ZIMRE PROPERTY INVESTMENT (PVT) LTD
versus
CITY CALVARY CHURCH

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 24 September and 13 January 2010

Opposed Court Application

H Nkomo, for the applicant
B Diza, for the respondent

GOWORA J: On 31 August 2006 the applicant herein concluded a lease agreement with an entity known as Calvary Family Fellowship Trust in respect of certain immovable property commonly known as Guild Hall Uniprops, Harare. The applicant is the registered owner of the building. The agreement was to commence on 1 September 2006 and terminate on 31 August 2007. Some time in 2007 prior to the expiry of the lease, the applicant gave notice to the City Calvary Fellowship Trust of its intention to carry out renovations on the building in order that it, applicant, would occupy the premises after their renovation. It seems common cause that the building is somewhat dilapidated and in need of renovations. The lessee did not vacate in terms of the notice resulting in the applicant instituting proceedings under Case No H.C. 4945/07 for its eviction. On 26 October 2007 the parties compromised and entered into a Deed of Settlement which is the basis upon which the applicant has now approached this court for appropriate relief.

At the outset I sought the views of counsel regarding the identity of the parties before me. Both assured me that even though the deed of settlement was in the name of City Calvary Fellowship Trust the respondent whose name was cited on the papers was one and the same person as the trust. Thereafter Mr *Nkomo*, on behalf of the applicant indicated that the applicant did not, through these proceedings, seek the eviction of the respondent from the premises but sought merely to give effect to the terms as set out and agreed in the deed of settlement. All that the applicant was seeking was to be permitted to undertake the renovations which the parties bound themselves to in the aforementioned deed of settlement.

Paragraph 5 of the Deed of Settlement which the applicant seeks to have enforced through an order of this court is framed as follows:

5. Plaintiff when making renovations of the church hall shall provide defendant an office within the partitions.

Although in filing the application the draft sought the eviction of the respondent from the premises in line with his submission that all that was sought was that the parties comply with the terms of the deed, Mr *Nkomo* sought that the draft order be amended to permit the applicant to commence renovations and that anyone resisting be taken into custody and arrested. Mr *Diza* did not oppose the application to amend the draft order and the amendment was granted by consent.

As regards the merits of the application, it is obvious that when the settlement was negotiated and agreed to by the parties, it was in the contemplation of the parties, whatever their appellation, that there was need for the building to be renovated. Although inelegantly worded the theme running through the deed is that of the parties accommodating each other to achieve this goal. It is with this understanding and intention of the parties gleaned from the deed that I now approach this dispute in order to achieve a resolution of the same.

In terms of para 2 of the deed of settlement the respondent was required to vacate space occupied by the bookshop, the bridal shop, the electrical shop and any other office within the same section of the building in order to accommodate Fidelity Funeral Assurance Company, for the latter to commence renovations. The respondent also agreed that if by 31st October 2007 it had not vacated the space stated then the Sheriff for Zimbabwe or his lawful deputy could evict the respondent from the same. As this was not a court order I am not convinced that the eviction could be carried out on the strength of the deed of settlement. A statement in the founding affidavit to the effect that once the deed of settlement was filed with the registrar of this court, it then became a court did not convince me that it was in fact a true statement of the law. Nevertheless, it goes without saying that the respondent agreed to vacate the said section of the building to make way for renovations. The renovations to this portion of the building have in fact been effected. What is left are renovations to the church. It is the paragraph which relates to the church which the applicant now wishes the respondent to vacate and afford the applicant the opportunity to renovate.

In order to oppose the granting of the relief sought the respondent has raised a number of defences to the same. The first ground on which it seeks the dismissal of the application is that there are material disputes of fact, such that the matter cannot be resolved on the papers. The material disputes of fact alluded to is whether the notice of 2007 is still valid since the parties entered into negotiations for a new lease. In his address to me Mr *Diza* did not touch on the alleged dispute of fact which was raised I believe in answer to the initial claim for eviction. As the applicant has clearly stated that it is not seeking eviction, I believe that this is not an issue I need exercise any more effort and time on.

The deed of settlement required that the parties enter into a new and separate lease agreement, but it is not clear which part of the premises the lease was supposed to cover. The applicant in an effort to place the background to the application before the court has gone to some length to explain why the lease agreement has not been executed. The respondent has in turn gone to equally lengthy explanations as to why there is no lease agreement concluded. This however is not the issue before me. What I have to determine is whether or not the applicant is required to request that the respondent give it, the applicant, an opportunity to effect renovations as agreed between the parties in terms of the deed of settlement. I do not see any lawful reason on the papers why the applicant should not be allowed to renovate as agreed to.

In submissions to the court the respondent contended that the applicant is not the entity that filed the plans for permission to renovate. Indeed the plans submitted bear the name of Fidelity Life Assurance. The date of the approval by the local authority is 11 June 2007. From the date quoted on the permit, it is clear that the deed of settlement was entered into after the parties had agreed on the need for the renovations as the approval had been given. It is also clear on the deed of settlement that the party effecting the renovations was not Zimre, but a subsidiary, Fidelity Life Assurance. It is also common cause that the respondent, did, in terms of para 2 of the deed vacate the space stated therein in order to permit renovations to the same, which renovations, according to the agreement, were being effected by Fidelity Assurance Company. In the opposing affidavit the respondent did not question the need to renovate. I must confess that given the manner in which the application was made, the respondent would have been confused as to the exact nature of the relief being sought by the applicant. The averments being made as to the different parties on the plans and the application were made

from the bar, and I was not disposed to discount them as the draft order was changed at the last moment thus placing the respondent somewhat at a disadvantage. However, I find that all that the applicant is seeking is that the parties comply with the deed of settlement, to which the respondent, even in the oral address was unable to mount a reasonable defence. When the parties agreed to the renovations, it was in the contemplation of them both that it was to accommodate the applicant's sister company, not the applicant itself. I find it self serving and hypocritical for the respondent to raise at this stage an issue that should have been raised when the compromise was made. It should have in agreeing to the terms of the deed insisted that Fidelity Funeral Assurance Company was not a party to the lease agreement and had therefore no right to be referred to in the compromise agreement. Instead it agreed to all conditions requiring it to give space and vacate certain portions of the building to allow for renovations, not by the lessor but by a sister company of the applicant. It cannot at this late stage refuse to comply with the deed on the basis of the lack of *locus standi* of Fidelity Life Assurance to renovate the building. Given the history of the matter and the circumstances under which the compromise was reached I am of the view that the attitude adopted by the respondent is indicative of dishonesty to say the least.

Again in his oral address Mr *Diza* submitted that the permit provided that building work connected with the plan had to be implemented on or before 11 June 2009 or such later date as may be approved by the local authority on good cause shown. The applicant was not afforded an opportunity to respond to this aspect as it was not raised in the opposing affidavit. I will therefore not let it weigh with me in the decision that I make.

There is an aspect of the case which neither party addressed me on as elates to the incidence on the scene of Fidelity Life Assurance Limited as the applicant for the renovations as opposed to Fidelity Funeral Assurance Limited which was specifically mentioned in the deed of settlement. It would seem that the parties are not very concerned about the niceties of attaching to a holding company and its subsidiaries. I will not let it weigh with me as neither Fidelity Funeral Assurance nor Fidelity Life Assurance is a party before me. The deed of settlement would appear to have been effected for the benefit of one or both of them.

In the result I find that the respondent has not established any basis for this court not to order that the deed of settlement be put into effect. It is therefore only just that the applicant be permitted to renovate the church hall as agreed by the parties. I cannot however order the

arrest of any party barring the applicant from effecting the renovations. In the amended order now being sought by the applicant it is required that any persons or persons inhibiting the applicant from effecting the renovations as ordered in this matter be arrested. An arrest for failure to comply with a court would only ensue after a finding by a court that a party has deliberately failed or refused to comply with a court order. An order that a party is in contempt also allows such part an opportunity to purge his contempt before he can be incarcerated for contempt. No notice was given to the parties sought to be found in contempt that such an order would be sought against them in the event that they disobeyed the court order.

C.J. MILLER in his book Contempt of Court states as follows regarding notice:[1]

> "In all cases it must be shown that the person against whom it is sought to apply the sanction of the law of contempt had sufficient notice of the terms of the judgment or order which it is alleged he has disobeyed. The ways in which this requirement of notice may be satisfied are set out in RSC Ord. 45, r 7.
> The general rule is that personal service of a copy of the judgment or order is required. In the case of a judgment or order against a corporate body enforcement will be possible against an individual director only if he has been personally served."

The same point was made by Arlidge and Eady in their book The Law of Contempt[2] wherein they state:

> "It is clear that because of the special nature of the court's jurisdiction, where there is prescribed any procedural step antecedent to the exercise of that jurisdiction, every such rule should be scrupulously observed and strict compliance insisted upon. This is so because the court's powers to punish for civil contempt are quasi-criminal in nature. Where committal is sought, although the court has the power to dispense with service of the notice of motion, personal service will generally be insisted on unless there is clear evidence of evasion. It has even been held that the attendance of the alleged contemnor at the hearing does not per se waive the need for service. It is also necessary to establish service of the order which is alleged to have been disobeyed by leaving a copy with the person to be served. The importance of personal service, where committal is sought, is to enable the alleged contemnor to know what conduct would amount to a breach, and what would not; and before committal such notice is required to be proved beyond a reasonable doubt".

Although the rules being referred to above are the rules of court pertaining in the English courts, it goes without saying that our own rules are not very different when it comes to orders for contempt of court. In terms of Order 9 r 39 (1) process in relation to a claim affecting the liberty of a person shall be served by delivery of a copy thereof to that person

[1] P 422
[2] para 5-06 p 265

personally. This requirement that personal service be effected upon a person whose personal liberty is in issue has been recognized by our courts, per GILLESPIE J in *Scheelite King Mining Co (Pvt) Ltd v Mahachi*[3]. Before a person can be held in contempt it is necessary to establish that not only was the order not complied with but that the non compliance was willful on the party of the person being complained against.

In *casu* I have not been asked to find a person in contempt of compliance with a court order served on the person. I am being asked to find that a person may refuse to obey the order and that in such a case anyone behaving in that manner be found in contempt. Such an order would be in violation of the *audi alteram partem* rule, that is tantamount to having a party found in contempt of an order of court without being brought to court for an order of contempt. I am unable to grant an order in those terms. In the event however, that the respondent refuses to comply with the order the applicant would then be at liberty to institute appropriate proceedings to ensure compliance. I will therefore issue an order in the following terms:

IT IS HEREBY ORDERED THAT:

1. The applicant be and is hereby permitted to effect renovations to the church hall in terms of the deed of settlement entered into by the parties on 25 October 2007.

2. In compliance with para 5 of the deed of settlement the applicant is to provide the respondent with an office.

3. The respondent is ordered to pay the costs of this application.

Mtetwa & Nyambirai, legal practitioners for the applicant
Musunga & Associates, legal practitioners for the respondent.

[3] 1998 (1) ZLR 173.