PEDZISAYI MIRIAM LILLIETH GARWE
versus
DANIEL GARWE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 9, 10 and 11 October 2018

OPPOSED APPLICATION- CONTEMPT OF COURT

F Mahere, for the applicant
L Madhuku, for the respondent

CHIRAWU-MUGOMBA J: This application has its roots in a matrimonial dispute between the applicant and respondent. The background is as follows: - On the 15th of June 2018, MUSHORE J gave an order in HC 4882/18 in which the respondent was interdicted from taking away, removing and or in any way disposing of any of the assets held under the family companies and family trust listed on the confirmed interim relief pending finalisation of divorce proceedings in case no HC 5020/18. The order also compelled the respondent to return forthwith certain assets as specified and to also prohibit the respondent from removing certain specified assets. Essentially the order relates to returning of assets and prohibiting the removing of assets. It is the applicant's contention that in defiance of the court order, the respondent is in breach of paragraph 2 which required him to return forthwith assets removed from Subdivision D of Rhosesdale, Sebakwe of subdivision A of Rhodesdale and Remainder of Xmas of subdivision A of Rhodesdale also known as Sebakwe Range farm in Mvuma being an electric hammer mill, boom spray, lister pump, planter, gladiator mower, TD 95 tractor and P 11 plough. The applicant averred that again the respondent was in breach of the court order by failing to return forthwith all assets he removed from number 12 Mitchel Road Kamfinsa, Greendale, Harare, being an Isuzu truck registration no ABI 5006, bomac roller, construction shutters, window frames, timber (various sizes), pivot water pump set and Isuzu TR Registration no. ABI 5791. The applicant thus seeks the following order:-

1. That the respondent be and is hereby declared to be in contempt of the High Court order in case no. HC 4882/18 dated the 15th of June 2018.

2. The respondent shall be committed to prison for a period of 90 days, 60 of which shall be suspended on condition that he complies with the order of the court immediately.

3. The respondent shall pay costs of this application on the higher scale of legal practitioner and client.

It is pertinent to also note that the respondent appealed against the order of MUSHORE J in HC 4882/18 by filing a notice of appeal with the Supreme Court date stamped the 28th of June 2018. The respondent also filed an urgent application under HC 6144/18 for an interdict against the applicant and on the 5th of July 2018, this application was struck off the roll with costs by MANGOTA J. On the 11th of July 2018, the applicant obtained an order before CHITAKUNYE J under case number HC 6100/18 in terms of which leave to execute the order in HC 4882/18 was granted and further that the order (HC 6100/18) was to remain operational and shall not be suspended by any appeal that may be lodged against it. The respondent was also ordered to bear the costs on a legal practitioner and client scale. The order in HC 4882/18 falls into the category of orders *factum praestandum* (i.e. orders to do or abstain from doing a particular act) where committal for contempt is competent.

The respondent does not deny that he has failed to act as per paragraphs 2 and 4 of the order in HC 4882/18 but that he was prevented from doing so due to two main reasons (1) that the assets were with third parties in terms of commercial arrangements that he entered into as the person who had been running the company and (2) he was in the rural areas campaigning for a parliamentary seat.

Contempt of court proceedings are in terms of Order 43 of the rules of the High Court. As aptly stated by GOROWA J (as she then was) in *Zellco Cellular (Pvt) Ltd and Ors* 2012 (1) ZLR 164 (H) 170 A-C:-

> "It is trite that an applicant for an order for committal must establish the following:
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> 1. that an order was granted against the respondent;
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> 2. that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information ; and
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> 3. That the respondent has either disobeyed the order or neglected to comply therewith see *Uncedo Taxi Service Association* v *Mtewa and Ors* 1999 (2) SA 495 (E); *Consolidated Fish Distributors (Pty) Ltd* v *Zive and Others* 1968 (2) 517 (C).

> Contempt of court in the context of these proceedings would entail a deliberate disobedience of a lawful order issued by a court of competent jurisdiction."

In the case of *Zellco* case at 165 it was observed that –

> "A court will not entertain an application for committal for contempt unless wilful or reckless disregard for the court order has been proved. Before a person can be found guilty of contempt, his disobedience of the order must not be only wilful but also a *mala fide*. In contempt proceedings, once a failure to comply with a court order has been established, wilfulness will normally be inferred and the onus is on the person who failed to comply with the order to rebut the inference of wilfulness on a balance of probabilities."

