DYNAMIC SUCCESS (PRIVATE) LIMITED
versus
SINOHYDRO CORPORATION LIMITED ZIMBABWE

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 6 September 2024 & 13 September 2024

Opposed Application for Contempt of Court

B Mugogo, for the applicant
G R J Sithole, for the respondent

DEMBURE J: This is a chamber application for contempt of court in terms of r 79(1) of the High Court Rules, 2021. The applicant, Dynamic Success (Pvt) Ltd seeks the following relief against Sinohydro Corporation Ltd Zimbabwe, the respondent:

1. The application be and is hereby granted.
2. The respondent be and is hereby declared to be in contempt of the order of this court in case number HC 2315/20.
3. The respondent shall pay a fine of US$3 000 or its Zimbabwean dollar equivalent at the prevailing interbank rate.
4. Respondent be and is hereby ordered to fully comply with the terms of the order under case number HC 2315/20 within seven (7) days.
5. Respondent shall pay the costs of suit.

At the hearing of this matter, counsel for the applicant, Mr *Mugogo*, abandoned paragraph (3) of the draft order.

THE FACTS

On 14 May 2020, the respondent, as the plaintiff filed summons in case number HC 2315/20 against the applicant, as the first defendant, claiming payment of US$596 422.86 with interest and costs. It alleged that the said amount was what the applicant owed due to a breach of

contract to supply diesel to the respondent. The diesel supply agreement related to the Hwange Power Station (600MW) Expansion Project. The second defendant in that action was cited as Dynamic Success Southern Africa (Pty) Ltd. The applicant defended the claim and also filed a claim in reconvention against the respondent for payment of US$1 144 586.26 being unpaid duties and the sum of US$1 000 000 as damages for breach of contract, interest and costs.

On 20 April 2022, the applicant, as the plaintiff, and the respondent, as the defendant, signed a Deed of Settlement for the matter HC 2315/20. The parties agreed to have the Deed of Settlement registered with the High Court as an order of the court. The terms of the agreement were recorded as follows:

1. The Plaintiff shall refund the Defendant the sum of US$430 000 (Four Hundred and Thirty Thousand United States Dollars), the payment of which shall be made by or before the 22nd of April 2022; and the Plaintiff shall transfer or deposit the said sum into the bank account detailed hereunder:
   Account Name: Dynamic Success Southern Africa (PTY) LTD Bank: FNB Account No: 62801564784 Branch: 254605 Swift Code FIRNZAU896
2. The Defendant shall continue to supply duty-free fuel to the Plaintiff under a new contract at the Total fuel price, less duty.
3. The Defendant shall continue to engage the Ministry of Finance, the Ministry of Energy and the Zimbabwe Power Company (ZPC) for the balance of the refund, the amount of which shall be shared equally between the Plaintiff and the Defendant.
4. The Plaintiff shall suspend the legal proceedings against the Defendant under Case No. HC 2315/2020.
5. The parties agree that their respective representatives are fully authorized and shall sign the Deed of Settlement on their behalf.
6. This agreement is the exclusive embodiment of the terms and conditions of the parties and no alterations, additions or variations shall be valid unless reduced to writing and signed by both parties.
7. Each party shall bear its own costs.

On 4 August 2022, this court issued a consent order with the following terms:

1. The matter is settled in terms of the deed of settlement filed of record.

2. The deed of settlement be and is hereby made an order of this Honourable Court.
3. Each party shall bear its own costs.

It is common cause that the respondent paid US$430 000.00 due in terms of para (1) of the deed of settlement which was also part of the court order. The applicant, however, averred that the respondent had failed to comply with para(s) (2) and (3) of the deed of settlement in that it failed to avail a new contract to the applicant for execution and to enable the delivery of fuel and failed to submit all documentation for the refund to be made by the relevant authorities respectively. There was, however, no indication as to what these documents were in all the applicant's papers. At the hearing, Mr *Magogo* abandoned the second ground of the application in particular that which related to the breach of paragraph 3 of the deed of settlement but insisted that there was contempt of court with respect to para 2 of the deed of settlement. The respondent opposed the application.

ISSUE FOR DETERMINATION

The issue to be decided is whether or not the respondent failed to comply with the court order in particular para 2 of the deed of settlement and if so, whether the non-compliance was wilful and *mala fide*.

APPLICANT'S SUBMISSIONS

Mr *Mugogo*, for the applicant, submitted that there was no dispute that the terms of the deed of settlement were made part of the order of the court by consent. While he initially submitted that para(s) 2 and 3 thereof were the basis of the application, he later abandoned the claim for contempt with respect to paragraph 3. He argued that fuel was not supplied and the respondent has not complied with that order of the court. He cited *Mukambirwa & Others* v *The Gospel of God Church International 1932* SC 8/24 as the authority where the requirements for contempt of court were outlined. He argued that the first requirement that there is a court order is common cause. On the second requirement, he submitted that there is no dispute that the order had been served. He further argued that the other requirement was whether or not the respondent was aware of what it is required to do and this was clear. He referred the court to para 18 of the opposing affidavit wherein the respondent responded to paragraph 13 of the applicant's founding affidavit and argued that it shows that the respondent did not avail the contract. It was further argued that the response therein clearly shows that the respondent knew what it was required to do. The response

presupposes a clear acceptance that the order required that the respondent come up with a contract and that parties sign it. What the respondent pleads is what it considers factors inhibiting compliance. One cannot plead these factors. The third requirement, he argued, had been proved.

Counsel further submitted that on the fourth requirement of whether the individual deliberately and consciously disobeyed the court order shortened as wilful and *mala fide*, the aspect of wilfulness comes out clearly in para 18 of the respondent's opposing affidavit. The respondent knows it had to avail the contract and states that it was aware of that but it does not make economic and strategic sense for the parties to have it. The respondent is saying you cannot force me. The aspect of wilfulness exists. The corollary aspect is *mala fide*. In the same paragraph 18 the respondent wants it to appear as if the contents of the contract were not agreed upon. Paragraph 2 is clear that the response by the respondent is full of *mala fides*.

It was also argued that the parties identified the product and the price and all essential elements of the contract existed. He cited the case of *Salisbury Municipal Employees* v *Salisbury City Council* 1957 (2) SA 554 at 557E where it was held that an agreement is the foundation of a contract. Mr Sithole objected to the submission that there was a contract when the deed of settlement was signed as this was not stated in the applicant's founding affidavit. I sustained the objection on the reason that from the applicant's founding affidavit it is clear that there was no contract entered into as the applicant averred that the respondent was supposed to avail a new contract for the parties to sign. The applicant did not say that there was an agreement already in place in its founding affidavit. Counsel, therefore, attempted to alter the averments in the founding affidavit which was unacceptable. The applicant's case stands or falls on its founding affidavit and the averments stated therein. See *CABS* v *Finormagg Consultancy (Pvt) Ltd & Anor* SC 56/22 at p. 8.

Mr *Mugogo* further submitted that the deed of settlement was dated 20 April 2022 and the affidavit from the respondent was signed in March 2023 and the respondent is, therefore, speaking to the situation as at the time of the affidavit. The absence of clarity on the economic and strategic sense referred to was problematic as the respondent's submission makes the failure to comply wilful and *mala fide*. There is no indication in the affidavit as at what point did it stop to make economic sense for the parties to enter into the contract. There was no compliance from April 2022. The contempt is amplified in para 1.7 of the respondent's heads of argument. The respondent was aware of what it was required to do. He also argued that the order was not vague or ambiguous

as the vagueness is viewed from the respondent's lens as a party which knew what it was required to do. The respondent was very clear about his obligation to avail a new contract. All the requirements for contempt are met and the respondent must be ordered to comply with the court order.

Per contra, Mr *Sithole*, for the respondent, submitted that the bone of contention is para 2 of the deed of settlement. There are matters not captured in para 2. The applicant had to explain a lot of things and what was contemplated by para 2 may be inconclusive. Anyone can say what they think about para 2. It was ambiguous or vague in so far as what the respondent was supposed to do. He argued that the order does not specify what positive duty was on the respondent. It is the applicant which has the positive duty. For contempt of court to be established there has to be a positive duty clearly outlined in the court order. The deed of settlement incorporated into the court order does not stipulate a positive duty on the respondent to enter into a contract. He, therefore, submitted that there cannot be any contempt of court to talk about. Probably at best para 2 highlights an intention to agree in the future. Even if we were to read para 2 with a benevolent interpretation which the applicant is saying we would still arrive at the same principle that a court cannot write a contract for the parties and for a contract to exist there must be consensus *ad idem*. This is why in para 18 it is said that it is no longer economic to enter into a contract. A person cannot be forced to contract.

It was further argued that what we can observe is that the deed of settlement was prepared by the parties themselves otherwise such a shoddy job could never have been passed by lawyers. If an order is ambiguous a party cannot be held to be in contempt for failing to comply with an unspeaking or an ambiguous order. On this position, he cited *Minister of Lands & Ors* v *Commercial Farmers Union* 2001 (2) ZLR 457 (S). Counsel submitted that looking also at the authority of *Mukambirwa & Ors* v *The Gospel of God Church supra* and relating it to para 2 it cannot be said that the respondent knows what it had to do. The applicant cannot tell what it is that the respondent failed to do in terms of para 2. Counsel also asked me to check the record in case number HC 5228/23 to appreciate the nature of the parties' relationship and the disputes that arose herein. Mr *Sithole* finally submitted that the application must be dismissed with punitive costs as the applicant is driving a hopeless case which ought not to have been before the court.

THE LAW

The law is settled that civil contempt relates to the wilful and *mala fide* non-compliance with an order of court. The procedure for civil contempt of court is outlined in terms of r 79(1) of the High Court Rules, 2021 and is basically meant to enforce compliance with an order *ad factum preastandum* meaning an order to do or refrain from doing a particular act. This position was fully captured in *Mukambirwa & Ors* v *The Gospel of God Church International supra* at pp. 5 – 6 where the court stated as follows:

> "The crime of contempt of court is committed intentionally and in relation to administration of justice in the courts. This was captured in lucid terms by ZIYAMBI JA in *Moyo v Macheka* SC 55/05 at p 7 of the cyclostyled judgment, quoting with approval GOLDIN J in *Haddow v Haddow* 1974 (1) RLR 5, at 8A-C thus;
>
> > "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."
>
> See also *Whata v Whata* 1994 (2) ZLR 277 (S), *Sheetlite Mining Company Ltd v Mahachi* 1998 (1) ZLR 173 (H).
>
> Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do, that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order.
>
> In addition to the above the court must be satisfied that, not only was the order not complied with but also that the non-compliance on the part of the defaulting party was wilful and mala fide. In *Lindsay v Lindsay* (2) 1995 (1) ZLR 296 (S) GUBBAY CJ said:
>
> > "The finding was *res judicata*. In none of the subsequent proceedings was any new or different circumstances revealed; nor could they have been. I entertain no doubt that GARWE J was correct in concluding that the appellant remained bound by the order and had failed to comply with it. Judgment No. SC 8/2014 Civil Appeal No. SC 279/11 6 Once it was established that the order had not been met, which of course was common cause, wilfulness and mala fides on the part of the appellant was properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow v Haddow* 1974 (1) RLR 5 (G) at 6; Gold v Gold 1975 (4) SA 237 (D) at 239F-G. It may be, as indicated by BAKER AJ (as he then was) in *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517 (C) at 521A-522A that wilfulness and mala fides are identical in direct contempt cases, whereas mala fides is an essential element in constructive contempt. However, that may be, I agree with the learned judge that the appellant failed completely to discharge the requisite onus."

An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus resting upon the applicant of proving the contempt has been discharged. The applicant must also prove that the respondent has failed to comply with

the order. It is trite that before seeking to enforce an order through contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question."

From the above case law, the requirements for contempt of court are that:

1. There must be an extant order of court;
2. The order must have been served on the individual concerned and the individual concerned knows what it requires him or her to do or not do;
3. The order was not complied with, and
4. The individual concerned deliberately and consciously disobeyed the order, in other words, the non-compliance on the part of the defaulting party was wilful and *mala fide*.

The *onus* is on the applicant to prove all the requirements on a balance of probabilities.

THE ANALYSIS

The applicant was required to satisfy all the requirements for contempt of court on a balance of probabilities. It was not in dispute that the order of the court in question is still extant and that it was served on the respondent. The terms of the deed of settlement signed by the parties on 20 April 2022 were incorporated as part of the order of court issued on 4 August 2022. It is common cause that the said order was issued with the consent of the parties. What is in dispute is whether the order informed the respondent of what it was required to do or abstain from doing. The issue for determination is, therefore, whether the respondent has breached or failed to comply with the said court order in particular paragraph 2 of the deed of settlement and if so, whether the breach was wilful and *mala fide*. The said para 2 states as follows:

> "2. The Defendant shall continue to supply duty-free fuel to the Plaintiff under a new contract at the Total fuel price, less duty." (My emphasis)

In case number HC 2315/20 the defendant therein was the applicant while the respondent herein was the plaintiff. The order placed a positive duty on the applicant, as the defendant to supply duty-free fuel to the respondent, as the plaintiff. The respondent only had a corresponding right from the order to demand performance. The order does not impose a positive duty or obligation on the respondent but it imposes a positive obligation on the applicant itself to supply fuel. It is trite law that words in any document, contract or statute must be interpreted in their context and must be given their ordinary grammatical meaning unless to do so would lead to some absurdity. See *Lungu & Ors* v *Reserve Bank of Zimbabwe* SC 04-24 at p. 12. The ordinary grammatical meaning of the words "defendant shall continue to supply duty-free fuel to the applicant" establishes a clear obligation on the applicant itself while creating a corresponding right on the respondent. Further, that duty imposed on the applicant would continue to exist under a new contract. But was there a new contract for the supply of the duty-free fuel? The applicant's founding affidavit in particular paragraph 13 is pertinent and it reads as follows:

> "Applicant engaged the Respondent with a view to signing a new contract and supplying the fuel. The respondent has not been forthcoming in this regard and to date, it keeps giving excuses for the failure to give the new contract. Effectively, Respondent has failed to avail a new contract and applicant has been hindered in supplying fuel in terms of the order"

These averments from the applicant do not show that there was already a new contract to supply duty-free fuel and that only what the parties had to do was to sign the written one. What comes out from the said averments is that the respondent has not signed a new contract with the applicant to enable the applicant to comply with its obligation in terms of the court order. That excuses the applicant from its obligation in terms of the court order but that order does not mean the respondent has to be forced to contract. From para 18 of the respondent's affidavit it is clear that the respondent did not accept the terms of a new contract as it viewed the supply of fuel to be uneconomic. I do not agree with Mr *Magogo* that the respondent should be compelled to sign a new contract. It is an accepted principle of our law founded on freedom of contract that courts are not at liberty to create contracts on behalf of the parties or compel a party to enter into a contract with another person. This is a matter of public policy. See *Magodora & Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 at 403C-E; *Ashanti Goldfields Zimbabwe* v *Mdala* SC 60/19. In any event, the court order itself does not compel the respondent to sign a new contract.

Given the clear position of our law, para 2 can be interpreted to mean that the parties expressed an intention to agree in the future since there was no agreement concluded on the new contract when the deed of settlement was signed. Such an agreement to agree in the future, is in any event, unenforceable. See *Hativagoni* v *CAG* SC 42/15. The order under para 2 of the deed of settlement presupposes that the parties would agree on the new contract. I agree with Mr *Sithole* that in the absence of such a contract existing at the time of the signing of the deed of settlement or the court order, the court cannot force the respondent to enter into a new contract or to "avail a new contract" as demanded by the applicant. It would be unlawful for this court to do so.

Paragraph 2 of the deed of settlement does not in clear and unambiguous terms provide what the respondent must do or is required to do. It does not say he must avail a new contract. It simply imposed an obligation on the applicant to supply duty-free fuel under a new contract but if there was no new contract entered into by the parties then the court cannot find the respondent to be in contempt where the order does not clearly set out the positive obligation of the respondent. The order must be clear and should not leave any doubt as to what the respondent is required to do. What the respondent had to do cannot be implied nor can it be speculative. One cannot be punished on speculation. Further, the order must not give rise to various inferences and conclusions as the one before me: See *Chimutanda* v *Buwu & Anor* HH122/23 at p. 4.

The above position was confirmed by the Supreme Court in *Minister of Lands & Ors* v *Commercial Farmers Union* 2001 (2) ZLR 457 (S). at 465 where the court stated as follows:

> "C J Miller in his book *Contempt of Court* 2 ed at pp 423-424, has this to say on the issue of contempt of court:
> Before a finding of contempt of court can be made it is necessary to determine whether there has been 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 and 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."
> Similarly, the following observations were made in the case of *Collins* v *Wayne Iron Works* 227 p 326, 76A 24, 25 (1910):
> "It (the court order) should be definite, clear and precise in its terms as possible so that there can be no reason or excuse for misunderstanding it or disobeying it, and when practicable, it should plainly indicate to the defendant all the acts which he is restrained from doing without calling on him for inferences or conclusions about which persons may well differ."

In *casu*, as stated above, para 2 imposed a positive duty on the applicant to supply duty-free fuel to the respondent under a new contract. It does not set out in clear language what the respondent should do. The order does not say the respondent is obliged to sign or avail a new contract at all. The applicant cannot read into a court order an obligation not expressly and clearly stated or seek to supplant a court order. The court order must stand as it is and cannot be varied in the manner the applicant tried to do. It has not, therefore, been proved that the respondent failed to comply with the court order. In the absence of an established breach of the order of court or proof that the respondent failed to comply with the order of court, the last requirement for contempt of court that the party concerned deliberately and consciously disobeyed the order does not arise. There is no contempt of court to talk about in these circumstances.

DISPOSITION

The applicant has failed to discharge the *onus* to prove contempt of court in terms of the law. The application cannot succeed. Costs should follow the cause. Mr *Sithole* submitted that the application must be dismissed with punitive costs but I am, however, unable to agree that punitive costs are justifiable in the circumstances. While the interpretation given by counsel for the applicant to the said para 2 of the deed of settlement and the attempts to create an obligation for the respondent to avail a new contract were erroneous that conduct does not, in my view, warrant an order for punitive costs. I do not consider these proceedings to be reckless or malicious or to fit in exceptional cases where costs on a legal practitioner and client scale can be awarded. See *Criff Investments (Pvt) Ltd & Anor* v *Grand Home Centre (Pvt) Ltd & Ors* HH 12/18 at p.3. I also observed that the respondent did not respond to the letter from the applicant's legal practitioners dated 22 February 2023 at p 13 of the record. Had the respondent been forthcoming with the courtesy of a reply and in the context of the parties having settled the main matter amicably possibly these proceedings may have been avoided.

Accordingly, it is hereby ordered that:

1. The application be and is hereby dismissed with costs.

DEMBURE J: ………………………………...

Gurira & Associates, applicant's legal practitioners
Manokore Attorneys, respondent's legal practitioners