REPORTABLE ZLR (41)

Judgment No. SC 49/09
Civil Appeal No. 312/06

TREVOR BATEZAT v PERMASSAN (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, OCTOBER 6, 2008

H Zhou, for the appellant

No appearance for the respondent

SANDURA JA: The appellant was found guilty of contempt of court by the High Court, and was sentenced to thirty days' imprisonment with labour, which was wholly suspended on condition that he returned a certain trailer to the respondent. After hearing the appellant's counsel, we dismissed the appeal with no order as to costs, and indicated that our reasons would be given in due course. I now set them out.

The relevant facts in this matter are as follows. The respondent instituted civil proceedings in the High Court against the appellant, claiming the return of a tri-axle trailer, registration number 490-816V.

On 20 October 2004 the High Court gave judgment in favour of the respondent, and ordered the appellant to return the trailer to the respondent.

On 24 November 2004 the Deputy Sheriff served the court order on the appellant at 8 Summerdale Walk, Msasa, Harare, which was the appellant's residence. At the time the court order was served on him the appellant advised the Deputy Sheriff that the trailer had been involved in an accident in Zambia on 11 November 2004.

On 1 June 2005 the Deputy Sheriff made a second attempt to recover the trailer from the appellant's residence. The return of service indicated that the notice of removal had been served on a receptionist at the appellant's residence, and that the receptionist had advised the Deputy Sheriff that the delivery of the trailer would be effected on 10 June 2005.

On 13 July 2005 the Deputy Sheriff again attempted to recover the trailer from the appellant's residence, but without success. According to the return of service, the appellant advised the Deputy Sheriff that the trailer had been disposed of in Zambia.

In the circumstances, the respondent believed that the appellant had the trailer, but was deliberately lying in order to defeat the course of justice. Accordingly, the respondent instituted contempt of court proceedings in the High Court against the appellant, seeking the order that the appellant return the trailer to the respondent forthwith or be imprisoned for thirty days.

The proceedings were opposed by the appellant who filed an opposing affidavit in which he averred that the trailer had been involved in a road accident in Zambia and had been written off. To the opposing affidavit the appellant annexed a report on a traffic accident allegedly compiled by the police in Zambia.

When the matter came before the learned Judge in the court *a quo*, he granted the order sought by the respondent. Aggrieved by that result, the appellant appealed to this Court.

What ought to be established by the applicant in contempt of court proceedings where committal to prison is sought was considered by GOLDIN J (as he then was) in *Haddow v Haddow* 1974 (1) RLR 5 (GD). At 7E-8A the learned Judge said:

> "Not every breach of an order of court justifies committal for contempt. Firstly, a person's disobedience must be not only wilful but also *mala fide*. Secondly, it must be such a breach which will be punished in this manner.
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> The first aspect has been fully considered in the case of *Consolidated Fish (Pty) Ltd v Zive and Ors* 1968 (2) SA 517 (C) at pp 522-5. The learned Judge states that 'it is essential that the element of wilfulness be present in the act or omission alleged to constitute contempt'. The question was considered whether an allegation of *mala fides* is an essential averment, or proof of *bona fides* is a defence in a claim for committal for contempt. At pp 524-5 the learned Judge says:
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> > 'I deduce from this that only in the limited class of case referred to as "constructive" contempt does the applicant have to allege and prove *mala fides*; in the more usual case of a "direct" contempt, a deliberate disobedience of an existing order of court, he need prove wilfulness only, *mala fides* being inferred.'

> In my respectful 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."

I entirely agree with the views expressed by the learned Judge.

Applying the principles set out in *Haddow's* case *supra* there is no doubt in my mind that the learned Judge in the court *a quo* correctly determined the matter. In his judgment he said the following:

> "On two occasions the order of the court was brought to the respondent's personal notice. On the other occasion it was served on the respondent's receptionist. Three different explanations were given on the three occasions, and in fact there is a fourth explanation in (the) respondent's opposing affidavit in which he states that the trailer was written off. The mere fact that the trailer was involved in an accident in a foreign country in my view does not mean that (the) respondent could not comply with the order of the court. (The) respondent did not even comment on the comments attributed to his receptionist in respect of the service of 1 June 2005 wherein it was noted that the trailer would be delivered on 10 June 2005. Even (the) respondent's comments attributed to him in respect of (the) service effected on 13 July 2005 to the effect that the trailer was disposed of in Zambia contradict the earlier explanations as noted by the Deputy Sheriff.
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> The police report from Zambia has no reference at all to the trailer. To the contrary it only records the registration number of the horse. (The) respondent has not filed any proof to back his claim that the trailer was written off. … On the facts before me (the) respondent did not discharge the *onus* on him."

In my view, the learned Judge's reasoning is unassailable. The appellant disobeyed a court order which was brought to his notice more than once. Therefore, the appellant's wilfulness to disobey the court order, as well as his *mala fides*, must be inferred.

That being so, the *onus* was on the appellant to rebut the inference of *mala fides* or wilfulness on a balance of probabilities. In my view, there can be no doubt that the appellant failed to discharge that *onus*. The contradictory explanations given by the appellant about what happened to the trailer clearly indicate that the appellant was lying in order to defeat the course of justice.

Quite clearly, the appellant deserved the sentence imposed by the learned Judge. As GOLDIN J said in *Haddow's* case *supra* at 8 A-C:

> "The object of proceedings for contempt is to punish disobedience so as to enforce an order of court, and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular fact. 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."

These are the reasons why, after hearing the appellant's counsel, we dismissed the appeal. As there was no appearance for the respondent, we made no order as to costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Gula-Ndebele & Partners, appellant's legal practitioners