CHEMADEN RESOURCES (PVT) LTD
versus
EDISON KADZOMBE
and
MINISTER OF LANDS AND RURAL RESETTLEMENT N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 June, 2017 and 24 August, 2017

Opposed Matter

P Ranchhod for the applicant
Advocate E Mubaiwa, for the respondents

MANGOTA J: It has become more of a rule than an exception for persons who apply under Order 33 of the High Court Rules, 1971 to prescribe a sanction. They include in the draft order the punishment which the court must, in their view, mete out to the wrongdoer. They, invariably, move the court to commit their adversary to gaol. They, in short, use civil contempt of court proceedings as a weapon of attacking their adversary and not as a way of ensuring that the ends of justice are met.

The practice of prescribing a sanction in civil contempt of court proceedings is wrong. It amounts to a party arrogating to itself the power and roles of a policeman, a prosecutor and a judge all in one. It is not in tandem with Order 33 of the rules of court. Rules 391 and 392 of the High Court Rules 1971 confer upon the court a discretion to respectively impose a fine upon the wrongdoer or to commit him to prison. Prescribing a sanction in the draft order is, therefore, akin to a usurpation of not only the discretion, but also the powers, of the court in civil contempt of court proceedings.

The practice of prescribing a sanction should be discouraged. It serves little, if any, purpose. It is emphasised that it is not the applicant who is held in contempt. It is the court

which, because of the wrongdoer's wilful and wrongful conduct, has its authority and dignity undermined. Contempt of court proceedings, therefore, aim at nothing but a restoration of the authority of the court. Their primary aim is to compel persons to obey and comply with court orders which bind them.

The present applicant fell into the above described set of circumstances. It moved the court to find the first respondent to be in contempt of court. It prayed that he be committed to 30 days imprisonment at Harare Central Prison or at such other facility as the Sheriff of Zimbabwe determines.

The applicant anchored its application on HC 8406/15. HC 8406/15 is an order which the court made in favour of the first respondent on 8 September, 2015. He had approached the court seeking a spoliatory relief against the applicant. The court ordered the applicant to restore the land to the first respondent who was or is its lawful occupier. It ordered the first respondent to, *inter alia*, preserve the area which related to the applicant's mining claims against any mining activity.

The applicant is the registered owner of some mining claims. These lie on a piece of land which is known as Lot 6 of the Remaining Extent of Eskbank which is in Mazowe District under the Province of Mashonaland Central.

The first respondent is the lawful occupier of the land on which the applicant's claims lie. The land was 125 hectares in extent in 2013. It now covers an area of 55 hectares. The second respondent reduced it to the current hectarage in an offer letter which he issued to the first respondent on 19 September, 2016.

The incident of 12 January, 2017 revealed to the applicant that illegal mining of gold was taking place at its claim(s) or at some of them. The incident related to a person who had fallen and got trapped at the bottom of an 80-metre deep shaft. It attracted the attention of the Zimbabwe Broadcasting Corporation news crew, the police, members of the local authority and others who stayed in the affected area.

The shaft into which the victim fell and got trapped was on the applicant's claim. The claim was allegedly on the first respondent's farm. It was the applicant's contention that the victim was the first respondent's worker. It averred that the victim and others were working on its claim(s) for the first respondent's benefit. It was for the mentioned reason that it filed

the present application. It moved the court to find him to have been in contempt of court and, if found to be so, to commit him to gaol for 30 days.

The first respondent opposed the application. He raised five (5) preliminary matters after which he addressed the court on the merits.

The first respondent's first preliminary matter was a result of the manner in which the applicant's draft order was couched. He submitted that service of the application on his legal practitioners was not proper service. He insisted that the application should have been served upon him personally. His reason for the same was that the application had the effect of adversely affecting his liberty.

