

COMMISSIONER GENERAL OF POLICE

Versus

FARAI BASIL NYAPOKOTO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 5 MARCH AND 14 MARCH 2013

Mr R.M Basera for the applicant
Mr T. Muganyi for the respondent

Urgent Chamber Application

MAKONESE J: On the 26th February 2013 the Applicant filed an Urgent Application seeking the following relief:

“(a) **TERMS OF FINAL ORDER SOUGHT**

That you should show cause to this Honourable court why a final order should not be made in the following terms:

- (i) Execution of judgment handed down in case No. HC 851/11 be and is hereby stayed until finalisation of the application for rescission which is still pending under case number HC 851/11.
- (b) **INTERIM RELIEF GRANTED**
 - (i) Pending finalisation of this matter, the writ of execution granted, dated 21 December 2011 be and is hereby rescinded.”

I heard argument in this matter in chambers and dismissed the application with costs on an attorney and scale. I indicated that my full reasons would follow. These are my reasons.

Background

It is essential to briefly outline the background of this matter before dealing with the issues raised in the Urgent Chamber Application. On 16th June 2011 the Respondent obtained default judgment against nine defendants under case number HC 851/11. In that matter the

first and second Defendants are the Co-Ministers of Home Affairs, the third Defendant is the Commissioner General of Police, the fourth Defendant is Superintendent Pilate Moyo (Officer Commanding Camps, Bulawayo), the fifth Defendant is Chief Superintendent Nkomo (Criminal Investigation Department, Bulawayo), sixth Defendant is Detective Inspector Jefias Sibanda, the seventh Defendant is Detective Assistant Inspector Sibanda, eighth Defendant is Detective Constable Mugabe and the ninth Defendant is cited as Constable Shoko.

The basis of the Respondent's claims against the nine Defendants arose out of incident which occurred around 10th March 2010 at Criminal Investigation Department Homicide, Bulawayo. The Respondent's version of events as set out in his declaration is that on or about the 10th March 2010 he and other police officers acting on the instructions of their superiors were instructed to cover up a murder case involving a suspect which occurred at Criminal Investigation Department Homicide. The Respondent states that they were instructed to go and stage manage a shoot out of two suspected armed robbers who had died in police custody. As a result of the death of the suspects an inquest was opened. On the 9th of July 2010 and at Tredgold Building in the Bulawayo Magistrate court, the Respondent testified during the inquest and gave details regarding the stage-managed shoot out. Soon after giving evidence the Respondent was approached by five police officers including 8th and 9th Defendants referred to above, who assaulted him in public before handcuffing him. Respondent was taken into police custody from the 9th to the 12th July 2010, and charges of perjury were laid against him. Respondent was released on bail on 14th July 2010. Respondent was then immediately evicted from his police living quarters. The Respondent was discharged from the Police force.

It is common cause that the Defendants did not enter an appearance to defend the Respondent's claims and judgment was accordingly granted by the Honourable KAMOCHA J on the 16th June 2011, in the following terms:

"IT IS ORDERED THAT:

- (a) *Payment of US\$6400 being legal costs incurred in trying to find justice in his matters.*
- (b) *payment of US\$50 000 being general damages for pain, shock and suffering and contumella, depreciation of liberty, mental trauma, assault and humiliation*

plaintiff suffered as a result of the malicious arrest detention, prosecution and unlawful eviction.

- (c) interest at the prescribed rate from date of issue of summons to date of final payment.*
- (d) costs of suit."*

In a bid to enforce the default judgment and recover the sums of money awarded to him, the Respondent issued a Writ of Execution against Immovable Property on the 21st December 2011. It is the enforcement of this Writ of Execution which has resulted in what can only be described as a cat-and-mouse game between the Respondent and the Applicant and his officers.

On 29th November 2011, almost five months after the default judgment was granted, the Applicant filed an Application for Rescission of Judgment under case No. HC 3527/11. The application was opposed on the basis that it was filed way out of time and there was no application for condonation for the late filing of the application for rescission of judgment. It would seem that the Applicant has still not pursued the application for rescission of judgment for reasons that are not entirely clear.

On the 8th of May 2012 the Respondent filed an Application seeking an order for contempt of court. In his founding Affidavit, the Respondent avers that on the 10th January 2012 the Deputy Sheriff had proceeded to number 208 L. Takawira Avenue, being the residence of Superintendent Pilate Moyo, where he had placed under judicial attachment several of his movables in terms of the Writ of Execution. The date of removal was set for the 13th January 2012. On the 15th February 2012 the Deputy Sheriff's assistants returned to Superintendent Pilate Moyo's residence to remove the attached property. The removal was abortive and Superintendent Pilate Moyo threatened to kill the Deputy Sheriff's assistants. The Respondent complained in his Founding Affidavit that the conduct of Superintendent Pilate Moyo and the other Defendants was a flagrant disregard of a court order and contemptuous of this court. Further attempts to execute the court order against the other defendants cited on the Writ of Execution was also met with resistance and there was violent obstruction of the Deputy Sheriff and his assistants in the execution of his duties. The Respondent therefore, sought an order

declaring, the defendants to be in contempt of court and that they be logged at the nearest prison for a period not exceeding 90 days or until such time as they purge their contempt.

On the 7th February 2013 the Honourable CHEDA J, issued the following order:

“IT IS ORDERED THAT

1. *1ST Respondent be and is hereby declared to be in contempt of court.*
2. *The Deputy Sheriff be and is hereby authorised and directed to apprehend the 1st Respondent, Superintendent Pilate Moyo with the assistance of Senior Assistant Commissioner Mutamba, the officer Commanding, Bulawayo Province or his Assistant and lodge him to the nearest prison and this shall be your warrant*
3. *The officer-in-charge of the Prison shall detain the 1st Respondent for a period not exceeding (90) ninety days on until such time they purge their contempt and this shall be his warrant.*
4. *The 1st Respondent pay costs of this application on an attorney and client scale.”*

Armed with Honourable CHEDA J’s court order dated 7th February for contempt of court, the Respondent made an attempt to enforce the said order. What transpired thereafter is best summarised by a letter from Respondent’s legal Practitioners, dated 22 February 2013 and addressed to Senior Assistant Commissioner Mutamba. The contents of the letter are as follows:

**The Senior Assistant Commissioner S. Mutamba
Officer Commanding Bulawayo Province
Provincial Headquarters
Bulawayo**

Dear Sirs,

RE: COMPLAINT: DENIAL OF THE DEPUTY SHERIFF AND OURSELVES FROM ENTRY INTO ROSE CAMP PROVINCIAL HEADQUARTERS

On Tuesday the 19th of February 2013 the Deputy Sheriff called at your office in a bid to serve you with a court order. The said court order has directed you or your Assistant to assist in the apprehension of Superintendent Pilate Moyo for contempt of court. You were said not to be in the office. The deputy Sheriff was told to call back later.

The Deputy Sheriff could not come back on this day. We accompanied the Deputy Sheriff and got to your office some few minutes after eight in the morning of the 20th

of February 2013. The Chief Clerk, who identified himself as Inspector Charles Machingura, advised that you were out and had gone to Harare on duty.

We requested to see your Assistant, Assistant Commissioner Gora, who was present. We were advised by the same Chief Clerk that he was in a briefing which was to take about an hour. We waited, to the Chief Clerk's full knowledge. We noted that we had been ignored as none was informing us of what was happening. We then checked with the Chief Clerk who this time told us that Assistant Commissioner Gora finished briefing and had gone for sports and that we were not going to see him. The Deputy Sheriff and ourselves would not understand it. The Chief Clerk simply told us to come back at 14:00 hours. The Deputy Sheriff requested if he could go and see him from the grounds next to your offices. He was told that that was not possible.

This is the time our Mr Bukuta called you on your cellphone for assistance. For sure, there was slight movement. After talking to you the Chief Clerk emerged from his office to which he repeated that Assistant Commissioner Gora was still not in but had requested that he (Chief Clerk) read the contents of the court order to him (the Assistant Commissioner) over the phone. Though the Deputy Sheriff and ourselves suspected that the Assistant Commissioner was simply trying to avoid us, the Deputy Sheriff gave the Chief Clerk a copy of the court record. He came back later saying Assistant Commissioner Gora insisted we should see him at 14:00 hours. We all knew that the Chief Clerk only wanted to take photocopies from the record. This is not an issue as the court order even without taking a photocopy from the Deputy Sheriff, is in the public domain. The court record from which we uplifted a copy from the High Court is a public record.

Whilst we were still waiting at your office we actually saw Superintendent Pilate Moyo driving in a not so good looking official Mazda pickup truck. He emerged from his office, drove down into the residential area, round the flats, to the road on the eastern side of your driving school yard out of the gate and turned left into Basch street. As he was avoiding us by the main parking.

We were back at your office at 14:00 hours to see Assistant Commissioner Gora as he had promised. To our surprise him together with the Chief Clerk were said to be away on sports. Though we queried as to why Assistant Commissioner Gora, with full knowledge that we were coming with the Deputy Sheriff decided to go away. We drove out briefly and our Mr. Muganyi phoned and spoke to Assistant Commissioner Gora on his cellphone. Assistant Commissioner Gora promised to phone back shortly. We decided to wait for Assistant Commissioner Gora's call at his office.

This is the time when all hell broke loose. Our efforts to drive back to your office to see Assistant Commissioner Gora was thwarted by Sergeant Major Zhou L. Who

seemingly was waiting for us. He told us that we were not allowed in to your offices, Provincial Headquarters, Bulawayo Province. No satisfactory explanation was given.

There we were the Deputy Sheriff and ourselves got stuck and had to leave. We could not force our way through the gate.

The court order, as you are now fully aware, copy attached, is for you or your Assistant to assist the Deputy Sheriff to apprehend Superintendent Pilate Moyo for contempt of Court. The Deputy Sheriff was refused entrance or access to your offices. We view this as a flagrant and brazen disregard of a court order and an obstruction of the Deputy Sheriff from carrying out his lawful duties as mandated by the High Court of Zimbabwe.

This is therefore our official complaint to you as the most Senior Police officer who is commanding Bulawayo Province. You are required to assist not only as the most senior officer, but as directed by the Honourable Court.

On this note we ask for an immediate appointment to see you in connection with this matter. In the event that we do not manage to meet you by close of business on Monday the 25th of February 2013 then it is our client's conclusion that no help is going to come from your office. Our client will be left with no choice but to approach your superiors and/or approach the Honourable Court on an urgent basis for an appropriate order against whoever we think is denying him justice, and whoever is harbouring Superintendent Pilate Moyo, Officer Commanding Camps and against all those who still believe that the police is above the jurisdiction of the High Court jointly and severally in their personal capacities. The treatment your office gave displays the highest levels of unprofessionalism. The same conduct that led to this order we seek to enforce was the conduct your good offices displayed.

We await to hear from you shortly.

Yours faithfully
(signed)
Dube-Banda, Nzarayapenga and partners
c.c The Registrar
High Court
Ref (HC 1444/12)".

On 26th February 2013 the Applicant in the present application, the Commissioner General of Police filed an Urgent Chamber Application seeking the following relief:

“(a) TERMS OF FINAL ORDER SOUGHT

That you should show cause to this Honourable Court why a final order should not be made in the following terms:

- (i) Execution of judgment handed down in case No. HC 851/11 be and is hereby stayed until finalisation of the application for rescission which is still pending under case No. HC 851/11.
- (b) **INTERIM RELIEF GRANTED**
 - (i) Pending finalisation of this matter, the writ of execution granted, dated 21 December 2001 be and is hereby rescinded.”

The urgent Application for stay of execution was filed by the Commissioner General of Police as the Applicant. He avers that he is vicariously liable for actions of his officers, which actions are done during the course of employment. He further avers that the Respondent should have sought recourse against the Commissioner General in his official capacity instead of executing it against a mere police officer who is executing his duties. The Applicant seeks an order staying execution and “rescinding the Writ of Execution.”

The Respondent has opposed the Urgent Chamber Application and has raised several points *in limine*. The issues are dealt with *in seriatim*.

1. **Urgency**

Respondent contends that there is no urgency in the matter in that default judgment was obtained on 16th June 2011 and application for rescission of judgment was only filed on the 29th November 2011. There was no application for condonation for late filing of the application for rescission of judgment and there are no prospects of success for the application. When the parties appeared before me Mr *Bhasera* who appeared on behalf of the Applicant properly conceded that there was no urgency established. The urgency it was noted only arose when there were attempts to enforce the orders of the court. In any event the order being contested is not against the Applicant. The order for contempt of court was made against Superintendent Pilate Moyo. The Urgent Application by Applicant is therefore clearly misplaced under the circumstances.

2. **No matter before the court**

The Respondent contends that the Founding Affidavit sworn to by Joseph Mumbengegwi who is not a party to the proceedings effectively means that there is no application before the court.

I cannot agree with that proposition. Mr Mumbengegwi is a law officer who is acting under the instruction of the Applicant. He has averred that he has been authorised to swear positively to the facts and that he is acquainted with the facts of the matter. I am of the view that this point *in limine* cannot be sustained see *Zimbabwe v Trust Finance Ltd and Another* 2006 (2) ZLR 404

3. **Dirty Hands.**

The Applicant is a party to the proceedings still pending in court. The Applicant purports to assume liability of a party who is in contempt of a court order. The Applicant cannot be heard until he has purged his contempt. There is clear evidence that the court order has been ignored and violated by the Applicant and his officers. It is abundantly clear that the conduct of the Applicant and Superintendent Pilate Moyo shows a flagrant disregard of a lawful order of the court. The level of defiance to the court order is in my view, not expected of law officers. If police officers violate court orders deliberately and knowingly, then there is likely to be a breakdown of law and order. The Applicant should not be seen to be actively encouraging and aiding in the violation of orders of this court. The court frowns upon such conduct. I have no doubt, therefore, that the Applicant is approaching the court with dirty hands. On this basis alone he should not be heard by the court until he purges his contempt. See the case of *Samudzimu v Ngwenya* 2008 (2) ZLR 228.

The principle that a litigant who has dirty hands should be denied audience in the halls of justice was expressed by BARTLETT J in the case of, *Deputy Sheriff, Harare v Mahleza and another* 1997 (2)ZLR 425 at page 426 where he stated as follows:

“people are not allowed to come to court seeking the court’s assistance if they are guilty of probity or honesty in respect of the circumstances which cause them to seek relief from court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant

with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

The same principle was adopted by CHIDYAUŠIKU CJ in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's office and others* SC 20/03. The learned CHIEF JUSTICE stated at page 11 of the cyclostyled judgment as follows:

"The court will not grant relief to a litigant with dirty hands in the absence of good cause shown or until such defiance or contempt has been purged."

Mr *Muganyi* for the Respondent contended that the Applicant was persisting with the defiance of the court orders and had been extremely violent against the Deputy Sheriff and his assistants. This assertion has not been denied by Mr *Bhasera* appearing for the Applicant.

I am satisfied therefore that the preliminary points raised by the Respondent in this matter are meritorious. The urgency referred to by the Applicant is certainly self-created. No reasonable explanation has been advanced for the failure to comply with the court order of KAMOCHA J, dated 16th June 2011 and that of CHEDA J, dated 7th February 2013. The Application for rescission of judgment was made out of time and there was no application for condonation for the late filing of that application. The application for rescission of judgment is fatally defective and no attempt has been made to rectify the defect. Further, the Applicant's hands are not clean. The court cannot assist the Applicant to defy court orders. The Applicant's conduct shows that he has no intention of respecting orders lawfully issued by the court and he must purge his contempt if he is to seek the court's indulgence.

For these reasons, I upheld the preliminary points raised by the Respondent and accordingly dismissed the application with costs on an attorney and client scale.

*Civil Division, Attorney General's Office, applicant's legal practitioners
Dube-Banda, Nzarayapenga and partners, defendant's legal practitioners*

Judgment NO. HB 59/13
Case No. HC 496/13
Xref No. HC 1444/12, 851/11, 3527/11