GODFREY MUKWENA MPOFU Applicant

versus

TAPSON MLILO Respondent

HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 21 FEBRUARY 2002

Application for stay of execution

Mazibuko for applicant
Nyathi for respondent

CHEDA J: This is an application for stay of execution. The applicant (hereinafter referred as "Mpofu") entered into an agreement of sale with one Charity Moyo who was the lease holder of stand 13424 Nkulumane, Bulawayo. Subsequent to the said agreement Charity Moyo entered into another agreement of sale with the respondent (hereinafter referred to as "Mlilo") and the said property was eventually transferred into Mlilo's name.

The applicant was called upon to give vacant possession of the said stand but refused and/or neglected to do so until the respondent applied for an eviction order which was granted to him on 16 February 2001. The relevant part of the order reads:

> "Respondent together with all those claiming through him be and is hereby ordered and directed upon being served with this order, to vacate house number 13424 Nkulumane Township, Bulawayo within 14 days of the service of this order.
>
> Failing compliance ... the Deputy Sheriff of this honourable court be and is hereby authorised and directed to forthwith evict the respondent together with all those claiming through him from the said premises and to deliver vacant possession of the premises to the applicant."

In pursuance of the said order the Deputy Sheriff evicted the respondent together with all those who claimed occupation through him on 23 April 2001. However, immediately after the eviction the respondent's wife brought in Alderman Sidanile into the scene. He prevented the respondent from taking occupation as he claimed that he, being a councillor of the City of Bulawayo, had authority to stop the eviction of the Deputy Sheriff.

On 10 August 2001 the applicant issued out summons out of this court against the respondent and Bulawayo City Council claiming that the agreement of sale entered into between the respondent and Charity Moyo be declared invalid and also asking for an order that the immovable property in dispute be transferred into his name. The facts in this matter are the same as those in the present application.

Subsequent to this action the applicant made an application on 17 August 2001 for stay of execution of the order of ejectment granted by this court on 16 February 2001. At the hearing Mr *Nyathi* raised a point *in limine* being that the respondent was not properly before this court as he had not complied with the eviction order and as such was in contempt of court. He further argued that if he was indeed in contempt of court the matter should end there and asked me to make a finding. After hearing both arguments, I reserved

my ruling and allowed the applicant to be heard on the main action.

I now deal with the arguments raised *in limine*. Mr *Mazibuko* argued that the applicant was not in contempt for these reasons:

1. that the respondent at one stage withdrew his contempt of court proceedings; and
2. that if any person was in contempt it was the councillor and his actions cannot be visited upon the applicant.

Indeed it is correct that the respondent attempted to institute contempt of court proceedings against the applicant and later withdrew. This, however, in my view does not assist the applicant in his defence as the contempt is against the order of the court and not against the respondent. The respondent is, however, entitled to institute the said proceedings, as failure by the applicant to comply indeed results in him suffering in the process.

The second point is whether or not the actions of the councillor is legally that of the applicant. I am constrained to look at the order itself and the order in my view should be given its true and ordinary meaning. The order calls upon the applicant and all those who claim under him. In *Baron* v *George* 1994 (2) ZLR 141 (S) at 145C McNALLY JA stated:

> "an order of court must be presumed, where it is not ambiguous, to mean what it says."

In this regard the order is clear, so much so that even he who runs can read it. The councillor was summoned by the applicant's wife for the sole objective of stopping the eviction and that objective was indeed achieved.

I have to decide therefore whether in light of the above the applicant was in contempt. In our law failure to comply with a court order for whatever reason renders one contemptuous. In *Lindsay* v *Lindsay (2)* 1995 (1) ZLR (S) 296 at 300D GUBBAY CJ stated:

> "The contempt of the order of this court continues until it is purged by compliance."

I hasten to add that I am strengthened by the above observation of the learned Chief Justice which puts paid to all doubts regarding the correct legal position in this regard.

In the present case, after having been served with a warrant of ejectment, the applicant did not appeal against that order, which was the proper course of action to take. He, instead, issued summons against the respondent on the basis of the same facts which were used in the matter where he was ordered to give the respondent vacant possession. He subsequently made this application. In my view, the summons and the present application were purely a ploy to frustrate the court order issued against him. A court order remains in force until it is complied with or set aside on appeal. In as much as it primarily must be complied with, as is what the applicant would have prayed successfully for, this court has equally an interest in its compliance for the insurance of the protection, upholding of the dignity and its respect.

Our courts take a serious view of anybody who disobeys a court order. The English courts hold the same view as stated in the English case of H*adkinson* v *Hadkinson* [1952] 2 All ER 567 (CA) at 569C where ROMER LJ remarked:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a competent jurisdiction to obey it, unless and until that order is discharged. The compromising nature of this obligation is shown by the fact it extends even to cases where the person affected by an order believes it to be irregular or even void."

There are two consequences that flow from that obligation. The first is that anyone who disobeys an order of court is in contempt even if he believes it to be irregular. The second is that no application to court

by such a person will be entertained unless he has purged himself of his contempt. Therefore the disregard of an order of court is a matter of sufficient gravity and as long as it has not been discharged it remains in force whatever the order may be.

LORD DENNING LJ (as he then was) in *Hadkinson supra* at 574 had this to say:

> "It is a strong thing for a court to refuse to hear a party to a cause and is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the cause of natural justice and where there is not other effective means of securing his compliance."

It is plainly clear that the courts will not take kindly to litigants who disobey its orders willy nilly. The court, in my view has a discretion to either give or refuse audience to the offending party. Such discretion from LORD DENNING's point of view ought to be exercised with a view of the consequences of such failure by the litigant. In this case, the applicant frustrated the Deputy Sheriff in the execution of his duties and went further to issue out summons out of this court on the basis of the same facts upon which this court ruled against him. This, in my view, was a deliberate way of frustrating and impeding the otherwise smooth course of justice. It is in the interest of justice that matters before the courts should reach a certain conclusion, they cannot continue in perpetuity.

I agree with Mr *Nyathi* that the applicant did not comply with the court order and his hands are therefore not clean. He cannot, therefore, expect the court to hear and/or symphathise with him when he has totally ignored its authority.

In *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H), GILLESPIE J restated the correct legal position at 177H:

> "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 non-compliance was willful on the part of the defaulting party."

In this instance there is no doubt that there was no compliance by the applicant and he did not dispute it. The question which perhaps is pertinent is whether or not the non-compliance was willful. In determining this question I have to take into account the circumstances surrounding this incident on the date in question:

(a) there was a lawful order;
(b) the Deputy Sheriff had given respondent vacant possession;
(c) the applicant's wife summoned the councillor in order to persuade and/or stop the eviction.

These factors, taken in totality, in my view amount to nothing other than both unlawfulness and willfulness on the part of the applicant and those who claim through him.

I therefore find that applicant is in contempt of court and as such cannot be heard. This application is accordingly dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Sibusiso Ndlovu, respondent's legal practitioners