

Judgment No. HB 39/05  
Case No. HC 613/05  
X-Ref: HC 5207/99,  
250/05, 2496/04, 1753/01,  
3386/01 & 4295/98

**VIGOUR BUSILIZWE FUYANA**

**Versus**

**NTOMBAZA MOYO AND 2 OTHERS**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 8, 12 AND 28 APRIL 2005

*S Sibanda* for applicant  
*T Moyo* for respondent

Contempt of court

**CHEDA J:** On 8 April 2005 applicant filed an urgent application seeking the following relief:

**“Interim Relief Granted**

That this order shall operate as an interim interdict until the order is confirmed and/or pending the finalisation of the Supreme Court Appeal under case number SC-236-00

1. That applicant’s obligations, in the main action, be and are hereby declared discharged.
2. That the writ of civil imprisonment be and is hereby suspended.
3. That 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby ordered to release the applicant from Bulawayo Prison.
4. That this order shall be served upon the 1<sup>st</sup> respondent by the Deputy Sheriff and upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by the applicant’s legal practitioners.”

The historical background of this matter is that applicant and respondent have had a long dispute regarding ownership of a certain house in Bulawayo. On 12 July 2002 in case HC 3385/01 this honourable court made the following order against applicant:

“It is ordered that:-

- a) First respondent be and is hereby ordered to surrender the title deeds, in respect of stand number 11747 Nkulumane suburb, Bulawayo held under deed of transfer registration 4631/98 to the Deputy Sheriff within 6 days of service of this order upon him failing which 1<sup>st</sup> respondent be and is hereby deemed to be in contempt of court and is hereby committed to Bulawayo Prison to serve a prison term of 3 months provided that at any time during his imprisonment, 1<sup>st</sup> respondent shall be entitled to his release if he complies with the High Court order in the main action.
- b) Should 1<sup>st</sup> respondent for any reason, finally fail to comply with the court order in the main action, second respondent be and is hereby directed to issue out to the Deputy Sheriff, a duplicate copy of deed of transfer registration number 4631/98 held under the name of 1<sup>st</sup> respondent, only for the purposes of transfer of the same property into the name of applicant.”

Applicant did not obey that order. First respondent subsequently took transfer of the said property by virtue of paragraph (b) of the said order. As applicant did not comply with that order, he was subsequently arrested for contempt of court and was lodged in prison which then culminated into this urgent application.

Mr *S Sibanda* for applicant has argued that applicant should be released from prison on the basis that:

1. the contempt which he had committed by refusing to transfer the Title Deed had been cured by the transfer of the property by the Deputy Sheriff; and
2. that the imprisonment does not serve any purpose at this stage as 1<sup>st</sup> respondent has now obtained her order.

Mr *Moyo* for 1<sup>st</sup> respondent has argued that applicant is in contempt and should not be heard. He further argued that applicant has sought to mislead the court in this application, firstly, by alleging that it was 1<sup>st</sup> respondent who filed application in case number 4295/98 yet he is the one who had done so and secondly

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that he had appealed against the judgment of CHEDA J (as he then was) in case number 3385/01 which in fact was not true.

There is a valid order in operation but applicant has refused to comply with it. In fact in his own words he said “I refused to surrender my Title Deeds”. It is trite law that disobedience of an order by a competent court results in contempt. In paragraph (a) of the order by CHEDA J (as he then was) it is clear that he ordered applicant to surrender the Title Deeds failing which applicant should be held in contempt. There are three requirements for contempt procedure:-

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 P/L v Zive & Others* 1968 (2) SA 517 (C) at 522.

I agree with Mr *Moyo* that a party who is in contempt should not be heard, in fact this is the law. The person remains in contempt until he purges his contempt. The court will however, follow this course in the absence of urgency, see *Clement v Clement* 1961(3) SA 861. Applicant has been arrested and is in prison. This dispute has been going on since 1998. There have been applications and counter applications. Litigations must come to finality. It is for the above reasons that I allowed applicant to be heard, thereby departing from the usual procedure.

On the merits, I find that applicant flagrantly disobeyed the order and in his own words states in his affidavit “ I refused to surrender my Title Deeds”. This is an

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open defiance of a court order. He obviously holds this court in contempt. He can not therefore seek a redress from the same court which he holds in contempt.

His argument that 1<sup>st</sup> respondent should not bother with the insistence of his incarceration because he is now in possession of the said Title Deeds is to me to miss the fundamental point in this matter. He has not obeyed the order, that is all. The alternative order was to serve a situation where applicant refuses to sign the transfer papers. This in my view, was to avoid the unnecessary delay on 1<sup>st</sup> respondent's part in executing her order. However, the matter does not end there, the court saw it fit to impose a sanction on applicant in the event of his failure for whatever reason to surrender Title Deeds. He has refused to do so, therefore, it logically follows that he should be arrested for contempt and sent to prison. For him to avoid the incarceration he should therefore surrender the Title Deeds and thereafter his cherished liberty will be restored without further ado. Mr *Sibanda*'s argument, therefore, that his imprisonment is nothing but harassment is misplaced. I should add that in addition to applicant's attitude it appears that he found solace from his legal advisers who were all the time advising him that he was correct in his defiance of a court order. I say so in reference to a letter of 30 March 2005 by Mr *Moyo* addressed to both Messrs *S K M* and *S Sibanda* where he said:

“For that reason, the writer completely disagrees with Adv. S K M Sibanda where he says a delict is being committed by Fuyana's incarceration.” (my emphasis)

It is therefore clear to me that Mr *Moyo* went to pains to explain to applicant's legal practitioners the correct legal position with regards to a contempt of court order.

This is borne out by Mr *Moyo*'s informative paragraph in the same letter where he further stated:

“Our major concern is that from our conversation it seems your client is not prepared to release the Title Deeds in spite of the fact that we have advised you that he is continuing to sell the house to various people ... We further confirm that in our conversation with Mr Sibanda yesterday, we had agreed that once the title deeds were surrendered there was no need to keep Mr Fuyana in goal.”

It is therefore clear to me that while applicant is a stubborn man his attitude was exacerbated by wrong legal advice. The correct legal position with regards to disobedience of a court order is well known by every legal practitioner. It is certainly improper for a legal practitioner to urge a litigant to defy a court order on the basis of some unfounded delictual claim. Applicant is in contempt of court and remains in that position until he purges that contempt. In as much as 1<sup>st</sup> respondent is now in possession of the new Title Deeds in her name, applicant has a duty to obey that order. In fact I do not see any reason for his refusal to do so if he is not harbouring an ulterior motive and it is those motives the court would like to curb. The said court order is absolute and it must be obeyed as it is. Defiance of that order on the basis of some misconception of the law can not be tolerated.

Applicant has applied for costs at a higher scale. The general rule is that the courts are averse in making an order for attorney and client costs. The courts have, however, departed from this general rule if there is dishonesty on the part of the losing litigant. *In casu*, applicant has been untruthful in his averments namely that it was 1<sup>st</sup> respondent who had instituted proceedings in case number 4295/98 and that he had appealed against the judgment in case number 3385/01. There is therefore an absence of *bona fides* on his part. The second justification for such departure is where the

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losing party has shown a deplorable attitude towards the court – see *Caluza v Min of Justice & Anor* 1969 (1) SA 251 (N). *In casu*, applicant having disobeyed the court order, proceeded to institute these proceedings when he knew that he had not purged his contempt. In my view, the circumstances are ripe for the award of costs on the punitive scale.

In conclusion, this application is accordingly dismissed with costs on the attorney and client scale.

*Advocate S K M Sibanda & Partners*, applicant's legal practitioners  
*Hwalima, Moyo and Associates*, respondent's legal practitioners