for the respondent

DUBE-BANDA J:

[1] This is a court application for contempt of court. The applicant seeks that the respondents be held to be in contempt of court, and as a sanction thereof be ordered to pay a fine and to comply with the court order.

[2] The respondents in this contempt of court application are the Provincial Mining Director – Gweru and the Minister of Mines and Mining Development. At the commencement of the hearing, Mr *Mutatu* Counsel for the applicant informed the court that the respondents were consenting to the order sought. Mr *Jukwa* Counsel for the respondents confirmed that indeed the respondents were consenting to the order sought in this application. I raised some queries with Mr *Mutatu*, who then asked for a brief adjournment, which I granted. At the resumption of the hearing, it appeared that the respondents were now somewhat opposing the application.

[3] This application will be better understood against the background that follows. In Case Number HC 1984/15 the applicant sued Geroge Pedzisayi Fichani Family Trust and Geroge Pedzisayi Fichani. In a judgment delivered on 8 August 2019, cyclostyled as *Mavata v Geroge Pedzisayi Fichani Family Trust & Anor* HB 118/19 (main case) this court (*Per* TAKUVA J) ordered that:

- i. The transfer of mining claims Gazemba 105 to 108, Copper Queen under Gweru Mining District dated 20 March 2007 into 2nd defendant's name, be and is hereby set aside.
- ii. The provincial Mining Director, Gweru be and is hereby authorised to transfer the mining claims Gazemba 105 to 108 into the names of the plaintiff.
- iii. The defendants jointly and several pay the costs of suit.

[4] The applicant contends that the respondents were made aware of the above order, and they have wilfully disobeyed it, and this court must answer this disobedience with an order of contempt. It is against this background that the applicant has launched this application seeking a contempt of court order against the two respondents.

[5] Mr *Mutatu* submitted that there was no valid notice of opposition before court, in that the opposing affidavit is fatally defective and hence a nullity. The factual situation anchoring this submission was that the deponent signed the 'affidavit' in Harare on 2 March 2023, and the Commissioner of Oaths signed it in Gweru on 28 March 2023. According to Counsel, the deponent did not take an oath before the Commissioner of Oaths as required by the law, and therefore the document before court is not an affidavit. Counsel submitted further that the respondents were barred for failure to file heads of argument as required by the rules of court. Counsel argued that in the circumstances this application was unopposed and must be treated as such. Mr *Jukwa* had no meaningful answer to the issues taken by the applicant, all he could do was to seek condonation to be permitted to argue the respondents' case notwithstanding the attack on the opposing affidavit and the failure to file heads of argument as required by the rules of court. Neither did he seek leave of court to regularise the shortcomings in the respondents' papers.

[6] It is clear that the 'deponent' signed the opposing 'affidavit' in Harare on 2 March 2023, and the Commissioner signed it in Gweru on 28 March 2023. I agree with Mr *Mutatu* that the deponent did not take oath before the commissioner as required by the law. Therefore, the 'opposing affidavit' is invalid and fatally defective. In *Rock Chemical Fillers (Pvt) Ltd v Bridge Resources (Pvt) Ltd & Ors* 2014 (2) ZLR 30 (H) MATHONSI J (as he then was) made the following pertinent remarks:

“Quite often legal practitioners indulge in the unfortunate and unbecoming behaviour of signing ‘affidavits’ in their capacities as *ex officio* commissioners of oaths, not only without satisfying themselves that an oath is taken but also in the absence of the ‘deponent’. They do this as a favour to colleagues racing against time. Not only is such conduct disdainful, it is clearly dishonourable. It is the height of dishonesty for a commissioner to authenticate a signature he has not seen the signatory sign, but even worse for him to sign a blank document, hoping that the intended deponent’s signature would be appended later. It is a serious dereliction of duty on the part of the commissioner of oaths. The deponent must always appear before the commissioner and be duly sworn. His signature must be appended in the presence of the commissioner whose signature is an assurance to the court that all these procedures have been complied with.”

[7] It is uncontroverted that the ‘deponent’ did not appear and take an oath before the commissioner. She signed the affidavit in Harare on 2 March 2023, and commissioner signed it in Gweru on 28 March 2023. What happened in this matter is exactly what MATHONSI J (as he then was) in *Rock Chemical Fillers (Pvt) Ltd v Bridge Resources (Pvt) Ltd & Ors (supra)* described as disdainful and dishonourable. It is wrong and misleading and it must not be done. It is disgraceful. A deponent must appear physical before a commissioner and take the oath, and anything short of this is unacceptable and a façade. Therefore, there is no opposing affidavit before court, in that the ‘opposing affidavit’ is invalid and fatally defective. Without an opposing affidavit, there is no opposition. Mr *Mutatu* submitted that the application should be treated as unopposed. I agree. Therefore, this application is not opposed.

[8] In view of the decision I have reached above and the finding that the matter is unopposed for want of a valid notice of opposition, there is no useful purpose that will be served by dealing with the failure to file heads of argument as required by the rules of court.

[9] The requirements for contempt of court are now trite. It is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established. See *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC) para 37; *Lindsay v Lindsay* (2) 1995

(1) ZLR 296 (S); *Moyo v Macheke* SC 55/05; *Mukambirwa & Ors v The Gospel of God Church International* 1932 SC 8/14. All persons have a duty to respect and abide by the law. Disregard of court orders is an attack on the very fabric of the rule of law.

[10] Mr *Mutatu* argued that the respondents are aware of the court order and that which is required of them. It was contended that they first took positive steps to comply with the order but later reneged. Counsel argued that the only issue for determination is whether the non-compliance with the court order was wilful and *mala fide*. Counsel argued that the non-compliance was wilful and *mala fide* and this court must find the respondents in contempt of court.

[11] It is clear that the two respondents were not party in main case whose order is sought to be enforced through these contempt of court proceedings. Again, the second respondent is not mentioned in the order, it is the first respondent who is mentioned to the extent that he was *authorised* to transfer the mining claims Gazemba 105 to 108 into the names of the applicant. The thrust of the applicant's argument was that notwithstanding that the two respondents were not party to the main case, the Mines and Minerals Act [Chapter 21:05] bestows on them the responsibility to administer this legislation and ensure compliance with its provisions.

[12] Counsel did not refer to any authority in support of this proposition. However, I had sight of certain authorities which are clearly distinguishable from this case. The authorities include the matter of *20th Century Fox Film Corporation v Playboy Films* 1978 (3) SA 203 (W), where a director of a company who caused the company to disobey a court order, made himself guilty of contempt; *State v Gerber in re: State v Baleka* 1986 (4) SA 214 (T) where the proprietor, publisher and editor of a newspaper which was a subject of a charge of contempt, was held liable; *East London Local Transitional Council v MEC for Health* 2001 (3) SA 1133 (CKHC), where it was held that officials and Ministers of State may be held in contempt. In this case the respondents did not cause the respondents (Geroge Pedzisayi Fichani Family Trust and Geroge Pedzisayi Fichani) in the main matter to disobey the court order, and neither the respondents in this matter nor the Government were party to the main matter. Again, if the applicant knew that the enforcement of the order in the main matter required the active participation of the respondents herein, he should have simple joined them in the main matter. See *City of Tshwane Metropolitan Municipality v Beukes* 2009 JDR 0951 (GNP) paras 16-19.

[13] The court order sought to be enforced *via* contempt of court was granted against the George Pedzisayi Fichani Family Trust and George Pedzisayi Fichani not the respondents herein. None of the respondents herein were cited in the main application. The applicant erroneously assumed that as the respondents are the officials bestowed with the administration of the Mines and Minerals Act, they could simple be held in contempt without more. A court will not hold a party in contempt of a court order where that party was not cited in the proceedings, or against whom the order was not granted, unless there is a factual or legal basis to do so. See *City of Tshwane Metropolitan Municipality v Beukes* 2009 JDR 0951 (GNP) paras 16-19. The fact that the first respondent was authorised to transfer the mining claims to the applicant, does not amount to an order to transfer. Again, the fact that the respondents are bestowed with the administration of the Mines and Minerals Act does not accord, without more, the applicant a legal and factual basis to hold them in contempt. There is no basis in law or fact to hold the respondents liable for contempt of a court order to which they were not a party. It is for these reasons that this application must fail.

[14] It is a general rule that costs are in the discretion of the court, to be exercised judicially in the light of the circumstances of the case. In this matter, I am of the view that although the respondents have escaped a contempt of court order, they are not entitled to an order of costs. In arriving at this conclusion, I took into account the fact that this matter was unopposed. The court *mero motu* refused the order sought by the applicant because a case had not been made for such an order. Further, the respondents had initially consented to the order sought by the applicant, and only made a turn when the court raised queries with the applicant's Counsel.

Accordingly, the following order is made:

The application for contempt of court be and is hereby is dismissed with no order of costs.

Mutatu and Partners, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st and 2nd respondents' legal practitioners