Judgment No. HB 78/2003
Case No. HC 1169/2003

DR ADOLF MACHEKA

Versus

LETINA TITITI MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 JUNE AND 10 JULY 2003

C P Moyo for the applicant
Makonese with Ms P Rusike for the respondent

Urgent Application

NDOU J: On 21 May 2003 in HC 986-03 my brother CHIWESHE J, granted an *ex parte* order in favour of the applicant for the return of his goods that had allegedly been removed from his home by the respondent within 24 hours of the service at the said order. The said order was properly served on the respondent on 22 May 2003.

The respondent has not taken any steps to have the said order set aside. Having obtained a judgment in his favour, the applicant wants to obtain satisfaction of it from the respondent. A judgment, as the one *in casu*, ordering the debtor to do or to refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, not by execution against his property – see J*eanes* v J*eanes and Ano* 1977(2) SA 703 at 705 F-G and *Food & Allied Workers Union* v *Sanrio Fruits CC & Ors* 1994(2) SA 486(T).

It is common cause that the respondent did not return the property identified in the order within 24 hours of service of the court order on her. A month later she still has not complied with the order. The question is whether the respondent is in contempt of this court. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court – see *Holtz* v *Douglas & Associates (OFS) CC en Andere* 1991(2) SA 797(O) at 802C and *The Civil Practice of the Supreme Court of South Africa* (4th Ed) by L Van Winsen, AC Cilliers and C Loots at page 815. It is trite that the principal object of civil contempt proceedings is to compel, by means of personal attachment and committal to goal, the performance of the court's order, the imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations in *Haddow* v *Haddow* 1974(2) SA 181 (SR); *Naidu & Ors* v *Naidoo & Ano* 1993(4) SA 542(D) at 544 J and *Harare West Rural Council* v *Sabawu* 1985(1) ZLR 179 (HC). A court, however, is loath to restrict the personal liberty of the individual in matters of this kind – *Protea Holdings Ltd* v *Wriwt & Anor* 1978(3) SA 865(W) at 872B. Committal to goal is a very severe and rigorous way of achieving performance in respect of a civil order of the court and should not lightly be resorted to. When resorted to, committal achieves two objectives, namely, firstly, enforcing compliance and, secondly, protecting and upholding the dignity and respect of the court. In respect of latter objective, the applicant acts an informer who brings the contempt to the attention of the court – see *Naude en 'n Ander* v *Searle* 1970(1) SA SA 388 (O); *Cape Time Limited* v *Union Trades Directors (Pty) Ltd and Ors* 1956(1) SA 105(N) at 124E and 126B and *Scheeltie King Mining Co (Pvt) Ltd* v *Mahachi* 1998(1) ZLR 173(H) at 178.

Before holding the respondent to have been in contempt of court, it is necessary for me to be satisfied both that the order was not complied with and that the non-compliance was wilful on her part – *Lindsay* v *Lindsay* 1995(1) ZLR 296 (S) at 299B.

In casu, the court order requires the respondent to return the applicant's listed property within 24 hours of the service of the order. The order was properly served on her on 22 May 2003. By the time these proceedings were launched on 18 June 2003, the respondent had not returned the property subject matter of the proceedings. She has not taken any steps to assail the said order. So she has clearly not complied with the order. The only issue left is whether she did so wilfully. ROME LJ in *Hadkinson* v *Hadkinsn* [1952] 2 ALL ER 567 (CA) stated:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged … The first is that anyone who disobeys an order of the court … is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained until he has purged himself of his contempt."

This approach was followed in our jurisdiction – see Allan v Allan 1959(3) SA 473 (SR) and *Sabawu* v *Harare West Rural Council* 1989(1) ZLR 47 (HC). The second consequence authored by ROME LJ *(supra)* does not arise in this case as the applicant submitted that he does not object to the respondent being heard. In the circumstances I exercised my discretion in favour of her being heard. In any event even if the concession was not made by applicant I am of the view that in exercising such a discretion a court should not lightly deprive a party of his right to be heard. As admirably pointed out by DENNING LJ in the *Hadkinson* case *(supra)*-

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by a grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance" – see also *Jackman* v *Jackman* 1969(2) RLR 534 (GD)

In the present case the respondent has given the reason that she did not remove the property in question from the applicant's residence. In her opposing papers she has made a bare denial of taking, and having, in her custody the property in question. In these proceedings the applicant has filed a supporting affidavit of the parties' neighbour one Ms Charlene McKop. The main thrust of her evidence is that she went to applicant's house and saw three men busy loading furniture into a white Mazda van. The respondent's Nissan Sunny vehicle was also in the yard. The Mazda drove away and soon thereafter the respondent drove out in her Nissan Sunny. She stopped the respondent and spoke to her. The respondent was with her daughter. She observed that the respondent had some property on the backseat of her vehicle and she managed to recall a cellular phone set and a heater. Respondent had many other things in the vehicle. The respondent told her about the altercation that she had had with the applicant. It seems to me that this is the only explanation for the disappearance of the property. At a later stage the respondent returned the cellular phone to the applicant at Donnington Police. She does not proffer any explanation on how the property of this kind disappeared. What seems beyond dispute is that after the altercation between the parties. The respondent remained in the house. This is clear from her opposing affidavit in paragraph 3 (C) and 3 (d) where she states –

> 3(c) "I never saw the deponent in my yard. There was no Mazda pick up truck …
> 3(d) This never happened because there was no truck in my yard."

Bearing in mind that property included a fridge, sound system, 34 inch television set, a table and chairs, microwave over, car fridge etc one requires at least a truck to transport the same. She remained in the house. This property went missing. She cannot explain how it went missing. She is adamant that there was no Mazda truck/van in the yard. She can only be sure if she was present. It is apparent that the property was taken in her presence. She is not being candid in this regard when she ventured some attempt at explanation. Her explanation is generally unsatisfactory and does not withstand scrutiny. *Mr Makonese*, her legal practitioner, did not help her situation either. In his submissions at chambers he dwelt more on the marginal issues which are not contained in the opposing affidavit and papers. One such issue is the ethical conduct of the applicant's legal practitioner *Mr Moyo*. This tended to cloud the issue of contempt. I will deal with this issue later. In the circumstances, the wilfulness of the respondent is, in my view, indisputable. If her protestations of good faith were true then her explanation would have clearly and factually shown where she was when the property was taken and why she is not aware who took such bulky property in broad daylight without people noticing. The respondent, who had the benefit of professional legal advice throughout, understood the order granted by CHIWESHE J. She deliberately and knowingly disregarded it. The requisites for granting an order for committal exist in this case. First, an order ad *factum prastandum* (i.e. an order to do, or abstain from doing a particular act, or to deliver a thing) was granted against the respondent. This is common cause. Second, it is common cause that the respondent was served with order. Third, it is common cause that the respondent either disobeyed the order or neglected to comply with it. As

alluded above, in general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside – see *Culverwell* v *Beira* 1992(4) SA 490 (W). In my view, the onus is on the applicant to show a disobedience of the court's order. He has discharged this onus. That being the case wilfulness is in such circumstances, inferred and the onus is now on the respondent to rebut the inference of unwilfulness on a balance of probabilities. The latter onus is on the respondent because as a defaulting or intransigent party, she must by such default be regarded as having intended the natural consequences of her action, i.e. to bring the administration of justice into contempt – *Haddon* v *Haddon (supra)*; *Consolidated Fish Distributors (Pty) Ltd* v *Zive & Ors* 1968(2) SA 517(C) at 522H; *Culverwell* v *Beira (supra)* *Wickee* v *Wickee* 1929 WLD 145 at 148 and V*an Biljon* v *Van Biljon* 1960(1) PH F 28(O).

From her opposing papers, the respondent is relying on inability to comply with the order in that she does not have the goods she was ordered to return. In my view, proven inability to comply with the court's order affords a respondent protection against a committal for contempt – *Cambell* v *Herbert* (1980) 18 CTR 22. From what I highlighted above, the respondent has failed to discharge the onus on her. She has failed to establish that she is unable to comply with court order. The evidence shows that she was instrumental in the removal of the property. She is in a position to comply with the order and it is expected of her to do so. She should not be allowed to defy the law. In this regard GREENLAND J, in *Sabawu* v *Harare West Rural Council (supra)* at 51B-D stated –

> "To my mind, the fact that the applicant has succeeded in defying the law and the High Court over a period … does prejudice justice in an insidious way. It tends to subvert the psychological bond that exists between the law giver and the subjects of the realm. People in general accept the law and submit to its dictates and circumscriptions in the knowledge that such submission ensures peace and good order. What they do demand is equality before the law as being the guarantee of sacred human rights. Actions such as those by the applicant, in which a subject sets himself outside or above the law, prejudices this relationship, if only for the reason that other persons are then entitled to question why they should be expected to be law abiding. He is demonstrating to the world his ability not only to defy the law but to emasculate the court's power to enforce its orders. Success in this stance makes a mockery of the law and tends to bring the administration of justice into disrepute. It also subverts the state's power over its subjects to ensure compliance with its laws via the court which is the state's constitutional vehicle for enforcement."

I am, therefore, satisfied that the respondent's disobedience of the order of this court is not only wilful but also *mala fide.* The origin of her conduct can be traced in her fear of not getting any matrimonial property as their relationship is for all intents and purposes dead. There is no registered marriage between the parties and in her papers she went all out to establish that she was not the applicant's girlfriend but his customary law wife. Her position does not look very bright in absence of a registered marriage and the fear for losing out on assets is understandable. Defying the law, however, is not the solution. She has to go and establish her status as a common law wife in court and thereafter benefit from the share of matrimonial property. Self help cannot be condoned even in such circumstances. People have to assert their rights through lawful means.

Before I grant the order I propose to deal with the issue of *Mr Moyo*'s ethical conduct. *Mr Makonese*'s attempts at assailing *Mr Moyo*'s ethical conduct is lacking articulation. After questioning him I was able to discern the following. First, the respondent wanted *Mr Moyo* to declare his "interest" in the matter. Second, *Mr Moyo*'s attitude was no consistent with the achievement of reconciliation of the

parties. Third, that *Mr Moyo* socialises with applicant. A lot of allegations were thrown around. I will deal with material issues raised in turn.

First, the fact that *Mr Moyo* was involved in other matters involving the parties and the applicant and other parties is not a bar for him to appear for the applicant in this matter. Second, there is nothing wrong *per se* in a legal practitioner advising a client in the termination of a relationship. *Mr Makonese* should know better that the communication between *Mr Moyo* and his client, the applicant is privileged. Third, the fact that *Mr Moyo* socialises with the applicant is not a problem as such. Although the nature of such socialisation may, in some instances, not be ethically desirable. From what was submitted there is some cause for concern here. Although it did not come out that clearly it seems beyond dispute that *Mr Moyo* knows the applicant socially. He also stated that he dealt with him in his divorce two years ago. When the relationship between the parties *in casu*, started having problems he tried to "resolve" the problems. It is not clear whether he was trying to resolve in his capacity as a friend or as applicant's legal practitioner. I would, however, point out that if *Mr Moyo* mediated between the parties as a mutual friend is would be ethically wrong for him to later appear for one of the parties in legal proceedings involving the same dispute. The other issue raised related to a different matter between the parties. *Mr Moyo* drafted an affidavit of withdrawal on behalf of the applicant. He signed the affidavit as a Commissioner of Oaths. This, in my view, is clearly wrong. Most of these allegations were raised during the application for committal for contempt. They are not relevant to the issue before me. As I understand it, *Mr Makonese*, brought this to my attention as a concerned officer of this court and not in order to cloud the issue of the contempt committal by his client. It would, in any event, be unethical for *Mr*

Makonese to do the latter. The Registrar will forward a copy of the judgment to the Law Society for these issues to be looked into properly.

Coming back to the main issue, I am satisfied that the order sought is merited and I therefore grant the order in terms of the amended draft.

Majoko & Majoko applicant's legal practitioners
Makonese & Partners respondent's legal practitioners