Judgment No. HB 41/2004
Case No. HC 682/2002

SAMUEL KNOT CAWOOD

And

CAWOOD CATTLE COMPANY

Versus

DR M B MANGENA

And

DR D N NDLOVU

And

COMMISSIONER OF POLICE

And

OFFICER-IN-CHARGE, BEITBRIDGE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 FEBRUARY 2003 & 1 APRIL 2004

J Tshuma for the applicants
S Mazibisa for the 1st and 2nd respondents

Opposed Application

NDOU J: In case number HC-2892/01, the applicant herein obtained an order against the respondents directing first and second respondents, *inter alia*, to remove from second applicant's properties certain livestock that had been moved onto the latter unlawfully. The provisional order was served on the first and second respondents in October 2001. In the absence of any opposition by first and/or second respondent the order was made final on 8 November 2001.

From the papers before me it is clear that the first and second respondents were made aware of the said order in HC 2892/01. The first applicant telephonically

and by letters deliberated on the execution of the order. It seems beyond dispute that the second respondent even visited the second applicant farm after the granting of the order.

The first and second respondents did nothing to comply with the said court order. The applicants have, consequently launched this application seeking that the first and second respondents be held in contempt. The question is whether first and second respondents are in contempt of this court. Civil contempt is the wilful and *mala fide* or failure to comply with an order of court – *Holtz* v *Douglas & Associates (OFS) CC en Andere* 1991 (2) SA 797 (O); *The Civil Practice of the Supreme Court of South Africa* (4th Ed) by L van Winsen, AC Cilliers & C Loots at 815; *Haddow* v *Haddow* 1974 (2) SA 181 (SR); *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H) and *Macheka* v *Moyo* HB-78-03.

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 – *Haddow* v *Haddow supra*; *Harare Waste Rural Council* v *Sabawu* 1985 (1) ZLR 179 (HC) and *Naidu & Ors* v *Naidoo & Ano* 1993 (4) SA 542 (D).

A court, however, is loath to restrict the personal liberty of the individual in matters of this kind – *Protea Holdings Ltd* v *Wriwt & Ano* 1978 (3) SA 865 (W) at 872 B. This is so because committal to goal is a very severe and rigorous way of ensuring compliance with a civil court order. When resorted to, contempt proceedings achieve two objectives, namely, firstly, enforcing compliance and secondly protecting and upholding the dignity and respect of the court. In respect of

the latter objective, the applicant acts as an informer who brings the contempt to the attention of the court – *Naude en'n Ander* v *Searle* 1970 (1) SA 388 (O) and *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi, supra.* It seems to me that this application seeks to achieve both these objectives.

Before a person can be held to be in contempt of court for failing to comply with a court order, it must be proved both that the order was not complied with and, that the non-compliance was wilful – *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi supra*; *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) at 299 B.

In *casu*, it is common cause that the order in HC 2892/01 was not complied with. That being the case, wilfulness and *mala fides* on the part of the first and second respondents is presumed, with the onus being on the latter to rebut the same – *Haddow* v *Haddow, supra*; *Gold* v *Gold* 1975 (4) SA 237 (D) at 239F-G and *Lindsay* v *Lindsay*, *supra*, at 299.

The first and second respondents' first contention is that they were unaware of the said order until they were served with the application in the present matter on or around 8 May 2002. They are not being truthful in this regard. First, they accept that they were duly served with the provisional order in October 2001. The provisional order made it quite clear that it would be confirmed unless they file opposing papers within ten (10) days of the service thereof. As they did not file any opposing papers, and, were not advised that opposing papers had been filed, they must have known that the provisional order had been made final in terms thereof.

In any event, it is apparent from the papers before me, that the first applicant did take the trouble to advise the respondent of the court order. The first and second respondents cannot, therefore, be heard to say that they were unaware of the order.

First and second respondents, further contend that it was impossible for them to comply with the order. This contention is untenable. As far as the question of authority is concerned, the mere fact that they are acting pursuant to a court order would, in itself, be sufficient to clothe them with the requisite authority. Besides, from the papers it is clear that first and second respondents had been directed by the Head of their Department, the Director of Veterinary Services, to remove from the applicants' property, all the livestock that were thereon unlawfully.

Further, in terms of section 21 of the Animal Health Act [Chapter 19:01], the first and second respondents, as "authorised persons", are empowered to:

> "… enter any land or vehicle and take with him such persons, animals, vehicles, appliances, instruments, tools, drugs and other things as he may consider necessary for the performance of his duties and there …
>
> (a) do anything which he is authorised or required to do in terms of this Act; and supervise and inspect the doing of anything which any other person is required to do in terms of this Act …?"

The removal of the said livestock, therefore, fell within the ambit of what first and second respondent s were required to do in terms of the Act. The removal from second applicant's properties of livestock that had been moved there without the requisite permit arose in the context of the outbreak of the foot-and-mouth disease. In terms of the actual physical capacity, it is evident from the papers, that the applicants were in a position to, and did offer any assistance that the respondents might have required to discharge their duties. First and second respondents chose not to take advantage of the offered assistance. Besides, first and second respondents could have sought the assistance of the Zimbabwe Republic Police. They never did so. In all the circumstances the question of impossibility of compliance with the court order does

not arise. The first and second respondents could have complied with the order had they desired to do so.

The fact that first and second respondents have applied for rescission of the said order does not absolve them from complying with the terms thereof. Whereas an appeal from a judgment of the High Court has the effect of suspending the decision appealed against, an application for rescission does not have that effect. That is, precisely, why an application for rescission is usually accompanied or preceded by an application for a stay of execution. In the circumstances, the final order of this court in HC-2892-01 remains valid and in force unless and until it is set aside, and first and second respondents are obliged to comply therewith. 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).

The applicants have discharged the onus on them and have established existence of wilful disobedience of the civil court order in HC-2892-01 by the first and second respondents. The said order still subsists. It has not been set aside or suspended. First and second respondents' duty to comply with it still subsists.

I therefore order that:

1. First and second respondents be and are hereby declared to be in contempt of this court.
2. Arising from such contempt the first and second respondents be and are hereby punished by a fine of $10 000,00 each.
3. The first and second respondents be and are hereby sentenced each to a fine of $100 000 or in default of payment a period of one month imprisonment, sentence is, however, suspended on condition that the

first and second respondents shall faithfully and dutifully comply with the order given in this court in case number HC-2892-01; and

4. The first and second respondents shall pay the costs of this application jointly and severally.

Webb, Low & Barry, applicants' legal practitioners
Cheda & Partners, first and second respondents' legal practitioners