GERTRUDE SOPHIA HAZVINEI MAKANI (nee ZIMONDI)
versus
CHARLES MAKANI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 11 October 2016 and 27 July 2017

Opposed Application

G K Muchapirei, for the applicant
M E Motsi, for the respondent

CHITAKUNYE J. The applicant and the respondent were married to each other till the 22nd April 2010 when their marriage was dissolved and a decree of divorce granted in case No. HH 74/2010. In granting the decree of divorce court also distributed the assets of the spouses. In the distribution of the assets the applicant was awarded, *inter alia*, stand number 1120 Prospect Township of Subdivision C of Prospect situate in the district of Salisbury.

The court order provided that the respondent, who was the plaintiff, shall transfer the property into the defendant's name within 60 days of the date of the order failing which the Deputy Sheriff was authorised to sign all the necessary papers to effect transfer. The defendant on her part was to meet the cost of transfer.

As fate would have it, transfer was not effected within the 60 days and even after the 60 days no transfer was effected either by the respondent or by the Deputy Sheriff as was envisaged.

On the 5th May 2015 the applicant filed this court application for contempt of court against the respondent for the failure to effect transfer. In her application the applicant alleged that the respondent had not been candid and *bona fide* to the court when he tendered a bonded property without disclosing it to the court resulting in the court awarding her that property. The respondent thereafter defaulted in making mortgage repayments resulting in the property being sold by respondent's creditor to her detriment. She thus wished the respondent to be held in contempt of court. Her initial prayer in terms of the draft was to the effect that:

"The respondent be ordered to compensate the applicant with another property of the same market value as Stand number 1120 Prospect Township, Harare."

The respondent opposed the application. In his opposition the respondent raised a point *in limine*. The respondent alleged that the application is misplaced and defective as in effect the applicant is petitioning this court for an order of damages under the guise of an application for contempt. In this regard respondent alluded to the founding affidavit and the draft order which did not show that the applicant was seeking the respondent to purge his contempt of an order of this court.

Order 43 r 389 of the High Court Rules, 1971, is to the effect that a court application for contempt of court shall set forth distinctly the grounds of complaint and shall be supported by an affidavit of the facts. Rules 391 and 392 on the procedure where a fine or committal to prison is ordered shows clearly that the order should call for the respondent to purge his contempt failing of which he has to pay a fine (in Form 48) or be committed to prison as per Form 49. The object is to compel the respondent to purge his contempt by doing that which the court order required him to do. The facts to be stated in the affidavit must disclose the failure to comply despite full knowledge of the court order and the relief being sought in order to enforce compliance.

In casu, the grounds stated in the court application were that:

a. The respondent tendered a burdened property in bad faith which the court went on to award to the applicant;
b. The respondent therefore cheated the court.

As a consequence of the respondent not having been truthful to court in his evidence the applicant seeks an order that the respondent compensate her with another property of the same value.

In her founding affidavit the applicant clearly alluded to the aspect of the respondent not having been candid with court as the basis for seeking compensation.

It is clear from both the grounds of the application and the applicant's founding affidavit that the application is misplaced. The applicant is in effect seeking to be compensated for a property she had been awarded but which she has since lost out on.

I am of the view that respondent's point *in limine* has merit.

In her answering affidavit the applicant argued that the application was not defective but, nevertheless, proceeded to file an amended draft order. That on its own was confirmation of the defective nature of the founding documents. The notice of amendment was filed

together with the answering affidavit and merely states that the applicant amends the draft order in this matter. The amended draft order is only referred to in the prayer for an order in terms of the amended draft annexed to the answering affidavit.

It is pertinent to note that the amended draft, whilst seeking to incorporate aspects that should have been in the original draft is, however, not in tandem with the facts alluded to in the founding affidavit as the basis for seeking relief.

In *Mutarisi* v *United Family International Church and Another* HH 445/12 at p7, ZHOU J aptly stated that:

> "Litigants are reminded that while the draft order is only a draft and does not bind the Court, it must be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the Court as to the relief being sought by the applicant."

In casu, the amended draft order attempts to incorporate the aspects of committal to gaol due to the contempt (Form 49) and the suspension of such imprisonment term on condition the respondent transfers to the applicant full title of a residential property of the same market value as Stand number 1120 Prospect Township, Harare within 14 days of the granting of this order.

