TAURAI DORCAS MATHEMBA

And

5 OTHERS

Versus

ZIMBABWE POWER COMPANY

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 NOVEMBER 2011 AND 11 OCTOBER 2012

Miss *Dube* for the plaintiff
Miss *Gororo* for the respondent

Urgent Chamber Application

CHEDA J: This is an urgent application whose relief is couched as follows:

"TERMS OF THE FINAL ORDER

1. That the eviction of the applicants from the premises in dispute be and is hereby stayed pending the finalisation of the application for rescission of judgment in case number ...../2012.
2. That Respondent pays costs of suit.

INTERIM RELIEF SOUGHT

1. That to the extent sought in paragraph 1 above Respondent and its agents be and are hereby interdicted from interfering with the applicants occupation of their respective premises.
2. That in the event that such eviction has been carried out this order shall temporarily operate to direct the Deputy Sheriff, Hwange to restore possession and occupation of the premises to the applicants."

Applicant filed this urgent chamber application for stay of execution following my granting an order by consent of all the parties involved in this matter.

The genesis and background of this matter is that, the parties have been involved in numerous disputes concerning the issue of their right perceived or privilege to remain in

occupation of respondent's property which is either themselves or their spouses, some of whom are now deceased while others are now pensioners. This dispute is found in cross-references numbers 120/11, 1203/11, 1199/11, 1198/11, 1205/11, 1200/11, 1202/11, 1204/11 & 1233/12.

Under case Number HC 1205/11, the matter came before me on the 1st December 2011 for a Pre-trial Conference. The following litigants, Phoeb Muringani, Chipo Khani, Miriyamu Amini, Lucy Derembwe, Judith Marowa, Oripha Phiri, Dorcas Themba and Florence Maswera were represented by a Mr *Z Ncube* (plaintiffs) while Ms *Gororo* represented the now respondent. After deliberations at the Pre-Trial Conference stage, all the defendants agreed to vacate Plaintiff's premises and I granted an order as follows:

"PRE-TRIAL CONFERENCE

WHEREUPON, after reading documents filed of record,

IT IS ORDERED THAT: (By consent)

1. The Defendants and all those claiming through them be and hereby are ordered to vacate the premises by 31 January 2012;
2. The Plaintiff be and is hereby ordered to provide Defendants with transport to their respective destinations, and
3. Each party to bear its own costs.

(signed)
BY THE JUDGE

DEPUTY REGISTRAR/MASTER"

On the 31st January 2012, 1st, 2nd, , 4th, 5th, 7th together with one Norman Amini who was not party to the proceedings under case No. HC 1205/2011 filed this application seeking a stay of execution. The basis of their application is that:

(1) the consent order was granted without them signing the said consent paper and as such their legal practitioners misrepresented them and

(2) they have no other places to go upon eviction.

Ms *Gororo* for respondent raised two points *in limine* which I propose to deal with *seriatim:*

(1) **Contempt of court**

An order of this court was issued on the 1st December 2012 by consent of all the parties and a Deed of settlement was filed of record. It was obligatory for respondents (now applicants) to obey that order. Whether or not they changed their minds after the granting of the said order is neither here or there, it remains a valid order until it is varied or discharged by the same court. It is trite that before a court holds a party to be in contempt, it must satisfy itself that indeed there had been non-compliance and that such non-compliance was wilful. Applicants are no doubt in contempt of court. The principle of contempt is well stated in *Hadkinson v Hadkinson* (1952) ALLER 567 (CA) at 569 C-E where ROMER L, J, stated:

> "It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged---."
> Lord Cattenham, L.C said in *Chuck v Cremery* (1) (1 coop.temp.catt,342): " *A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid –whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."*

Any one who disobeys an order of the court is in contempt and may be punished. He remains in contempt until he has purged himself of his contempt.

An order of the court should be complied with irrespective of whether or not the person affected is of the view that it is null or irregular. If it is not complied with, it becomes inoperative and unenforceable order *(brutum fulmen*)

The correct legal position is therefore quite clear. Despite my knowledge of this legal position, I allowed applicants to make their submissions as they are self-actors. This however does not change the legal position but I felt that this matter needed to be properly ventilated as

there has been numerous cases before this court and there was therefore a need to deal with this issue once and for all. This was purely on discretionary basis in the interest of justice. In that decision I am fortified by the *dicta* by Lord Denning, that doyen of the English system in *Hadlkinson'*s case *supra* where the learned Judge at pp 574 H-575 stated;

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by a grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance."

Applicants are therefore, clearly in contempt and they are not supposed to have been heard.

(2) **Urgency**

The order was granted on the 1st of December 2011 after it had been postponed on two occasions. In addition, it was not an order granted as a result of the determination by the court or Judge, but that which resulted from negotiations of the parties privately. The present application was filed two months, after the order by the consent. Applicants had ample time to correct the anomaly if they felt short-changed by their legal practitioners.

