REPORTABLE ZLR(8)

(1) SHAUN EVANS (2) PAUL FRIENDSHIP v (1) YAKUB SURTEE (2) COLLIN MACMILLAN (3) RODNEY FINNIGAN (4) ACROSS ENTERPRISES (PVT) LTD

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & CHEDA AJA
HARARE, JULY 11, 2011 & FEBRUARY 13, 2012

D Ochieng, for the appellants

L Uriri, for the first respondent

ZIYAMBI JA: On 19 May 2009, the High Court (BHUNU J) granted an order in favour of the first respondent in the following terms:

> "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 to the plaintiff.
>
> 2. Costs of suit."

The defendants referred to in the Order were the two appellants and the second, third and fourth respondents ("Macmillan", "Finnigan" and "Across Enterprises"). I shall refer to the two appellants and the second to the fifth respondents collectively as "the defendants" and, where the context requires, to the two appellants as "the appellants". The first respondent will be referred to as "Surtee".

When the defendants failed to make delivery in terms of the Order made by BHUNU J, the Deputy Sheriff was charged with the execution thereof. He served the Order at 72 Eastern Road, Greendale, Harare, on the 22 July 2009 and made the following return:

> "Attempt to recover the fuel. Mrs Evans said they are no longer dealing in fuel supplies and they do not have the fuel. *Nulla bona*. Return to Attorneys."

This prompted Surtee to file an application in the High Court seeking an order that the defendants be held to be in contempt of court and committed to gaol for 90 days. Macmillan, Finnigan and Across Enterprises did not file opposing papers and were therefore in default. All five defendants were found to be in contempt of court. Across Enterprises was sentenced to a fine of US$55 000.00 while the remaining four defendants were sentenced each to a term of 30 days imprisonment. The sentences imposed were suspended on condition that the defendants jointly and severally the one delivering the other to be absolved, deliver to Surtee 47500 litres of fuel on or before the 30 November 2010.

The appellants now appeal against the order of the court *a quo* on the grounds, *inter alia,* that the learned Judge erred:-

(1) In finding that the appellants were in contempt of the order made by BHUNU J;

(2) In finding that that order was one *ad factum praestandum*;

(3) In finding that the appellants intentionally disobeyed that Order despite the Deputy Sheriff's *nulla bona* return the import of which was that the appellants did not have the fuel.

The main issues to be determined are whether the order by BHUNU J was an order *ad factum praestandum* and if so whether the court *a quo* correctly found the appellants to be in contempt of court by reason of their disobedience of that order.

Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam;* and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum.* [1] The remedy of committal for contempt is available only in the latter category of cases. These definitions notwithstanding, the distinction between the two types of orders is in practice not as clear cut as it may seem. Thus certain orders for the payment of money, namely maintenance orders, (which one would have regarded as orders *ad pecuniam solvendam*) have been classified by the courts as orders *ad factum praestandum.* The principle was expressed by SCHREINER A.J. as follows:

> "The reason for holding maintenance orders ...to be orders *ad factum praestandum* is that they are not really money orders at all. In their essential nature they are orders that the defendant do something, namely, maintain the wife or the children. This duty might be performed in various ways, including the provision of housing, clothing and food in kind, or the transfer of property; but in practice the Court indicates how the defendant is to fulfil the duty by the payment of a periodical sum of money fixed in relation to the apparent capacity of the defendant and the needs of the party to be maintained at the time of the making of the order. This direction by the Court does not convert the judgment from one ordering the doing of an act by the defendant into one awarding a sum of money to the Plaintiff."[2]

And, in *East London Transitional Council v MEC for Health, Eastern Cape & Ors* 2001 (3) SA 1133 (Ck), an order directing a public official to pay a certain sum of money to the judgment creditor, was held to operate against that official *ad factum praestandum.* The following extract from the judgment of EBRAHIM J at page 1140F-I of the judgment is instructive:

> "In its strict sense the order that this Court issued on 28 July 2000 for payment of the sum of R801 249 is an order *ad pecuniam solvendam*. But the crucial issue that falls to be considered is in what manner such an order operates against the first and second respondents and what the effect thereof is. In my view, its operation is similar to that

[1] *HERBSTEIN AND VAN WINSEN- THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA; 3Ed at 652-653.*
[2] Carrick v Williams 1937 WLD 76 at 83.

of an order which indicates the manner in which maintenance must be paid. See *Carrick v Williams* 1937 WLD 76 at 83.

