JUDITH MAPFUMO
versus
DIRECTOR OF HOUSING AND COMMUNITY SERVICES
and
T. MURONZI N.O.
and
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 29 May 2014 and 11 June 2014

Opposed Application

F. Chauke, for the applicant
Ms *S. Nyagura*, for the respondents

MATHONSI J: The applicant is the beneficiary of an order of this court, per MUSAKWA J, issued against the first and third respondents on 21 March 2013, to writ;

> "IT IS ORDERED THAT:
> 1. Default judgment be and is hereby granted as against the 1st defendant and 2nd defendant(s).
> 2. It is be and hereby ordered that the 1st and 2nd defendant(s) reallocate another stand in Chitungwiza, measuring 400 square metres in a serviced area, to the plaintiff.
> 3. 1st defendant and 2nd defendants be and (are) hereby ordered to pay the costs of suit."

The order was granted following an action instituted by the applicant, which the respondent saw no need to defend, seeking to enforce an agreement entered into on 15 July 2010 with the third respondent, which I shall refer to as "the Municipality" in terms of which she was allocated stand number 33075 Unit H, Chitungwiza on a lease to buy basis. To the applicant's chagrin, after paying the full purchase price for the stand, the Municipality was unable to complete the transaction and let her develop it after discovering that the area where it was located was set aside for recreational purposes.

Although other people who had been allocated stands in the same recreational area were allocated replacement stands elsewhere, the applicant was not that fortunate which prompted her to litigate against the Municipality and its director of housing seeking a

replacement stand. She obtained the order which I have quoted above in default of opposition. The order remains unchallenged to this date and therefore valid and effectual. It was served upon the Municipality on 3 June 2013 but was not complied with.

On 5 July 2013, Messrs *Uriri* Attorneys-At-Law, the legal practitioners for the applicant addressed a letter to the Municipality, through its director of housing, in the following:

> "RE: JUDITH MAPFUMO vs YOURSELF AND ANOTHER: CASE NO. HC 10888/12
>
> The above matter refers and in particular that you were served with an Order of the High Court on 3 June 2013 and up to now you have not complied with the Order.
>
> May we advise you that you must comply promptly with the Order otherwise we will institute contempt of court proceedings against yourselves.
>
> Kindly reallocate a serviced stand to our client within seven (7) days failing which we will have no option but to institute contempt of court proceedings and execution at your cost. Stand guided accordingly.
>
> Yours faithfully
>
> Mr F. Chauke
> Uriri Attorneys-At-Law"

Having been warned of possible contempt of court proceedings the Municipality's laid back and indeed lackadaisical approach was most shocking. In a letter to the applicant's legal practitioners dated 11 July 2013, the second respondent, writing in his capacity as the "Acting Director of Estates, Education, Housing and Community Services" stated:-

> ""RE: JUDITH MAPFUMO v THE DIRECTOR OF HOSUING AND COMMUNITY SERVICES AND ANOTHER : CASE NO: HC 10888/12
>
> We acknowledge receipt of our (*sic*) letter dated 5 July 2013 in connection with the above issue.
>
> We are however unable to process anything due to the fact that both your letter and the High Court Order do not contain the relevant stand number to enable us to attain pertinent information from the relevant file.
>
> Kindly request your client to visit our offices and furnish us with the stand number concerned so that we may trace the history of the case and take appropriate action.
>
> Yours faithfully

T. Muronzi
Acting Director of Estates, Education,
Housing and Community Services;
FOR: TOWN CLERK"

The Municipality was not prepared to act on the court order. It wished to be furnished with a stand number, presumably the stand initially allocated to the applicant, so that it could trace the history of the case, not to allocate another stand to the applicant. It is not clear what appropriate action it wished to take. Clearly, nobody at those offices was prepared to put a shift for this matter. If they took it seriously they would have used the High Court case number given in the correspondence which the erstwhile Acting Director gleefully cited in his letter, to trace the history of the case.

The applicant's legal practitioners responded by letter dated 16 July 2013 giving the stand number which had been requested in the heading of that letter. They stated:

> "RE: JUDITH MAPFUMO v YOURSELF & CHITUNGWIZA MUNICIPALITY: CASE NO. HC 10888/12: STAND NO 33075 UNIT H, CHITUNGWIZA
>
> Your letter dated 11 July 2013 has come to our attention. We advise you that the Order directs you to 're-allocate' a serviced stand to our client measuring 400 square and nothing more.
>
> It is your duty to make sure that you comply with the Order promptly not later than 25 July 2013 otherwise you will be in contempt of court. The High Court has inherent original jurisdiction over all civil matters and over all persons in ZIBMABWE.
>
> Stand guided accordingly.
>
> Yours faithfully
>
> MR F. CAUKE (*sic*)".

When that letter did not attract any reaction from the respondents, in fact the applicant still has not been allocated a replacement stand more than a year after the order of MUSAKWA J, the applicant brought this application seeking the committal of the first and second respondents to prison and a fine of $5000-00 against the Municipality for contempt of court. In that application, the applicant not only made reference to stand number 33075 Unit H, Chitungwiza which was originally allocated to her but taken away, she also attached the summons and declaration in HC 10888/12 and the Court Order as annexures. The entire application was served upon the Municipality on 26 September 2013.

While seeing no wisdom in complying with the court order even when equipped with all relevant information relating to what they had earlier called "the history of the case", the respondents still found time to oppose the application. In an opposing affidavit deposed to by George Makunde, the Town Clerk, the respondents trifled about the citation of the parties, about the applicant's failure to come to their office thereby frustrating reallocation and about offering "a stand of comparable status in Nyatsime" which she refused.

In fact, Makunde's affidavit is noteworthy more for what it does not say than what it says. It does not say what the Municipality did when it received the court order towards fulfilling its terms. It does not state which stand was allocated to the applicant in compliance with the court order. If indeed a stand was earmarked for the applicant in Nyatsime, how was this done? How was this brought to the attention of the applicant? Since the applicant is said to have refused to attend at the Municipal offices, the said allocation could not have been done physically. If it was in writing, surely the written offer and indeed the rejection, would have been attached to the opposing affidavit. It was not. In fact nothing was. Clearly the explanation that the "good faith of the third respondent cannot be questioned", cannot withstand scrutiny, and I reject it.

There can be no doubt that every citizen of this country is obliged to obey the orders of the courts. That is the whole essence of the rule of law, a commodity which the state sells to the citizen as a reward for his allegiance, taxes and personal services. It is a commodity which our courts have always upheld and will not compromise on. In that regard, the seminal remarks of Romer L J in *Hadkinson* v *Hadkinson* [1952] 2 ALLER 567 (CA) at 569 C are apposite: He said:

> "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. The uncompromising nature of this obligation is shown by the fact that it even extends to cases where the person affected believes it to be irregular or even void."

See also *Mpofu* v *Mlilo* 2002 (1) ZLR160 (H) 163 B-C.

A person who disobeys a court order is in contempt of court. In interpreting an order of court such an order must be presumed where it is not ambiguous, to mean what it says and no evidence would be admissible to contradict, alter or add to the contents of the order. *Baron* v *George* 1994 (2) ZLR 141 (S) 145 C-D. GILLEPSIE J made the crucial point in *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H) 177 G and 178 A that:

> "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 that the non-compliance was wilful on the part of the defaulting party."

See also *Haddow* v *Haddow* 1974 (1) RLR 5 (G) 6 A; *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) 299 B.

In *casu* there can be no doubt that the order was brought to the attention of the respondents and that notwithstanding, they have not complied with it.

Once a failure to comply with a court order is proven, as has been in this case, a presumption arises that the failure was wilful and *mala fide*. The onus then shifts to that party to prove that the failure was not wilful and *mala fide*: *John Strong (Pvt) Ltd* & *Anor* v *Wachenuka* 2010 (1) ZLR 151 (H); *Mawere & Anor* v *Director Administration – Central Intelligence Organisation & Ors* HH267/13.