These courts have always held that a matter does not become urgent only because the day of reckoning is imminent, but, that the matter cannot wait as its delay would result in the aggrieved party irretrievably losing its right or legal interest which it seeks to protect pending subsequent litigation. This principle was clearly laid down in the celebrated case of *Kuvarega v Registrar and another* 1998(1) ZLR 188 (H) at 193F where CHATIKOBO J 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 can not wait."

In *casu* applicants waited for two months before they mounted this application. This delay and/or non-action speaks volumes of their attitude in attending to this matter timeously. For that reason, I agree, with Ms *Gororo* that this application was not urgent as viewed by these courts. Therefore, on that basis alone; the application should fail.

Applicants have argued that they did not consent to the order as captured by the Deed of Settlement.

The parties met on two occasions in an attempt to settle this matter. On the third occasion their legal practitioner *Muviringi* asked for a further postponement in order to contact and take further instructions from his client which he did. Upon his return he advised me that applicants had agreed to vacate the premises subject to respondent giving them two months stay without paying rent and that respondent should provide them with free transport to their respective rural homes. This to me, was a clear agreement which was freely and voluntarily entered.

The court granted a consent order or order in terms of rule 56 of the High Court Rules, 1971. A judgment given by consent under the rules may be set aside and the applicant given leave to prosecute or defend his claim by the court on good and sufficient cause shown.

The question which falls for determination is what "good and sufficient cause" amounts to. In *Masulani v Masulani* HH 68/03 MAKARAU, J. (as she then was) considered and aligned herself with the principles laid down in *Georgias and Another v Standard Chartered Bank* 1998 (2) ZLR 488 (S) and *Ronald and another v McDonnell* 1986(2) ZLR 216 (S). In that case three principles were laid down and are that:

(1) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(2) the *bona fides* of the application for rescission; and

(3) the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospects of success; a balance of probability need not be established.

In *casu,* applicants stated that their erstwhile legal practitioner Mr *Muvhiringi* did not carry out their mandate. This argument with great respect is very shallow. Some of the applicants were present at the Pre-Trial Conference hearing and subsequent postponements. It is therefore difficult to imagine Mr *Muvhiringi* misrepresenting them to the effect resulting in a consent agreement being signed when in fact there was no such consent.

On the 1st January 2011 their legal practitioner together with respondent's legal practitioner sought time to consult and obtain further instructions and thereafter advised that an agreement had been reached subject to applicants' remaining on the properties for two months without paying rent. They have not advised the court, which instructions or mandate was not carried out by their legal practitioner. Surely, Mr *Muvhiringi* had nothing to lose by refusing to enter into agreement with respondent's legal practitioner as he had no personal interest in the matter. After all a legal practitioner does not create facts, as facts always remain with client. If Mr *Muvhiringi* had a problem with applicants he would have renounced agency. Infact, this was the stance taken by KAMOCHA J in the matter of *Ncube v Gumbo* HB 10/10.

This application was made after the agreed two months grace period to had expired. Infact it emerged during the hearing that some applicants, have since left the premises at the expiry of the two months period. This was after respondent had provided them with transport. This, therefore, brings into question the present applicants' genuiness in this application as they had previously agreed to vacate these premises. Their application therefore lacks *bona fides.*

With regards to their defence on the merits, it has been established that some of them are widows others pensioners. Respondent has since replaced them with new employees who naturally require accommodation. It is impossible for them to be accommodated while applicants remain in occupation. In other words they have no accommodation as their accommodation is occupied by applicants who are no longer providing service to the respondent.

For the above reasons, I find that this application does not meet the requirements for setting aside a court order/judgment by consent.

Before, I conclude, it is important to point out that Norman Amini was not part of the proceedings in case No. HC 1203/11 and for that reason he has no *locus standi* in this matter. He is, therefore, not part of these proceedings.

Respondent asked for costs at a higher scale. While courts are reluctant to do so, there are very few circumstances where this should be. In *casu,* the facts that are coming out in this matter are that, applicants have not been truthful throughout these proceedings as they sought to lie against their own legal practitioner and indeed the court/Judge in circumstances where it is clear that there was a settlement as captured in the Deed of Settlement filed of record.

I, therefore, agree with respondent's legal practitioner that this is an appropriate case where the courts should show its displeasure of dishonesty conduct of a litigant by awarding costs at a higher scale against applicants.

Order

(1) The application is dismissed.

(2) Applicants to pay costs on an attorney and client scale jointly and severally the one paying the others to be absolved.

Dube and company, plaintiff's legal practitioners
Marondedze, Mukuku, Ndove and partners, respondent's legal practitioners