SERGEANT MANDE B 047375T
and
CONSTABLE NYAKUJARA L T 070317F
and
CONSTABLE MBIRI S 074088E
versus
THE TRIAL OFFICER
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 March & 1 July 2022

Opposed Matter

N Mugiya, for the applicant
C Chitekuteku, for the respondent

MANGOTA J: I heard this application on 24 March 2022. I delivered an *ex tempore* judgement in which I granted the application with costs which are at attorney and client scale.

On 14 April 2022 the Registrar wrote requesting written reasons for my decision. He advised that the respondent appealed my decision. My reasons are these:-

The applicants who, until 17 May 2016, were members of the police service, successfully reviewed the decision of the police commissioner general, the second respondent *in casu*, who dismissed their appeal against the decision of the first respondent, the trial officer, who convicted them on a charge of contravening para 24 of the Schedule to the Police Act, [*Chapter 11:10*]. CHIKOWORE J who dealt with the applicants' review on 25 July 2019 under HC 5055/16 directed the respondents to, *inter alia*, reinstate the applicants into the police service without loss of salary and benefits.

The respondents' inaction in regard to the court order which had been entered for the applicants set the latter on a collision course with the respondents. The applicants filed this application for civil contempt of court. They filed it under Order 43 r 388 of the repealed rules of this court. They move me to:-

a) direct the respondents to purge their contempt by complying with para (sic) 2, 3 and 4 of the court order under HC 5055/16 within seven (7) days from the date of this order, failing which;

b) commit the respondents to gaol for a period of ninety (90) days as well as;

c) direct the respondents to pay costs of suit at the scale of attorney and client.

Civil contempt of court, simply defined, is the respondent's willful and *mala fide* disobedience of a court order which a court of competent jurisdiction issues against him. It is more often than not prayed for by an applicant in whose favour the order has been entered. Before the respondent is held to be in contempt for failing to comply with a court order, the applicant who moves for contempt of court must allege and prove, on a balance of probabilities, that:-

i) the order which he seeks to be complied with is extant;

ii) the respondent's attention has been drawn to the existence of the court order - and

iii) the respondent willfully or with *mala fide* intention failed to obey the order of court – *Scheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H).

The primary purpose of contempt of court procedure is to compel compliance with the court's order as well as to protect and uphold the dignity and respect of the court and its processes. To compel compliance, therefore, the court invariably imposes a suspended committal to prison. The suspended sentence, if a comparison may be favoured, aims at affording the intransigent party a powerful inducement to fulfil his obligation in terms of the order: *Haddow* v *Haddow* 1974 (1) RLR 5 (G) at 6A; *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) at 299 B.

Civil contempt of court is, therefore, a powerful tool through which respondents who, without lawful cause, choose to disobey court orders are brought to book. It compels them to comply with such under pain of sanction. The suspended punishment which hangs over their heads does, in the majority of cases, compel compliance. It is couched in such a way as to accord to the respondent the opportunity to comply. It is only when he fails to comply with the extant order of court and has no lawful cause for not so complying that he is committed to gaol. The committal falls away where, acting in line with the window of opportunity which the court has extended to him, he complies with the order of the court.

Court orders are an important element of civilized man's way of life. They cannot be disobeyed without the society in which such disobedience occurs falling into utter chaos. They ensure peace, law and order as well as development. They are a *sine qua* non aspect of good order, good governance and best practices which every society on planet earth emulates. It is for the mentioned reason, if for no other, that the people of this country had to make provision for compliance with orders of court when they enacted the Constitution of Zimbabwe in year 2013. They stressed in section 164 (3) of the same that:-

> "An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies and must be obeyed by them."

Khumalo & Anor v *Maoni Trading (Pvt) Ltd & Ors* HB 279/17 brings out the court's most serious disquiet in respect of litigants who flout its orders without lawful excuse. The court stated:-

> "…Litigants who deliberately soil court processes by refusing to comply with court orders pose a serious threat to the administration of justice. They cannot seek protection of the very court whose orders they treat with contempt."

