BEVERLEY BUILDING SOCIETY
versus
THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE , 31 May and 15 August, 2002

Ms *B Mtetwa* for applicant
Mrs *Dondo* for respondent

SMITH J: The applicant (hereinafter referred to as "BBS") reviewed its structures in 2001 and decided that some of its managers would have to be retrenched. It gave them notice that their services were being terminated but it failed to comply with the requirements of the Labour Relations (Retrenchment) Regulations, 1990 (S I 404 of 1990) (hereinafter referred to as "the Retrenchment Regulations"). It subsequently withdrew the notices and tried to negotiate with the managers concerned. When they were unable to reach agreement the matter was referred to the Retrenchment Committee in terms of s 5 of the Retrenchment Regulations. That Committee met on 22 August 2001 and thereafter made its recommendations to the respondent (hereinafter referred to as "the Minister") on 30 August 2001. The Minister decided not to accept the recommendations of the Retrenchment Committee. BBS then instituted review proceedings (case No HC 9726/01). The Minister, by way of an opposing affidavit deposed to by the Chief Labour Relations Officer, opposed the application but subsequently withdrew his opposition and agreed to abide by any order the Court might make. The managers who were to be retrenched did not file opposing papers within the prescribed period and were barred. They subsequently filed an application for the uplifting of the bar but that application was formally withdrawn on the day of the hearing on 25 January 2002.

On 25 January OMERJEE J handed down the order (hereinafter referred to as "the Court Order") which reads as follows -

> "1. The Applicant must submit an application to the Minister for approval of the retrenchment accompanied with full reasons for the retrenchment together with the recommendations of the retrenchment committee.
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> 2. The Minister is to consider the application on the basis that the lst to 12th Respondents (i.e. the managers to be retrenched) do not object to the retrenchment".

A copy of the Court Order was served on the Minister on 4 February 2002. BBS considered that the Minister would make his decision within 14 days, as required by s 6 of the Retrenchment Regulations. When no response had been received by 18 February, a reminder was sent to the Attorney-General's Office, BBS then filed this application on 25 March 2002, seeking an order declaring the Minister to be in contempt of court and directing that he be committed to jail until such time as he complied with the Court Order. BBS also claimed its costs on the legal practitioner and client scale.

The Minister opposed the application, needless to say. He submitted that the Court Order did not specify any time limit within which he had to make a decision. He considered that BBS is being unfair and unjust because there was no input from the managers who are being retrenched and so he could not make a decision on the mater. Although BBS served the application and the Court Order on him, they were not served on the managers concerned. The Court Order did not debar him from hearing the managers concerned or prevent them from making representations "on a fresh application as they would have legitimately expected to do or be allowed". It was BBS that made it impossible for him to make a determination by 18 February or any other date as it did not advise the managers of the applications and the terms of the Court Order. In order to be able to make an informed decision and bring the

matter to finality, he had called for the written views of the managers. It would have been a travesty of justice for him to have made a determination without first hearing the parties that would be affected thereby. As at 5 April he had not been furnished with any input from the managers which would enable him to make a decision pursuant to the Court Order.

The Minister's opposing affidavit was filed on 8 April. Subsequently, on 15 April, an application was filed on behalf of the Minister in terms of Order 49, rule 449, of the High Court Rules for the Court Order to be set aside. The founding affidavit was deposed to by John Nkomo in his capacity as Acting Minister of the Public Service, Labour and Social Welfare. In his affidavit the Acting Minister stated as follows -

> "6. Whilst I had indicated a willingness to abide by the court's decision I observed and indeed my attention was later so drawn by my Ministry's legal advisor that the order of the court dated 25 January 2002 was materially different from what the Respondent originally sought in that Application. I attach a copy of the Draft Order sought in Application No. HC 9726/01 marked Annexure 'JM I'.
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> 7. It is evident as I have stated that the terms of the original Draft Order and upon which I had based my concession to abide were materially different from the Final Order given on 25 January 2002 by OMERJEE J. It was my understanding of the court's order that I was being called upon to act and make a decision in terms of powers vested in me by S.I. 404/90 and that the format of Applicants application had to comply with S.I. 404/90.
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> 8.(i) Furthermore in terms of compliance there exists a difficulty as regards paragraph 2 of the Court Order. My ministerial file on the matter submitted to me reflects that the employees were actually contesting the retrenchment. It is my view therefore that in coming to a just decision in terms of law, I am thus required to solicit the views of both parties.
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> 8.(ii) Paragraph 2 of the said Order thus has the effect of usurping the powers given to me in terms of the applicable law in so far as the said paragraph seeks to limit my discretion to act. The relevant law as set out in S.I. 404/90 gives my office a wide discretion and it is for that reason I believe that the Order seeks, perhaps inadvertently, to limit this discretion. In fact what the content of the Order seeks to do is to take precedence over the statutory provisions of the instrument aforesaid.

9. In the circumstances it is my humble view that the Order given in Case No. HC 9726/01 is not the order originally sought by Applicants therein neither is it the Order that I elected to abide by. I am advised and verily believe that that Order was erroneously made. The fact that the draft order sought is materially different from the order granted by this Honourable Court lends credence to that proposition.
   It is accordingly on the basis of the aforegoing that application is hereby sought in terms of Order 49, Rule 449 (1)(a) of the High Court Rules for variation of the Order of 26 January 2002 on the grounds that same was erroneously given as it was at variance with original draft order. My right to a fair hearing as enshrined in section 18(9) of the Constitution seems to have been overlooked as I was not heard with respect to the order that this Honourable Court subsequent granted.
10. Alternatively there is need for this Honourable Court to clarify its order as on a proper interpretation of S.I. 404/90 the effect and meaning of the judgment or order is unclear. This will enable me to give effect to its true intention.
11. I further contend that Respondents legal practitioners acted improperly when at the hearing of review they failed and or deliberately omitted to ensure that the Order originally sought and consented to by Applicant was the one granted by the Court instead this Honourable Court was misled into granting an erroneous order. For this reason I contend that this is a matter befitting the award of costs on a legal practitioner and client scale."

The order sought by the Acting Minister was for the Court Order to be set aside and substituted with the following order -

"(i) That the dispute be and is hereby referred to the Minister in order for him to act in terms of section 5(3) of the Regulations.
(ii) That all salaries and other benefits paid to the employees after 20 October be deducted from the final package".

BBS opposed the application by the Acting Minister. *In limine*, it contended that the Court Order was not made in error or erroneously made in the absence of other interested parties as the Minister and the managers concerned deliberately chose not to appear at the hearing. It also submitted that there is no ambiguity in the Court Order. Therefore the only conclusion to be drawn is that the Acting Minister brought the application improperly in order to avoid the consequences of the application filed by BBS to hold the Minister in contempt of Court. BBS also submitted that the Acting Minister, John Nkomo, could not properly swear to facts arrived at by a totally different Minister. It is only the substantive Minister, July Moyo, who can say what

he did and why. Therefore the supporting affidavit cannot be accepted. BBS also questioned why it had taken the Minister/Acting Minister almost three months to bring the action if it was genuinely believed that an error had occurred.

In the opposing affidavit BBS made the following submissions. The Minister was advised, before he withdrew his opposition in case No HC 9726/01, that an amended order would be sought as new facts had been unearthed when perusing the retrenchment file. The information was contained in the answering affidavit that was served on the Minister's legal practitioners on 7 November 2001. The application in that case had been premised on the belief that it was not the Minister who had made the decision. When BBS was invited to peruse the record, it was ascertained that the Minister had in fact made the decision, although he had grossly misdirected himself in that he had acted on the recommendations of the Chief Labour Relations Officer and ignored those of the Retrenchment Committee. The amended draft order had been served on the legal practitioners of the Minister and those of the managers concerned. The Acting Minister/Minister is therefore deliberately trying to mislead the Court when he says that he expected that the order that would be granted would be the one set out in the founding papers and not the amended draft order. The notice of withdrawal was filed in January 2002, more than two months after BBS had advised the Minister that it would seek an amended order. When the matter was argued in Court on 25 January OMERJEE J wished to make an order that would ensure that the recommendations of the Retrenchment Committee on the application that had been filed with it would be placed before the Minister in terms of the Court Order, in an endeavour to avoid the possibility of officials placing selected documents before the Minister. The Minister did not at any stage consent to the original draft order. Opposition to the order sought was filed on his behalf. He was then advised that an

