

**SIBUSISIWE MHLANGA**

**Versus**

**BONGANI MHLANGA**

HIGH COURT OF ZIMBABWE  
NDLOVU J  
BULAWAYO, 23, 30 NOV. 2023 and 28 NOV. 2024

**Opposed application for contempt of court**

*Mr T. Ndebele*, for the applicant  
*Mr M. Chipetiwa*, for the respondent

**NDLOVU J:**

**INTRODUCTION.**

This is an application for civil contempt of court proceedings against the Respondent who is allegedly in wilful violation and disobedience of a Divorce Court Order granted by this Court under case number **HC 1981/18** on 23 August 2018.

**POINTS IN LIMINE**

1. The purported Answering Affidavit is expunged by consent.
2. The attack on the admissibility of the respondent's Opposing Affidavit is without merit and is dismissed as the affidavit in question is shielded from the kind of attack it got from the applicant by *Rule 85[5] of the High Court Rules, 2021*.

**BACKGROUND FACTS**

It is common cause that the parties are divorced from each other by Order of this court. A part of the said order granted custody of the parties' two minor children to the Applicant with the Respondent being awarded access to the children during weekends and two weeks of the School Holidays.

The applicant averred that the respondent had breached the court order in that he kept the minor male child in South Africa after the children had visited him from Zimbabwe during the December 2020 School Holidays. Efforts to persuade him to purge his contempt have not yielded the desired result in that the Respondent keeps promising to return the child to Zimbabwe has done nothing to fulfil those promises. The applicant goes on to aver that the Respondent is taking the law into his hands in contemptuous violation of this court's order by failing to engage her in the affairs regarding the minor child in question. The minor child has medical special needs.

The application is opposed. The Respondent in his defence avers that he is taken aback and surprised by this application and the accompanying allegations by the Applicant. He avers that when the children went to South Africa during the December 2020 School Holidays he agreed with the Applicant that the child in question remain in South Africa and continue his education there. This agreement according to the Respondent, was influenced by the realisation from their joint wisdom that it was in the best interests of the child in question to be educated in South Africa and visit the Applicant during Holidays. They so reasoned because the child had a special medical condition that affected his learning ability, and emotional sensitivity. That condition necessitated that they place him at a Special Needs school for his preschool and early primary schooling in South Africa. The parties spent vast amounts of money on therapy for the child in South Africa. In addition, he is on daily medication. This medication and therapy is not readily available in Zimbabwe. The respondent further submitted that the sudden change in environment brought about by their departure from South Africa under circumstances beyond their control had negatively affected the child in question.

All along he was of the genuine belief that the relocation of the child was a product of mutual agreement between him and the applicant. His lawyers did not tell him that the Applicant wanted the child back and wonders why the Applicant would choose to approach his lawyers and not him if she genuinely had had a shift of mind on the subject matter.

He suspects that the change of mind on the Applicant's part and this application are retaliatory

moves by the Applicant against him after he initiated litigation against her over her sale of his property without his consent or force of a court order.

#### **RELIEF SOUGHT.**

- 1. The Respondent be and is hereby found to be in Contempt of Court, for failing to comply with the Order granted by this Court in Case No HC 1981/18.*
- 2. Arising from such contempt, the Respondent be and is hereby punished by a fine of ZW\$200 000.00*
- 3. The Respondent be and is hereby sentenced to a period of three months imprisonment, the sentence is, however, suspended on condition that the respondent shall faithfully and dutifully comply with the order given in this court in case number HC 1981/18 within seven working days, and*
- 4. The Respondent shall pay the Applicant's costs of suit at the legal practitioner and client scale.*

#### **ISSUE**

Whether or not the Respondent is in contempt of court in the meaning of the law.

#### **APPLICABLE LAW.**

The law relating to contempt of court for violations of a civil order or judgment is settled. The purpose of civil contempt of court is to enforce an order of the court by the threat of committal to prison.

*In Re Chinamasa 2001 (2) SA 902 (ZS).*

*Mafoshoro Farm (Pvt) Ltd v Hubert Nyanhongo & Tendai Mbereko HH-32-09.*

Civil contempt is the wilful or mala fide failure to comply with an order of court. The three requirements for contempt that need to be proved, are:

- 1. That an order was granted by a competent court.*
- 2. That the respondent was indeed served with the said order or that it was brought to his attention; and*

**3. That respondent has either disobeyed it or has neglected to comply with it.**

*Mafoshoro Farm (Pvt) Ltd v Hubert Nyanhongo & Tendai Mbereko* HH-32-09.

*Consolidated Fish Distributors (Pty) Ltd. v Zive and Ors* 1968 (2) SA 517.

Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and the non-compliance was wilful on the part of the defaulting party.

*Scheelite King Mining Co. (Pvt) Ltd. v Mahachi* 1998 (1) ZLR 173 (H)

The respondent must be aware of the existence of the order. When an applicant proves that the respondent has disobeyed a court order that he was aware of, then both wilfulness and mala fides are inferred. The onus then shifts to the respondent to rebut the inference of mala fides or wilfulness on a balance of probabilities. If a respondent proves that while he was in breach of the order his conduct was bona fide, he should not be held to have been in contempt of court because disobedience must not only be wilful but also mala fide.

*Haddow v Haddow* 1974 (1) RLR 5.

## **APPLICATION**

I now examine whether or not the facts support the grant of the relief sought. There is no dispute that there is an order by this court stipulating that the Applicant is the custodian parent post the divorce. The Respondent is aware of that Order. It is also not in controversy that the relocation of the child to the custody of the Respondent without a court order is on the face of it an act of contempt of the court which made that order.

The Applicant has therefore proven that the Respondent has disobeyed that court order. Both wilfulness and mala fides are then inferred. On those facts, the onus then shifts to the respondent to rebut the inference. There is a dispute of fact on whether or not the parties agreed that the child's custody relocates to the respondent for the reasons that the respondent placed before this court through an affidavit has placed before the court.

When faced with a material dispute of facts a court in motion proceedings has four options to choose from in charting the way forward towards the resolution of the dispute between the parties.

1. *Adopt a robust approach and resolve the dispute on the available information on paper.*
2. *Call for oral evidence.*
3. *Convert the motion proceedings to action proceedings by referring the matter to trial.*
4. *Dismiss the application if, in the view of the court, the applicant knew of or anticipated that such dispute exist or will arise but deliberately chose to proceed by application instead of action.*

Because this matter involves a child and that child needs specialised management medically and otherwise, I choose to adopt a robust approach. The time the Applicant took to launch this application reasonably feeds into the respondent's suspicion that the application is excited by mala fides. The nature of the application is extraordinary and drastic in the circumstances of the case. There is no allegation that the child is not well managed or taken care of properly by the respondent. If all was about the rule of law, the applicant would in all probability have opted for lesser drastic mechanisms to cause the return of the child to her. When one contrasts all this with what the respondent has said in his papers, his explanation is more probable than that of the Applicant. In my view, the respondent's argument is understandable. Had he approached the Court for an order to relocate the child to South Africa it is highly improbable that the High Court would have declined his application. An order to pay a fine and of committal to prison even though suspended is not merited. The net effect of this finding is not that the respondent has not violated an extant order of the court but rather that he acted with bona fides. He has thus successfully rebutted the presumption that he acted with wilfulness or mala fides.

## **DISPOSITION**

The application is dismissed with costs.

*Lazarus And Sarif*, applicant's legal practitioners  
*Ingwani Chipetiwa*, respondent's legal practitioners