KARNEC INVESTMENTS (PRIVATE) LIMITED
and
ROBERT STRONG
versus
ECONET WIRELESS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 March & 27 April 2016

OPPOSED APPLICATION

J B Wood, for the Applicants
T Mpofu, for the Respondent

TSANGA J: This is an opposed application in which the applicants seek that the respondent Econet Wireless (Private) Limited ("Econet"), be fined for contempt of a court of an order granted on the 4 February 2011 by consent of both parties. In terms of the order that was granted, Econet was to desist forthwith from carrying out building operations on its property. The property is located in a certain upmarket neighbourhood in the suburb of Highlands. The applicants' residential home is directly opposite a property owned by Econet. The allegations that gave rise to the court order granted on 4 February 2011 were that at the time, starting in November 2010, Econet was carrying out building operations without complying with the Regional Town and Country Planning Act [*Chapter 29:12*]. The acts complained of included the level of noise on a daily basis arising from the said operations and the intensity of building operations both inside and outside the house. The operations were said to have caused a heightened nuisance and a danger to the public as the road was narrow and heavy vehicles were blocking the road. The entrance that had been created from knocking down a wall was said at the time to have facilitated the movement of earth moving equipment, construction equipment and materials, 30 ton trucks and large dumper trucks. Hundreds of tonnes of building materials were also said to have been delivered. Econet also owned another adjacent property nearby where it was carrying out legitimate renovations.

An urgent application had been filed and an order had been granted by consent at the time. It was worded as follows:

1. That 1st Respondent[1] concedes that building operations/developments were being conducted at 75 Orange Grove Drive, Highlands.
2. That the new entrance on 75 orange Grove Drive, Highlands shall be sealed off within 7 days of this order.
3. That building operations/developments shall cease at 75 Orange Grove Drive, within 7 days of this order.
4. That within the 7 days period all traffic shall be managed by the 1st Respondent who shall ensure that all motorists are given adequate warning.
5. That the 1st respondent shall pay applicants costs on an attorney client scale.

This order was complied with forthwith as Econet stopped its activities and the case was closed with payment of costs for the infractions. However, more than three years following the granting of the above order, Econet again knocked the wall to create an entrance for the delivery of a generator. It is applicants' allegation that on 20 December 2014, the second applicant, Mr Robert Strong, observed that an entrance to the perimeter wall had been made. This was the same entrance that had been ordered by the court to be closed in 2011. On the same date, he observed that a freightliner truck delivered a massive generator. Through direct inspection of the premises, Mr Strong averred that he observed that there had been substantial developments on the premises which included a concrete slab and an oil soak away for the generator. From this, he concluded that Econet was in fact carrying out commercial and industrial operations on the premises, contrary to the Regional Town and Country Planning Act and in violation of the Pockets Hill residential zoning. The actions were said to be in violation of the court order as Econet should not have been a carrying out any building operations. It is these acts that have led the applicants to approach this court seeking that Econet be charged with contempt of a valid court order in that once again these developments were taking place without the requisite statutory authority.

The applicants through their counsel Ms *Wood* stressed that the onus of proving that the contempt was not wilful and *mala fide* is on the respondent. (*John Strong (Pvt) Ltd &*

[1] Having been Econet in that case.

Anor v *William Wachenuka* (1))[2]. Her interpretation of the court order on behalf of the applicants was that the entrance was to remain sealed off and that no building operations could take place on the premises whilst the order remained in force. She interpreted the order as referring to building operations in general. She stated that the order could not be read to imply that fresh building operations could resume at some future date. She insisted that what was being carried out were building operations as the wall which was knocked down was a structure and would need to be rebuilt. She also argued that slab for the generator is a structure normally undertaken by a builder. The operations were also said to fall foul of the Act in that they change the use of the building from residential to commercial/industrial.

Econet, through its legal counsel Mr *Mpofu*, vehemently denied that it was in violation of the court order and maintained that it could not be in contempt as it complied with all aspects of the order in 2011 and the matter was closed. If there had been violation, he said the application would no doubt have been filed sooner. Moreover, he maintained that the order did not interdict Econet from installing a basic necessity such as a generator, which they regard as essential given the electricity situation in the country. He argued that a generator is a necessity and insisted that all activities complained were consistent with the purchase, supply and installation of the said generator. Moreover, he emphasised that there is no law which prescribes the maximum capacity of generators that individuals can purchase and utilise. Since the generator was not on the property in 2011, his position was that it was never part of the order. He also insisted that if so inclined to pursue legal action then the applicants ought to have approached this court by way of a fresh application rather than seek to enforce an order that was fully complied within the context of the facts that had given rise to its quest at the time. As regards the soak away he argued that no evidence was placed before the court that this was a recent development. He asserted that the application was merely meant to frustrate Econet because the applicants were miffed at the occupation of the property by a company.

Mr *Mpofu* maintained that the order was complied with and fell away. The gist of his legal argument was that where the order has been served and non-compliance is alleged, the onus is on the applicant to show wilfulness or *mala-fides* beyond a reasonable doubt. [*Ex Parte Mushambi*[3]*; Consolidated Fish Distributors Pty Ltd* v *Zive & Ors*[4]*; Fakie NO* v *CCII*

[2] *2010 (1) ZLR 151*
[3] *1989 (2) ZLR 191 (HC)*

Systems (Pty) Ltd[5]*; Gold* v *Gold*[6]*.]* He argued that the meaning of the order must be sought from the four corners of the order itself. (*Firestone South Africa (Pty)* v *Genticuro AG).*[7] He also argued that to the extent that the respondent flouted the Act by not obtaining the necessary permit, then s 27 of the Regional, Town and Country Planning Act [*Chapter 29:12]* allows regularisation of any such development. Reliance was placed on the case of *Bruce* v *Econet Wireless (Pvt)*[8] for this assertion. Drawing on the case of *Nzara & Ors* v *Kashumba and Ors*[9] he also argued that the judgment became superannuated after three years, meaning that the judgement became too old to use after three years expired and would need to be revived. However, the applicant's response to this argument was that Order 40 r324 applies to superannuated judgments in respect of execution. In essence, the rule provides that no writ of execution may be issued after the judgment has become superannuated unless the judgment has been revived.

Ms *Wood* challenged the claim that the applicants should have made a fresh application as the basis of the consent order was to ensure that Econet complied with the Act, yet the operations were carried out without a permit. She argued that installing an industrial generator and construction of an industrial septic tank is a violation of the Part V of the said Act.

The Legal Position on Contempt of Court

In terms of s 3 of our Constitution,[10] one of the founding values and principles upon which Zimbabwe is founded is respect for the rule of law. [11] If the court's authority is not respected there can be no fostering of respect for the rule of law. Furthermore, in terms of s 164 (3) an order of a court binds the state and all persons and governmental institutions and agencies to which it applies and must be obeyed by them. Contempt of court has clear bearings on legal proceedings in that if it is not addressed, the jurisdictional power of the courts would be illusionary. It is regarded as an act of disrespect and insult to the court and an obstruction to

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[4] 1968 (2) SA 517 at 523
[5] *2006 (4) SA 326 (SCA*
[6] *1975 (4) SA 237 D at 239F.*
[7] *1977 (4) SA 298 (A) at 304).*
[8] HH 52/2009
[9] HH 151 - 2016
[10] Amendment (No. 20) Act 2013
[11] See section 3 (1) (b) in particular

justice. Contempt can take place inside or outside the court. In the case of *Nthabiseng Pheko & Ors* v *Ekurhuleni Metropolitan Municipality*[12] contempt of court was explained as follows:

> "Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of and officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. …Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous orders as well as to compel performance in accordance with the previous order".

Central to contempt is not only the disobedience to a court order but also contumacious or stubborn and wilful disrespect for authority.

Econet's counsel placed heavy reliance on the South African case of *Fakie* in his argument that the standard of proof in contempt cases must now be beyond a shadow of doubt. Materially, what was sought in the *Fakie* case was committal to prison arising from the alleged contempt. It was in that context that it was laid down in that case that an applicant for committal for contempt is required to prove all elements of contempt beyond a reasonable doubt so as to accord with constitutional protections availed accused persons. However, it was highlighted that the respondent in such proceedings is "not an accused person but is entitled to analogous protections as are appropriate in motion proceedings". It was further explained in that case that the applicant is not required to lead evidence on the respondent's state of mind. Therefore, once an applicant in contempt proceedings proves three requisites namely, the existence of the order, its service or notice, and non-compliance, it is the respondent who then leads evidence as to whether the non-compliance was wilful or *mala fide*. The respondent need only adduce evidence that establishes a reasonable doubt.

The parameters of contempt of court were summed up in the *Fakie* case [13] as follows*:*

> "
>
> a) ….
> b) …..
> c) In particular the applicant must prove the requisites of contempt (the order; service or notice; noncompliance; and wilfulness and *malafides)* beyond a reasonable doubt
> d) But once the applicant has proved the order; service or notice; and noncompliance; the respondent bears an evidential burden in relation to wilfulness and *mala fides.* Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether noncompliance was wilful and mala fide, contempt will have been established beyond a shadow of doubt…

[12] [2015] ZACC 10
[13] See note 3 supra

e) …."

Whether contempt has been committed or not is largely a question of fact given that contextually not every act of disobedience of a court order amounts to civil contempt. Whilst a fine may be merited in some cases, in others a rebuke or a warning may suffice given the circumstances of the case.

That there was an order of the court is not in doubt. That it was served and the respondent was also fully aware of it is equally not in dispute. The issue is whether for decision in so far as the onus is on the applicant, is whether or not that order was complied with.

Given that the essence of bringing contempt of court proceedings is to induce compliance with a previous order, and that the court grants enforcement to foster obedience to a court order[14], I do not think that the facts before me show that there was disobedience with the order granted by the court. It is far from being alleged that any of the acts that gave rise to the complaint in 2011 continued unabated in the face of the court order. I agree fully that if that had indeed been the case, given the wording of the court order, any contempt of that order would have been brought to the notice of the court at that time. The entrance was sealed; the building operations did cease; and Econet managed all traffic as per court order. It also paid costs. In other words, Econet was in full compliance with that court order in light of the facts to which the order related to. It was a readily enforceable agreement which was couched in manner which gave finality to the dispute as much of the action was to be done within a specified period. I am therefore also in agreement with Econet's counsel that what is complained of in this matter, more than three years later, arises from an entirely new set of facts which must of necessity be examined in context.

The breaking down of the wall in the same spot as the previous one cannot in itself be used as an indicator of disobedience and should not be looked at in isolation of the facts that gave rise for the need. The applicants themselves are clear that what they observed being delivered through the created entrance was a generator. An inspection by the second applicant of the premises also showed that a platform have been put in place for the mounting of the generator. There are no allegations that besides this purpose the entrance was now being used for the very same operations that had led to the granting of the court order. Having found that the order was complied with and that the complaint before me is a new cause of action, there

[14] Fakie No v CCII Systems note 3 supra at p332 A-C

is no need in my view in this instance to also delve into the superannuation argument and the import of r 324 in this instance which the respondent also sought to rely on.

In my view, applicants have failed to discharge the onus of showing that this order was not complied with. But even if my conclusion is erroneous that the order was complied, and even if the evidential burden shifts to Econet as respondent to show that it did not act wilfully and with *mala fides*, I am of the view that the respondent succeeds in raising a reasonable doubt, which is all that is required of it, that its actions were not wilful or *mala fide*. The respondent clearly highlighted that the major purpose of knocking down the wall was because the vehicle delivering the type of generator could not fit through its normal entrance. It is not an unusual occurrence to have a household item delivered where his vehicle may not fit through the standard gate. In the absence of clear proof that the respondent was motivated by disrespect for authority, the respondent's explanation succeeds that it genuinely did not believe that it was acting in violation of the court order.

There was also no legal argument placed before his court that the type of generator in question is forbidden in residential areas. It is common knowledge that in light of the electricity shortages that have faced this country for more than fifteen years now, individuals and companies have had to find ways of obtaining their own electricity. Installing generators has become one of the common solutions in addition to solar panels and invertors. The size of generator is dependent on the use to which the generator is to be put. Others are designed for heavy duty needs which include not only lighting but running cookers, geysers, boreholes among other requirements, while some provide basic power for lights and plugs. It is the needs to which the generator is to be put that determines its size. Applicants seem to allege that its mere size denotes that the premises are being used for commercial purposes. No evidence of this was placed before the court other than the applicants say so. While naturally in light of the facts previous facts that had necessitated the obtainment of the court order by consent, applicants may have had justifiable reason to panic at observing an opening and seeing a huge delivery track, the circumstances that had necessitated opening the wall had been fully explained to them. The explanation had been reasonable. In the absence of any other evidence that Econet intended to wilfully resume operations without a court order and that it has indeed done so, that should have been the end of the matter. If indeed the slab constructed for the generator does need town planning authority then Econet should rectify this by using s 27 of the Regional Town and Country Planning Act as they have already

asserted. Overall, this application lacks merit and there is no reason why costs should not follow the result.

In the result this court makes the following order:

1. The application be and is hereby dismissed.
2. Applicants are ordered to pay the costs of suit.

Venturas and Samkange, applicants' legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners