

ELIZABETH KHAKA
versus
PETER FREDERICK RENNIE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 18 May 2022 and 27 October 2022

Opposed application for contempt of court

Mr N Chidembo, for the applicant
Mr P C Paul, for the respondent

CHINAMORA J:

Factual background

The brief background to this matter is that, the applicant sued the respondent sometime in 2007 under HC 3314/07 for specific performance and transfer of a property known as Lot 5 of the remainder of Subdivision “A” of Lichfied of Wilksden Farm (hereinafter called “the property”). Alternatively, the applicant claimed damages for breach of contract. On 4 July, the parties entered into a deed of settlement which is marked Annexure “A” and appears on pages 6-7 of the record. This deed of settlement was made an order of this court under HC 5000/08B on 29 November 2012, and the said order is on page 8 of the record marked Annexure “B”. The parts of the said order which are relevant to this application read as follows:

“1. The defendant shall purchase and transfer to the plaintiff Old Mutual Limited Shares (‘Old Mutures shares’) within fourteen (14) working days from the 4th July 2008. The number of share to be transferred to the plaintiff shall be arrived at as set out below:

1.1 The defendant, at his cost, shall cause the property purchased by the plaintiff, being Lot 5 of the remainder of Subdivision “A” of Lichfied of Wilksden Farm together with all permanent improvements constructed thereupon to be valued by Tony West Real Estate and Fox and Carney Estate Agents within five (5) days of today’s date (4 July 2008)”. [My own emphasis]

The applicant averred that the respondent had breached the court order in HC 5000/08B as he had not purchased and transferred the Old Mutual shares to the applicant within 14

working days from 4 July 2008. The second aspect of breach alleged by the applicant, was that the respondent had failed to have the property valued by Tony West Real Estate and Fox and Carney Estate Agents within 5 working days from 4 July 2008. It was submitted that the respondent had shown a “wanton” and “flagrant” disregard of this court’s order, the applicant sought an order in the following terms:

- “1. The respondent be and is hereby declared to be in contempt of court in HC 5000/08B.
2. That the respondent shall within ten (10) days of this order comply with paragraph 1 and 2 of the order in HC 5000/08B.
3. Should respondent fail to comply with the order in HC 5000/08B as set out in paragraph 2 above, the applicant shall be entitled on this order to instruct the Sheriff of Zimbabwe, if he is not available, his deputy or assistant to procure members of the Zimbabwe Republic Police as may be necessary to effect the arrest of the respondent and his committal to Central Prison until such time as he purges his contempt in Case No. HC 5000/08B.
4. The respondent shall pay the costs of this application on the legal practitioner and client scale”.

The application was opposed. Firstly, the respondent pointed out that the court order was granted 4 years after the deed of settlement was signed. Then, he argued that it was impossible to comply with the order as it required him to purchase Old Mutual shares in July 2008. (See paragraph 4 of the opposing affidavit, which appears on page 12 of the record). He further argued that any valuation which may be obtained for the property now would likely be different from what stands were worth in 2008. More importantly, the respondent submitted that he was unaware of the court order and, therefore, he could not be held to be in contempt of court.

The applicable law

The law relating to contempt of court for violations of a civil order or judgment is settled in this jurisdiction, as in South Africa. The purpose of civil contempt of court is to enforce an order of court by the threat of committal to prison. This was well articulated by the Supreme Court in the case of *In Re Chinamasa* 2001 (2) SA 902 (ZS), where it was reasoned:

“So far as contempt involving disobedience to the order or process of a court is concerned, the offence is often treated as 'civil contempt'. This is because such contempts are, in reality, a form of execution, pursuant to which the person of the defaulting party may be attached in order to coerce compliance with the order. See *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N) at 120F - 121D; *Wiley NO v M* 1979 RLR 144 (GD) at 146A-D”

The requirements for contempt proceedings were set out in *Mafoshoro Farm (Pvt) Ltd v Hubert Nyanhongo & Tendai Mbereko* HH-32-09, where CHITAKUNYE J (as he then was) said:

“Civil contempt is basically the wilful or mala fide failure to comply with an order of court. There are three basic requirements for contempt procedure that need to be proved, namely:-

1. That an order was granted by a competent court.
2. That the respondent was indeed served with the said order or that it was brought to his attention; and
3. That respondent has either disobeyed it or has neglected to comply with it.
(See *Consolidated Fish Distributors (Pty) Ltd. v Zive and Ors* 1968 (2) SA 517 at 522E-G)”.

What these requirements entail was explained in *Scheelite King Mining Co. (Pvt) Ltd. v Mahachi* 1998 (1) ZLR 173 (H) at 177H-178A by GILLESPIE J as follows:

“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 wilful on the part of the defaulting party.”

I add that the requirement for the respondent to be aware of the existence of the order was elucidated with clarity in *Haddow v Haddow* 1974 (1) RLR 5 at 7H-8A by GOLDIN J thus:

“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 wilfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or wilfulness 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 wilful but also mala fide.”

Analysis of the case

In light of the law on the subject, I now examine whether or not the facts support the grant of the relief sought. There is no dispute that the order in HC 5000/08B was issued by this court, and has not been complied with. However, the respondent has placed before the court information which I cannot ignore, firstly, that the order as formulated is incapable of being complied with and, secondly, the order did not come to his notice. I will deal with the averment that he was not aware of the order first. The applicant in paragraphs 6, 7, 8 and 10 of her answering affidavit (on pages 16-17 of the record), maintained that the court order came to the attention of the respondent. She also attached a return of service by the Sheriff which states that service was effected “*by affixing to the outer principal green gate*”. (See Annexure “CS” on page 19 of the record).

I would have given the respondent the benefit of doubt if this was the only evidence relating to service of the court order. Nevertheless, the applicant submitted that the respondent instituted proceedings under HC 11585/15 for rescission of the order granted in HC 5000/08B.

From this, I am satisfied that the order came to the respondent's notice, hence the attempt to rescind the order. I will now turn to the respondent's next defence, namely, that the order as couched cannot be complied with. The order, which was issued on 26 November 2012, requires the respondent to purchase and transfer to applicant Old Mutual Limited shares within 14 days from 4 July 2008. Practically, the order cannot be complied with, given that it was issued in 2012 and yet the period within which to comply was calculated from a date in 2008. This is not the only anomaly which is evident *ex facie* the court order. The respondent was also required to cause the property to be valued "*within 5 days of today's date (4 July 2008)*". It is clear that this part of the order is ambiguous. The learned judge, if he meant the order to be complied with within 5 days of the date it was issued, namely, 29 November 2012, confused the order by putting the date, 4 July 2008, in brackets. The impression created is that compliance was to be calculated from 4 July 2008 as opposed to 29 November 2012. I am of the view that 4 July 2008 was included in the order *ex abundante cautela* to leave no doubt that it was the date from which the *dies induciae* was to be reckoned. From requirements of the law, it can be gleaned that the order granted by MUSAKWA J and whose enforcement is sought, should be one which is capable of compliance. In my view, the issue is not merely that an order was granted and was not complied with. Rather, it is whether the order can be complied with in the form it is in. It must be recalled that civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. Therefore, if an order cannot be complied with, there can be no contempt to talk about and, *a fortiori*, nothing to compel. I am mindful of the principle of law which says *lex non cogit ad impossibilia* (i.e. the law does not punish that which is impossible to perform).

In my view, the respondent's argument is understandable. This is the kind of order which could have been corrected or amended via the mechanism of r 449 of the old High Court Rules. As this was not done, the order as currently worded is impossible to comply with. The explanation proffered by the respondent effectively means that he was not in wilful default, and the order of committal to prison is not merited. As I have come to the conclusion that failure to abide by the order was not the result of a deliberate disdain for an order of the court, in the exercise of my discretion, I will not award costs to any of the parties.

Disposition

In the result, the application is dismissed with each party bearing its own costs.

Mtewa and Nyambirai, applicant's legal practitioners
Magwaliba and Kwirira, respondent's legal practitioners