

SHERPHERD CHIMUTANDA
versus
EDWARD BUWU
and
FANI LESLEY BUWU

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 27 January 2022 & 15 February 2023

Opposed Application

W Ncube, for the applicant
O Gutu, for the respondents

KATIYO J. This is an application for contempt of court in terms of order 43 as read with r 388 and form No.29 of the old rules of this court.

Brief facts

The applicant approached this court in his official capacity as the Scheme manager of the scheme arrangement of Atrax Holdings Limited, Atrax Milling (Pvt) Limited, Atrax Petroleum (Pvt) Ltd, Commlands (Private) Limited t/s Nyanga Downs Farm: Foday Investments (Pvt) Ltd. The applicant claims that on 17 January 2018 he was appointed scheme manager of the secured and unsecured creditors of the above mentioned companies and the scheme arrangement is in terms of the court order HC 5869/17 dated 05 July 2017. The applicant claims that the respondents were served with the court order and are aware of the contents and dictates of the court order together with the scheme of agreement. The applicant further claims that the respondents disobeyed the order of this court through their representative one Christmas Mazarire who refused to give the applicant control of Nyanga Downs Farm (herein referred to as the farm) in defiance of the court order. The applicant contends that the respondents also went on to lease out an immovable property known as 65 Chicago Drive, Longlands, Marondera to several tenant including Energy Park and Lidosine Trading (Private) Limited. It is further claimed that the respondents frivolously attacked him and were seeking to disrupt and prevent him from fulfilling his lawful duty of implementing the scheme of arrangement when they held a meeting on 12 July 2018. The applicant further claims that during the above mentioned meeting the respondents through their representative tried to

unlawfully rewrite the scheme arrangement. It is further claimed that Christmas Mazarire demanded the effectuation of the agreement of sale of Foday Investments (Private) Limited entered into between the respondents and an unnamed third party. In addition the applicant claims at the time of sale of Foday Investments (Private) Limited was under judicial management and the respondents had no right to sell the company. In response respondents raised the following points of law

1. Mis-citation of parties
2. Misjoinder and or non-joinder of interested parties
3. Lack of authority or lack of capacity to act

I will now in turn go through each point raised above

Mis-Citation

The respondents aver that the applicant is not properly cited because he was not duly appointed in terms of the law and does not have a Certificate of appointment. More so the respondents further content that the applicant purported appointment is impugned under active motion proceedings before this court. The respondents also stated that the applicant is acting in his personal capacity and is therefore not authorized to institute litigation against the first respondent and or any of the above mentioned companies. Furthermore the respondents claim that the applicant assumes his official capacity as the Scheme manager is *prima facie* not on Court record of case HC 5869/1. Thus the security features and serials numbers are not the same however the other content is similar. This court is of the view that this point raised by the respondent is raising issues that are not part of the proceedings before this court. The court order that the applicants are attacking still stands and it was not appealed against. In *Manyikwa v Jiri* HH 338/15 this position was held as follows;

“The law that stands to be applied to the facts and developments as they stand is that an order of court is valid unless it has been set aside .As such, the High Court decision holds and has not been set aside .It is therefore the applicant who stands on the firmer ground.”

It is a common presumption that when it comes to official documents like this court order they are deemed to be authentic unless proven otherwise. More so this court order was granted by a judge of the same jurisdiction as this court so this court has no jurisdiction to deem this order fake or fraudulent. If a party discovers that a court order is fraudulent and or that it may not have originated from this court there are proper legal channels to follow, thus not wait

for the applicant to bring an application to court for the respondent to raise such burning issues surrounding the case. Therefore this point of law falls away.

Misjoinder and or non-joinder of interested parties

The respondents argue that in terms of Order 13 of the high court rules 1971 (Rules) this application is defective for want of joinder of parties that have vested rights, interests and legitimate expectations in the failed corporate action and matters in dispute. The Supreme Court in *Wakatama & Ors v Madamombe* SC 10/2012 the court held that;

“The question whether the non-joinder of the Minister is Fatal need not detain this Court and can easily be disposed by reference to r87 of the Rules of the High Court which provides:

- (1) No cause of action shall be defeated by reason of this misjoinder or non-joinder of any party and the court may in any cause or matter determine issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter
- (2) At any stage of the proceedings in any case or matter the court may on such terms as it thinks just and either of its motion or application –
 - (a)
 - (b) an order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon to be added as a party:
but no person...

The above provision is clear and allows for no ambiguity. The non-citation of the Minister is not, in the circumstances, fatal.”

However in this matter we are dealing with contempt of court which can have serious repercussions on the affected respondents in the event of the application succeeding (issues that deal with the freedom of a person should be dealt with seriously as this affect the status of that individual). Thus the misjoinder of parties is therefore fatal and the point of law is up held.

Merits

The only remaining issue is for this court to determine whether a person can be in contempt of a court order that he or she is not a party to.

Contempt of court

In *Minister of Lands and Others v Commercial Farmers Union* 2001(2) ZLR 457 SC the requirements of contempt were set out as follows:

“Before a finding of contempt of court can be made it is necessary to determine whether there has been a factual breach of an order or an undertaking on the part of the person brought before the court. This necessarily demands that the terms of the order be expressed in clear unambiguous language and in so far as possible, the person should know with complete precision what it is required to do or abstain from doing”

It is clear from above case that for a contempt of court charge to succeed the court order must be clear and precise and unambiguous so that it is not misunderstood. More so it should not give rise to various inferences and conclusions. In this current case the respondents were not party to the order granted on 17 January 2018. It then boggles the mind as to how the parties can be bound in their personal capacity for proceedings that they were not a party to.

The case of *Mangwiwo and Others v City of Harare* HH 307/14 provided the requirements that the applicant has to provide when seeking an order for contempt of court

- a) That an order was granted against the respondent
- b) That the respondent is aware of the order
- c) That the respondent willfully disobeyed or neglected to comply with it

.More so in the case of *Evans & Anor v Surtie & 3 Others* (2012)ZWSC 4 (p 7) ZIYAMBI JA as he was then commented as follows

“A court ought to satisfy itself with the ability of the defendant to comply with the order otherwise it takes the risk of issuing a hallow and unenforceable order .There is also an obligation on the Court before whom an application for an order of contempt of an order of court is made to examine the order sought to be enforced in order to ascertain its true nature and to determine in which of the two categories the order falls.”

From the above cases there is no doubt that an order of contempt should be as clear as far as possible so as not to leave any doubt as to who the order is intended .Whilst it can be implied that the respondents could have acted in contempt of court well aware of the existence on such an order, however in the absence of a clear and substantive evidence to support that view it remain implied or speculative. One cannot therefore be punished based on speculation.

Having discussed as above I come to the following conclusion and order as follows:

1. Point *in limine* of misjoinder be and is hereby upheld
2. Application for contempt of court be and is hereby dismissed
3. Applicant to pay costs at an ordinary scale.

Thompson Stevenson & Associates, applicant’s legal practitioners
Gutu and Chikowero, respondent’s legal practitioners