In my view, the respondents have not discharge that onus. They wilfully disobeyed a lawful order resulting in the applicant not enjoying any benefit from the court order more than a year after it was issued. If I entertained any doubt about the wilfulness of the respondents' conduct, such doubt dissipates upon reference to the submissions made by Ms *Nyagura* who appeared for the respondents. This is what she stated in her heads of argument:

> "2.1. 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 fatal, for the authority of the court. However where blind compliance with an obviously invalid order would itself tend to weaken respect for the administration of justice, disobedience of the order cannot be regarded as contemptuous.
>
> 2.2. More so it is accepted that a corporation can only comply with a court order through its offices (*sic*) and can thus only be guilty of contempt if the offices (*sic*) for whose conduct it can in law be held liable, have refused or failed to comply with the order. A director of a company who cause (*sic*) the company to disobey the order is guilty of contempt of court."

Ms *Nyagura* contradicts herself but whatever the case, the respondents took the view that the order was invalid and elected not to comply with it for that reason. Unfortunately it has not been shown how a lawful order can be said to be invalid.

Having found that there has been contempt, I now have to decide how to react to it. Mr *Chauke* for the applicant urged me to commit the first and second respondents to prison for a period of 2 months and to fine the third respondent $5 000-00. Ms *Nyagura*, who took

the view that there was no contempt, found it unnecessary to address me on the appropriate penalty.

I am in agreement with the sentiments of GILLESPIE J in *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi, supra* at 178 C-F and intend to proceed along those lines. He said:

> "In determining how to respond to this contempt, I bear in mind the many *dicta* to the effect that:
>
> > 'The primary object of contempt procedure is to compel compliance with the court's order. It often follows for this reason, that any order of committal to goal is suspended to afford the intransigent party a powerful inducement to fulfil his obligations in terms of the order' (per REYNOLDS J in *Harare West Rural Council* v *Sabawu* 1985 (1) ZLR 179 (H) at 183 D)
>
> It has been said:
>
> > 'Generally speaking punishment by way of fine or imprisonment for civil contempt of an order of court in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment.' (per MILNE J in *Cape Times* v *Union Trades Directories & Ors* 1956 (1) SA 105 (N) at 120 D)
>
> This is not to say, however, that enforcing compliance is the only purpose of committal. There remains an interest in protecting and upholding the dignity and respect of the court. Although the contempt may be referred to as 'civil' contempt, it remains a criminal offence wilfully to disobey the order of a court with intent to violate its dignity or authority. Where such contempt is established, the purpose of securing compliance with the flouted order, while it may remain the main, is not necessarily the only, purpose of committal for contempt."

I take the view that this is a case where the imposition of a fine meets with justice, after all it is competent to impose a fine in terms of r 391 of the High Court of Zimbabwe Rules, 1971. This is because the order was effectively directed at the Municipality although its director of housing was also cited. Whatever the director did, was done on behalf of the Municipality. It is therefore against the Municipality, which is an artificial person so to speak, that the expression of disfavour and indignation must be directed.

I therefore order that:

1. The third respondent is hereby fined $5 000-00 for contempt of court.
2. Of that fine of $5 000-00, a sum of $3 000-00 is suspended on condition the third respondent allocates to the applicant a 400 square metre stand in a serviced area of Chitungwiza within seven (7) days of the grant of this order in compliance with the court order issued in HC10888/12.
3. This order shall forthwith be drawn to the attention of the Registrar of this Court for enforcement in terms of r 391 of the High Court of Zimbabwe, Rules, 1971.

4. The third respondent shall bear the costs of this application on a legal practitioner and client scale.

Uriri Attorneys At Law, applicant's legal practitioners
Matsikidze and Mucheche, respondents' legal practitioners