In *Fakie NO* v *CCII Systems (pty) Ltd*, 2006(4) SA 326 (SCA) the test of whether failure to obey a civil order constitutes contempt of court was stated as follows:-

> 'as whether the breach was committed 'deliberately and *mala fide'*. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements – that the refusal to obey should be both wilful and *mala fide,* and that the unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt- accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation.'

Indeed, if an explanation for failure to act is reasonable, the court is bound to accept it and find that there has been no contempt – see *Karnec Investments (Private) Limited & Anor* v *Econet Wireless (Private) Limited* HH 261 -16.

It is not in dispute that an order was granted and that the respondent is aware of the order. As confirmed by *L Madhuku* the respondent is not disputing the fact that he has not complied with paragraphs 2 and 4 of the order. The sole issue before this court therefore is whether or not the respondent's conduct in disregarding the court order is wilful and *mala fide* and the onus is on him to prove that it is not- see *Fakie* case (*supra).*

On the 25th of June 2018, the applicant's legal practitioners addressed a letter to the respondent's legal practitioners pointing out the fact that the respondent was in contempt of the court order. The respondent's legal practitioner responded by email dated the 27th of June 2018 in which he stated that he had scheduled a meeting with his client (respondent) that afternoon and he would revert to the applicant's legal practitioner after taking instructions. The 'response' came by way of a notice of appeal to the Supreme Court date stamped the 28th of June 2018 and served on the applicant's legal practitioners on the 29th of June 2018. The respondent must be given the benefit of the doubt that perhaps he was advised that the appeal suspended the operation of the order in HC 4882/18. However, on the 11th of July 2018, as already stated, CHITAKUNYE J granted the order for leave to execute the order granted in

HC 4882/18. That means that the window given to the respondent by the noting of the appeal was no longer available to him. He was expected to return the assets listed in HC 4288/18 'forthwith'.

The attitude of the respondent is revealed in an email dated the 23rd of July 2018 addressed to the applicant's legal practitioners by the respondent's legal practitioners. The following is crucial.

"Mr Garwe strongly disagrees with both judgements of the High Court, and sincerely believes that they are wrong and set a very dangerous precedent. He believes that the Supreme Court should and will overturn them. However, in the interests of the negotiations, Mr Garwe is prepared to comply with the judgements and restore the status quo ante".

This assertion clearly ignores that fact that it was not about the respondent being 'prepared' to comply. The court order has to be complied with, 'forthwith'. Even though he was, 'unhappy' with the decisions of this court, he had no choice but to comply. In the words of MATHONSI J in *Mathuthu* v *Chegutu Municipality & Ors* HH 502/14 at p1:

> "The authority, dignity and respect of courts of law should never be demeaned, prejudiced or undermined. It behoves the subject to bow to the decision of the court and, where there exists a remedy, to then pursue that remedy elsewhere. This is extremely important for the proper administration of justice".

In the above cited email, the issue relating to the respondent being involved in campaigning was also stated as follows, *"Mr Garwe is presently based in Murewa where he is campaigning for a parliamentary seat. He accordingly asks that he be allowed until 1 August 2018 to comply with the judgements".* The request ignores the fact that the court order stated that the respondent must comply, 'forthwith'. And the fact that he was campaigning cannot be a reasonable explanation for him not to comply. The onus is on him to prove that he was not in wilful disobedience of a court order or acting *mala fide.* He has failed to show how the campaigning prevented him from complying with the court order. His attitude seems to be that of a person who seeks to be 'excused' from complying with a court order simply because he was taking part in an election process. To allow such would be tantamount to throwing spanners in the rule of law. As stated by TSANGA J in *Karnec Investments (Private) Limited & Anor* case;-

> "In terms of s 3 of our Constitution, one of the founding values and principles upon which Zimbabwe is founded is respect for the rule of law. If the court's authority is not respected there can be no fostering of respect for the rule of law…….Contempt of court has clear bearings on legal proceedings in that if it is not addressed, the jurisdictional power of the courts would be illusionary. It is regarded as an act of disrespect and insult to the court and an obstruction to justice".

