

LOVENESS SENGEREDO
versus
ERIC CABLE N.O.

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 20 March and 2 April 2008.

Opposed Application

Mr S Tsauryi, for applicant,
Mr S Chatsanga, for respondent.

MAKARAU JP: On 12 September 2006, the applicant obtained an order from this court compelling Africa International Removals to pay her the sum of \$4 441 841, 67 together with interest thereon, to deliver to her vehicle and a mobile phone together with a line for use in that phone. A warrant of execution was taken out against the defendant and some vehicles belonging to the defendant were attached in execution. A few days after the attachment, the defendant paid the amount levied on the warrant in full. The motor vehicle and the mobile phone handset were not delivered, prompting the applicant to approach this court for an order committing the respondent to prison for contempt.

The application was opposed.

In his opposing affidavit, the respondent averred that it was not necessary to deliver the motor vehicle and the mobile phone to the applicant as she had always had possession of these. It was specifically averred in the opposing affidavit that the applicant has always had possession of these assets and did not surrender them when she left employment. The respondent further averred that after receiving a letter from the applicant's legal practitioners demanding delivery of the vehicle and the mobile phone, the respondent caused the legal practitioners for Africa International Removals to surrender to the applicant the registration book of the motor vehicle as the applicant already had the motor vehicle. On the basis of its belief that the applicant already had in her possession the mobile phone and the line that she used during the course of her employment with the removals, the respondent averred that the approach to court by the applicant in the proceedings before me was an abuse of process.

In answer to the opposing affidavit, the applicant admitted that the respondent has complied with some of the terms of the order but has not delivered to her the handset and has

not paid the sales commission that was due to the applicant together with accrued interest. On that basis, the applicant persisted with the proceedings for contempt and prayed that the respondent be sentenced accordingly. The answering affidavit by the applicant is rather terse and does not assist the court much in resolving the dispute between the parties. I shall revert to the brevity of the answering affidavit in detail below.

At the hearing of the matter, the applicant's legal practitioner submitted from the bar that all that the respondent has not caused to be delivered to the applicant is the handset that she has always had when she was employed by International Removals. It is on account of the non-delivery of this handset that the applicant seeks the imprisonment of the respondent. It was accepted that the other aspects of the court order had been complied with although details of such compliance were not given. It may be impertinent of me to note at this stage that the issue of the line for use in the handset was not persisted with. Again details of when and how the line may have been delivered to the applicant were not given in the papers nor in the oral address by the legal practitioner.

In my view, the purpose of an answering affidavit is akin to that of a replication in an action. It is filed not merely for the form but to specifically meet and traverse all the averments made in the opposing affidavit that have the effect of defeating the applicant's claim. Like in any pleading filed with the court, all issues that are not specifically denied and traversed in the answering affidavit are to be taken as if they have been admitted.

It is my further view that answering affidavits, like all other affidavits, must be drafted with precision and must meet the sting of the defence being raised in the opposing affidavit.

In *casu*, it is my view that the answering affidavit is not only too brief but fails to meet the sting of the defence that the respondent is proffering. In the opposing affidavit, the point is specifically raised that the handset is already in the possession of the applicant. It is further averred that the applicant never returned the handset to her former employer when her services were terminated. In answer to such a specific denial by the respondent, the applicant merely repeats that the respondent has not delivered the handset to her in terms of the court order. With respect, this is inadequate. The applicant in my view had to go further and specifically deal with the allegation of whether or not she had always had possession of the hand set and if so, when she returned it to the possession of her former employer so that the charge of contempt could be sustained.

It is trite that before holding a person to be in contempt of court, it is necessary for the court to be satisfied both that the order was not complied with and that the non-compliance was wilful on the part of the defaulting party.

The primary purpose of contempt procedure is to compel compliance with the court's order where such compliance cannot be obtained through any other execution set out in the rules of court. Where, however, there is a dispute as to whether the court order can be complied with or not, in my view, contempt proceedings are not competent until it has been proven on a balance of probabilities that the respondent can comply with the court order and is willfully deciding not to.

In *casu*, it appears to me that there is a real dispute of fact as to whether the mobile phone handset is in the custody or under the control of the respondent as alleged by the respondent or whether as for the motor vehicle, it has always been in the possession of the applicant. The dispute becomes real in view of the acceptance by the applicant that she has always had the motor vehicle and the handset in her possession during the period she was employed by Africa International Removals. Without further proving that she was dispossessed of the handset at some time, in my view she cannot succeed in having the respondent committed for contempt as she prays for.

Assuming that I have erred in holding that I cannot determine whether there has been non-compliance in the matter, I will proceed to hold that the requisite mental element for the offence has not been proved. I am persuaded by the respondent's protestations of good faith. He genuinely believes that the applicant already has the handset and that there is nothing for him to deliver. The opportunity that the procedures of this court afforded the applicant to challenge that belief went begging.

In contempt proceedings, the onus is on the applicant to prove not only that the court order has not been complied with, but that such non-compliance was wilful on the part of the respondent. It is not enough for the applicant to wave a court order in his or her favour and cry that such has not been complied with. Contempt proceedings are not only concerned with enforcing orders of this court. Such proceedings also relate to the integrity of the court and its processes. The integrity of the court is further enhanced by only holding respondents to be in contempt where their actions threaten the dignity and integrity of the court and are literally thumping their noses at the judiciary. It is not enhanced by holding defaulting respondents to

be in contempt where such respondents act under a genuine and reasonable belief that there is nothing further required of them in terms of an order of court.

It is my view that the necessary mental element requisite in contempt proceedings has not been adequately proved in this matter.

Having failed to satisfy me on the two elements necessarily attendant upon a finding that the respondent is in contempt, I will dismiss the application and order costs against the applicant.

In the result, I make the following order:

1. the application is dismissed
2. The applicant pays the costs of the application.

Hungwe & Partners, applicant's legal practitioners

Robinson & Makonyere, respondent's legal practitioners