

GILAD SHABITAI
and
MUNYARADZI GONYORA
versus
OFFER SIVAN
and
ADLECRAFT INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 19 September & 19 October 2023

Opposed Application

T Mpofu, with T Makamure, for the applicants
M Ndlovu, with M Tarugarira & Sande, for the 1st & 2nd

KATIYO J: That applicants petitioned this court seeking the following relief:-
Whereupon after reading documents filed of record and hearing counsel;

IT IS ORDERED THAT;

1. The application for rescission of judgment under HC 4776/21 be and is here granted.
2. The order dated 21 September, 2022 entered against applicants in case number HC 1202/21 be and is hereby rescinded.
3. The respondents shall file their replication to the special plea and exception and heads of arguments within ten days of this order.
4. There shall be no order ad to costs.

Brief Background

The order sought follows a default judgment involving same parties which was

issued under case number 4541/21. At the commencement of the application the respondents raised an objection in what they term dirty hands approach. They argued that the applicants are fugitives from justice and as such could not have audience with the court. Specifically that they are on warrants of arrests. Initially the applicants argued that the said warrants were dealt with and respondents were then supposed to offer proof to that effect, either in the form of a magistrates court record or otherwise. With the events unfolding it then turned out that indeed the warrants of arrests do exist and an application for setting aside has since been lodged with this court under case number HC 5578/23.

The respondents are moving this court to have the application struck off the roll or have their application withdrawn and dismissed. In the middle of all this the applicants moved that the court hear their arguments on the issue of those warrants of arrests. Both sides filed heads of arguments on that aspect. As commonly known the principle of law on fugitives from justice is that a party who has put themselves beyond the reach of the court, cannot approach the same court seeking relief.

Arguments

That applicants insist that the current so called warrants of arrests cannot be used against them because they were issued well after the current proceedings had commenced and if any they were dealt with before. It is their argument that for the purpose of this application they do not qualify to be labelled fugitives from justice. Cited is a case of *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425(H) it was held that:

“People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. As stated by

Davidson I in *Underhay v Underhay* 1977 (A) SA 23 (W) at 24E -F.

“It is fundamental to court procedures in this country and in all civilized countries that standards of truthfulness and honesty be observed by parties who seek relief. If this court were not to enforce that standard, it would be washing its hands of its responsibility”

Argued that the principle is so entrenched and its justification so clear, it cannot operate even against a respondent given that it regulates matters when a court is approached and the time it is so approached. Further submitted that the principle does not, however, govern procedural matters thus a fugitive has the right to even ask for extension of time *Escom v Rademeyer* 1985(2) SA 654 (T) @ 662 held that:

“It may well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim- in- reconvention. He may suffer other disadvantages in respect of pre-hear and even substantive, rights ordinarily enjoyed by a litigant. It is not necessary for me to deal with the question so broad a basis I hold only that whatever the disadvantages that may be suffered by a fugitive from, justice seeking to answer process of the court issued against him, they do not deprive him of the right to ask for such time as the court may deem fit in the circumstances to enable him to provide the answer he has been called upon to give. I hold that the respondent, although a fugitive-com-justice, has *locus standi* at least to approach the court for an extension of time in which to comply with the requirements of the rule *nisi*.”

Applicants argued that the fact that the first two warrants arrest being relied upon was issued a day before hearing and the second when the court queried the existence of a court record shows they were issued to deal specifically with the concerns raised by the court. Submitted therefore that the respondents cannot have an advantage they did not have before. It is further argued that because the warrants of arrest have been challenged it means no rights arise to the respondents *Buyanga's case* has been given as an incisive case. Respondents averred that the Supreme Court made a finding that he was a fugitive from justice because he already had a warrant of arrest when he brought his application. The applicants rebutted the contention by the respondents that the matter be struck off the roll on the basis of dirty hands. They content that a matter can only be struck off the roll if it was invalid at the time it is brought to court. In support of that argument cited is the

case of *Jensen v Acavalos* 1993 (1) ZLR 216 (16) and *Willowvale Mazda Motor Industries (Pvt) limited v Sunshine Rent- A –Car (Pvt) Ltd* 1996 (1) ZLR 415 (SC). Further cited on this position is Practice Directive no 3/of 2013 which reads as follows:

General Note

2. With a view to ensuring the uniform use and application of the terms struck off the roll”; postponed sine die' and removed from the roll', the following changes to the current practice take effect from 1 January, 2014.

Struck off the roll

The terms shall be used to effectively dispose of matters which are fatally defective and should not have Postponed *sine die*/Removed from the roll

Postponed *sine die*/removed from the roll

6. The terms postponed *sine die*' shall be used where a matter is adjourned indefinitely without the Court specifying the date when the matter shall be heard again.

7. The term removed from the roll' shall have the same meaning as postponed *sine die* been enrolled in that form in the first place.

The applicants therefore submits that the matter simply has to be removed from the roll pending the application for review filed. Argued that in the event of them succeeding will be heard on the same papers. With this among other submissions the applicants closed their submissions.

The respondents on the other hand vehemently oppose this position arguing that the applicants are in total disregard of the law and have no audience whatsoever. They open their argument by quoting a South African authority. *Botes v Goslin 1987 (2) SA 716 (C) pef VAN DEN HEEVER J.*

“The basic morality in denying a fugitive from justice the assistance of the very system he refuses to submit to is elementary a man cannot say that he is prepared to abide by the

rules of society, and seek society's assistance in enforcing them, only when they favour him and when he chooses, but not when he decides that R does not suit him to de se, There was no question of the relevant fugitive perhaps having to testify in *S v Isaacs* 1968(2) I SA 184 (A) or *S v Nkosi* 1963 (4) SA 87

(7) ear indeed in the majority of cases referred to below, Nor is it necessary that the fugitive should have already been convicted, Rademeyer's case, at 661 H-1, the law will deny its protection to those who place themselves beyond its reach. *Mulligan v Mulligan* 1925 WLD 164 has been followed and quoted with approval for more than half a century, Goslin, by jumping ball, was avoiding the processes of the law, By assisting him with its process the court would be 'stultifying its own recesses and it would, moreover, be conniving at and condoning the conduct of a person, who, through his flight from justice, sets law and order in defiance.”

The respondents who appear not amused by the conduct of the applicants have urged this court not to depart from the warning issued by the then learned judge of the High Court now SC MATHONSI JA in *Wengayi v Mudukuti* HB 155..... “A litigant who does so risks the consequence of his head being cracked open by the gravel of this court. The respondents submits this it is the same scenario obtaining in this case caused by the applicants and to some extent their legal practitioners and as such urged this court to censure them. This court convened three times with no meaningful progress being recorded as parties were haggling on the existence of a warrant arrest. Amidst that the applicants set in motion proceedings under HC 5578/23 as per *Mhungu v Mutindi* 1986(2) ZLR(s) the court is being urged to look at that authority. According to the respondents the 2nd applicant’s warrant of arrest arises from alleged externalization of foreign currency in breach of s 5(1) b of the Exchange control Regulations of 1996. The first applicant is also said to be in the same position as the second. It is argued that these warrants are extant and there cannot be any debate about. In the case of *Mulligan v Mulligan* 1925 WLD 164 where the learned judge *STEGMANN J held as follows:*

“In that passage it appears that a fugitive from justice may be accepted as being one who is wilfully avoiding the execution of the processes by the court of the land; or as one who is avoiding the processes of the law through flight out of the country is hiding within the jurisdiction of the court”

In view of the above citation it is being argued that these applicants fit into this category of litigants and have no right of audience before this court until they purge their warrants....

In *S v Nkosi* 1963 (4) SA 87 (T) the appellant was convicted of a Statutory offence and sentenced when he escaped from jail. HILL J, after referring to *Mulligan v Mulligan (supra)* said at 87-88 stated thus:

In one of these cases, *Togan v Casaus*, reported in the second series of the American Law Reports (49 ALR 2d) p 1419, the presiding Judge at p 1423 says in regard to an appeal by a defendant who willfully avoided the process of the Court and punishment:

“Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to the action cannot with right or reason, ask the aid or assistance of a court in hearing of the demands, while he stand, in attitude of contempt of legal orders and process of the courts of the State.”

The respondents also cited the case of *Chioza v Siziba* SC 4/15 where it was emphasized that the court cannot assist a person who is out reach of the law.

In light of above the respondents urged this court to strike off the application until there is compliance with the law. A fugitive forfeits certain rights amongst of which is the right to be heard.

Analysis

This is simple and straight forward case where no amount of time is worth wasting. All arguments evolve around the question as to whether the applicants are fugitives from justice or not. If so do they have right of audience. The second aspect is whether a warrant of arrest issued after commencement of proceedings can affect the status of the litigant in so far as his right to be heard is concerned. Both counsels have argued on these aspects of the law. What is not in doubt now that indeed there are

warrants of arrest which were issued against the litigants before and after this litigation had commenced. Those issued before were dealt with and are no longer an issue for contention. The cases cited (*supra*) have defined what a fugitive from justice is and what rights that person has before the courts in so far as litigation is involved. The law does not clearly define in what circumstances does a person becomes a fugitive but the general principle agreed is that those who go beyond the reach of the law especially in circumstances where they willfully do so. It is an established position as put in the case of *Mulligan v Mulligan (supra)* that before a person seeks to establish his rights in in a court of law he must approach the court with clean hands, and where he himself, through his conduct, makes it impossible for the process of the court to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights. The argument that the warrants of arrest were issued after the proceedings had commenced in my view do not change anything. Absconding from any of the lawfully established courts of law whether inferior or superior the effect is the same. We cannot cross a bridge before arriving there, once it is established that you are a fugitive from justice in my view that is the end of the matter. One cannot seek to assert his right using left hand when the right hand is busy flouting the law. A reading of my brother KWENDA J in the matter *The State v Offer Sivan and Cassandra Myburg* HH 320/23.

In that case the judge noted, that the applicants who were key witnesses as the complainants in the matter could not avail themselves despite all the effort by the state leading to the acquittal of the respondent the then accused. It was quite clear that the same litigants never availed themselves to the jurisdiction of this court. If they can lodge litigation it is a demonstration that they do exist somewhere. Their founding affidavit are notarized in South Africa but still cannot avail themselves in Zimbabwean courts jurisdiction. The argument that the warrants have been challenged cannot itself absolve the applicants from availing themselves to the court jurisdiction. All they need to do is simply to avail themselves and purge their contempt by explaining their non availability

when they are required by the courts. I have no doubt that by virtue of the warrants of arrest they have become fugitive from justice unless or otherwise have purged their warrants. Let me hasten to say there is no half fugitive. One cannot carry both titles at the same time. You cannot be a fugitive in another court and then regarded a clean person in the other. The law is very clear purge yourself then you still be heard. One cannot seek recourse from the very courts he is shunning. The impropriety of the warrants is not for this court to deal with. This court goes by the assumption that they lawfully issued. In the end the submission that the applicants be heard or be removed from the roll pending the outcome of the review application is neither here nor there. Why should the court wait for someone who is a fugitive. This court cannot condone that. This matter as much as the learned advocate did a though research cannot save them.

Conclusion

Having stated as above I am greatly persuaded by the respondent's arguments. These applicants are indeed fugitives from justice and such cannot be heard. Argument that the matter be removed from the roll is not good enough as the matter will still be pending before the court thereby giving right to be heard against all odds. Alternatively, if they insist they are not fugitives I can give them 10 days within which to avail themselves physically before this court failure of which they shall be deemed to be fugitives from the law and matter struck off the roll.

After perusal of papers filed of record and hearing counsels

IT IS ORDERED THAT:

1. Applicants to avail themselves within 10 days of this order failure of which they will be deemed to be fugitive from justice and the matter HC 6545 /22 will automatically be struck off the roll.
2. In the event the applicants availing themselves as per paragraph 1 of this order the matter to continue on merit.
3. The applicants to pay costs of this application.

Chatambudza Legal Practitioners, applicant's legal practitioners

Tarugarira Sande Legal Practitioners, respondent' legal practitioners