The respondent's averment that the assets in question were subject to commercial arrangements was rejected twice by this honourable court. *F Mahere* in her submissions made reference to the words of CHITAKUNYE J in *Garwe* v *Garwe* HH 408-18 a matter in which the applicant and the respondent were litigants, as follows:-

> "In this regard respondent contended that the assets that he removed were on commercial hire so as to earn income for the family and others had been taken for repairs so that they were in a state to be leased out for profit. It is in this regard that he contended that the nature of the order would be to freeze the commercial activities of the respondent. By such freeze, income will be lost and business contacts he had already entered into would be broken leading to potential law suits for breach of contract. The respondent would not however prove before MUSHORE J who granted the order in question that he had entered into any lease agreement with a third party. This was despite having been given a week's period within which to bring the alleged lease agreements. Even in this application, respondent failed to include in his notice of opposition any lease agreement with the entity he had alleged he had leased the assets to……"

The need to produce proof therefore cannot be said to be something new. The respondent had an opportunity in his notice of opposition in this contempt of court case to take the court into his confidence by producing evidence to prove his assertion especially regard being had to the onus placed on him to prove that he is not acting wilfully or *mala fide.* I find therefore that there is no merit in the respondent's assertion that he could not comply with the court order due to the alleged commercial arrangements.

In light of the foregoing, I am satisfied that the respondent is in contempt of court. His failure to act in accordance with paragraphs 2 and 4 of HC 4882/18 is both wilful and *mala fide.*

The applicant seeks an order that the respondent be committed to prison for a period of 90 days, with 60 being suspended on condition that he complies with the order. As observed by MANGOTA J in *Chemaden Resources (pvt) Ltd vs. Kadzombe and others* HH-549-17;-

> "The practice of prescribing a sanction in civil contempt of court proceedings is wrong. It amounts to a party arrogating to itself the power and roles of a policeman, a prosecutor and a judge all in one. It is not in tandem with Order 33 of the rules of court. Rules 391 and 392 of the High Court Rules 1971 confer upon the court a discretion to respectively impose a fine upon the wrongdoer or to commit him to prison. Prescribing a sanction in the draft order is, therefore, akin to a usurpation of not only the discretion, but also the powers, of the court in civil contempt of court proceedings."

Rule 391 of the High Court rules envisages a situation where a fine can be imposed and r 392 envisages committal to prison. The amount of the fine and the time period for committal is at the discretion of the court. The respondent's legal practitioner suggested

committal of a period of a week wholly suspended should the application be successful. To note however as per MATHONSI J in *Vant* v *Jeche* HH-440-15 is that :-

> "…..the primary objective of the contempt of court procedure is to compel compliance with the court's order. Any punishment should therefore be suspended to afford the intransigent party a strong inducement to comply: *Harare West Rural Council* v *Sabawu* 1985 (1) ZLR 179 (H) 183 D; *Mapfumo* v *Director of Housing and Community Services and Ors* HH 274/14; *Mathuthu* v *Chegutu Municipality and Others* (*supra*).
>
> The term of imprisonment should therefore be suspended and left hanging over the respondent's head as a constant reminder and incentive for fulfilment of his obligations in terms of the court order."

A balance should therefore be struck between the fine/committal periods ordered with the need to ensure that court orders are complied with.

With regards to costs, it is trite that such are always at the discretion of the court. The respondent's conduct deserves censure. He has unnecessarily put the applicant out of pocket. He has shown disdain for orders of this court. An order of costs on a higher scale is therefore appropriate.

Having found that the respondent is in contempt of the court order in HC 4882/18 and that he acted and continues to act wilfully and *mala fide*, it is ordered as follows;-

1. The respondent is hereby found to be in contempt of the order of this Honourable Court dated the 15th of June 2018 in HC 4882/18.

2. The respondent is hereby sentenced to 60 days imprisonment which is wholly suspended on condition that he complies with paragraphs 2 and 4 of HC 4882/18 forthwith.

3. In the event that the respondent fails to comply forthwith with paragraphs 2 and 4 of HC 4882/18, the applicant is entitled to lodge a complaint on oath with the Registrar of this court who shall upon receipt of such complaint issue a warrant of committal against the respondent for him to serve the suspended sentence.

4. The respondent shall pay the costs of this application on a legal practitioner to client scale.

T.H Chitapi and Associates, applicant's legal practitioners
Mundia and Mudhara, respondent's legal practitioners