amended order would be sought. Thereafter the opposition was withdrawn and he said that he would abide by the court's decision. The provisions of the Retrenchment Regulations were followed right up to the time when the Retrenchment Committee made its recommendations and forwarded them to the Minister. Thereafter it was the Minister who failed to act in terms of the Retrenchment Regulations when he made his decision based on recommendations from other sources. The application for retrenchment approval was made to the Retrenchment Committee and each party was given an opportunity to make representations, which were taken into consideration by that Committee. In terms of the Retrenchment Regulations, the Minister must have regard to the recommendations of the Retrenchment Committee. There is nothing in those regulations which requires or indeed permits him to solicit the views of either of the parties.

The application to set aside the Court Order cannot possibly be upheld. It purports to be made in terms of Order 49, rule 449, of the High Court Rules. Rule 449 (1) provides that the court or a judge may, *mero motu* or on the application of any party affected, rescind or vary any judgment or order on the grounds specified in para (a), (b) or (c) thereof. Paragraphs (b) and (c) are irrelevant. Paragraph (a) provides that the order may be set aside or corrected if it was erroneously sought or erroneously granted in the absence of any party affected thereby. There is no possible basis for holding that the order was granted erroneously in the absence of any party affected thereby. The learned judge who granted the order was fully aware of what he was doing. The applicant was seeking the order that was granted. The other parties affected, namely the managers and the Minister, were aware of the draft order initially sought and of the amended draft that would be sought. They were also aware of the date of the hearing and deliberately decided not to oppose the application or attend the

hearing. However, even if the papers did show that there was some error on the part of the learned judge (which they do not), the founding affidavit cannot be accepted because it is indisputably false. As stated earlier, the affidavit was deposed to by the Acting Minister, John Nkomo. He says that it was he who had indicated a willingness to abide by the decision of the Court yet the papers clearly show that it was the substantive Minister who did so. The Acting Minister says that it is his view that he was required to solicit the views of both parties in order to come to a just decision. In fact that was the view of the substantive Minister and he solicited the views of only one of the parties, not both. It is obvious that officials in the Ministry drew up the affidavit, put it before the Acting Minister and showed him where to sign and he did so without even bothering to read the document. I say that because, if he had read it, he could not possibly have sworn on oath that he was the one who had done the things and reached the conclusions stated therein and then signed it. He would have known that it was not he who had done the things alleged in the affidavit.

The timing and the content of the application to set aside the Court Order render the *bona fides* of the Minister very suspect. If he genuinely believed that the Court Order had been granted in error, why was the application not made a few days after the Court Order was served on him? Why was it filed some two and a half months later? Why was it only filed after the application to put him in contempt of court? Why was it then so urgent that the founding affidavit had to be put before the Acting Minister, who then perjured himself? Why did the founding affidavit contain palpable untruths? I cannot accept statements to the effect that the Minister's decision to abide by any order of the Court was based on what was set out in the original draft order, when notice of the amended draft order was served on the Minister on 4

November 2001 and he made his decision to abide by the Court's order on 23 January 2002, nearly three months later.

The allegations made by the Minister in his opposing affidavit differ in many respects from the allegations made by the Acting Minister in his affidavit seeking to set aside the Court Order. These affect the credibility of the Minister. In the heads of argument filed on behalf of the Minister it was not argued that he had refused to comply with the Court Order because it was erroneously granted. Instead it was argued that he is yet to comply with the order but has had to get the input from the managers concerned.

