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Judgment No. SC 55/05
Civil Appeal No. 190/03

LETINA TITITI MOYO vs ADOLF MACHEKA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ,CHEDA JA & ZIYAMBI JA
BULAWAYO, JULY 25 & OCTOBER 24, 2005

M Makonese, for the appellant

C P Moyo, for the respondent

ZIYAMBI JA: On 23 May 2003, the High Court sitting at Bulawayo granted an *ex parte* order in favour of the respondent against the appellant for the return of his goods allegedly removed from his house by the appellant. In terms of this order the appellant was to return the said goods to the respondent within 24 hours of service of the order upon her. The order was served on the appellant on 22 May 2003. There was no compliance with the order and the respondent sought an order committing the appellant for contempt of court. This order was granted by the High court relying on the principle that:

> "… a judgment, as the one in *casu*, ordering the debtor to do or refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, not by execution against his property - See *Jeanes* & *Anor* 1977 (2)SA 703 at 705 F-G and *Food & Allied Workers Union v Sanrio Fruits CC & Ors* 1994 (2) SA 486 (T)".

Against this order the appellant now appeals.

The main grounds of appeal advanced were:-

"1. that the application should have been brought by court application yet it was brought as a chamber application and that the court erred in entertaining the application which was by reason of the irregularity referred to improperly before it;

2. that it had not been proved on a balance of probabilities that the appellant had unlawfully refused to comply with the Court order;

3. that the learned Judge erred in holding that the issue of contempt had been established when there was a real and substantial dispute of fact which could not be resolved on the papers."

It is necessary to set out the background facts.

The respondent and the appellant lived together as husband and wife for a period in excess of a year. Towards the end of the year 2002, the relationship went sour and the respondent asked the appellant to leave his house whereupon the appellant demanded payment of two million dollars. The respondent obtained a bank cheque in that amount and gave it to the appellant but still the appellant did not leave saying she needed time to make proper arrangements for herself and her daughter.

On the evening of 29 March 2003, the respondent was driving near Bulawayo Central Police Station when he noticed the appellant driving behind him. The next moment the appellant rammed her car into the rear of his motor vehicle. He tried to move away but she chased and caught up with him at the intersection and again rammed into the rear of his vehicle. The Police came onto the scene and shot at his vehicle

claiming that the appellant had reported to them that the car which he was driving was hers which had been stolen.

The respondent then instructed his legal practitioners to take action to ensure the eviction of the appellant from his house.

He returned home on 12 May 2003 to find that the appellant was moving her things out of the house. When he told her not to remove his property together with hers she reacted violently and assaulted him using 'all manner of weapons including bottles'. The altercation continued throughout the night until the respondent fled for safety to his neighbour's house where he spent the rest of the night. The doctor's report which forms part of the record shows that there were lacerations on the respondent's forehead, cuts on his upper lip, bite marks on both hands, small stab wound on the left side of the chest; loss of lower incisor. A statement from Sergeant Mhlanga of the ZRP Bulawayo, to the effect that he observed lacerations on the forehead and upper lip of the respondent while he observed no visible injuries on the appellant, also forms part of the record.

After the respondent fled, the appellant looted the house and took with her property belonging to the respondent and valued at some US$1400. The matter was reported to the Police and the respondent sought and obtained, on these facts, the *ex parte* order referred to above.

On 13 May 2003, the day on which the appellant allegedly removed the property, the parties met at Donnington Police Station where, in the presence of senior police officers, the appellant admitted to taking the respondent's property and as confirmation of that fact produced and handed to the police, the respondent's Motorola cellular phone which forms part of the property listed by the respondent as removed, by the appellant, from his house.

In her opposing papers the appellant denied taking or being in possession of the property in question. She gave no explanation for the disappearance of the property. However, in the supporting affidavit of Ms Charlene McKop ('McKop'), the parties' neighbour, which affidavit was annexed to the application, McKop confirmed that the respondent had come to her house on the morning of 13 May 2003, bleeding from cuts on his face and lips. After he had been at her house for some time he expressed the desire to return to his house in order to wash and change. Before he left, McKop decided to check whether the appellant was still at the house. She went out of her house and looked into the respondent's yard. There she saw three men loading furniture from the respondent's house into a Mazda pick up truck which was parked in the yard. The appellant's motor vehicle was also parked in the yard. After a while, the white Mazda van was driven off followed shortly by the appellant driving her vehicle and accompanied by her daughter. She stopped the appellant who informed her that she had assaulted the respondent with a bottle. She observed that there was property on the back seat of the vehicle which included a cellular phone and a heater.

The learned judge accepted the evidence of McKop as being the only explanation for the disappearance of the property. Indeed it was common cause that the appellant later handed the cellular phone which formed part of the missing property, to the respondent in the presence of the police at Donnington Police Station.

It seems to me that the evidence clearly established that the appellant was responsible for the removal of the property. At p 5 of the judgment the learned Judge said:-

> "Bearing in mind that the property included a fridge, sound system, 34 inch television set, a table and chairs, microwave oven, car fridge etc. one requires at least a truck to transport the same. She remained in the house. This property went missing. She cannot explain how it went missing. She is adamant that there was no Mazda truck/van in the yard. She can only be sure if she was present. It is apparent that the property was taken in her presence. She is not being candid in this regard when she ventured some attempt at explanation. Her explanation is generally unsatisfactory and does not withstand scrutiny……. In the circumstances, the wilfulness of the (appellant) is, in my view, indisputable. If her protestations of good faith were true then her explanation would have clearly and factually shown where she was when the property was taken and why she is not aware who took such bulky property in broad daylight without people noticing. The (appellant), who had the benefit of professional legal advice throughout, understood the order granted by CHIWESHE J. She deliberately and knowingly disregarded it".

The first ground of appeal raised on the appellant's behalf is without substance. Order 42 of the rules of the High Court does provide that proceedings for contempt of court should be by way of court application. This is so because of the need to ensure that the respondent is notified of such proceedings. However, Order 32 Rule 229C provides that the fact that an applicant has instituted –

"(a)……

(b) a chamber application when he should have proceeded by way of court application, shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that

(i) some interested party has or may have been prejudiced by the applicant's failure to institute the application in the proper form; and

(ii) such prejudice cannot be remedied by directions for the service of the application on that party, with or without an appropriate order of costs."

Further, Rule 4C allows the Judge to condone a departure from the rules if satisfied that the departure is required in the interest of justice.

In *casu* the appellant was served personally with the application and, having filed opposing papers, she was heard by the learned Judge, albeit in chambers. The appellant was legally represented and was given the opportunity to present her opposition to the application. Accordingly, no prejudice was caused to the appellant by reason of the fact that the application was not instituted in the proper form.

The appellant contended, secondly, that it had not been proved on a balance of probabilities that she had unlawfully refused to comply with the Court order. That the order requiring the appellant to return the property was served upon her personally on 22 May 2003, is clear from the return of service of the Deputy Sheriff. Indeed this much was common cause at the hearing. The learned Judge was conscious of the need in cases like the present one where the court is asked to hold a respondent in

contempt of court, for him to be satisfied both that the Order was not complied with and that the non-compliance was wilful on the respondent's part. See *Lindsay v Lindsay* 1995 (1) ZLR 296 (S) at 299 B. By the time this application was launched, the appellant had not complied with the order nor had she taken any steps to have the order set aside. The learned Judge was satisfied on both counts.

From the passage quoted above, I can find no fault with the conclusion reached by the learned Judge that the non-compliance was wilful on the appellant's part. In *Haddow & Haddow supra*, GOLDIN J had this to say:-

> "In my respectful view, whenever an applicant proves that the respondent has disobeyed an order of court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or willfulness on a balance of probabilities. Thus, if a respondent proves that while he was in breach of the order his conduct was *bona fide*, he will not be held to have been in contempt of court because disobedience must not only be willful but also *mala fide*. (See *Clement v Clement*, 1961 (3) S.A. 861 (T) at pp 865-6).
>
> The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable or any remedy, and at the same time constitute disrespect for the court which granted the order."

On the question of *mala fides*, the learned judge said:

> "From her opposing papers, the respondent is relying on the inability to comply with the order in that she does not have the goods she was ordered to return. In my view, proven inability to comply with the court's order affords a respondent protection against a committal for contempt – *Campbell v Herbert* (1980) 18 CTR 22. From what I highlighted above, the respondent has failed to

discharge the *onus* on her. She has failed to establish that she is unable to comply with (the) court order. The evidence shows she was instrumental in the removal of the property. She is in a position to comply with the order and it is expected of her to do so. She should not be allowed to defy the law. In this regard GREENLAND J, in *Sabawu v Harare West Rural Council (supra)* at 51B-D stated-

'To my mind the fact that the applicant has succeeded in defying the law and the High Court over a period … does prejudice justice in an insidious way. It tends to subvert the psychological bond that exists between the law giver and the subjects of the realm. People in general accept the law and submit to its dictates and circumscriptions in the knowledge that such submission ensures peace and good order. What they do demand is equality before the law as being the guarantee of sacred human rights. Actions such as those by the applicant in which a subject sets himself outside or above the law prejudices this relationship if only for the reason that other persons are then entitled to question why they should be expected to be law abiding. He is demonstrating to the world his ability not only to defy the law but to emasculate the court's power to enforce its orders. Success in this stance makes a mockery of the law and tends to bring the administration of justice into disrepute. It also subverts the state's power over its subjects to ensure compliance with its laws via the court which is the state's constitutional vehicle for enforcement'.

I am, therefore, satisfied that the respondent's disobedience of the order of this court is not only wilful but also *mala fide.*"

The third and fourth grounds of appeal are related in that they can be stated as one issue which is whether the contempt was proved on a balance of probabilities in the light of alleged factual disputes on the papers which could not be resolved without the calling of oral evidence.

The alleged factual dispute pointed out in the appellant's heads of argument is that the respondent says he went to McKop's house on the night of May 12-13 whereas McKop says she saw him on the morning of 13 May. The actual time is not given. In the absence of actual times the discrepancies are not material. The night of

May 12-13 could in certain instances easily be described as the morning of May 13 (which would begin at midnight). This discrepancy, if it can be said to be one, is not material and it neither advances the appellant's case nor detracts from the respondent's case.

As pointed out above, the appellant's bare denial in the light of the evidence of the respondent and McKop that she took the property away, was insufficient to discharge the *onus* upon her to rebut the inference of wilfulness and *mala fides* on her part on a balance of probabilities.

Accordingly I can find no fault with the judgment of the court *a quo*.

The appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Makonese & Partners, appellant's legal practitioners

Majoko & Majoko, respondent's legal practitioners