MAFOSHORO FARM (PVT) LTD.
versus
HURBERT NYANHONGO
and
TENDAI MBEREKO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 18 March 2009

Opposed Application

Advocate *E.T. Matinenga*, for applicant
Mr *Mapondera*, for respondents

CHITAKUNYE J: The applicant is a company with limited liability which purports to own all agricultural equipment and implements and runs farming operations at ELDORADO OF GWINDINGWI commonly known as MAFOSHORO FARM (PVT) LTD.

The first respondent is a beneficiary of land wherein he was offered the "whole of Eldorado of Gwindingwi in Mutare District of Manicaland Province. The farm is approximately 472.46 hectares in extent. He has an offer letter dated 25 September 2007 in respect thereof.

The second respondent is said to be first respondent's farm manager.

On the third of July 2008 the applicant obtained a provisional court order against the respondents. The order was in the following terms:

> "First respondent and all those claiming and or acting through him be and are hereby ordered to refrain from:-
>
> 1.1. Using applicant's farming implements and equipment.
>
> 1.2. Reaping bananas from applicant's farm.
>
> 1.3. Barricading Applicant's access road to the farm.
>
> 1.4. Barring Applicant's directors and employees from entering the farm."

The applicant has approached this court on a complaint that respondents are in contempt of court in that they have not complied with that court order.

In paragraph 8 of his founding affidavit Johannes Jacobus W Vorster, applicant's Director, stated that despite the respondents' having been duly served with the provisional

order and being aware of the contents of the said order they have continued to deny applicant's directors and employees access to the farm. Such access was denied even when they went in the company of the Deputy Sheriff and the police. The respondents have instead continued to harvest applicant's bananas. Respondents have continued to use applicant's equipment and implements and material contrary to the provisional order. Some of the occurrences in Johannes' affidavit are supported by affidavits from Brian Mwaonga and Liberty Dzarira both police officers based at Mutare Police Station. The net effect of their affidavits was to confirm accompanying the messenger of court/ Deputy Sheriff to Mafoshoro farm whereat a copy of the provisional order was served on one Tendai Mbereko. They also observed that despite the service and explanation of the terms of the order by the messenger of court/Deputy Sheriff first respondent's employees did not stop harvesting and loading bananas onto trucks that they found there. They also confirmed that when Mr Mbereko was confronted he categorically indicated that he would not stop unless so instructed by first respondent.

The applicant therefore prays that in these circumstances the respondents be found to be in contempt of court and be sentenced to a term of 6 months imprisonment.

The first respondent opposed the application contending that he is not in contempt of the provisional order. He indicated that on the occasions applicant said he was denied access he was not at the farm and as per applicant's affidavit it was his employees who are alleged to have denied him access and not himself. He contended that the conflict is on applicant wanting to carry out operations.

On the question of bananas first respondent contended that as bananas are perishables they cannot be kept on the trees for long hence admitting harvesting the bananas. He also argued that applicant no longer owned the farm and so as the beneficiary of the farm he was entitled to the bananas as this was no longer applicant's farm but state land. On the continued use of implements and equipment he conceded that his employees may have used them before he had advised them about the provisional order. In any case he has received implements and inputs of his own from government and so he is no longer using applicant's implements.

The major issue for determination was whether the applicant was in contempt of the provisional order. Civil contempt is basically the willful or mala fide failure to comply with an order of court. There are three basic requirements for contempt procedure that need to be proved, namely:-

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* (*Pty*) *Ltd.* v *Zive and Ors* 1968 (2) SA 517 at 522E-G).

In *Scheelite King Mining Co.* (*Pvt*) *Ltd.* v *Mahachi* 1998 (1) ZLR 173 (H) at 177H-178A GILLESPIE J. noted that "Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that the non-compliance was willful on the part of the defaulting party." In *Haddow* v *Haddow* 1974 (1) RLR 5 at 7H-8A. GOLDIN J had this to say:-

> "In my respective view, whenever an applicant proves that the respondent has disobeyed an order of court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or willfulness on a balance of probabilities. Thus, if a respondent proves that while he was in breach of the order his conduct was bona fide, he will not be held to have been in contempt of court because disobedience must not only be willful but also mala fide."

Willfulness connotes a deliberate decision not to comply with the order. Mala fides connotes bad faith. If it is proved that first respondent being aware of the terms of the provisional order deliberately chose not to comply with them then he would be guilty.

It is common cause that the basis of the application is the provisional order granted by this court on the 3rd July 2008. That order stated in clear terms what the respondent was required to do and not to do. From the papers filed of record and the submissions by counsel it is common cause that the order was served on the respondents. The order was served on first respondent at his residence here in Harare and it was also served at the farm in question. First respondent had the opportunity to comply with the order. There is therefore no denying that the first two requirements were met.

The major issue is whether the first respondent complied with the terms of the provisional order.

The applicant in its application alleged that access to the farm has not been granted and respondents have not stopped using applicant's equipment and machinery. The respondents have continued to harvest bananas contrary to the terms of the order.

First respondent contended that he complied with the order to the extent possible. In seeking to defend himself first respondent points at the fact that in his view the provisional order is in violation of the constitutional law on land in that it recognizes applicant's ownership on land

acquired by the state. The first respondent appears to confess and avoid the contempt. Thus he says, in paragraph 7 of his opposing affidavit-

> "7. As indicated above the provisional order granted is in violation of constitutional law on land in that it recognizes applicant's ownership on land acquired by the state. The provisional order pre-supposes ownership of the farm by applicant which is not the case anyone (*sic*) by virtue of the compulsory acquisition that took place at the farm."

And in paragraph 10 that;

> "10. I do respect the courts and the laws of this country and certainly abide by them. I am informed and advised that for my defence to succeed in this application I must proved (*sic*) not to be acting mala fide and I content I am not acting so but in fact it is the circumstances surrounding this matter and the conflicting positions between the law of the land and the provisional order granted that has resulted in the situation I now find myself in."

Apparently the situation first respondent finds himself in is one of not complying with the provisional order in full. Firstly, in paragraph 11 of his opposing affidavit he confirms that bananas are being harvested when he says that;

> "Bananas by their nature are perishables and cannot be kept on the trees for long. When they are ripe they have to be harvested. It is for this reason that they were harvested…"

Secondly, on the question of access he also seemed to confess such has not been granted in paragraph 14 of his affidavit when he says that;

> "The applicants cannot operate on a farm that is no longer theirs. The provisional order was cunningly drafted by applicant's legal practitioners. It orders me to grant applicant access to the farm but not for them to carry out operations on the farm. It is clear from para. 8 of applicant's affidavit that his intention on coming to the farm is to "operate", which was never part of the order that applicant sought and obtained from the court. In fact if it had been made clear to the court, the court would not have granted the access as it is in clear violation of laws on land acquisition by the government. In any event the order does not order me to vacate or stop operations hence if applicant was to come and carry out operations it would obviously clash with the operations I am carrying out. This is why applicant is alleging I am acting in disregard of the court order."

It would appear that because first respondent believes applicant wants to come and operate he won't let that happen. Though at some stage he stated that access was granted this seemed to have been done begrudgingly and clearly not in terms of the provisional order.

The general tenor of first respondent's position seems to be of trying to justify his failure to abide by all the terms of the provisional order and not that he has fully complied.

He confirms this when in paragraph 25 he states that;

> "As indicated before I am complying with the interim order **in as far as I can. Where it is impossible to comply with (*sic*) order I am unable to do so**."(Emphasis is mine)

The extent of compliance is premised on his contention that applicant no longer owns the farm and the bananas being harvested are not on applicant's farm. He could only be in contempt if the bananas were on applicant's farm.

This in my view is an argument in futility. There is no confusion regarding the farm and the bananas the provisional order related to. The first respondent is fully aware that the order related to Mafoshoro farm and the banana plantation on this farm. The first respondent's attempt at justifying his continued harvest of bananas is clearly contrary to the order. If, as first respondent seems to be saying, he was not happy with the terms of the order there are legal or lawful steps he should have taken rather than defy clear terms of a court order. Our courts have made it abundantly clear that a party's dissatisfaction or disagreement with a court order is no defence to contempt proceedings. In *Whata* v *Whata* 1994(2) ZLR 277 (S) at page 281F- 282A GUBBAY CJ quoted with approval what was held in *S* v *Mushonga*1994 (1) ZLR 296 (S) that:

> "generally a person may not refuse to obey an order of court merely because it has been wrongly made; for to do so would be seriously detrimental to the standing and authority of the court…. The proper approach was for the person first to obey the supposed invalid order and thereafter to seek redress, if any, by way of appeal or review. It was not for him to determine for himself whether the order ought not to have been made. He should come to court for relief if advised that it was invalid. The exception being where the order was blatantly absurd in its command and would itself tend to weaken respect for the administration of justice. Only in that remote eventuality would disobedience not be regarded as contemptuous".

The crime of contempt of court is committed intentionally and in relation to the administration of justice in the courts. This is so because as was held in *Scheelite King Mining Co.* (*Pvt*) *Ltd*. v *Mahachi* (*supra*)

> "although the primary purpose of contempt procedure is to compel compliance with the court's order, in such proceedings the court will also have an interest in protecting and upholding the dignity and respect of the court and the legal process."

In *Moyo v Macheka* SC 55/05 at page 7 of the cyclostyled judgment ZIYAMBI JA. quoted with approval the words of GOLDIN J in *Haddow* v *Hadow (supra)* wherein he said that:

> "the object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may

> render the other party without a suitable or any remedy, and at the same time constitute disrespect for the court which granted the order."

In *casu*, if the first respondent seriously believed that the provisional order conflicted with the law on land and that it posed great difficulties for him, he had the option to anticipate the return date so that the matter is heard earlier. If respondent felt that the bananas needed to be harvested by him and not applicant and that the provisional order is not practical to enforce and was in conflict with what he terms the laws of the land he had this option. I did not hear any submission to the effect that upon realizing the difficulties in complying with the order first respondent took any steps to have the matter heard earlier. Instead he contended that applicant is delaying finalization of the main matter so as to use the provisional order indefinitely by his application. In terms of the High Court rules first respondent need not wait for applicant to set the matter for hearing he can take that initiative himself.

Rule 236 of the High Court rules states that "Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either -

> (a) set the matter down for hearing in terms of rule 223; or
>
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

Rule 236 (4) goes on to state that:-

> "Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within one month thereafter set the matter down for hearing, the respondent, on notice to the applicant, may either-
> (a) set the matter down for hearing in terms of rule 223; or
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

Rule 247 on Provisional orders states in sub rule 2 that-

> "(2) Rules 231 to 240 shall apply *mutatis mutandis* to the enrolment and hearing of a matter consequent upon the issue of a provisional order referred to in sub rule (1).
> Provided that where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter be set down for hearing at any time and additionally, or alternatively, may hear the matter at

> any time and place, and in such event the ordinary periods of notice to the registrar and to any other party shall not apply to the matter."

It is clear from the above rules that first respondent had adequate avenues to take to ensure that the provisional order was dealt with expeditiously if as he said applicant was delaying the finalization of the matter. In fact the Provisional order is also instructive to respondent on the this on the front page last paragraph where it is stated that "If you wish to have the provisional order changed or set aside sooner than the rules of court normally allow and can show good cause for this, you should approach the applicant/applicant's legal practitioner to agree, in consultation with the registrar, on a suitable hearing date. If this cannot be agreed or there is a great urgency, you make a Chamber application, on notice to the applicant, for directions from a judge as to when the matter can be argued." As already alluded to he chose none of the avenues to have the provisional order dealt with expeditiously. He instead opted not to comply with those terms of the order he did not agree with.

I am of the view that first respondent is in contempt of the provisional order. He has deliberately not complied with the terms of the provisional order despite having been served with the order. His willful disregard of the court order is certainly inexcusable. He has not shown that his breach of the order was bona fide.

Regarding the second respondent, first respondent said he has no employee by that name and applicant has not shown that any one by that name was served with the court application for contempt of court proceedings and so no decision can be made on second respondent.

The penalty to impose on first respondent has to be looked at from the desire to ensure that court orders are obeyed at all times irrespective of whether one agrees with the terms of the order or not. In *casu* first respondent's counsel referred to the case of *Haddow* v *Haddow* (*supra)* wherein it was held that not every breach of an order justifies committal of contempt. This is indeed true. Each breach or contempt must be taken on its own merit. The Court has a wide discretion on this aspect. The sentence to be imposed has to be such as is necessary to ensure that respondent complies with the court order and that dignity and respect for courts is maintained.

It is my view that though the contempt is serious the period of 6 months prayed for by applicant is rather excessive. A sentence in the region of 4 months should meet the justice of the case.

Accordingly it is ordered that:

1. The first respondent be and is hereby found guilty of contempt of court.

2. First respondent is hereby sentenced to 4 months imprisonment all of which is suspended on condition that he complies with the terms of the provisional order issued on the 3rd July 2008 forthwith, that is:-

1. First respondent and all those claiming and or acting through him refrain from:-

   a. using applicant's farming implements and equipments.

   b. reaping bananas from Mafoshoro farm.

   c. barricading applicant's access road to the farm

   d. barring applicant's directors and employees from entering the farm.

Mugadza Mazengero & Dhliwayo
C/o Muvingi Mugadza & Mukome, applicant's legal practitioners
Mapondera & Company, 1st respondent's legal practitioners.