It is evident that the amended draft order is materially different from the original order sought. It, however, retains the aspect of substituting stand 1120 Prospect Township with a property of the same market value. It thus does not seek compliance with the court order as originally ordered by court. The amended draft order is not supported by the basis put forth for the alleged contempt which is that the respondent lied to court and as a consequence court awarded applicant a property that was bonded. One would have expected in the draft order a relief relating to a party who lied in court. I am of the view that the amended draft is also defective as not being in tandem with the case pleaded.

The issue that arises is whether the anomalies alluded to above are fatal to the application.

I am of the view that in as far as the grounds advanced are not in tandem with the grounds expected in an application for contempt; the basis for the application not being something that arose after the granting of the order but a complaint that respondent lied to court; and the relief sought being for compensation as against an order for enforcement of the court order as granted, the anomalies are fatal.

A consideration of the application as a whole also shows that the application has no merit.

Besides the anomalies in the founding papers already alluded to, it is pertinent to note that the thrust of the applicant's case was really on the manner in which she alleged the respondent had conducted himself during the divorce proceedings.

The starting point is what the applicant termed the contextual background. In her narration of the background on how the property came to be awarded to her, she alleged that during a pre-trial conference the respondent offered her that property and she accepted the offer. Unbeknown to her the property offered was encumbered with a bond for a loan which the respondent's company had obtained from Interfin bank. The respondent had gone behind her back and registered the mortgage bond despite knowledge that the property was res litigious. She described the respondent's conduct as nothing short of fraudulent and mala fide and calculated to ensure that she would lose the property. In furtherance of his machinations to ensure she lost out, respondent had gone on to open a family trust in which he registered all his other properties and she was not a beneficiary of the trust.

The applicant further alleged that when the property was awarded to her, the respondent deliberately failed to pay the loan and the bank obtained a judgement against him leading to the attachment of the property hence she lost out.

It is in these circumstances that the applicant prayed for an order requiring respondent to transfer to her a property of same value as the Prospect property within 14 days of this order.

The respondent disputed that the applicant was not aware of the encumbrance on the property. He also denied having offered the property to the applicant at any stage.

He further alluded to the fact that the applicant was aware of the mortgage bond that was registered over the property. According to the respondent, the failure to service the bond was as a result of the applicant's conduct in evicting the tenant who was occupying the property when she knew that rental proceeds from that property were being used to service the debt. The applicant evicted his tenant before the divorce proceedings had been finalised.

In the circumstances the respondent contended that there was nothing fraudulent and mala fide when he failed to service the debt. His source of income had been taken away by the applicant.

In her answering affidavit the applicant insisted that the respondent tendered the property to her as a divorce settlement. In para 3 of her answering affidavit she stated that:

> "It is irrelevant whether or not the property was tendered at Pre-trial Conference stage or at the main trial as the bottom line is the Respondent offered me a property encumbered by a bond and is now unable to satisfy the judgment by transferring the same."

I am of the view that whilst the stage at which the property was offered may not be pivotal, it is nevertheless important in assessing the credibility of the applicant's averments. In her founding affidavit she was categorical that respondent offered her the property during the Pre-trial conference. If no such offer was made at that stage it is for her to explain why she had alluded to that. The applicant was not truthful in this regard. She was also not truthful when she gave the impression that in furtherance of his machinations the respondent had gone on to open a family trust. The judgement in case HH 74/2010 shows clearly that the family trust was created in the year 2001 which was the year of their marriage. The creation of the trust had nothing to do with the machinations during the protracted divorce proceedings.

The other issue on which applicant was not candid was whether or not the respondent ever offered the property to respondent. The applicant's argument that the property was offered to her is not supported by the judgement in HH 74/2010 (HC 2432/08). At page 1 of the cyclostyled judgement the learned judge stated that:

> "The issue of the assets was seriously contested and the parties did not agree on anything. The plaintiff's position was that the property was not matrimonial property and in any event defendant had made no contribution towards their purchase. The defendant on the other hand took the view that the property was matrimonial property and she was entitled to a share."

The judgement shows that it is the learned judge who decided to award the applicant the property in question whilst awarding the respondent a property in Tynwald. This was despite the respondent's insistence that the Prospect property should not be taken as matrimonial property as he had acquired it in 1997 before marrying the applicant in 2001. Clearly the respondent had not at any stage offered that property to the applicant. The applicant's insistence that respondent offered the property to her was meant to buttress her assertion of fraudulent and mala fide conduct on the part of the respondent in offering her a property that was encumbered and then failing to service the bond. Now that it has been shown that the property was not offered, it follows that the basis for alleging fraud or *mala fides* in offering a property that was encumbered cannot stand.

The fact that the respondent had not offered the property does not however mean that he ought not to have complied with the court order. The undisputed fact is that respondent was ordered to transfer the Stand 1120 Prospect Township to the applicant.

The issue is thus whether or not respondent should be found to be in contempt of court given the circumstances of the case.

The principal object of civil contempt of court proceedings is to compel, by means of personal attachment and committal to gaol, the performance of the court's order. The imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations. See *Macheka* v *Moyo* 2003 (2) ZLR 49(H)

In *Haddow* v *Haddow* 1974 (1) RLR 5 at 7H -8A, GOLDIN J also aptly noted that:

> "The object of proceedings for contempt is to punish disobedience so as to enforce an order of the court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable or any remedy, and at the same time constitute disrespect for the court which granted the order."

In *Shaun Evans and Another* v *Yakuub Surtee and Others* SC 4/2012 at page 8 of the cyclostyled judgment ZIYAMBI JA, stated that:

> "While it is trite that disobedience by a litigant of an order *ad factum praestandum* is punishable by committal to gaol, it is also true that the disobedience must be wilful and *mala fide*. Punishment for contempt of such an order by committal to gaol is aimed at enforcing civil orders of court, and to bring to its logical conclusion an order given by a judge, which the court finds has been deliberately disobeyed. The principal object of the proceeding is to compel, by means of personal attachment and committal to gaol, the performance of the Court's order."

The basic requirements that need to be proved are that:

1. That an order was granted by a court of competent jurisdiction
2. That the respondent was indeed served with the said court order or that it was brought to his attention; and
3. That the respondent has either disobeyed it or has neglected to comply with it.

In casu, it is common cause that a court order was granted by a court of competent jurisdiction. That order required the respondent to, *inter alia*, transfer Stand 1120 Prospect Township of Subdivision C of Prospect, Harare into the defendant's name within 60 days of the date of the order failing which the Deputy Sheriff was authorised to sign all the necessary papers to effect transfer.

For starters, the onus was upon the applicant to show that there was an order of the court of which the respondent was served or that it was brought to his attention and that despite this he has not complied with the terms of the order.

Once the applicant has established the above requirement the onus shifts to the respondent to show that his failure to comply was not wilful and mala fide and so does not

deserve the relief being sought. In *Haddow* v *Haddow* (*supra*) at 7H-8A GOLDIN J had this to say:

> "In my respective view, whenever an applicant proves that the respondent has disobeyed an order of court which was brought to his notice, then both wilfulness and *mala fides* will be inferred. The onus is then on the Respondent to rebut the inference of *mala fides* or wilfulness on a balance of probabilities."

In casu, it is common cause that the parties were involved in a protracted divorce action which culminated in the court issuing the order in question. There is no dispute that the respondent was served with the court order and so he knew what was expected of him. It is also not in dispute that despite knowledge of the terms of the court order, the respondent did not transfer the property into the name of the applicant. In fact he has not done so up to date, *ex facie* therefore, the applicant has managed to shift the onus onto the respondent.

To escape being found guilty the respondent must rebut the inference that the disobedience or failure to comply with the court order was wilful and *mala fide*. Wilfulness in this regard implies a deliberate refusal to obey the order.

The respondent contended that his failure to transfer the property was not wilful and *mala fide*. It was beyond his ability as the property was encumbered. There was an existing mortgage bond that made the transfer within 60 days impossible as he had to clear the mortgage first. He alluded to the fact that the applicant was well aware of this encumbrance and the fact that the money to repay the loan was being derived from rentals from the property in question. It was his contention that before the divorce action was completed the applicant evicted the tenants who were renting the property and gave occupation to her son. She thus extinguished the source of income for the repayment of the loan. This therefore put the property at risk as he had no other sources of income to adequately service the loan.

To illustrate this it is pertinent to note that in paragraphs 4.6 to 4.8 of her founding affidavit the applicant stated the following:

> "4.6. Unknown to me, during the course of the proceedings and on a date unbeknown to me, the Respondent caused a caveat and or mortgage bond to be placed on the said property as security for his personal debts whose fruits I did not enjoy, and to which I was never a party to. The respondent knew fully well that the property was now res litigious and was subject to court process between the parties.
>
> 4.7. As a result the Respondent's conduct was nothing short of fraudulent and mala fide. It was a calculated move to ensure that I would lose the property which the court in its judgment awarded me.

4.8 The mortgage bond on the property was only registered on the 7th August 2009, well after *litis contestio* had been reached. It is clear that the Respondent knew fully well that the said property could be awarded to me and in a calculated and fraudulent manner he had that same property bonded and deliberately withheld that information from me, and worse still the court.

At this point, the Respondent had opened a family trust called TarBell in whose name he had registered all other properties he owned and I was not the beneficiary of the trust. Respondent also refused with our matrimonial property called No. 9 Dorset Road Avondale Harare leaving stand No. 1120, Prospect Township as the only property he could tender."

The respondent's response to the above paragraphs was as follows:

"Ad paragraph 4.6

13. The Applicant is again being untruthful, she was aware of the bond that was registered over the property at all material times. In fact, the bond was registered over property to secure fund to repair a company vehicle she had maliciously damaged…..

14. Further, there was a tenant in occupation of the property to whom the property had been leased in order to generate money to pay back the loan. Applicant evicted this tenant well before the conclusion of the proceedings in Case No. 2432/08 and gave occupation of the property to her son whilst she forcibly occupied my daughter's property.

Ad paragraph 4.7 – 4.10

15. There was nothing fraudulent or mala fide in the circumstances. The title deed to the property was tendered in court clearly endorsed to show that there was a bond registered over the property. In any event, all this was within Applicant's knowledge. She chose to ignore this whilst she spent the past several years trying to divest my daughter of her property."

Faced with the above responses to her paragraphs 4.6 to 4.8, the applicant only responded to paragraph 13 as follows:

"Ad para 13

This is denied. It is also denied that I damaged a vehicle; the Respondent has failed to produce evidence of the purported repairs done. It begs reason also why the Respondent took a bond of USD30 000.00(Thirty thousand United States dollars) simply for repairs of a vehicle. In fact, the Respondent might have registered the bond to cover the medical fees of his current wife who had been involved in a car accident at the relevant time."

The applicant chose not to respond to the rest of the contentions by the respondent that:

a) she knew the property had been leased out to generate income to service the loan and in spite of this knowledge she evicted the tenant and gave occupation to her son thus depriving the respondent income with which to service the loan; and

b) that the title deeds were in fact tendered in court clearly endorsed showing that there was a mortgage bond registered over the property.

It is trite that the purpose of an answering affidavit is to give the applicant an opportunity to reply to the respondent's contentions in the opposing affidavit. Where the applicant does not refute the contentions in an opposing affidavit it may as well be assumed that she admits the same.

The applicant in her answering affidavit and even submissions in court did not deny knowledge of the debt and the fact that she evicted tenants who were renting the property for value and put in her son. She did not deny knowledge that rentals from the property were being used by respondent to pay the debt. All she said about the debt was to deny that the loan was to repair a vehicle she had maliciously damaged and argued that the loan could have been to cover the medical expenses of the respondent's current wife who had been involved in an accident.

In this regard it is pertinent to note that paragraphs 14 and 15 of the respondent's opposing affidavit were not rebutted. The contents of these paragraphs show her role in incapacitating the respondent financially and the fact that she was aware of the mortgage bond on the property which disabled respondent from effecting the transfer before liquidating the debt.

In *Shaun Evans and Another* v *Yakuub Surtee and Others* (*supra*) at p 9 ZIYAMBI JA alluded to the fact that proved inability to comply with the order of court will afford protection against a committal for contempt.

Equally in *Haddow* v *Haddow* (*supra*) court did not grant an order of committal for contempt because the defendant's disobedience of its order was not shown to be *mala fide*.

In casu, the respondent could not transfer within 60 days because the property was encumbered. He was required to have the mortgage bond cancelled first before he could effect transfer. Whilst it is true that he had the obligation to clear the debt and ensure the encumbrance was removed, he failed to do this as the source of income had been extinguished by the applicant. His failure to transfer can therefore not be said to have been a deliberate disobedience and *mala fide*.

Another point to note is that the order sought by the applicant is not for the respondent to do that which he had been ordered to do, but to transfer another property of the same value to the applicant within 14 days. It has not been shown that the respondent has such property which he can transfer within 14 days. This would be a completely different order from the *ad factum praestandum* order granted in HH 74/2010. Clearly such an order would not be competent in the circumstances. What the applicant is in fact seeking is to be compensated

for the loss of the property she had been awarded. She can always sue the respondent for such compensation in the proper manner rather than seek compensation under the guise of contempt of court proceedings.

I thus conclude that the application cannot succeed.

Accordingly the application is hereby dismissed with costs on the general scale.

Tawanda Legal Practice, applicant's legal practitioners
M. E. Motsi & Associates, Respondent's legal practitioners.