

GOOSEFIELDS MINING SYNDICATE (PVT) LTD
versus
SHINGAI MUTUMBWA N.O
(Judicial Manager for Zimbabwe Indigenous Mining and Agriculture
(Pvt) Ltd)
and
ZIMBABWE INDIGENOUS AND AGRICULTURE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 20 & 24 May 2022

Opposed application

Ms.S.Z. *Luthuli* for the applicant.
Ms.C. *Makura* for the respondents

CHILIMBE J

BACKGROUND

[1] The respondents have requested for written reasons for a ruling which I passed on 24 May 2022. I accordingly avail the reasons concerned.

[2] In this matter, applicant seeks an order declaring the respondents in contempt of an order of this court. The order in question being one issued by CHATUKUTA J (as she then was) under case number HC 2087/20, on the 14th May 2020. In that regard, applicant seeks the committal of second respondent and or officers of first respondent to gaol for a period of 90 days. The prayer carried provision for suspension of the term of imprisonment on condition of payment of a fine in the sum of ZWL\$100,000-00.

[3] The application is opposed. The respondents raised three main grounds in opposing the order of contempt sought. Firstly, they attacked the founding papers on the basis of the deponent's alleged invalid authority. Secondly, the respondents argued that in any event, the founding affidavit was deposed to by a person who had no personal knowledge of the issues alleged in his affidavit reducing the contents to unsustainable hearsay. Thirdly, it was argued that the requirements of civil contempt of court were not met by applicant. In particular, the second respondent stated that his actions at the mining location concerned were in pursuit of

his lawful mandate as judicial manager of first respondent. In that regard, the conduct was in good faith, lawful and not at all in contravention of the court order.

VALIDITY OF LANGTON MHIRIZHONGA`S AFFIDAVIT

[4] Langton Mhirizhonga deposed to the affidavit that founded the application. Langton averred that he was (a) the managing director of the applicant, (b) authorised to represent applicant and (c) was familiar with the facts stated therein. Respondents challenged the validity of Langton`s authority as they did the truthfulness of his averments. Respondents` argument, in essence was as follows; - the resolution issued by applicant on the 24th February 2020 granting approval for Langton to represent the company had expired. That resolution`s authority was restricted to the proceedings under HC 2087/20. Case number HC 2087/20 is the very same matter that issued the order which respondents accused of violating.

[5] I consider it a matter well settled that unless there is real and substantial basis to dispute the authenticity of a party representing a company, that representative`s authority will be taken as valid. MATHONSI J (as then was) dealt with this issue in *African Banking Corporation of Zimbabwe Limited t/a BancABC v PWC Motors (Pvt) Ltd & 3 others* HH-123-13.

[6] MUTEMA J followed *African Banking Corporation of Zimbabwe Limited* in his decision of *Bulawayo City Council v Button Armature Winding (Pvt) Ltd* HB 36-15 and stated thus [at page 3]; -

In response to respondent`s contention that the deponent to the supporting affidavit filed by the applicant herein had no authority, the applicant relied on the case of *African Banking Corporation of Zimbabwe Limited t/a BancABC v PWC Motors (Pvt) Ltd & 3 others* HH-123-13. In that case MATHONSI J held as follows:

“I am aware that there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution. However, it occurs to me that that form of proof is not necessary in every case as each case must be considered on its merits: *Mall (Cape) (Pvt) Ltd v Merino Ko-Opraisie* BPK 1957 (2) SA 345 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not the unauthorized person.

To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary [but] where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application ...”

I respectfully subscribe to my brother MATHONSI J's views expressed *supra*. I would add that that approach has now become the commonly applied one in this jurisdiction when dealing with the subject under discussion.

[7] I was referred to the matter of *Madzivire & Others v Zvarivadza & Others 2006 (1) ZLR 514* as authority that a company shall be represented by only those authorised to represent it. No doubt a sound principle of law but whose application may be distinguished in casu. In that decision, the dispute between the parties related to a spirited contestation of the control of a company.

[8] In this instance, Mhirizhonga is merely reporting to the court the fact that someone obliged to obey a court order has refused and disregarded such order. NDOU J held as follows in *Cawood & Another v Dr. Mangena & Others HB 41-2004 at page 3*; -

“When resorted to, contempt proceedings achieve two objectives, namely, firstly, enforcing compliance and secondly protecting and upholding the dignity and respect of the court. In respect of the latter objective, the applicant acts as an informer who brings the contempt to the attention of the court-*Naude en Ander v Searle 1970 (1) SA 388 (O)* and *Scheelite King Mining Co (Pvt) Ltd v Mahachi supra*. It seems to me that this application seeks to achieve these objectives.”

[9] On that basis I would dismiss the objections raised against propriety of Langton Mhirizhonga's affidavit. I also found the respondents' averment that Langton Mhirizhonga's affidavit contained hearsay unsustainable. The deponent stated under oath that he was aware of the facts that he deposed to. I find no substance in the averments that the deponent never set foot on site. In any event, by and large, the court will examine the respondents' conduct as admitted.

THE REQUIREMENTS OF CONTEMPT

[10] Having found thus, the next question is; has sufficient basis been laid to sustain the allegations of contempt of court on the part of the respondents? The test for what constitutes contempt of court was laid in *JC Connolly & Sons (Pvt) Ltd v Ndhlukula & Another HB 43/15* as follows at page 5 thereof; -

The essentials of contempt of court are the following:

- (i) that the person charged with contempt had knowledge of the court order;
- (ii) that such person was aware of the constraints placed upon him by the court order;

- (iii) that the person disobeyed the court order; and
- (iv) that the disobedience was willful.

[11] Herbstein and van Winselen state as follows [page 1103 of Volume 2 of the 5th Edition of their Civil Practice of the High Court and Supreme Court of Appeal of South Africa]

“The applicant must set out clearly in the application such grounds as will enable the court to conclude that the onus resting on him of proving the contempt has been discharged. The applicant must show that the order of court with which the respondent has failed to comply had either been served personally or had come to the respondent’s personal notice. When a person has information, which there are no reasonable grounds to disbelieve, to the effect that an order of court has been granted against him, such person is bound to act as if the order has been duly served.

The court will not entertain an application for committal if no wilful or reckless disregard of the court order has been proved. It has been held that before a person can be found guilty of contempt of court the disobedience of the order must not only be wilful but also mala fide.”

[12] CHITAKUNYE J (as he then was) explained the import of (a) proof, (b) wilfulness and (c) mala fides in Mafoshoro Farm (Pvt) Ltd. Versus Hurbert Nyanhongo And Tendai Mbereko HH 32-2009 at page 3; -

In *Scheelite King Mining Co. (Pvt) Ltd. v Mahachi* 1998 (1) ZLR 173 (H) at 177H-178A GILLESPIE J. noted 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 willful on the part of the defaulting party.” In *Haddow v Haddow* 1974 (1) RLR 5 at 7H-8A. GOLDIN J had this to say: -

“In my respective 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*.”

Willfulness connotes a deliberate decision not to comply with the order. Mala fides connotes bad faith. If it is proved that first respondent being aware of the terms of the provisional order deliberately chose not to comply with them then he would be guilty.

[13] The authorities refer to the applicant’s obligation to establish disobedience of a court order. In such event, “...it is trite that where defiance has been proved, the onus rests on the respondent to show that such defiance was not willful.” (See page 4 of *JC Connolly & Sons (Pvt) Ltd v Ndhlukula & Another* -supra).

[14] The requirements (i) to (ii) outlined by TAKUVA J in *JC Connolly* cited above can be largely be taken as common cause. I need to establish whether conditions (iii) and (iv) were met. From the papers before me, it can be accepted that second respondent is a legal practitioner and officer of this court. This context is relevant to the assessment the issue before me. The second respondent stated thus in his opposing affidavit; -

7.15 My understanding of the order was that it recognised what had happened prior to the 16th March 2020 was not despoilation

7.16 The court order was only concerned with what it found as having happened of the 16th March 2020 namely that Applicant's employees had been disturbed in their rooms and that one of the employees had been assaulted."

WERE THESE THE FINDINGS OF THE COURT IN HC 2087/20?

[15] The dispute which led to the issuance of the order of 14 May 2020 was summarised by the court in HC 2087/20 as follows at page 1;

"On 20 March 2020, the applicant filed an urgent application seeking interim relief interdicting the respondents from going to the mining blocks consisting of 94 claims named Kachichi situate at Kachichi Estate, Mashonaland West Province (mining claims) and to recall any of their agents whom they had deployed to the mining claims pending the determination of the question on the ownership of the mining claims."

[16] This means that the subject matter of the dispute was identified as the mining location as described. The nature of the conduct complained of was similarly laid out by the court. The Court also found as follows at page 3:

"As alluded to earlier, the applicant averred that it was in peaceful possession of the buildings occupied by its employees, the mica plant and the mill and was forcibly or wrongfully dispossessed without its consent."

[17] The below remarks by the court in HC 2087/20 are particularly important. The court found the respondents to have improperly interfered with applicant (in both that matter and this) `s rights, as qualified in that judgment, to the mining location. The Court also concluded as follows at page 5; -

Given the concessions by the respondents` counsel and the failure by the respondents to file any supporting affidavits by those alleged by the applicant to have disturbed its peaceful possession of the buildings and processing plant, I find that the interference with the applicant`s operations and the removal of its employees` property was unlawful as it was carried out without due process. The applicant is therefore entitled to an order for spoliation.

THE ORDER IN HC 2087/20

[18] The respondents were aware of the court order. An attempt had been made to appeal against it [see below]. Second respondent, as stated is a legal practitioner. There can be no question therefore that the full import of the order of court was appreciated by the respondents. The respondents` subsequent conduct must be viewed against the fact that they fully appreciated the direction issued by the court order. Yet the second`s respondent`s affidavit as per the excerpts referred to in [14] suggests a different appreciation of the court order. Second

respondent's version of what it is that the court was seized with, is incorrect. The court's finding in HC2087/20 further controverts the respondents' averments. The court order went as follows;

1. The 1st and 2nd respondent be and is hereby ordered to restore to the applicant the status quo ante prevailing as at 16 March 2020 at the mining blocks consisting of 94 claims named Kachichi Estate, Mashonaland West Province.
2. The 1st and 2nd respondent and any person acting through him be and is hereby interdicted from interfering with the applicant's possession and occupation of the premises occupied by the applicant or its agents as at 16 March 2020.

FIRST RESPONDENT'S OWN ADMISSIONS

[19] It is clear that first respondent never in fact accepted the order of HC 2087/20. A notice of appeal was immediately filed against the order and it set out no less than 8 grounds of appeal. It is common cause that the appeal was eventually abandoned only after the Registrar of the Supreme Court advised the appellants in that matter that their appeal had lapsed. This communication was dated 14 September 2020, some 4 months or so after the order in HC 2087/20. As correctly pointed out by applicant, first respondents proceeded to attend to the affairs of the disputed mining location as if the court had not ordered him from doing so. This is confirmed by the letter dated 8th October 2020 addressed Messrs Mutumbwa Mugabe to Chinawa Law Chambers.

[20] In response to this letter, which carries the argument that first respondent's actions were by consent, the applicant's lawyers refuted that contention and commented as follows in their letter dated 19 October 2020; -

“As you are all aware that there is a Court Order still extant which prohibits the Judicial Manager from disturbing our client's operations unless proper processes have been followed; -Our client considers your conduct as a violation of the court order and hence they have not given any consent to yourselves to do whatever you have been doing, including your actions to purportedly connect electricity and the intended clean up.”

CONCLUSION

[21] On the basis of the facts before me, the requirements of contempt of court as defined by the authorities cited above are satisfied. There is no doubt that the respondents' disregarded the court order. That disregard was both willful and mala fides. No valid explanation was tendered as to why first respondent proceeded to continue and assert rights in a mining location in clear contravention of a court order. Given the role, nature and background of first respondent, there is a lot more than could be said in fuller explanation of the culpability and blameworthiness characterising the complaint before the court. Suffice to say, it is expected of officers invested

with authority to manage entities in distress to conduct themselves in the strictest sense, in accordance with the law. That obligation escalates where such officer is a legal practitioner.

[22] There was no focussed argument regarding the penalty proposed in the draft order. Apart from some vehemence in the protestations by applicant toward costs, there is nothing to suggest aggravated conduct on the part of respondents as would warrant a punitive order of costs. I note that a finding and order of contempt is severe enough punishment on both respondents and an order of costs at the normal scale should suffice.

DISPOSITION

In that regard, the order is granted as follows; -

1. That the application for a contempt of court be and is hereby granted.
2. The 1st and 2nd Respondents be and are hereby declared to be in contempt of court.
3. The 1st Respondent and any of the 1st and 2nd Respondents` agents acting on the instructions of Respondents be and are hereby sentenced to 90 days imprisonment.
4. Paragraph 3 shall be suspended on condition that the 1st and 2nd Respondents jointly and severally with one paying the other being absolved, shall comply with the court order dated 14 May 2020 and pay a fine of ZWL\$100,000-00 within three (3) days of this court order.
5. That 1st and 2nd Respondents jointly and severally, with one absolving the other, to pay legal costs on an ordinary scale.

Chinawa Law Chambers, applicant's legal practitioners
Caleb Muccheche & Partners, respondents` legal practitioners