

ZELCO CELLULAR (PVT) LTD  
versus  
NETONE CELLULAR (PVT) LTD  
and  
DR CALLISTUS NDLOVU  
and  
REWARD KANGAI  
and  
LYNDON NKOMO

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE, 31 May and 1 February 2012

### **Opposed Court Application**

*F Chirimuuta*, for the applicant  
*D Ochieng*, for the respondents

GOWORA J: On 13 April 2011 under Case No HC 3507/11 PATEL J granted a provisional order in the following terms;

#### INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following interim relief;

1. The decision of the Respondent to cancel the Service Provider Agreement be and is hereby declared unlawful and is set aside.
2. The Respondent be and is hereby interdicted from effecting any of the consequences of such cancellation in terms of Clauses 15 and 16 of the Service Provider Agreement.
3. The Respondent be and is hereby ordered to retract its text message sent to the Applicant's post-paid customers by way of a similar message to the effect that the Applicant's Service Provider Agreement is still valid and subsists and that customers should continue to pay their bills to Zellco Cellullar and that the Respondent regrets the previous notification of cancellation which was issued in error.

## PROCEDURE FOR DETERMINATION OF FINAL ORDER SOUGHT

N/A

## TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The Respondent is interdicted from invoking and implementing the termination provisions of Clause 15 and 16 of the Service Provider Agreement pending the resolution of the dispute declared by the Applicant in accordance with Clause 19 of the Service Provider Agreement.

## SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the Applicant's legal practitioners to effect service of this Provisional Order upon the Respondent.

The parties to the dispute under Case No HC 3507/11 are the applicant and the first respondent respectively. The second, third and fourth respondent were not cited as parties thereto. On 10 May 2011 the applicant then launched these proceedings as an ordinary court application seeking the following relief:

## IT IS ORDERED THAT:

1. The second, third, and fourth respondents be and are hereby held to be properly enjoined to these proceedings.
2. The respondents be and are hereby held to be in wilful contempt of the court order by PATEL J on 13 April 2011 in HC 3507/11.
3. The first respondent be and is hereby ordered purge its contempt and to mitigate the consequences of cancellation of the Service Provider Agreement that it effected against the applicant in defiance of the court order within 48 hours of this order as follows:
  - (a) Remit to the applicant all payments received directly from the applicant's customers from date of unlawful cancellation of the Service Provider Agreement to date.

- (b) Cancel all contracts or arrangements for provision of direct services concluded with the applicant's customers from date of cancellation of the said Agreement to date.
  - (c) Provide the applicant with all call data relating to its customers as from 1 April to date in the form and detail as ordinarily provided in terms of the Service Provider Agreement.
  - (d) Action all requests for network services submitted by the applicant from 1 April to date.
4. The first respondent be and is hereby ordered to broadcast within 24 hours of this order the following text message to the applicant's customers:

"NetOne sincerely regrets the text messages sent to all Zellco's subscribers on 5 April 2011 and 19 April 2011 which text messages were grossly inaccurate, misleading, sent in error and should be completely disregarded. Customers are advised that the Service Provider Agreement is still valid and subsists and should continue to pay their bills to ZELLCO CELLULAR. There will be no loss of service."
  5. The second, third and fourth respondents be and are hereby ordered to ensure full compliance by the first respondent with the terms of this order failure of which they shall be committed to prison until such time as full compliance takes place.
  6. The respondents shall not be heard in any court, whether in this matter or in matters already before the courts in HC 8318/10, HC 1587/11 and HC 3507/11 or any new related matter, unless and until they have purged their contempt.
  7. The first respondent be and is hereby ordered to pay a fine for contempt of court in the sum of USD20 000-00 within 7 days of service of this final court order upon it.
  8. The second, third and fourth respondents be and are hereby ordered, in their persons, to pay a fine of USD1 500-00 each within 7 days of service of this final court order upon them.
  9. The respondents be and are hereby ordered to pay the costs of this application on a higher scale, that of legal practitioner and client basis, jointly and severally, one paying the others to be absolved.

The application is opposed by all four respondents. The third respondent has filed an opposing affidavit on his own behalf and on behalf of the first respondent. The respondents have also raised points in *limine*.

In so far as the first respondent is concerned, it is contended that the applicant has failed to abide by the order of MTSHIYA J under Case No HC 3639/11 which was dismissed with an order of costs payable by the applicant. The matter had been brought to court as an urgent matter. The LEARNED JUDGE had dismissed it on the basis that it was not urgent and had ordered the applicant to pay the costs. The first respondent had through its legal practitioners sent an estimate of its costs and an indication of what it had paid to counsel. The applicant had not paid. It was therefore argued on behalf of the respondents that due to the refusal to pay these costs, the applicant was in contempt of a court order and until such time that it had purged its contempt, it should not be afforded a hearing on the merits of the dispute.

The applicant counters by arguing that it had sought the taxation of the estimated bill as it considered that the costs were on the high side. It was suggested on behalf of the applicant that counsel did not have the latitude to charge any amount as his fees and that counsel's fees should be subjected to taxation in ordinary course. It was in this vein argued that the reasonableness of counsel's fees must be tested through taxation.

It is trite that counsel's fees are a disbursement and not subject to taxation by the taxing officer. It is also accepted that counsel's fees are not regulated by a tariff such as attorney's fees are. In *Logan v Taxing Officer & Ors* NO 2001 (2) ZLR 175 GILLESPIE J noted that the *de facto* bar within this jurisdiction does not work to a tariff of fees. He bemoaned the absence of such tariff, which he suggested should set minimum and maximum thresholds for various work. This point was reiterated by GUVAVA J in *Choto v CBZ & Anor* 2006 (2) ZLR 277 at 281E thus:

“It is also accepted that fess charged by legal practitioners who have been so instructed are generally regulated from the bar from which they operate. These fees are not determined by any tariff. That this distinction has been maintained by the legislator may be gleaned from the provisions of the First Schedule to the High Court (Fees and Allowances) Rules 2000 (S.I.82 of 2000) as amended by S.I. 195 of 2003, which provides as follows:

- ‘8. When another legal practitioner is instructed he or she shall not be required to adhere to this tariff but shall charge such overall fee as the taxing officer considers fair and reasonable in the circumstances:

Provided that this paragraph shall not apply where a legal practitioner is instructed by a country practitioner’.

In my view, therefore, there is a recognition by the legislator that there is a class of legal practitioners who are not bound by the tariff set out in the Rules.”

The respondents have argued that the urgent chamber application filed by the applicant under HC 4169/11 wherein the first respondent was awarded costs was so defective in a manner and to an extent that not just the respondent but the court before whom it was set down commented on the defects. This did not appear to deter the applicant as it proceeded to file yet another urgent application substantially on the same basis as the defective one. It however did not pay the costs it had been ordered to pay. I am persuaded to agree with the contention by the respondents that the applicant has taken a decision to mire the respondents in litigation despite the dispute over the parties’ commercial transaction needing resolution. A submission to the effect that the applicant had filed no less than six sets of proceedings went unchallenged. When a litigant files defective proceedings and refuses to pay costs awarded against it, it is clearly causing the other party unwarranted expense. The applicant was advised that the costs from the abortive urgent applicant amounted to US\$2 205-00, constituting US \$2 005-00 being fees due to counsel and US\$200-00 the estimation of the costs due to the respondent’s legal practitioners.

It seems that the applicant was not unhappy about the estimation of US\$200-00 but required that counsel’s fee be taxed. The basis of the unhappiness was the assumption that counsel’s fee was not a disbursement. The law on that is clear and in the absence of a tariff against which counsel’s fee can be measured it is clear that the taxing officer has no means by which to test its reasonableness or otherwise. That said it was I believe the obligation of the first respondent, in order to enforce payment of its costs by the applicant, to have the bill taxed. I believe that the requirement that the first respondent

have its bill taxed is not unreasonable as every party to a *lis* has the right to have the costs claimed by the successful party tested as their reasonableness by a taxing officer. The first respondent chose not adopt this route but to force the applicant pay on the basis that it considered the costs reasonable and that the applicant should accept its position. That was an error on the part of the first respondent. It would have been different if the applicant had chosen not to pay a taxed bill of costs. That is not the position here. I therefore find that the first respondent has not made out a case for these proceedings to be stayed. The point in *limine* therefore fails.

The next issue raised in *limine* is that the second, third and fourth respondents have been wrongly cited herein and their citation in facts amounts to a mis-joinder. They are in fact cited in their official capacities, i.e as representatives of the first respondent. It is contended by the respondents that their citation herein in fact amounts to a duplication of the citation of the first respondent. The applicant has prayed for the joinder of the second, third and fourth respondents to these proceedings. Since they are already cited it is difficult to understand why an order for their joinder to these particular proceedings is being sought. Para 2 of the draft order seeks that the respondents be found in contempt for lack of or refusal to comply with the order granted by PATEL J against the first respondent under HC 3507/11.

It is trite that an applicant for an order for committal must establish the following:

1. That an order was granted against the respondent
2. That the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and
3. That the respondent has either disobeyed the order or neglected to comply therewith. See *Uncedo Taxi Service Association v Mtetwa & Ors* 1999 (2) SA 495; *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517.

Contempt of court in the context of these proceedings would entail a deliberate disobedience of a lawful order issued by a court of competent jurisdiction. That an order was granted against the first respondent is not in dispute. The order was served upon the first respondent's legal practitioners who are also instructed by the second, third and fourth respondents herein.

Service of the order upon the legal practitioners clearly constitutes proof of service upon the first respondent. The applicant contends that the first respondent is in contempt of the provisional order granted against by PATEL J on 13 April 2011. It contends further that in view of the continued act of contempt by the first respondent, it, the applicant addressed a letter to the first respondent through the fourth respondent which letter it copied to the second and third respondents requesting them to comply with the order. Despite the letter having demanded action from the respondents, the applicant contends that the order has not been complied with.

It is trite that a party cannot be found to be in contempt of an order which has not been addressed to it or which has not been served upon such party. The provisional order granted against the first respondent is an order *ad factum praestandum* an order to do or refrain from doing a thing. It is trite that by its nature, an order *ad factum praestandum*, as the provisional order in this case is, is an order in *personam* and consequently is only binding upon those against whom it has been issued. The principal object of contempt proceedings is to compel compliance by a party to an order given by a court of competent jurisdiction. Before an applicant can be afforded an order for committal on the basis of contempt of an order of court an applicant must show that the court's order was either served upon the respondent personally or has been brought to his personal attention.

It is correct as contended by the respondents that the order was not granted against the other respondents herein but against the first respondent.

The first respondent is a corporate entity and the affairs of corporate entities are managed and run their officers and directors and any disobedience of court orders must therefore be attributed to the directors of the company. The directors of a company are its mouth, brains, voices and bodies through which the company acts. Any proceedings by the company are directed, managed and implemented by them. To this end the applicant contends that the second respondent as chairman of the board has ultimate authority to cause and direct the first respondent to act in a certain way. The third respondent is the managing director of the first respondent and it is contended by the applicant that he ensures that the decisions of the first respondent and the board are implemented. The fourth respondent is a legal practitioner who is the company secretary in the first

respondent and it is contended by the applicant he acts as the legal adviser to the second and third respondents herein.

I am not aware of any principle that would seek to hold liable an officer of a company for acts done by the company unless the person is a member of the board of directors. Clearly no liability attaches to the fourth respondent herein. As for the second and third respondents, it is clear that as directors, they constitute the physical arm of the first respondent. A corporation can only comply with a court order through its officers. Thus it can be convicted of contempt if its officers have refused or neglected to comply with the court order. A person who also contributes to the commission of the offence, can, without being a principal, be punishable as an accomplice.<sup>1</sup> Consequently, a director who has knowledge of the order and causes the company to refuse to obey the order is guilty of contempt. In *Twentieth Century Fox Film Corporation v Playboy Films* 1978 (3) SA 202 KING AJ opined as follows:

“A director of a company, who with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of contempt of Court. By his act or omission such director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order. Vide Halsbury 4<sup>th</sup> ed vol 9 at 75. Consequently Jagger who had knowledge of the order of Court is guilty of contempt of an order of this Court. An order *ad factum praestandum* against a company should also be served on its directors if a punitive order is sought against the directors in order to establish knowledge of the order of Court.”<sup>2</sup>

The purpose of contempt proceedings is to ensure that court orders are obeyed. Courts must jealously guard the orders they grant against the community and persons appearing before these courts cannot and should be allowed to disobey or ignore such orders with impunity. Since the applicant seeks an order for the incarceration of the second and third respondents herein, it should have ensured that the court be served upon each of them personally. It did not do this. It addressed a letter to the fourth respondent. The applicant has not in these proceedings proffered any authority to support its contention that the second, third and fourth respondents, who had not been cited in the

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<sup>1</sup> *Holtz v Douglas & Associates en endere* 1991 (2) SA 797 (O)

<sup>2</sup> At p 203-C-E



main proceedings and who were not served with the order should be found to have been in contempt of the provisional order.

Proceedings for committal for contempt are a form of enforcement of an order *ad factum praestandum*. An applicant for an order for committal must show that the respondent had personal knowledge of the order from which the proceedings for contempt emanate. A court will not entertain an application for committal for contempt unless wilful or reckless disregard for the order has been proved. It has been held that before a person can be found guilty of contempt his disobedience of the order must be not only wilful but also *mala fide*.<sup>3</sup> It has also been held that in proceedings for contempt of court, once a failure to comply with an order of court has been established wilfulness will normally be inferred and the onus is on the person who failed to comply with the order to rebut the inference of wilfulness on a balance of probabilities.<sup>4</sup> At p 836D-E SMALLBERGER AJA stated:

“... Once a failure to comply with an order of Court has been established, wilfulness will normally be inferred, and the onus will rest upon the person who refused to comply with such order to rebut the inference of wilfulness on a balance of probabilities (cf *Du Plessis v Du Plessis* 1972 (4) SA 216 (O) at 220A-D). This can be done by such person establishing that he did not intentionally disobey the Court’s order.”

In this case the applicant relies on a letter addressed to the Company’s Secretary and copied to the second and third respondents. Even if it were to be inferred that the second and third respondents were informed through the copy of the letter in question there is no proof that these copies were actually delivered to the respondents. The applicant has in my view failed to establish personal knowledge of the order on their part and a wilful decision to disregard it or disobey it.

The position is different as far as the first respondent is concerned. The court order in question was issued against it and served on its legal practitioners. It deliberated decided to alter the terms of the order given by PATEL J and inserted its own version. In his Order PATEL J had ordered the retraction of the text sent out to customers by the first

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<sup>3</sup> See *Haddow v Haddow* 1974 (2) SA 181(R) at 182H

<sup>4</sup> See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & other related cases* 1985 (4) SA 809 at 836E

respondent and for the respondent to issue a text to the effect that the applicant service provider contract was still in force and customers should continue paying their bills to the applicant. The first respondent did retract the text but instead of requesting customers to pay to the applicant, it directed that customers pay their bills to the first respondent. The cause of the dispute between the parties was the alleged failure by the applicant to remit payments from customers to the first respondent. The purported termination had the effect of changing the mode of payment directly to the first respondent. The order by PATEL J reversed the cancellation which is why the first respondent was ordered to retract its text message. The retraction it published had no effect on the termination as customers were ordered to pay their bills to it instead of the applicant as previously obtained. In the circumstances it defied the order of court. I have no hesitation in finding that it was guilty of contempt.

Subsequent to hearing this matter after having researched on the subject I requested the parties to address supplementary heads of argument for the benefit of the court. The respondents were kind enough to oblige and I am indebted to Miss Moyo for having taken the time to prepare and file the heads of argument. At the time of preparing this judgment the applicant had not acceded to this request. In the heads of argument filed by Miss Moyo on behalf of the respondents I am informed that the proceedings herein have been overtaken by events in that the contract has been cancelled. In her view ordering the first respondent to purge its contempt by issuing an amended statement is of no force and effect in view of the position prevailing between the parties. The only alternative is consequently that the first respondent be ordered to pay a fine as prayed in the draft order. There were no representations from the respondents on the fine to be paid. I therefore order the payment of the sum prayed for in the draft.

IT IS ORDERED AS FOLLOWS

1. The first respondent be and is found to be in wilful contempt of the Court Order of this court under Case No HC 3507/11 dated 13 April 2011.
2. The first respondent be and is hereby ordered to pay a fine in the sum of US\$20 000-00 within ten (10) days of the date of service of this order.

3. The first respondent shall pay the applicant's costs.
4. The application against second, third and fourth respondent is hereby dismissed with costs.

*Chirimuuta & Associates*, legal practitioners for the applicant  
*Coghlan, Welsh & Guest*, legal practitioners for the respondents