YAKUB SURTEE
versus
SHAUN EVANS
and PAUL FRIENDSHIP
and
COLLIN MacMILLIAN
and
RODNEY FINNIGAN
and
ACROSS ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 30 July 2010, 13 August 2010 and 27 October 2010

S. Mahamed, for applicant
*F. Piki*for respondent

MTSHIYA J: In this application the applicant seeks the following relief:

"1. The respondents be and are hereby held to be in contempt of this Honourable Court Order granted on 19 May 2009.

2. The respondents be and are hereby incarcerated for a period of ninety (90) days each.

3. Costs of this application shall be paid by the respondents".

The background to the relief sought can briefly be stated as follows:

On 4 June 2008 the applicant instituted legal proceedings in this court by way of summons. The relief sought therein was:-

"(a) An order that the first, second, third, fourth and fifth defendants supply and deliver to the plaintiff the total of 47 500 litres of fuel, within forty eight (48) hours of service of this order upon them failing which the Deputy Sheriff be and is hereby authorized to recover the fuel and deliver it to the plaintiff.

(b) Cost of suit".

In terms of the declaration to the summons, the above claim arose out of the fact that in July 2006 the first, second third and fourth respondents (then defendants) as directors of the fifth respondent (then also defendant) entered into a verbal agreement with the applicant (then plaintiff) whereby the respondents agreed to use the applicant's service station for the storage of their fuel. For the usage of the service station by the respondents, the applicant would receive 2500 litres of fuel per month in lieu of monthly rent.

At the commencement of the agreement the applicant made available to the respondents 30 000 litres of petrol and 10 000 litres of diesel. This means that a total quantity of 40 000 litres of fuel were due to the applicant at termination of agreement in August 2007. In addition to that quality the respondents were liable for 7500 litres of fuel in respect of three months outstanding rentals. That brought the total quantity of fuel due to the applicant to 47500 litres.

The above quantity of fuel forms the basis of the court order obtained from this court by the applicant on 19 May 2009 which order reads as follows:-

> "1. The defendants, jointly and severally, the one paying the others to be absolved deliver to the plaintiff 47 500 litres of fuel within forty-eight (48) hours of service of this order, failing which the Deputy Sheriff be and is hereby authorised to recover the fuel and deliver it tot he plaintiff.
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> 2. Cost of suit"

The respondents did not deliver the fuel within 48 hours as directed in the above order. The Deputy Sheriff was then mandated to recover the fuel and on 22 July 2009 the Deputy Sheriff issued a '*Nulla Bona'* return of service.

It is the alleged non-compliance with the above order that has led to the current proceedings.

I first heard this application on 30 July 2010. At the commencement of the hearing the first and second respondents applied to file heads of arguments out of time. The application was not opposed. I allowed it. The third, fourth and fifth respondents were in default and had not filed any opposing papers.

The applicant applied for default judgment. I initially granted default judgment against the third, fourth and fifth respondents. However, I later thought it best to reserve my decision on the issue of default judgment until a full hearing of the application with respect to the remaining respondents who had filed opposing papers. I then caused an attendance of both parties in my chambers on 11 August 2010 where, in terms of the rules, I altered my earlier decision on default judgment against the third, fourth and fifth respondents.

As correctly acknowledged by both parties this court's order of 19 May 2009 was the type of order normally referred to as '*ad factum praestendum'* (i.e an order for specific performance or the performance of an act – namely the delivery of 47 500 litres of fuel). The order did not grant the respondents the alternative of paying the applicant the monetary value of the fuel.

In its heads of argument the applicant raised a point *in limine*. The point was that the opposing affidavits of first and second respondents were improperly commissioned. It was argued that the Commissioner of Oaths' name was not s pelt out and that the stamp used read "true copy of the original". However, I pointed out that, in my view, there were obvious unintended errors on the part of the Commissioner of Oaths. The affidavits were sworn to before a Commissioner of Oaths from a reputable law firm, namely Wintertons. The applicant then abandoned the point *in limine*.

In support of its case, the applicant correctly quotes from *Haddon v Haddon* 1974(1) RLR5 where GOLDIN J said:

> "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".

As will be seen later in this judgment, the above enunciation of the law was relied upon by our own Supreme Court in the case of *Trevor Batezat v Permassan (Private) Limited* SC 49/09 where the contemnor had failed to return a tri-axle trailor as ordered by the court.

On whether or not the order to be complied with was incompetent for lack of clarity (i.e on the type of fuel to be delivered) and the citation of first and second respondents, the applicant submitted that the respondents were obliged to comply with the order and raise their objections later. In making that submission the applicant relied on *Whata v Whata* 1994(2) ZLR 277 (SC) where GUBBAY CJ, as he then was, had this to say:-

> "The proposition advanced was closely considered by this court in *S v Mushonga* 1994(1) ZLR296(S). It was there held, after a review of he cases, 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 judgment went on to point out that 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 the 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.
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> However, as was noted in *S v Mushonga supra*, it is not an inevitable consequence that disobedience to a simply wrong order of court constitutes the crime of contempt. It must be committed intentionally and in relation to the administration of justice in the courts. Contempt is not an offence of strict liability. *Mens rea* remains an essential element to be proved".

