CHAD CECIL MUPANDANYAMA
and
SWIFT EAGLE INVESTMENTS BUSINESS CONSULTANCY PRIVATE LIMITED
versus
RUAN MEATS ENTERPRISES (PRIVATE) LIMITED
and
TARIRAI DAVID MUNANGAGWA
and
WHOZHERI STONE CRUSHERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 7 June & 21 July 2021

Urgent Court Application

R Mabwe with *J Chimombe & M Tarugarira*, for the applicants
M Chipetiwa, for the 1st – 3rd respondents

MANZUNZU J This is an urgent court application in which the applicants seek the following order;

> "IT IS ORDERED THAT:
> 1. The 1st respondent is found to be in contempt of the judgment of the High Court of Zhou J under case number HC 7529/20 and CHITAPI J given under case number HC 27/21 consequently;
> a) The 1st respondent is ordered to pay $20 000 000.00
> b) The 1st respondent's directors be committed to Chikurubi Maximum Prison for a period of 8 months of which all of it will be suspended on the grounds that immediately upon service of this order the respondents stop from carrying out mining activities and ferrying quarry stones away from Jilikin Mine registration number 12641BM.
> c) The 1st respondent shall pay the cost of suit on a higher scale of legal practitioner and client scale."

The application is opposed. The undisputed brief background to this application is that on 28 December 2020 this court in case number HC 7529/20 (*per* ZHOU J) granted a provisional order barring the respondents from carrying any mining activities and ferrying quarry stones from Jilikin Mine. The interim order reads;

> "That pending the determination of this matter on the return date, the applicants are granted the following relief:

1. All forms of mining activities by the 1st respondent and anyone acting through them on the disputed mine known as Jilikin Mine Registration Number 12641BM be and are hereby suspended.
2. The respondents are interdicted from removing any stones mined from Jilikin Mine."

On 29 December 2020 the respondents appealed against this order under SC 584/20. The effect of the appeal was to suspend the order of the High Court in HC 7529/20. In response the applicants filed an urgent chamber application to execute pending appeal under case number HC 27/21. On 2 February 2021 an order was granted (per CHITAPI J) as follows;

"IT IS ORDERED THAT:

1. The application for leave to execute the provisional order granted by ZHOU J on 28 December 2020 in case number HC 7529/20 pending appeal against that order noted by the respondents herein under case number SC 584/20 is hereby granted.
2. The first, second and third respondents shall jointly and severally, the one paying the other to be absolved pay the costs of this application."

Both the applicants and respondents raised certain preliminary points which, for expedience, I allowed to be argued together with the merits and more so in that no party would suffer any prejudice by that approach. I will now deal with the points *in limine* in turn.

i) Whether 2nd respondent should be a party to these proceedings?

The second respondent took exception as to why he was cited as a party to these proceedings. This was for the simple reason that the application did not lay any allegations of wrong doing against him neither is there any relief sought against him. Indeed there are no averments against him by the applicants. Ms *Mabwe* for the applicants was quick to realize the anomaly and conceded to drop the application against him. However second respondent asked for costs on a higher scale. I do not think such costs are justified given the fact that applicants cited him as he was one of the respondents in the interdict order.

ii) Is there opposition by the 3rd respondent?

There was a purported notice of opposition from the third respondent by a deponent who failed to demonstrate that he was so authorized to do so. There is therefore no opposition by the third respondent. Counsel for the third respondent did not contest to the issue. In any event no direct relief is sought against it.

iii) Is the matter urgent?

The requirements for urgency are settled. In *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (HC) it was stated

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules."

In *Documents Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H) the court said,

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

The applicants allege the first respondent started the removal of quarry stones on 18 May 2021. They filed the urgent application on 28 May 2021. In their view they acted timeously. In any event the contempt was said to be of a continuing nature and involves commercial interests.

The first respondent's claim that the matter is not urgent was raised as a matter of fashion. This is so because the first respondent cling to a typographical error in the security report which says 1 May. Even if it were accepted that it was not an error, I do not think the issue of urgency will be altered. This matter is urgent.

iv) Material Disputes of fact

The first respondent said there were material disputes of fact which cannot be resolved on paper without giving evidence. This is because first respondent is denying the ferrying of quarry stones from Jilikin mine. I do not think this matter calls for *viva voce* evidence. This is because the issue of whether or not first respondent ferried quarry stones from Jilikin mine is sufficiently covered by the parties' evidence in their affidavits.

Material dispute of facts is measured where the court cannot resolve the dispute from the papers. See *Supa Plant Investments Pvt Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F-G which held that;

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In *casu* this is not the case. The point in *limine* must fail.

MERITS

The applicants seek an order for contempt of court against the first respondent and its directors.

Contempt of court is the wilful and mala fide refusal or failure to comply with an order of court. Before holding the respondent to be in contempt of court, the court must be satisfied that the order was not complied with and that the non-compliance was wilful on the respondent's part. It is wilful disobedience of a court order.

An applicant who seeks an order for contempt of court must prove the following;

1. That an order was granted against the respondent.
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
3. That the respondent has either disobeyed the order or neglected to comply therewith. See *Zellco Cellullar (Pvt) Ltd* v *Netone Cellullar (Pvt) Ltd and Other*s, HH 32/12.

The fact that there is a court order HC 7529/20 interdicting the respondents from removing quarry stones from Jikilin mine is not in dispute. It is also not disputed that in HC 27/21 leave was granted to execute the order for an interdict pending appeal. The respondents also admit that they are aware of these orders and their meaning.

The only issue is whether the respondents removed the quarry stones from Jilikin mine in contravention of the court order directing the respondents not to. The first respondent denies ferrying any quarry stones from Jilikin mine. Instead it alleges that it was carrying on mining operations in areas under the third respondent's special grant.

The applicants have alleged in the founding affidavit that 1st respondent has as from 18 May 2021 started to ferry quarry stones from Jilikin mine. In support are two affidavits by the applicants' security personnel.

Engo Wuta was one of the security guards at the Jikilin mine with the sole responsibility to safeguard the applicants' quarry stones. He said while on duty on 18 May 2021, a number of trucks came and ferried quarry stones. His intervention did not assist the situation as he was threatened with death by one Tafadzwa Gift Zhuwawo. He was then arrested. They did a report which is part of his evidence as annexure D.

The evidence of Thomson Maseko the other security guards corroborates the evidence of Engo Wuta. He was also on duty on 18 May2021 when some trucks entered the mine and

loaded quarry stones. He also made an attempt to intercept them as they were leaving but was threatened with death. He was thereafter arrested without charge.

The two security guards corroborated each other that the removal of quarry stones by the first respondent is a continuing act. There is a fairly detailed security report which covers the period 18 May 2021 to 21 May 2021. The report is dated 26 May 2021.

In the face of very strong evidence against it, the first respondent says it is carrying quarry stones from a different location than Jilikin mine. It alleges the mining operation is on the third respondent's special grant done with its consent. No proof whatsoever was attached of the special grant or consent. It remains unclear as to where the first respondent claims it is mining.

The evidence of the two security guards was not controverted by the first respondent. It means what they said is admitted. As MCNALLY JA said in *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

I agree with Mr Chipetiwa that the burden of proof in such matters is one beyond reasonable doubt. This is one such case which has been so proved.

The applicants seek an order for first respondent to pay a fine and that the directors of first respondent have a suspended imprisonment term on condition of compliance with the order.

The relief sought by the applicants was amended at the hearing. Paragraph 1 (b) initially sought for the imprisonment of the "1st respondent's representatives or agents". When the court asked how such an order in the event of it being granted would be enforced, counsel for the applicants sought to amend the relief to read, "1st respondent's directors."

In the *Zellco Cellullar* case, cited supra, the court stated;

> "The first respondent is a corporate entity and the affairs of corporate entities are managed and run their officers and directors and any disobedience of court orders must therefore be attributed to the directors of the company. The directors of a company are its mouth, brains, voices and bodies through which the company acts. Any proceedings by the company are directed, managed and implemented by them."

In *casu*, the first respondent is a corporate entity whose affairs are run by its officers and directors and any disobedience of court orders must therefore be attributed to the directors of the company. However before such directors are held to account there must be proof that they were served with the court order. Secondly they must be cited in the contempt proceedings

and personally be served with such application. This is because rule 39 (1) of the High Court Rules provides that;

> "(1) Process in relation to a claim for an order affecting the liberty of a person shall be served by delivery of a copy thereof to that person personally."

The applicants have not shown proof of personal service of this application on the individual directors. In the circumstances there can be no order against the directors.

The applicants proposed that the first respondent be fined $20 000 000. The amount is opposed by the first respondent who describes it as "unconscionable and it induces a sense of shock and disbelief." The first respondent does not then go further to say what it considers to be a conscionable amount.

The court is at liberty to consider judiciously the amount to be paid by the first respondent. The applicants successfully proved the three elements of contempt; that is, the order, service and non-compliance. The matter is aggravated by the fact that the non-compliance is by an act of commission rather that omission. The first respondent's first attempt to dislodge the court order was by lodging an appeal. That approach failed when leave to execute pending appeal was granted. The first respondent then decided to take the law into its own hands and physically forced its way to ferry the quarry stones from Jilikin mine. Even the intervention of the applicants' security personnel could not stop this open defiance to the court order.

The need to comply with court orders is so important and compelling in a democratic society to an extent that the Constitution recognizes it in section 164 (3) where it says;

> "(3) An order or decision of a court binds the State and all persons and governmental institutions and agen-cies to which it applies, and must be obeyed by them." (emphasis is mine.)

The rule of law is a pillar of every orderly and civilized society. The first respondent's conduct is a classic case of an unlawful and intentional refusal to comply with an order of court. The court will express its displeasure in such conduct. The circumstances of the case as already outline call for punitive costs.

DISPOSITION

1. The 1st respondent be and is hereby found to be in wilful contempt of the Court Order of this Court under cases number HC 7529/20 and HC 27/21.
2. The 1st respondent be and is hereby ordered to pay a fine in the sum of

RTGS$2 500 000 (two million five hundred thousand dollars) within (10) ten working days of service of this order.

3. The 1st respondent shall pay the applicant's costs on a legal practitioner and client scale.
4. The application against the 2nd respondent is dismissed with costs.

Chatsanga and Partners, applicants' legal practitioners
Maringe & Kwaramba, respondents' legal practitioners