In *casu*, even though the order directs that the debt be paid, it is issued, and operates, against the respondents in their nominal capacities. At the same time, and because of their official capacities, it imposes an obligation on them to take such steps as are necessary to enable the relevant departmental procedures to be implemented so that payment of the debt can be effected. The obligation it imposes is not of a financial nature but one that requires them to carry out one or other function which forms an integral part of their official duties. In this respect I consider that the Court's order of 28 July 2000 operates against the first and second respondents as an order *ad factum praestandum*."

On this basis Mr *O Chieng* submitted that on the authorities, the key determinant is not the act directed but the nature of the obligation to be enforced. He submitted that the true nature of the Order by BHUNU J was one for the payment of a debt – albeit in kind- and that the fact that the court ordered the delivery of fuel does not convert the order from an order for payment of a debt into an order *ad factum praestandum* in the same way that an order for the payment of money by way of maintenance is not converted from an order *ad factum praestandum* to an order *ad pecuniam solvendam* by the fact that it is expressed in monetary terms. He further submitted that just as a maintenance order requires the performance of an act in a specific way (and is therefore an order *ad factum praestandum*), so the order by BHUNU J required the payment of a debt in a specific manner (and was therefore an order *ad pecuniam solvendam*).

Mr *Uriri*, on the other hand, contended that the order was clearly one *ad factum praestandum* since it directed the appellants to do something, namely, to deliver 47 500 litres of fuel.

The learned Judge in the court *a quo* decided the first issue on the basis that:

> "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 praestandum*' (i.e. an order for specific performance or the performance of an act – namely the delivery of 47 500 litres of fuel)."

I can find no such acknowledgement by the appellants on the record. On the contrary, it is quite clear from the record that it was not common cause between the parties that the order was one *ad factum praestandum*. In the supplementary heads of argument filed on behalf of the appellants in the High Court the following appears:

> "It is submitted that the order sought to be enforced is not ***ad factum.*** The present case is very different from the one in *Trevor Batezat case SC 49/09* in that the appellant in that case was ordered to return an identified triaxle trailer Registration Number 490-816V....In the case before this Honourable Court, the order arises out of a contractual arrangement of which the applicant cannot say he has no other remedy...to cover his losses."

In taking the parties to have agreed as to the nature of the order made by BHUNU J, the learned Judge misdirected himself.

Three factors persuade me to agree with Mr *Ochieng's* submissions. Firstly, the true nature of the order sought to be enforced is the repayment of a commercial debt. In this connection:

> "I am disposed to take the word *debt* in a wide and general sense as denoting whatever is due – *debitum* – from any obligation."[3]

[3] Per KOTZE J in Leviton & Son v De Klerk's Trustee, 1914 CPD 691 : see C.J.Claasen , Dictionary of Legal Words and Phrases

The debt in question comprised of 40 000 litres of fuel as well as arrear rentals expressed in litres of fuel to the amount of 7 500 litres. In terms of the contract between Surtee on the one hand and Across Enterprises and the remaining defendants who were then its directors on the other hand, Surtee, as I understand it, lent or made available to Across Enterprises 40 000 litres of fuel which would be utilised in the course of trading. At the end of the contract an equal quantity of fuel was to be returned to Surtee by Across Enterprises. That much can be gathered from the judgment of the *court a quo*. A copy of the contract does not form part of the record and no more is known of the facts forming the background of the events leading up to the grant of the order by BHUNU J despite the averment in paragraphs 3- 4 of the founding affidavit attested by Surtee that:

> "3. I instituted legal proceedings in this Honourable Court on the 4th June 2008, under case number HC2926/08 against the 1st, 2nd, 3rd, 4th, and 5th Respondents claiming supply and delivery of forty-seven thousand five hundred (47500) litres of fuel from the 1st 2nd 3rd 4th and 5th Respondents, jointly and severally, within 48 hrs of service of the Court Order upon them.
>
> 4. I beg leave of this Honourable Court to incorporate herein by reference the averments as stated in Plaintiff's declaration filed of record and abide by the same."

Needless to say, the record of those proceedings was not attached to the record of proceedings in this appeal, but it was not disputed that the arrears of rent were to be paid in fuel or that the defendants were indebted to Surtee in the amount of 47 500 litres of fuel. The purpose of the order by BHUNU J was therefore to secure payment of that debt.

Secondly, it would appear that prior to the grant of the order in question, no inquiry was conducted into the means of the appellants to comply with it. The Deputy Sheriff's issuance of a *nulla bona* return would, without more, (for example, evidence that

the fuel had been available but was spirited away before his arrival at the premises), appear to bear this out.

From a reading of the authorities on this subject it appears that in each case where an order *ad factum praestandum* was granted, the Court was satisfied that the defendant was able to comply with it so that a refusal so to comply would be *mala fides* and therefore contemptuous of the court. Thus in the *Batezat case, supra*, an order of committal to gaol was granted because there was clear evidence that the defendant was in possession of an identified tri-axle trailer and had given a number of excuses for failing to deliver it. In *Sabawu v Harare West Rural Council*[4] the defendant wilfully disobeyed an order to pull down certain buildings which he had unlawfully erected.

In view of the dire consequences attendant upon the failure to obey an order *ad factum praestandum*, namely, committal to gaol, it is my respectful view that before granting an order which is *ad factum praestandum* a court ought to satisfy itself as to the ability of the defendant to comply with the order otherwise it takes the risk of issuing a 'hollow and unenforceable' order. There is also an obligation on the Court before whom an application for an order of committal for contempt of an order of court is made to examine the order sought to be enforced in order to ascertain its true nature and to determine in which of the two categories the order falls.

Thirdly, there were other remedies available to Surtee, for example, an alternative order for the value of the fuel. Such an order would have been enforceable in the usual manner, namely by a warrant of execution over the appellants' property and, if

[4] 1989 (1)ZLR 47 (HC)

necessary, a warrant for civil imprisonment. Orders *ad factum praestandum* are usually granted only where there is no other remedy available to the applicant the rationale being that the successful party has other options to enforce an order *ad pecuniam solvendam*.

I therefore conclude that in its essential nature, the order by BHUNU J was one for the repayment of a debt and therefore one *ad pecuniam solvendam*. The fact that the order was framed as it was did not convert that order to one *ad factum praestandum*.

In any event the appellants, in my judgment, were wrongly found to be in contempt of that order. While it is trite that disobedience by a litigant of an orde*r ad factum praestandum* is punishable by committal to goal, it is also true that the disobedience must be wilful and *mala fide*. Punishment for contempt of such an order by committal to gaol is aimed at enforcing civil orders of court, and to bring to its logical conclusion an order given by a judge, which the court finds has been deliberately disobeyed. The principal object of the proceeding is to compel, by means of personal attachment and committal to goal, the performance of the Court's Order. Thus the Court has enforced by committal for contempt, *inter alia,* orders to give up possession of and quit a farm; to pass transfer of a plot of ground; in the case of an executor, to file estate accounts; to frame an account showing profits of a partnership business; to give discovery.[5]

Wilfulness and *mala fides* will normally be inferred upon proof that the order sought to be enforced was brought to the attention of the respondent and that he has either disobeyed the order or neglected to comply with it. The onus then shifts to the respondent to rebut the inference on a balance of probabilities. Proved inability to comply with the order of

[5] *Herbstein and Van Winsen op cit at p653*

Court will afford protection against a committal for contempt.[6] Thus in *HADDOW V HADDOW 1974 (2) SA 181 (R)*, the Court did not grant an order of committal for contempt because the defendant's disobedience of its order was not shown to be *mala fide*. See also *Clement v Clement* 1961 (3) SA 861.

In the court *a quo*, the appellants expressed their inability to comply with the order by BHUNU J. The company (Across Enterprises) had stopped operations and they were not able to comply with the order because they did not have the fuel. Their failure to comply with the order was due to inability to do so as appears from the *nulla bona* return made by the Deputy Sheriff and not to wilfulness and *mala fides* on their part. They expressed their respect for the Court and averred that their failure to deliver the fuel did not constitute contempt of the court. No evidence was placed before the court *a quo* to contradict the averments by the appellants that they were unable to comply with the order.

In my view, the appellants rebutted, on a balance of probabilities, the inference of wilfulness and *mala fides.* The court *a quo* therefore erred in granting an order for committal to gaol in circumstances where the appellants proved, on a balance of probabilities, their inability to comply with the order and failure to comply therewith was not due to *mala fides* on their part.

The appeal is therefore allowed with costs.

The judgment of the court *a quo* is set aside and substituted as follows:

[6] *HERBSTEIN & VAN WINSEN OP CIT AT PP 657-8*

"The application is dismissed with costs."

GARWE JA: I agree

CHEDA AJA: I agree

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