

GEORGE RUSERE

versus

STERNLY KONDONGWE

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO 25 September, 2,3& 10 October 2023 & 9 February 2024

N. Mugiya, for Plaintiff

I. Moyo, for Defendant

Civil Action; stated case

ZISENGWE J. This matter poses the rather interesting legal question of whether or not a party can refuse to honour an obligation imposed by a court order, properly issued, ostensibly on the basis that the opposite party has in the meanwhile instituted a claim challenging the very order which gave rise to the obligation, which order incidentally was one by consent.

Here are the facts. On 15 July 2021 this court under Case No. HC 369/20 delivered a judgment by consent obliging the plaintiff to vacate a piece of land identified as subdivision 3 of Cambria farm situate in Masvingo upon the expiration of 6 months' notice commencing the date of the issuance of the consent order. In return, the defendant was required to compensate the plaintiff for the value of the improvements effected on that property which value was to be determined by Great Zimbabwe Realtors. The evaluation was done and the value of the improvements was given as \$30 500. Of that amount the defendant paid a total of US\$20 000 leaving a balance of US\$10 500 which the plaintiff now seeks to recover.

The defendant does not deny owing the said sum of money. However, in his plea he contends that the plaintiff is merely driven by greed in that not only is he (i.e. plaintiff) in the process of attempting to move back onto the property having previously vacated it but also that he

has also since mounted an application seeking an order declaring the order under HC 369/20 declared null and void.

The defendant's position therefore is that the plaintiff cannot have his cake and eat it too. He cannot seek to enforce the very order which he also wants the court to declare null and void. Therein lies the conundrum.

Although the plaintiff appears to suggest that the latter claim has since been amended to refer to a different cause of action (of a miner v farmer conflict) the fact remains that in their joint PTC minute in the present matter crystallizing the issue(s) for determination, the parties agreed that the sole issue was;

“Whether or not the plaintiff's claims sustainable at law in light of the fact that the order under case No. HC 369/20 which he seeks to enforce his subject to ongoing proceedings wherein plaintiff seeks to have recovery order declared null and void and of no force at all”

The parties soon agreed for the matter to proceed as a stated case and it is the sole question posed therein and as captured in the P.T.C minute that falls to be answered.

Authorities abound which serve to reinforce the time-honoured principle that a court order, unless sooner set aside on appeal or review must be obeyed. In *Magauzi & Anor v Jekera* SC 54/22 the following was said:

“When a court grants an order, all subsequent acts affecting the dispute between the parties rely on the courts order and not the reason or facts the court based its judgment on. Execution of the judgment is based on court orders and not the reason for which the court order was granted. Therefore, a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga v Chiwenga* SC 2/14, it was stated that: The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this court and not even by consent can parties vary or depart therefrom. See also *CFU v Mhuriro & Ors* 2000 (2) ZRL 405 (S).”

In *Mauritius & Anor v Versapark Holdings (Private) Limited & Anor* SC 2/2022 the following was said in the regard:

“It is trite that once a court has made an order it binds all and sundry concerned. Everyone bound by the court order has a been lawfully altered or discharged by a court of competent jurisdiction or statute. ”

See also *Hadkinson v Hadkinson* [1952] All ER 567 (CA), where the following was 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 the obligation is shown by the fact that it even extends to where the person affected believes it to be irregular or even void.’

Finally, in *Chiangwa & Ors v Apostolic Faith Mission in Zimbabwe & Ors* SC 67/21 the following was stated:

‘It is trite that extant court orders must be obeyed. This principle was affirmed by this Court in *Econet Wireless (Pvt) Ltd v Minister of the Public Service, Labour and Social Welfare & Ors* SC 31/16 at p 6, where BHUNU JA aptly remarked that:

‘The doctrine of obedience of the law until its lawful invalidation was graphically put across by Lord Radcliffe in *Smith v East Elloe Rural district Council* [1956] AC 736 at 769 when he observed that:

‘An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.’ If it were not so, and every litigant challenging the validity of any law was excused from obeying the law pending determination of its validity, there would be absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into the works to defeat or evade compliance with the law.’

In *casu* although it would be unconscionable and indeed untenable for the plaintiff to blow hot and cold in the sense of seeking both to enforce the consent order and to impugn it, (as alleged by the defendant but denied by the plaintiff), the fact however remains that the consent order is extant and parties are obliged to obey it.

For as long as the court judgment has not been expressly abandoned or set aside or rescinded by a competent court, it is binding and has the force of the law. To rule otherwise would be to invite chaos in the legal system because then a party may refuse to respect an extant judgment on the basis of a perceived intransigence (rightly or wrongly) of the opposing party in relation the said judgment.

Put differently, a party on whom a court order imposes a duty or obligation is not at liberty to strike a pre-emptive blow against the opposing party by refusing to honour or abide by the judgment on the basis of pending court proceedings which purport to undermine or even reverse the extant court judgment. He may, of course in appropriate cases use the outcome of the previous

case as a defence (e.g. the defence of *res judicata*) to ward off the subsequent case. The claim therefore stands to succeed.

Costs

The parties haggled over the need to award costs on the attorney client scale. There is no justification for such costs. One can easily understand why defendant perceived plaintiff's actions in seeking to both enforce the terms of the consent order and to have it set aside as legally untenable hence his defence to the present claim. It seems he was quite prepared to abide by the terms of the consent order up until the plaintiff issued the applications in 89/23.

His defence to the present matter was neither borne out of malice nor did it amount to an abuse of court process. He genuinely believed, albeit wrongly, in legal efficacy of his defence.

Accordingly, the following order is hereby made.

IT IS HEREBY ORDERED THAT:

- a) The claim succeeds.
- b) The defendant to pay the plaintiff the sum of US\$ 10 500 (Ten thousand five hundred United States dollars) being the balance of the money due to the plaintiff as sanctioned under case No. HC 369/20
- c) The defendant to meet plaintiff's costs of suit on the party to party scale.

ZISENGWE J

Mugiya & Muvhami Law Chambers; Plaintiff's Legal Practitioners
Mutendi, Mudisi & Shumba; Defendant Legal practitioners