The first respondent missed the point. He failed to appreciate that the application was filed under rules 388 and 389 of the High Court Rules, 1971. It was an application to find him to be in contempt of court. Personal service of the application was not, at that stage, necessary. Service of the same on his legal practitioners, as occurred *in casu*, sufficed. Personal service of process is only required when he has been found to have been in contempt and the court, in the exercise of its discretion, decides to proceed under rule 392 of its rules. He should, by a mere reading of rules 391 and 392, have known that the court would not religiously be bound by paragraph 2 of the applicant's draft order. He should have known, further, that the court may, or may not, exercise its discretion under rule 392 but under rule 391 of its rules. His first *in limine* matter was, therefore, misplaced.

The first respondent's second *in limine* matter was that there were material disputes of fact in the case. He insisted that those could not be resolved on the papers.

There was a disagreement between the applicant and the first respondent. The applicant alleged that the first respondent violated the contents of HC 8406/15. The first respondent said he did not. The parties' respective positons can never be said to constitute what the first respondent referred to as material disputes of fact. Evidence which is led does enable the court to resolve the parties' case in one way or the other.

It is not a material dispute of fact for the applicant to make the allegations it made which the first respondent denies. Such a matter constitutes an issue which the court will determine on the basis of evidence which the parties place before it. The first respondent's second *in limine* matter which he premised on the above stated position cannot, therefore, hold.

Equally misplaced was the first respondent's assertion which was to the effect that the application was anchored on inadmissible hearsay evidence. Affidavits of persons who claimed to have been at the scene of the accident were attached to the application. Reference is made in this regard to the affidavits of one Maxen Ncube and one Willian Mpofu. Affidavits of person who claimed to have been working on the applicant's claims with, or for, the first respondent were also attached to the application. The affidavits of one Christian Mavhunga and one Lovemore Kaseza are relevant on the point.

The issue of the pending case - HC 11370/15 - which the first respondent raised in his third *in limine* matter was neither here nor there. HC 11370/15 was, to all intents and purposes, totally divorced from the present application. It sought a dismissal of HC 8406/15 which the first respondent did not prosecute. The current application seeks to make him accountable for his alleged disobedience of the court order. HC 11370/15 is, therefore, different in both form and substance from the current application which was filed under HC 532/17. The first respondent's third *in limine* matter which he couched under the heading *lis pendens* does not, therefore, hold.

The remarks which the court made in regard to the first respondent's second preliminary matter dispose of his fourth preliminary matter. He criticised para(s) 9, 10, 11 and 12 of the founding affidavit. His criticism which was to the effect that the paragraphs were not compliant with r 227 (4) (a) of the rules of court cannot hold. The rule was not offended at all. Affidavits of persons who said they visited the scene of the incident contain direct, as opposed to hearsay, evidence. There was, therefore, no inadmissible hearsay evidence in the application.

The first respondent's fifth preliminary matter centred on Nkonyeni Agri-Hub. He submitted that the land in which the applicant's claims lie was parcelled out to Nkonyeni Agri-Hub. He insisted that Nkonyeni Agri-Hub should have been joined to the present application. The applicant, he said, had its rights in the claim(s) extinguished by the stated development. He submitted that the applicant did not, therefore, have *locus standi* to sue him. He moved the court to dismiss the application which he said was defective for the non-joinder of Nkonyeni Agri-Hub.

The first respondent knows that non-joinder of a party does not render an application or an action defective. Reference is made in this regard to r 87 (1) of the High Court Rules,

1971. He did not, at any rate, produce any evidence which showed that Nkonyeni Agri-Hub assumed rights and interest in the land which the second respondent allocated to him in 2013. He only made an allegation which he did not substantiate. His fifth preliminary matter is devoid of merit.

It is pertinent to consider whether or not the first respondent engaged in wilful disobedience to, or disregard of, the order which the court imposed against him under HC 8406/15. It is necessary to establish whether or not:

(i) HC 8405/16 is extant;

(ii) it was not complied with or was violated – and

(iii) the violation was or is wilful on the part of the first respondent

[see *Scheelifc V King Mining Co (Pvt) Ltd* v *Mahachi*, 1998 (1) ZLR 173 (H) at 177 H to 178 A; *Haddon* v *Haddon*, 1974 (1) RLR 5 (G) at 6A, *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) at 299 B].

The deponent of the founding affidavit is a director of the applicant. He did not visit the scene of the accident. He stated as much. He said HC 8406/15 prohibited him from doing so. He attached to the application the supporting affidavits of Maxen Ncube and William Mpofu. The affidavits of the two stated in clear and categorical terms that the accident occurred at one of the applicant's claims which were on the first respondent's farm. Ncube and Mpofu corroborated each other's evidence on the point that Ministry of Mines officials and them entered the first respondent's house on 13 January, 2017. They said, in the house, they saw a large number of bags and stockpiles of ore. Mpofu estimated the ore which was in the house to have been more than ten tons. Both of them testified to have observed some mining equipment – a compressor and jack hammers – which they said was in the house.

William Mpofu went a step further than the evidence which he gave. He attached to his affidavit the supporting affidavits of Christian Mavhunga, Lovemore Kaseza and Taipisa Wilson. He called them p 1, p 2, and p 3 respectively.

Christian Mavhunga's affidavit was short and to the point. He said he was one of the first respondent's workers. He averred that he and others started working for him in November, 2016. He said they were digging for gold. One Mushore was their foreman, according to him. He stated that the first respondent later dismissed Mushore from work.

Lovemore Kaseza's affidavit was to the effect that he worked for the first respondent. He stated that his co-workers and him mined gold at the mine which was on the first respondent's farm. He averred that his employer purchased the equipment which they used in their mining operations from one Nexus. The compressor was the only item which did not belong to the first respondent, according to him. He said his co-workers and him would take the ore which they extracted from the mine to the first respondent's house which was at the latter's farm.

Taipiwa Wilson is the wife of the victim of the incident of 12 January, 2017. She stated that her husband used to work for the first respondent. She said he used to come and fetch her husband and take him to his mine. She averred that the first respondent did not pay her husband. He would, according to her, promise that the ore which they extracted from the mine would go to the mill after which her husband would receive his pay.

The evidence of the five deponents was more incriminatory, than it was exculpatory, of the first respondent. It was told in a clear and unambiguous language. It was cogent, convincing and to the point.

I could not but marvel at the first respondent's resourcefulness. He made every effort to undo the damage which had been inflicted upon him. He attached to his supplementary affidavit the affidavit of one Transwell Koti Mushore.

Mushore's affidavit was sworn to on 17 January, 2017. Its aim and object were to exculpate the first respondent. It was to the effect that Mushore was the owner of the ore which was found at the mine. His statement which was to the effect that he apologised to the owner of the mine for working the mine without the owner's knowledge and consent confirms the observation that the first respondent always held himself out to the world at large as the owner of the mine. Mushore, as Christian Mavhunga stated, once worked as the first respondent's foreman. He, therefore, believed that the mine which forms the basis of the present application belonged to no one else but to the first respondent. The belief was not unfounded. It had its foundation on the conduct of the first respondent.

Elsewhere in his opposing papers, the first respondent stated that he concentrated on his farming activities under the command agriculture programme. Mushore said he lied to the first respondent whom he told that he would do farming activities at the farm when he was doing illegal gold mining. The two statements cannot co-exist and continue to have any

meaning. The first respondent's alleged farming activities under command agriculture would have required his constant presence at the farm. He would have been present at the farm in person or through his workers. He would not, under the stated circumstances, have failed to notice:

(i) the presence of Mushore's illegal mining activities at the farm and/or

(ii) the gold ore which was at the mine if not in his farmhouse, if Mushore's assertions are anything to go bye.