In making my determination herein I shall stand guided by the above principles of our law in respect of the offence of contempt of court.

It was the applicant's submission that the order in question was made against and served on the respondents. The Deputy Sheriff had then proceeded to execute against the cited respondents. It was the applicant's contention that failure to react to the order within 48 hours was deliberate and intentional. There was, therefore, it was submitted, wilfulness and *mala fides* on the part of the respondents. The respondents had instead sought to challenge the court order and also declare that they had no fuel (not that they could not get the fuel).

The respondents had in turn submitted that the *Nulla Bona* return was clear evidence that they did not have the fuel. They said the fact of having no fuel did not render them contemptuous of a court order. They argued that the correct procedure upon the *Nulla Bona* return was an application for civil imprisonment. The applicant, it was argued, has alternative remedies.

In its heads of argument the applicant correctly responded to the above in the following terms:-

> "2. It must be noted that the order obtained by the applicant did not contain any monetary figures and hence clearly an application for Civil imprisonment would be inappropriate and would certainly not apply in this mater. Accordingly the present case can clearly be distinguished from the case of *Chinamora v Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S) which case deals with imprisonment for a debt. In the present case there is no debt to talk about nor is the applicant claiming payment of debt".

The court order that led to these proceedings is, in my view, very clear and calls for no debate. The order is for the delivery of 47500 litres of fuel. The order is still in force. The order has not been complied with. The pleadings clearly show that all parties were aware that what was in issue were 30 000 litres of petrol and 10 000 litres of diesel. Another 7500 litres of fuel were in respect of outstanding rentals. True, the type of fuel for rentals is not spelt out but the parties were fully aware of how they had been operating prior to the dispute. That, in my view, removes any possible ambiguity.

Given the competence of the order, I find myself being unable to distinguish this matter from the *Trevor Batezat* case (*supra)* where it was ruled as follows:-

> "In my view, the learned Judge's reasoning is unassailable. The appellant disobeyed a court order which was brought to his notice more than once. Therefore, the appellant's wilfulness to disobey the court, as well as his *mala fides,* must be inferred.

> That being so, the onus was on the appellant to rebut the inference of *mala fides* or wilfulness on a balance of probabilities. In my view, there can be no doubt that the appellant failed to discharge that onus. The contradictory explanations given by the appellant about what happened to the trailer clearly indicate that the appellant was lying in order to defeat the course of justice.
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> Quite clearly, the appellant deserved the sentence imposed by the learned Judge. As GOLDIN J said in Haddow's case *supra* at 8A-C:
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> '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 fact. 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". (My own underlining).

In *casu* the issue is not about lying but about the intentional unwillingness to obey a court order or lack of will to comply with a court order. The order, granted by this court on 19 May 2009, required compliance within 48 hours. The application for contempt of court was only filed on 15 March 2010. There is nothing in the papers to show that respondents ever took steps to show that the order was incapable of enforcement or indeed to throw away the obvious inference of *mala fides* or wilfulness. That, they could not do because they knew fuel is available in Zimbabwe. They could get the fuel. The order for the delivery of fuel was specific and gave no alternative. They had ample time within which to organise the delivery of the fuel. The order did not say the fuel was to be sourced only from their premises/business.

I am therefore, on a balance of probabilities, satisfied that the respondents wilfully and deliberately refrained from complying with the court order. All respondents, including those who did not file opposing papers and also defaulted from the hearing of this matter, are therefore in contempt of court.

The order applied for should, however, be granted in an amended form. An amendment is necessary because, as an artificial person, the fifth respondent cannot be imprisoned. However, the disobeyed order had equal weight on all the respondents. Rule 391 of the High Court Rules, 1971 clearly connotes that this court has the power to impose a fine for contempt of court. I do believe that, in the circumstances of this case, it will serve the interests of justice for the fifth respondent to be fined for the offence. I shall therefore order as follows:-

It is ordered that:

1. The respondents be and are hereby held to be in contempt of this Court's Order granted on 19 May 2009.

2. The first, second, third and fourth respondents be and are hereby sentenced to imprisonment for 30 days each.
3. The fifth respondent be and is hereby ordered to pay a fine of US$55000-00

4. The prison sentences and the fine referred to in 2 and 3 above, be and are hereby suspended on condition the respondents, jointly and severally, the one delivering the others to be absolved, deliver to the applicant 47500 litres of fuel on or before the 30 November 2010

5. Costs of this application shall be paid by the respondents jointly and severally the one paying the others to be absolved".

Ahmed & Ziyambi, applicant's legal practitioners
IEG Musimbe & Partners, respondents' legal practitioners