In *S* v *Mushonga* 1994(1) ZLR 296 (S) at 304-305 GUBBAY CJ said -

> "The opposing view is that generally a person may not refuse to obey an order of court merely because it has been wrongly made, for to do so would be seriously detrimental, if not completely fatal, to the authority of the court. This proposition was forcibly advanced by DE VILLIERS CJ in *In re Honeyborne* (1896) Buch Vol 6 145 at 150, in these terms:
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> > 'It would be utterly subversive of the authority of magistrates and of the dignity and decorum which ought to prevail in all courts of law if [an invalid order could be disobeyed with impunity]. If the agent were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court.'
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> On this approach, the person must first obey the supposed invalid order and thereafter seek redress, if any, by way of appeal or review. He is not to determine for himself whether the order ought not to have been made, but should come to the court for relief if advised that it is invalid. Otherwise, as observed by CANEY J in *S* v *Zungo supra* at 271E:
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> > '…the conduct of legal proceedings would become chaotic.'
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> See also *R* v *Vass* 1945 GWLD 34 at 39; *S* v *Tobias* 1966(1) SA 656 (N) at 665 E-F; *Culverwell* v *Beira* 1992 (4) SA 490 (W) at 494 A-C.
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> It is this view, and not the other, that derives direct support from English law. See Miller *Contempt of Court* 2 ed at pp 438-440; Arlidge and Eady *The Law of Contempt* para 5-44 at p 280.
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> The exception to the general proposition is where blind compliance with an obviously invalid order would itself tend to weaken respect for the

> administration of justice. Suppose, for instance, that a judicial officer had ordered a person to do something quite absurd and blatantly in violation of his legal rights; his disobedience could not be regarded as contemptuous. See *Makapan* v *Khope* 1923 AD 551 at 556 *in fine* - 557; *R* v *Vass supra* at 37' Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* at pp 172-173; Snyman *Criminal Law* 2 ed at p 343.
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> Accepting the limitation, which is essentially a matter of common sense, it is the second view that I find the more persuasive. Its adherence ensures that the authority, dignity and respect of the court - the maintenance of which is so fundamental to the proper administration of justice - is not demeaned or prejudiced".

The views so expressed were approved in *Whata* v *Whata* 1994(2) ZLR 277 (S) at 281-282 where GUBBAY CJ, after referring to *Mushonga's* case, said -

> "It was there held, after a review of the cases, that generally a person may not refuse to obey an order of court merely because it has been wrongly made; for to do so would be seriously detrimental to the standing and authority of the court. The judgment went on to point out that the proper approach was for the person first to obey the supposed invalid order and thereafter to seek redress, if any, by way of appeal or review. It was not for him to determine for himself whether the order ought not to have been made. He should come to the court for relief if advised that it was invalid. The exception being where the order was blatantly absurd in its command and would itself tend to weaken respect for the administration of justice. Only in that remote eventuality would disobedience not be regarded as contemptuous".

In his opposing affidavit the Minister has not alleged that the Court Order was invalid or obscure or in any way defective. It is only in the application for dismissal of the Court Order that the Acting Minister, not the substantive Minister, tried to establish that it had been erroneously granted.

In *Culverwell* v *Beira* 1992 (4) SA 490 (WLD) at 494 A-C GOLDSTEIN J said -

> "Counsel was unable, however, to refer me to any authority for the proposition that an order which is wrongly granted by this Court can be lawfully defied and I know of none. All orders of this Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. Counsel relied for his argument on cases concerning regulations which are found to be *ultra vires*; in such cases conduct in breach of regulations is not unlawful. However, no authority was quoted to me - and I am aware of none- which equates court orders with regulations in the manner contended for. Acceptance of counsel's argument would in many cases result in respondents being able to defy all but Appellate Division orders with impunity contending

> that they believed such orders to be wrong; the resultant chaos is not difficult to imagine. I accordingly reject counsel's argument".

If the Minister, for any reason, disagreed with the Court Order, it was for him to institute proceedings timeously, whether by way of appeal or review or otherwise, to have the order set aside or reversed or corrected. He took no such action. Instead, he just ignored the Court Order. He has tried to excuse his conduct by claiming that the views of the managers concerned had not been sought and that he had a duty to ensure that the views of all parties were obtained. In fact, the managers did have an opportunity to express their views to the Retrenchment Committee, as did BBS. In fact, the requirements of the Retrenchment Regulations were observed until after the Retrenchment Committee had forwarded its recommendations to the Minister. Thereafter the Minister decided to depart from the provisions of the Retrenchment Regulations. Instead of making a decision, as he was required to do, he decided to contact the managers concerned for their views. In doing so he did not act impartially. He did not advise BBS of what he was doing and he did not give BBS an opportunity to comment on the input of the managers.

It is clear from the provisions of the Retrenchment Regulations that retrenchment exercises must be attended to expeditiously. Unfortunately that has not been done in this case. The Retrenchment Committee made its recommendation on 4 September 2001. The Minister was required, in terms of s 6 of the Retrenchment Regulations, to make his decision by 18 September. He did not do so. Instead he made a decision that was irregular. The review application was filed in October. The Minister allowed opposing papers to be filed. Then in January 2002, when the matter was set down for hearing, he withdrew his opposition and agreed to abide by the decision of the Court. That initial opposition and subsequent *volte face* resulted in a delay of three months. The Court order was served on the Minister on 4 February and

the Minister had still made no decision by 31 May when this matter was heard. Had the Minister made his decision in September 2001, as required by the Retrenchment Regulations, the managers concerned would have had their retrenchment packages long ago and would have been paid off. However, BBS has had to continue paying them to date. It may well be that BBS has a good case to sue the Minister for the damages suffered due to his failure to comply with the Retrenchment Regulations.

In *in re Chinamasa* 2000 (2) ZLR 322 (S) at 343 C GUBBAY CJ said -

> "So far as contempt involving disobedience to the order or process of a court is concerned, the offence is treated as 'civil' contempt. This is because such contempts are, in reality, a form of execution, pursuant to which the person of the defaulting party may be attached in order to coerce compliance with the order."

There can be no doubt that the Minister has shown disobedience to the Court Order. His failure to comply with the order has caused BBS to suffer unnecessary expenses and has left the managers concerned in a state of uncertainty for many months. He has deliberately flouted the provisions of the Retrenchment Regulations which, as the responsible Minister, he is expected to enforce.

In para 8 (i) of the affidavit by the Acting Minister in support of the application to set aside the Court Order he says that his ministerial file on the matter reflects that the managers concerned were actually contesting the matter and therefore it was "his" view that, in coming to a just decision in terms of law, he was required to solicit the views of both parties. That shows that the Minister was not prepared to abide by the Court Order. There was something on the ministerial file which showed that the managers had not consented to the retrenchment so, despite being ordered by the Court to proceed on the basis that they had consented, he decided not to do so. Neither did he consider it necessary to institute proceedings forthwith to set aside or suspend the Court Order. He decided that he would ignore the Court Order. It is

accepted that no one, not even a judge, is infallible, although many believe that the Pope is and many lesser mortals believe that they are. The law recognises that judges, or at least those in the High Court, are fallible and that is why there are provisions allowing for an appeal from the judge's decision and for the setting aside or correction of a judge's decision. It is one of the basic tenets of our law, however, that until an order of court is suspended or set aside, it must be observed. Failure to do so renders the person concerned guilty of contempt of court. If any person is permitted to ignore a court order with impunity, the rule of law is endangered. There can be no rule of law in this country if a Minister or other official can, with impunity, ignore a Court Order because he thinks it is wrong.

As regards costs, I consider that they should be awarded on the higher scale. The Minister has shown a blatant disregard for the Court Order. He has shown complete disrespect for the Court. Insofar as the application for the setting aside of the Court Order is concerned, the *bona fides* of the application cannot be accepted. Clearly the application was filed in a vain attempt to convince the Court that the Minister was *bona fide* in his disregard for the Court Order. Had the contents of the affidavit of the Acting Minister been consistent with the opposing affidavit of the Minister, then the Court might have accepted that the Minister or his officials were acting honestly but under a mistaken view of the law. The affidavit of the Acting Minister was, however, completely at variance with the prior actions of the Minister. The Court does not even know whether the Minister supports the application for the setting aside of the Court Order. It appears that his officials were trying to mend broken fences and their attempts were very inept.

It is ordered that

1. The Respondent is declared to be in contempt of Court.

2. The Respondent is ordered to pay a fine of $50 000 and, in addition, is committed to prison for 3 months which is suspended on condition that the Respondent complies with the Order granted by OMERJEE J, on 24 January 2002, within 14 days of the date of this order.

3. The Respondent shall pay the Applicants' costs, including the costs of the application to set aside the order granted by OMERJEE J, on the legal practitioner and client scale.

Kantor & Immerman legal practitioners for applicants
Civil Division of the Attorney-General's Office, legal practitioners for respondent