It is the view of the court that the first respondent connived with Mushore to depose to the affidavit to exonerate him. No evidence was led to show why Mushore deposed to the affidavit. Its meaning and import remained unclear. Mushore did not state what he wanted to achieve with it. He filed it with the Ministry of Mines on 3 February, 2013. The question which bags the answer is whether or not he wanted the Ministry to give him the green light to collect the gold ore from the mine or from the first respondent's house for processing. Whatever reason, if any, Mushore did not have to put his request to the Ministry in the form of an affidavit. A letter of request would have sufficed.

The affidavit of one Ophias Dandawa is in consonant with what Christian Mavhunga stated. He said Mushore once worked as the first respondent's foreman. Mushore would, under the observed circumstances, hire some mining equipment from Ophias Dandawa to enable him to carry out his work for the first respondent. Ophias Dandawa's affidavit does not, therefore, take the first respondent's case any further than where the latter left it.

The affidavit of one Tendai Kambiwa was very interesting. It was attached to the first respondent's supplementary affidavit. It was deposed to on 14 February, 2017. Its origins remained unclear. Its aim and object were to show that Maxen Ncube approached and requested him to lie against the first respondent. It did not state what prompted Maxen Ncube to want to use Tendai Kambiwa to lie against the first respondent.

Neither the first respondent nor Tendai Kambiwa was able to show why Maxen Ncube would have wanted to see the first respondent in trouble. No bad blood was ever shown to have been existent between Maxen Ncube and the first respondent. Maxen Ncube had no difficulty in dismissing the affidavit which he said lacked substance.

The above stated matter shows the extent to which the first respondent went in his effort to discredit the evidence of persons whom he thought had inflicted substantial damage

to his own side of the case. His efforts were, unfortunately for him, unrewarded. Unrewarded because what he aimed at achieving did not hold.

It was ludicrous for the first respondent to suggest that Lovemore Kaseza and Christian Mavhunga deposed to affidavits in which they dissociated themselves from the affidavits which they deposed to on 18 January, 2017. The two's affidavits of 18 January, 2017 were hand-written and were in the vernacular language. They had to be translated into the English language for purposes of having the record completed.

The affidavits which Christian Mavhunga and Lovemore Kaseza are alleged to have deposed to on 27 June, 2017 were in typewritten form and were in the English language. Neither the first respondent nor his legal practitioner was able to tell how the two gentlemen had suddenly become proficient in the English Language. Nor was it ever suggested for the benefit of the court and the applicant that the affidavits of the two were translated from the vernacular, into the English, language. The vernacular version of their respective affidavits was not produced in court.

It was evident that the gentlemen's purported affidavits of 27 June, 2017 were a result of the first respondent's resourceful mind. He authored them with a view to undoing the damage which was contained in the two gentlemen's affidavits of 18 January 2017. The affidavits of 27 June, 2017 did not come from Christian Mavhunga and/or Lovemore Kaseza. They came from the first respondent.

The above observed matters show in a clear and succinct manner that the first respondent resolved to, and did actually, build on his case as the hearing of the application remained in progress. He, unfortunately for him, overdid his tricks to a point where it became too obvious for anyone let alone the court to see what he wanted to achieve.

The first respondent's assertion was that the land which the second respondent offered to him in 2013 was 125 hectares in extent. He said the second respondent reduced the size of the land to 54.5725 hectares in the offer letter which was issued to him on 19 September, 2016. He stated that all the land which the second respondent took away from him was offered to Nkonyeni Agri-Hub. His insinuation was that the applicant's claims went away together with the land which the second respondent offered to Nkonyeni Agri-Hub. He purported to suggest that HC8406/15 was no longer binding upon him because of the alleged changed circumstance.

The applicant rebutted the suggested state of affairs. It insisted that its claims fell within the first respondent's reduced piece of land. Its reason which the court accepts was that, if its claims lay outside the first respondent's reduced land, as alleged, the latter would have applied to have HC 8406/15 set aside on the basis of changed circumstances. It submitted that the fact that he did not apply as he should have done confirmed the observation that the claims remained on the first respondent's new farm.

