

REPORTABLE

TRYNESS KABITI
versus
DIRECTOR GENERAL CENTRAL INTELLIGENCE
ORGANISATION, NO
and
THE SHERIFF FOR ZIMBABWE, NO

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 4 MARCH & 26 MARCH 2025

Chamber Application

C.W Kanoti, for the applicant
C. Chitekuteku, for the 1st respondent

MUNANGATI-MANONGWA J: Compliance with court orders by some government officials acting in their official capacity is often problematic. This is despite the constitutional provision that obligates all citizens and state entities to observe the rule of law. This case is a clear example of reluctance to comply with a court order. This application is premised on the allegations that the first respondent defied an extant order of this court necessitating filing of the application for contempt of court in terms of r79 (1) of the High Court Rules, 2021.

The facts of the case are common cause. The first respondent who is the applicant's employer unilaterally reduced the applicant's monthly salary resulting in her suffering a shortfall of her monthly salaries in the sum of US\$132 152.42. This prompted the applicant to approach this court seeking a declaratory order to the effect that the first respondent had no right whatsoever to act in that manner, and consequential relief. On 27 November 2023, MHURI J granted a declaratory order in favour of the applicant under Case Number HCH 5840/22 which nullified the first respondent's conduct as well as granted consequential relief to the effect that the applicant be paid a total sum of US\$132 152.42 in owed salaries within one month of the granting of the order.

Suffice that the order was granted when the first respondent's legal practitioner Mr *Chitekuteku* was in attendance. He remains the first respondent's legal practitioner in these proceedings.

The applicant alleges that since the granting of the order, the first respondent made numerous but unfulfilled undertakings to the applicant's legal practitioner through telephone medium that the first respondent was making the necessary arrangements to settle the judgment debt together with taxed costs thereof to no avail. Due to the first respondent's non-compliance, the applicant in early January 2024 processed a writ of execution, instructed and paid the second respondent to attach in execution the said respondent's assets at least by not later than Friday 1 March 2024. The applicant alleges that such execution was not effected on the premise of a letter dated 24 January 2024 which was written by the respondent's legal practitioner to the second respondent advising the second respondent not to effect execution on the ground that the property of the Central Intelligence Organization is not executable given that it is state property in terms of s5(2) of the State Liabilities Act [*Chapter 8:14*]. The first respondent has not made an effort to meet his obligation to comply with the court order. The applicant prays that the first respondent who deliberately neglected to comply with the court order despite being aware of it should be found in contempt of court and be sanctioned for such conduct.

The application is vehemently opposed by the first respondent who denied being in deliberate contempt on the basis that the order he is due to comply with is still under contestation under a pending application for condonation for late seeking of leave to appeal to the Supreme Court under Case Number HCH 1352/24. The first respondent states that since the extant order was granted as unopposed after first respondent was barred, should its application for condonation succeed and it gets to defend the matter, the outcome might have an effect on the extant order the applicant seeks to execute upon. He denies being reluctant to prosecute his case so as to frustrate execution of the order. The first respondent states that his zeal to contest the extant order is evidenced by the effort of filing an application for condonation for late filing of leave to appeal to the Supreme Court. The first respondent denied the applicant's assertions that he showed interest to comply with the order through a series of follow up telephonic calls between his legal practitioner and that of the applicant. He avers that the applicant should just allow the dispute to be heard on merits and let justice prevail other than clinging to a default judgment. He denies being

privity to the communication between the applicant and the second respondent as regards the execution process.

The applicant in response disputes the first respondent's assertions, stating that his intentions are not genuine but a mere self-serving tactic to escape liability and to maliciously frustrate execution of the judgment. The applicant further stated that the first respondent had no genuine desire since 31 May 2023 to appeal nor timeously file for an application for condonation for late filing of an application for leave to appeal to the Supreme Court against the extant judgment. The applicant averred that the current application filed by first respondent for condonation for late filing of the application for leave to appeal filed on 8 March 2024 is a mere abuse of court process which is a counter move by the first respondent to the applicant's letter of demand of 6 March 2024. The applicant refers to the history of the case wherein after being barred in the main case for failure to file heads of argument on time and upon condonation being denied, the first respondent appealed to the Supreme Court despite advice that the appeal was fatally defective. It is not disputed that the appeal was struck off with costs as being defective. Equally an attempt to reinstate the appeal was dismissed with costs. That the first respondent's legal practitioner attended taxation and never indicated the first respondent's desire to pursue the matter. The applicant avers that it is only after the threat of this application was made on 6 March 2024 that first respondent on 8 March 2024 instituted the application for condonation for late filing of the application for leave to appeal to the Supreme Court. The applicant states that there can be abuse of process that equals what the first respondent is doing and persists in her application for contempt of court.

The applicant raised two preliminary points to the effect that:

- i. the first respondent's opposition is in bad faith and constitutes abuse of court processes.
- ii. the court ought not entertain the 1st respondent's opposition as first respondent is coming before the court with dirty hands.

On whether the first respondent's opposition is premised on bad faith and abuse of court processes, it is the court's position that this can only be decided when the court considers the merits of the case. This cannot be determined as a preliminary point for the court has to weigh out the evidence at hand, only then, can it say that the defence advanced and evidence relied on was such

that the first respondent's intentions in defending a matter were *mala fide*. In the same vein, it cannot be said that the first respondent's opposition should not be entertained by this court on the basis that he approached the court with dirty hands. The applicant has dragged the first respondent to court on allegations of contempt of court. Whilst the respondent has not complied with the extant court order, he has a right to place his defence before the court where contempt of court is alleged, hence the door cannot be shut in the first respondent's face. The court is enjoined to determine whether there was any contempt of court behaviour on the part of the first respondent, and this can only be done when the court considers the first respondent's defence. The court finds that the two preliminary points have no merit and are hereby dismissed hence the matter has to be determined on merit.

Submissions by the parties

Mr *Kanoti* for the applicant argued that the first respondent is in open and deliberate defiance of the court order and that all the requirements for contempt have been satisfied, thus nothing precludes this court to grant the relief sought. He contended that first respondent's defence for non-compliance is not genuine and that the first respondent is using any means possible including this forum to frustrate execution of the order. He urged the court take judicial notice of conduct of some senior government officials who wantonly disrespect the rule of law by ignoring and disregarding court orders. He submitted that this was the position *in casu*.

Mr *Chitekuteku* for the first respondent submitted that the test applicable in assessing whether one had deliberately disregarded a court order was stated in *Faki NO v CC Two Systems Pvt Ltd*. 2006 Vol 4 SA 326 SCA. He argued that relying on the case, the first respondent genuinely believed that by trying to challenge the court order leading to contempt, it is entitled to act the way it did thus its excuses for not complying with the order cannot be said to be flimsy. He contended that, if this application is granted, it may affect the first respondent's need to pursue the application for condonation for late filing of the application for leave to appeal. He argued that the property of the first respondent as a public entity is not executable.

Whether the first respondent is in contempt of court?

The requirements for contempt of court are that;

1. there is an extant order expressed in clear terms,
2. the respondent is aware of such an order

3. The respondent knows what he is required to do or not to do and
4. Knowing what the order dictates, the individual concerned deliberately and consciously disobeyed the order. (see *Madzimbamuto v Musamadiya* HH235/24 and *Minister of Lands and Others v Commercial Farmers Union* 2001 (2) ZLR 457 SC).

At the core of an enquiry for the determination of an application of this nature is, whether the first respondent is in deliberate defiance of the extant order. It is common cause that the first respondent has been aware of the order it having been granted in his legal practitioner's presence. Mr *Chitekuteku* his legal practitioner, did not dispute that he made undertakings through teleconversations on behalf of his client the first defendant that the judgment debt will be satisfied. The court finds that the first respondent is hiding under the guise of a pending application for condonation which was triggered by the threat of legal action for contempt of court. The argument by the first respondent that he cannot satisfy the judgment debt given that the application for condonation for late filing for leave to appeal to the Supreme Court is still pending does not hold water. It stands to be stated that even if one is not in agreement with a court order, as long as it is extant and execution thereof has not been stayed, one is obliged to comply with it (see *Nhapata v Maswi & Another* SC 38/16).

If the first respondent genuinely wanted his side of the story to be heard, he would have acted with haste since 2023. His springing into action upon being threatened with legal action in March 2024 is an indication that he filed his pending application for condonation in fear of being found in contempt of court. Suffice that the first respondent had not even sought the stay of the judgment whilst putting his house in order. Looking at the history of the main matter one can see the futility of the application for condonation referred to by Mr *Chitekuteku*. The initial appeal against refusal for condonation was struck off by the Supreme Court for being defective. The same court dismissed the application for reinstatement with costs. Now the first respondent has approached this court seeking condonation for late filling of an application for leave to appeal to the Supreme Court against refusal by this court to grant condonation. This is nearly a year after that decision. This can only be best described as the worst abuse of court process. Whilst this court is still to decide on that application, the fact remains that with no order for stay of execution having been applied for and granted, the first respondent has a duty to comply with the extant court order

and he has failed to do so by deliberately neglecting to pay. The belief he nurtured that there is an application before the court is just a scape goat and stands as unreasonable in the circumstance.

The argument by Mr *Chitekuteku* that the first respondent's property is not executable cannot exonerate the first respondent from failing to comply with the court order. Whilst the court notes that the Central Intelligence Organization is a state body established in the President's Office for the protection of national security, hence in terms of s5(2) of the State Liabilities Act, its property is not executable, there is provision in the aforementioned section for compliance in terms of payment of liabilities by nominal defendants or respondents as in this case. For clarity s5(2) of the State Liabilities Act [*Chapter 8:14*] provides as follows:

“ subject to this section, **no execution** or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section two or against any property of the state, **but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff**, the applicant or the petitioner, as the case may be.”

Thus, whilst state property may not be executable it is clear that compliance with a court order can still be achieved through payment of a judgment debt through funds from the Consolidated Revenue Fund. The court finds that the first respondent has not placed any acceptable defence why the order could not be complied with and hence he is in wilful defiance of the court order under Case Number HCH 5840/22.

It stands to be emphasized that every citizen including the first respondent, is required by the Constitution of Zimbabwe to submit himself to the law. The conduct of the first respondent is shocking given his integrity. Turning a blind eye to this open and wilful defiance of a court order will not only result in miscarriage of justice but places the integrity of the courts into disrepute.

In *Haddow v Haddow* 1974 (1) RLR 5, at 8 A-C the court stated that the object of proceedings for contempt of court is to punish disobedience so as to enforce an order of court, failure to comply may render the other party without suitable or any remedy and at the same time constitute disrespect for the court which granted it. As correctly put by Mr *Kanoti*, the court takes judicial notice of a habit worthy of correction among some public officials, that of turning a blind eye to what the courts obligate them to do. The conduct of public officials must be within the ambit of what is least expected of them by the rule of law. The court cannot countenance this kind of conduct given that the first respondent's defiance of the court order is *mala fide*.

Disposition

Given the first respondent's deliberate defiance of the court order coupled with his failure to rebut the inference that his non-compliance is *mala fide*, this application succeeds. As regards costs, the general principle that costs follow the cause applies herein. The first respondent shall bear the applicant's cost of suit on a legal practitioner client scale given that his opposition and defence is frivolous and vexatious. It was clear from the onset, that the first respondent's opposition lacked merit and was simply dilatory.

Turning to the period of compliance prayed for, ordering first respondent to comply with the order to pay the sum of US\$132 152.42 within seven (7) days is unrealistic. He would require ample time so as to ensure that he complies with the needful. The court therefore has to set a realistic period for compliance. In that regard 30 days should suffice.

Accordingly, the following order is granted;

1. The first respondent be and is hereby found in contempt of paragraph 2 of the court order in Case No. HCH 5840/22 of 27 November 2023.
2. The first respondent be and is hereby ordered to comply with paragraph 2 of this court's extant order in Case No. HCH 5840/23 dated 27 November 2023 within thirty (30) days of the granting of this order, failing which the second respondent be and is hereby ordered and authorized to arrest the first respondent and commit him to prison until such a day and time as he shall have purged his contempt of the said order.
3. The first respondent to pay the applicant's cost of suit on a legal practitioner -client scale.

MUNANGATI-MANONGWA J:

Kanoti And Partners Public Interest Lawyers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners