

RONALD BORGES
versus
PROSPER SHUMBA

HIGH COURT OF ZIMBABWE
TSANGA J
11 June & 5 August 2021

Opposed application

E Mangezi for applicant
TS Mujungwa for respondent

TSANGA J: Pursuant to an application for contempt of court made in terms of r 388 of the then High Court Rules, 1971, this court granted the order below on the 11th of June 2021.

1. The respondent be and is hereby held to be in contempt of paragraph 2 of the order granted by this Honourable Court in case number HC 3454/17.
2. The respondent be and is hereby committed to gaol for a period of thirty days, or until such time as he has complied with paragraph 2 of the court order in Case Number HC 3454/17.
3. The Sheriff of Zimbabwe or his lawful deputy be and is hereby directed and ordered to take respondent, if he is found in Zimbabwe and to deliver him to the keeper of a Gaol to be safely kept there in terms of paragraph 2 of this order.

The respondent wishes to appeal against the order and has requested the reasons for the above order in writing. The order for contempt was for non-compliance with an order of the court which was by consent and which had been granted on the 7th of November 2017. In his application, the applicant averred that the respondent had failed to comply with the part of the order whereby he was required to deliver a vehicle, namely a land rover Discovery 3, engine number 0264803276 DT, grey in colour, to the applicant before the 10th of November 2017. It was valued at US\$20 000.00

Regarding the fulfilment of the legal requirements for contempt, the applicant averred that there was an extant order of court; the order had been served on the respondent and the respondent knew what was required of him; and, knowing what was required of him, the respondent had deliberately and consciously disobeyed the order. (See *Wilson v Minister of*

Defence & Ors 1999 (1) ZLR 144 (HC); *Scheelite King Mining Co (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 (HC) *JC Connolly & Son (Pvt) Ltd v Ndhlukula & Anor* HB 43/2015)

The order had not been appealed against nor had its rescission been sought. The applicant also stated that the car had actually been given to him to test drive prior to the order by consent being agreed to at a pre-trial conference. However, after the order by consent had been granted, the applicant had sought delivery, including through a writ of delivery but the vehicle could not be found at the respondent's place of residence. The respondent was therefore said to have consciously disobeyed the order by hiding the motor vehicle in question. The record indeed contained correspondence which bore testimony to applicant's efforts to have the vehicle delivered to him. Whilst the respondent had offered him another vehicle, according to the applicant, it was not of the same value as the one they had agreed upon. Moreover, the respondent was also said to have demanded more money from applicant.

In his opposing affidavit date stamped 19 March 2021, the respondent averred that he had been unable to comply with the court order due to a *vis major* which rendered the judgement a *brutum fulmen*. He alleged that the motor vehicle in question was not in Zimbabwe, and was outside its jurisdiction. According to him it was impossible for him to get the vehicle. He also averred that he was no contempt as he was willing to cure the contempt through payment of money. There were no documents to support any of these averments.

In response to the opposition, applicant maintained that the respondent was being evasive and defiant of the court order as he clearly never had any intention of surrendering the vehicle since it was demanded soon after the court order and he failed to deliver it. Regarding repayment of money, the applicant's response was that it would not cure the respondent's default and that the payment would not be commensurate with the dictates of the court order. He also submitted that the respondent could not vary the terms of the court order. He emphasised that the court had ordered the respondent to perform a specific act. The respondent was also said to hop from home to home evading creditors.

The order was granted on the 7th of November 2017, and indeed the record shows that by the 17th of November 2017, correspondence had gone out to the respondent seeking delivery of the vehicle. There was no evidence attached by the respondent to show that the

car had indeed left Zimbabwe, when it left, or under what circumstances and why it could not be returned. The circumstances under which the vehicle became unavailable remain shrouded in mystery. In other words, there was no real evidence other than the respondent's own assertion to contradict the applicant's averment that the respondent was deliberately failing to comply with the order. Failure to aver the facts fully raises serious doubts about the veracity of the claim. It was only in paragraph 14 of the heads of argument that the respondent cursorily mentioned that the car was in South Africa during the time the order was made. Issues are simply ignored by the court where they are raised for the first time in heads of argument by a party and are not in the affidavit deposed to. This is because the other side will have had no opportunity to respond to such claims. See *Mutasa v Telecel International* HH 431/14.

Needless to say, it also defied logic why the respondent would have allowed an order to be made for a vehicle which he knew was already not within his control. It was also only in the heads of argument that the respondent submitted that he had offered to pay US \$20 000.00 as the value of the motor vehicle yet in the record there was no evidence of any such offer having been made. A respondent facing an order of contempt of court cannot simply take the court granted by expecting that his mere say so without any proof should be believed by the court. Whilst the respondent is said to have offered applicant another vehicle he is said to have demanded more money when that was never the thrust of the court order. As such this court concluded that the disobedience was *malafide* in the absence of concrete evidence that he was indeed unable to deliver the vehicle.

Whilst indeed it is not every act of contempt that warrants committal to prison, the circumstances of this case whereby the vehicle was not availed so soon after the order was granted, indeed confirmed the applicant's assertion that there was never any intention to deliver the vehicle. The element of malafides was present. *Batezat v Permassan Pvt Ltd S 49/09*.

For these reasons the court therefore granted the order for contempt as prayed.