

KNOWE RESIDENTS AND RATEPAYERS ASSOCIATION
versus
EDDIES PFUGARI (PRIVATE) LIMITED
and
EDWARD NYANYIWA
and
NORTON TOWN COUNCIL
and
THE REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 10 & 11 July 2017 & 03 July 2019

Civil trial

V. Tongoona, for the plaintiff
T. W. Nyamakura, for the 1st & 2nd defendants

FOROMA J: This matter was originally filed as court application for contempt of court and ancillary relief. BERE J as he then was referred the matter to trial.

At the pre-trial conference held before MAKONI J as she then was the issues were agreed upon as follows

- (1) Whether or not the first and second defendants are in contempt of court in respect of the order granted in HC 2887/05 and confirmed in SC 37/09 and if so the appropriate remedy and
- (2) Whether the defendants should pay the costs of suit on a legal practitioner client scale.

The burden proof was agreed to be on the plaintiff.

The relevant factual background to this dispute can best be summarised as indicated herein below.

The plaintiff a group of residents of Knowe Housing Development. Each member of the Group purchased an undeveloped stand from the first defendant a duly registered company whose business was a developing and selling residential stands on the property owned by the first defendant which had obtained a permit from Norton Town Council as the Local Authority

to develop a portion of a farm known as sub-division of Lot 2 of Knowe Hartley District as a housing project. The permit obliged the first defendant to service the area concerned in order to provide tarred roads proper drainage reticulated water supplied to all stands and sanitary systems.

As a result of the plaintiff's membership's disgruntlement with the first defendant's failure to fulfil the terms of the permit which the defendant had agreed to comply with when it sold the unserviced stands to plaintiff they sued defendant in the High Court for specific performance. GUVAVA J as she then was presided over the dispute and handed down the following order

1. The first respondent be and is hereby ordered to fully service the residential area in phase 1 of the Knowe Housing Development in Norton within 90 days of this order. In particular the first respondent shall provide the following services
 - (a) Ensure that reticulated water supplies are connected to all stands.
 - (b) Ensure that sanitary systems are connected
 - (c) Ensure that proper drainage systems are put in place and
 - (d) Ensure that roads are properly tarred.
2. The first respondent shall pay the costs of suit.

It is common cause that the first defendant appealed the decision of the High Court to the Supreme Court and lost the appeal which was dismissed with costs.

Despite dismissal of its appeal the first defendant did not comply with the High Court order. Consequent upon the said default plaintiff instituted contempt of court proceedings against the first defendant and the second defendant which is its Managing Director.

The contempt of court proceedings which plaintiff instituted are the subject of this matter which the defendants defended.

The contempt of court proceedings were instituted as a court application which BERE J as he then was referred to trial for resolution; with the court application and founding affidavit standing as the summons and opposing affidavit standing as the appearance to defend. Pursuant to the order of BERE J referring the matter to trial plaintiff filed a declaration and defendants filed a plea. In their joint plea the first and second defendants denied being in contempt of court and averred that the order plaintiff sought had been over taken by events in that the defendants had already constructed infrastructure described in the declaration which was the subject of the High Court order of GUVAVA J. It is clear from the defendants' plea that the defendants adopted the position that by the time that the plaintiff instituted HC 2887/05 the infrastructure forming

the subject of contempt of court proceedings was already in place thus suggesting there was nothing further to be done to comply with GUVAVA J's order. This was mischievous as in essence defendants were clearly arguing that the court's judgement was ill advised and would not be complied with.

That the defendants displayed contemptuous mischief is supported by the fact that before the trial of this matter the parties filed a joint statement of agreed facts in which the first and second defendants conceded that after the judgment of the Supreme Court dismissing defendant's appeal with costs no further development work was done by first defendant in respect of Knowe Phase 1 in terms of the order of GUVAVA J of the 12 September 2007.

As a result of the concession that no further construction/development work was done post the Supreme court dismissal of the first and second defendant's appeal the factual position that defendants had not complied with the order of GUVAVA J became irrevocably established. For this reason the parties then agreed in the statement of agreed facts to refer the only issue to trial as "whether or not non-compliance with the order of the High Court handed down by GUVAVA J was (1) willful and *malafide*?"

At the commencement of the trial the duty to begin was agreed to be on the Defendants as clearly the onus had shifted as a result of the filling of the statement of agreed facts namely para 3. The trial accordingly proceeded with defendants calling upon the second Defendant. I must say the calling of the second defendant was not only ill advised but a clear demonstration by the defendants of their persistence with contempt. This unrepentant attitude is clearly demonstrated by the fact that both defendants admitted the contents of a report prepared by an Engineer one Dr Diarra which vindicated the findings and order of GUVAVA J. The said engineer prepared the report after an inspection in loco conducted by the said engineer and witnessed by the parties' legal representatives. Dr Diarra's report which was admitted by the Defendants highlighted the areas or aspects which GUVAVA J found and ordered as requiring attention in order for the defendants to complete servicing of Knowe Phase 1.

The defendants determined that they did not agree with the judgment of GUVAVA J hence their an appeal against the said judgment. This they were entitled to do. However when their appeal was dismissed by the Supreme Court it was incumbent upon them to abide and comply with the order of the High Court. Any suggestion by the first and second defendants that there was nothing needing further attention despite confirmation of the High Court Order by the Supreme Court on appeal was a contemptuous, wilful and *mala fide* disregard, of a court order which remained extant.

The Defendants' *mala fides* is clearly demonstrated by their plea where in they plead that the judgment of GUVAVA J had in fact been overtaken by events that took place before instituting HC 2887/05.

For these reasons I dismiss unreservedly the evidence put forward by defendants seeking to excuse their contempt as totally without merit and also a further demonstration by the defendants of their determination to persist with their contemptuous conduct. The law regarding the need to comply with court orders which a party disagrees with is very clear- it is that in general all orders of court whether correctly or incorrectly granted have to be obeyed until they are properly set aside – *Culverwell v Berra 1992 (4) SA 490 (W)*

There is clearly no excuse *in casu* for non- compliance with the High Court order. The argument that the Defendants were not *mala fide* in failing to comply with the High Court order is lame and spurious in that not only is it not borne out by the defendants plea but is directly discredited by the plea which suggests that there was nothing further to be done. As indicated herein above the defendants admitted the report prepared by Dr Diarra at the parties joint request which unequivocally highlighted aspects requiring attention which were on all fours with what GUVAVA J had ordered as highlighted above. In the circumstances Defendants' contempt is found to have been both willful and *mala fide*- See *Haddow v Haddow 1974 IRLR 5* and *Mukambirwa and others v The Gospel of God Church international 1932 SC-8-14*. It is clear that the plaintiff has established the requirements of contempt of court beyond reasonable doubt.

Re: Costs

Given the attitude of the defendants as found namely that they regarded themselves as excused from complying with a judgment they disagreed with and further that they had no justifiable excuse for persisting with their contemptuous conduct after their appeal had been dismissed by the Supreme Court, I find that a punitive of costs is justified against both of them.

It is accordingly ordered that:

- (1) First and second defendants are hereby declared to be guilty of contempt of this court
- (2) First defendant is hereby sentenced to a fine of Two Thousand United States Dollars (US\$2 000) for contempt of court.
- (3) Second defendant is sentenced to 90 days imprisonment the whole of which is suspended on condition that first defendant performs its obligations as ordered by this court in HC 2887/05 to the satisfaction of Norton Town Council as the

local authority which satisfaction shall be evidenced by the issue of an appropriate certificate of compliance.

- (4) First and second defendants pay plaintiff's costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved.

Mapondera & Company, plaintiff's legal practitioners
Mtewa & Nyambirai, for the 1st & 2nd Defendants legal practitioners