The applicant's reasoning cannot be faulted. The court accepts its statement as conveying the correct position of the matter. Nothing prevented the first respondent from approaching, and moving, the court to revisit its order under HC 8406/15 if what he said was correct.

Paragraphs (2) and (3) of HC 8406/15 conferred authority on the first respondent to deal effectively with any person(s) who wanted to, or did actually, engage in any mining activities at the applicant's claims. The court placed at his disposal the Sheriff or the latter's deputy for him to call upon and request the removal or eviction of any such person(s) from the claims.

The first respondent's assertion which was to the effect that illegal miners were mining at his farm is as far-fetched as it is misplaced. He had the authority and machinery to remove those from the farm, if such was the case. He could easily have invoked the two paragraphs which were in the court order. These remained at his disposal.

Illegal miners could not commence, or continue, mining at the farm without his knowledge or that of his employees. A *fortori* when, as he stated, he focused his attention on command agriculture. His presence or that of his workers at the farm was a *sine qua non* aspect of his success in the programme.

On a proper analysis of the case, therefore, the court is satisfied that:

(i) the order which falls under HC 8406/15 is extant;

(ii) the order prohibited the first respondent from mining the applicant's claims or allowing others to do so;

(iii) the first respondent personally, or through others and with his knowledge and consent, violated HC 8408/15;

(iv) the first respondent's conduct was wilful and, therefore, contemptuous of the court.

Having found against the first respondent, the next matter which calls for consideration relates to the sanction which he must endure. The applicant moved the court to commit him to gaol. It specified the institution to which it said he should be committed.

The applicant's conduct was over-reaching. It arrogated to itself the powers which it did not have. The contempt was not to it but to the court. The court must, therefore, determine the sanction which is commensurate with the first respondent's conduct.

What the first respondent did was thoroughly reprehensible. He flouted a court order which was extant. He took advantage of the fact that HC 8406/15 barred the applicant and its representatives from entering the farm. He refrained from applying for confirmation or discharge of HC 8406/15. He saw that its continued existence operated in his favour. He, out of greed, kept it in the form in which it was granted to him. He undermined the dignity of the court when he deliberately disobeyed HC8406/15.

Court orders are what they are. They should be obeyed by all who are bound by, or under, them. Any person who flouts them has no one but himself to blame. If persons who fall into the category of the first respondent were allowed to go scot free, the court would lose its teeth and cease to be an instrument which places people into line. Discipline would be a thing of the past and so would be law and order which are the bedrock of a free and democratic society. Society would be real hell on earth as the mighty and crafty would get the start of the majestic world alone. In their unbridled state, the crafty would trample upon the efforts of the weak and the law abiding citizens of a country in a manner which defies description.

In assessing the sanction which is commensurate with the conduct of the first respondent, I remain satisfied that the latter has learnt his lesson. The current proceedings are in themselves a real lesson to him. He is possibly a first offender who must be curbed from the unbecoming conduct he engaged into *in casu*.

I am, because of the stated matters, persuaded to invoke r 391, and not r 392, of the High Court Rules, 1971. What affects his pocket which he lined with ill-gotten goods in violation of the court order will, in my view, instill in him a sense of not ever wanting to wilfully disobey court orders.

On the basis of the foregoing, therefore, it is ordered that:

1. Paragraph 2 of the draft order be and is hereby struck out,

2. Within 30 days of this order, the first respondent be and is hereby ordered to pay a fine of $1000 or, in default of payment 50 days imprisonment;
3. The application be and is hereby granted as per paragraphs 1, 3, 4 and 5 of the draft order.

Hussein Ranchhod & Co, applicant's legal practitioners
Antonio & Dzetero, 1st respondent's legal practitioner