In *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information* 2004 (1) ZLR 538 at 545 G 546 A-B, CHIDYAUSIKU CJ cited, with approval, the wise words of LORD DENNING MR who, in *State for Trade & Industry* v *F Hoffman-La Roche & Co AG & Ors* (1973) 3 All ER 945 (CA) expressed the need on the part of persons who are in a particular geographical space to obey orders of court when he remarked in the case as follows:-

> "The Secretary of State has made, under the authority of Parliament, an order which compels the plaintiffs to reduce their prices greatly. That order has been approved, after full debate, by both Houses of Parliament. So long as that order stands, it is the law of the land. When the courts are asked to enforce it, they must do so."

Lord Denning MR further observed at 955f-g:-

> "They argue that the law is invalid; but unless and until these courts declare it to be so, they must obey it. They cannot stipulate for an undertaking as the price of their disobedience. They must obey first and argue afterwards."

HC 5055/16 which the applicants attached to their application constitutes their cause of action. The court order appears at p 6 of the record. Its contents are clear and unambiguous. Clause 1 of the order, for instance, set aside the decision of the second respondent in which he upheld the conviction and sentence of the applicants. Clause 2 upheld the applicants' appeal against

conviction and sentence. Clause 3 directed the respondents to reinstate the applicants into the police service without loss of salary and benefits.

Because the respondents were in default when the order was issued, the applicants wrote to the second respondent on 29 August 2019. They drew his attention to the order which the court entered in their favour and against the respondents on 25 July 2019 under HC 5055/16. They attached a copy of the order to their letter. They did so for the convenience of the second respondent. They drew his attention to clause 3 of the order of court. The clause related to their reinstatement into the police service without loss of salary and/or benefits. The second respondent received the applicants' letter to which the order of court was attached on 30 August 2019.

It is evident, from a reading of the foregoing matters that the applicants proved the existence of an extant court order which the court entered for them against the respondents. They showed further that they served the court order upon the respondents. They, in short, satisfy the requirements for civil contempt of court.

The *onus* therefore shifts onto the respondents to show if they complied with the order of court. If they did, this application would not have been necessary. Their conduct after they became aware of the court order shows that they knowingly chose to defy the order of court. They did not, in essence, reinstate the applicants as the court directed them to do.

The respondents give a variety of reasons for their defiance of the court order. Their initial statement was that they applied under HC 7984/19 to rescind HC 5055/16 which they claimed was erroneously granted. Their second assertion was that they were not the employers of the applicants. They claimed that the police service employed the applicants and them. They alleged that reinstatement of members into the police was now the function of the police service.

The first reason which the respondents advanced cannot hold. They know as much as anyone does that an application for rescission such as the one which they claimed they filed under HC 7984/19 cannot suspend the operation of the order which the court issued under HC 5055/16. The respondents who boast of a team of very competent legal practitioners would have known that their filing of HC 7984/19, if such was filed, did not excuse them from complying with HC 5055/16. Their claim which is to the effect that HC 5055/16 was erroneously granted leaves a bad taste in the mouth of any judicial officer. It conveys the impression that the respondents

arrogated to themselves the power to review, or to sit as a court of appeal over, HC 5055/16. This is a *fortiori* the case when they do not bring out the error which accompanied the grant of the order.

The respondents appear to have groped in the dark for reasons which would assist them to, as it were, circumvent the order of court which was staring them in their face. Their statement which is to the effect that the police service employs the applicants and them was mentioned by them only as a matter of fashion. I took the liberty to go through provisions of the Police Act under which the Police Service Commission ("the Commission") is provided for. I observed that the Commission is but only a body which regulates the affairs of such persons as the applicants and the respondents. I observed further that employment and/or reinstatement of members into the police structures is not one of the Commission's functions.

The respondents were therefore being economic with the truth when they alleged that the police service has, as one of its functions, reinstatement of the applicants. It does not. However, even if it were to be accepted, for argument's sake, that reinstatement falls under the purview of the police service as the respondents would want me believe, the respondents, it is evident, did nothing to alert the Commission of the order of court. The Commission could not have acted on its own without its attention being drawn to the extant order of court by the respondents. It would not *mero motu* have known that the applicants were to be reinstated into the police service without loss of salary and/or benefits. It could only know of that matter if the respondents had drawn its attention to the stated matter. There is no evidence which shows that the respondents did write to the Police Service Commission on the matter of recruitment of the applicant.

Nothing, in my view, prevented the respondents from writing to the Commission drawing its attention to the circumstances of the applicants and calling upon it to take steps to comply with clause 3 of the order of court. The order was not binding on the Commission. It was binding on the respondents. They should therefore have shown the effort which they made, if they did, to comply with the order of court.

The respondents displayed a considerable degree of confusion in the manner that they endeavoured to defend themselves. They, for instance, stated in their opposing papers that the Police Act gives the second respondent power to discharge and reinstate…only in relation to s 51 of the Police Act. It is on the strength of the mentioned statement that the applicants moved the court under HC 5055/16 to direct the second respondent to reinstate them into the police service

without loss of salary and benefits. The second respondent does not explain why he did not utilize his powers as contained in the Police Act with a view to complying with the order of court. Nothing, in my view, prevented him from taking advantage of the power which the Act confers upon him to avoid defiance of the court order.

The respondents appear to have made some concerted effort to confuse the current application with HC 1206/19 wherein the first applicant, ex-sergent Mhande and one other, Ex-constable Mhaka, reviewed the proceedings which the Police Service Commission conducted on 31 October 2019 and 10 August 2019 respectively. Those proceedings which culminated in the aborted appeal which the two filed under SC 63/18 have no relationship at all with the current application which applicants filed against the respondents on 22 October 2019. It is my view that the respondents raised the matter which related to the review proceedings only to cloud issues which were in themselves clear.

The second respondent sits at the helm of an organization which prides itself in the maintenance of law and order within the length and breadths of Zimbabwe. He took the oath of office in terms of which he committed himself, and through him, all his juniors of whatever rank, to respect and protect the Constitution of Zimbabwe and all laws which flow from it. Now, if a person whose sworn duty is to obey the law of the land and to ensure that the same is obeyed by all and sundry without exception chooses to be a law breaker himself, this current chapter of the country's history would have to either be re-written or regarded as unconscionable. No one would keep the gate closed when the gate keeper himself chooses to allow it to remain open. That free-for-all attitude on the part of the respondents would be a serious recipe for utter chaos, disorder and disaster of unimaginable proportions.

Orders of court are what they are. They exist until they are set aside. They cannot be avoided. Nor can they be wished away. They simply are to be obeyed by all without exception. As one legal philosopher of the olden days was pleased to state. His words remain true and alive even to this day. He said he feared two things under the sun. He said he feared God and the Law. He said he feared God because he makes him man who is not man. He said he feared the Law because it makes him king who is not king.

CHIDYAUSIKU CJ summed it all up when he stated in *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information* 2004 (1) 538 at 545 G that:-

> "……citizens are obliged to observe the law of the land and argue afterwards……
> ……there is no difference in principle between a litigant who is defiant of a court order and a litigant who is defiant of the law……
> ……the court will not grant relief to a litigant with dirty hands …until such a defiance has been purged ……."

The above excerpts show the abhorrence with which courts look at the attitude of such persons as the respondents. Their duty is to uphold the Constitution of Zimbabwe and its laws including court orders. They review or sit in appeal over a court order. They pass a judgment which is to the effect that the order was not properly granted. They do not explain where they derive their power to review or sit as such in circumstances where a window of opportunity was opened to them to comply with the order of court.

The applicants proved their case on a balance of probabilities. The application is, in the result, granted as prayed.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners