

Judgment No. HB 126/06
Case No. HC 2168/05
X-Ref HC 3757/04

NERANDRA KARSON MADHOO

Versus

SHADRECK MPOFU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 JULY AND 16 NOVEMBER 2006

Ms H M Moyo for the applicant
Respondent in person

Opposed Matter

NDOU J: This is an application for committal to prison of the respondent for 90 days and for his ejection from number 9 Barbour Road, Parkview, Bulawayo. Briefly, on 13 March 2003 the parties entered into a written agreement of lease in terms of which the applicant let to the respondent the aforesaid property. The lease was for a duration of six months commencing with effect from 1 April 2003 and expiring on 30 September 2003. The lease has since expired through effluxion of time.

At the expiration of the lease agreement, the respondent was given due notice to vacate the premises but refused or neglected to do so. The respondent has refused to pay any rentals for the premises with effect from March 2004 to date. The applicant instituted court proceedings against the respondent for arrear rentals and for his ejection from the said premises. The applicant successfully managed to obtain judgment against the respondent on 7 January 2005, and in pursuance of a writ of ejection issued out of the court in case number 6978/04, the respondent was evicted by the Messenger of Court from the said property and some of his property was attached and removed for sale in order to satisfy the judgment debt. After the

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eviction, the Messenger of Court duly handed the said premises to the applicant. The applicant changed all the locks and secured the premises using new locks. That same evening, the respondent went back to the said premises and unlawfully broke in and gained entry. The respondent has been in occupation since then without paying rent. The respondent has not denied that he broke locks and restored himself into the premises after being evicted by the Messenger of Court. Instead he raised a vague allegation that he bought the property from the applicant. He concedes that there is no documentation of such sale. In any event, in his own affidavit, sworn to before a commissioner of oaths on 5 July 2004 (i.e. this founding affidavit in his application for rescission) he does not base his application on the sale, but on a verbal lease. This is what he says: (page 25 on these papers)

“(2) I have reasonable grounds to defend this matter in that earlier on the expiry of my lease I entered into a verbal agreement with the first respondent forbidding me off an offer of Mr Moyo ...”

Even in his pre-trial memorandum in case number 2113/04 dated 21 June 2004 (filed on 22 June 2004) he stated:

“(3) Defendant (respondent *in casu*) prays for the said verbal lease agreement so entered between plaintiff and defendant” (emphasis added).

This has been respondent’s cause of action throughout. The sale agreement is novel issue which never formed part of the proceedings subject matter of this application. If it is new cause of action it cannot be raised at this late stage without the court’s indulgence.

In his founding affidavit in HC 3757/04 the respondent omitted to mention that he had taken the law into his own hands and resorted to self help and put himself back into the premises. What he sought in that application is stay of execution yet he

had already disregarded the eviction carried out by the Messenger of Court. In essence he sought to “regularise” what he had done via self help. It is for this reason that he did not disclose his self help antics. The non-disclosure was *mala fide*. This order in HC 3757/04 was therefore erroneously granted in the absence of the applicant. This court had the power, *mero motu*, to “correct, rescind or vary” it in terms of Order 49 Rule 449(1) of the High Court Rules, 1971. Both parties dealt with the issue in their papers in relation to paragraph 3 of the draft order. The term in paragraph 3 cannot be granted as long as the order in HC 3757/04 is still operational. I am satisfied that the order in HC 3757/04 was erroneously granted on account of the material non-disclosure by the respondent that he disregarded the eviction by the Messenger of Court and resorted to self help. It is trite law that all orders of the court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside – *Culverwell v Beira* 1992(4) SA 490 (W) and *Macheke v Moyo* HB-78-03. The applicant has discharged the onus on him by showing that the respondent’s disobedience of the court’s order. That being the case wilfulness is 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, he must by such default be regarded as having intended the natural consequences of his action i.e. to bring the administration of justice into contempt – *Haddow v Haddow* 1974(2) SA 181 (SR); *Harare West Rural Council v Sabawu* 1985(1) ZLR 179 (HC); *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Jackman v Jackman* 1969 (2) RLR 534 (GD); *Kate v MEC for Department of Welfare Eastern Cape*, 2005(1) SA 141 (SE) and *Maccsand C C v Macassar Land Claims Committee & Ors* [2005] 2 All SA 469 (SCA).

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I am satisfied that the respondent did not comply with the court order and that the non-compliance was wilful on his part. The applicant has made a case for the relief sought – *Lindsay v Lindsay* 1995 (1) ZLR 296 (S) at 299B and *Fuyana v Moyo & Ors* HB-39-05.

Accordingly, it is hereby ordered that:

1. The order of this court in HC 3757/04 of 15 February 2005 was erroneously granted and is hereby rescinded in terms of Rule 449(1).
2. The respondent be and is hereby found guilty of contempt of court and sentenced to 90 days imprisonment all of which suspended on condition that the respondent and all those claiming through him comply with writ of execution by the Messenger of Court issued out of the Magistrates' Court on 7 January 2005, i.e. if the respondent and those claiming through him do not move out of the premises known as Number 8 Barbour Road, Parkview, Bulawayo within 48 hours of the service of this order, the Messenger of Court, Bulawayo is authorised to execute the above mentioned writ of execution.
3. The respondent pays costs of this application on legal practitioner and client scale.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners