

GETRUDE TENDESAYI TAVENGWA
versus
CHARLES ZVIDZAYI TAVENGWA

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 11 September 6, 12 & 28 October & 4 November 2020

Opposed Matter

S Mangwengwende for the applicant
S Kuchena for the respondent

CHIRAWU-MUGOMBA J: The applicant and respondent are formerly wife and husband. Sometime in 2016, the applicant instituted proceedings for divorce and other ancillary relief against the respondent in case number HC 3452/16. Subsequently, she filed an application for maintenance *pendete lite* and contribution towards costs under case number HC 1055/17. On the 17th day of July 2017, this court awarded applicant maintenance pending litigation in the sum of US\$1.000 and US\$8.000 being contribution towards costs. On the 29th day of November 2018, this court granted a decree of divorce and other ancillary relief in HC 3452/16. The latter was as governed by a consent paper signed by the parties on the 5th of October 2018. The applicant alleges that the respondent has failed to comply with the provisions of the two cited court orders. The applicant averred that the respondent had failed to transfer the property into her name within 3 months from the date of payment of the full purchase price. This means that transfer should have been done by the 6th of January 2020. Further that the respondent's conduct is *mala fide* and contemptuous of the court orders. He was aware of the orders and he also entered into a consent paper with the applicant and was aware of its contents.

Applicant thus seeks the following order.

1. The respondent is found in contempt of the orders that were granted by this honourable Court on the 11th of July 2017 and 29th of November 2018 under case no. HC 1055/17 and HC 3452/16 respectively.

2. The respondent be and is hereby committed to a prison for a period of ninety days or until such a time that the respondent purges his contempt.
3. The Deputy Sheriff be and is hereby authorised and directed to apprehend the respondent with the assistance of a police officer and lodge him at the Harare Remand Prison for which this shall be the warrant.
4. The officer-in-charge of the Harare Remand Prison shall detain the respondent for a period not exceeding (90) ninety days or until such time he purges his contempt and this shall be his warrant.
5. The warrant of committal is, however suspended for 7 (seven) days on condition that the respondent shall comply with the orders given by this honourable court on the 11th of July 2017, 29th of November 2018 under case no. HC 1055/17, HC 3452/16 respectively.
6. The respondent shall pay the applicant's costs of suit on a legal practitioner and client scale.

The respondent strenuously opposed the application. He made the following averments. He denied being in contempt of court as alleged. Case number HC 1055/17 has been appealed against, i.e. the order for payment of maintenance pending litigation and contribution towards costs. Maintenance pending litigation and all arrears were paid. As for the immovable property, the purchase price had been paid in full by the 10th of June 2019. Transfer fees had been paid in full to Messrs Dube, Manikai and Hwacha. What is left is for the seller's attorney's to process the title deed to enable respondent to transfer the property into the applicant's name. The delay is not of his own making.

The clause in contention is paragraph 3 of the consent paper that reads as follows.

3. The defendant shall purchase a three (3) bedroomed cluster home located at number 57 Kennedy Drive, Greendale, Harare, namely Unit number 11 Kennedy Flats as the plaintiff's sole and exclusive property under the following terms;
 - a) The defendant shall pay the full purchase price of USD152 000 to First Banking Corporation (Pvt) Ltd within a period of 12 months from the date of signature to this consent paper and both parties acknowledge that as at the date of signature to this consent paper the sum of USD 137 000 has already been paid by the defendant to First Banking Corporation (Pvt) Ltd living (*sic*) a balance of USD15000 to which the defendant shall obtain a mortgage for a period of 12 months.

- b) The defendant shall cause this property to be transferred into the names of the plaintiff within a period of three months from the date of payment of full purchase price.
- c) The defendant's legal practitioner shall attend to transfer of this property into the plaintiff's names.
- d) In the event of default by the defendant on any one of his obligations in terms of this consent paper, the plaintiff shall be entitled to sue the defendant for the balance of purchase due to First Banking Corporation.
- e) The defendant shall within thirty (30) days provide alternative accommodation to the plaintiff in the unlikely event that the mortgaged property is sold in execution by First Banking Corporation due to non-payment of mortgage instalments.

At the hearing, the applicant's legal practitioner stated that the contempt of court in relation to the payment of maintenance pending litigation and contribution towards costs in HC 1055/17 was no longer being pursued. That left the only legal issues being those related to the contempt of court over the immovable property described in the consent paper and that of payment of maintenance. It is also worth noting that the consent paper bears a wrong case number of HC 3452/17 instead of HC 3452/16. In my view, that is something that can be corrected under r 449 of the High Court Rules.

The applicant's legal practitioner made the following submissions. The applicant has proved all the requisites for contempt of court. The respondent does not dispute that there are an extant court order that he is aware of. At the time of the hearing, the respondent was in maintenance arrears of \$5663.15. He made a unilateral decision to make payments to CIMAS and yet medical aid was never part of the consent paper. The respondent changed the terms of the consent paper and that puts him in contempt of court. The letter from the applicant's legal practitioners that appears on page 81 of the record that acknowledges that the respondent was making maintenance payments was written on a without prejudice basis. It cannot therefore be used against the applicant. In any event subsequent letters stated a different position and showed that there were arrears still outstanding. While acknowledging that the respondent paid off the mortgage, he has not given any explanation of why transfer has not been effected since July 2019.

The respondent's legal practitioner made the following submissions. The applicant's legal practitioners have drawn up another consent paper that they have furnished him with. This brings to the fore the question of whether or not a litigant can be held in contempt for a court order which is subject to variation proceedings. Apart from varying the case number to

reflect that it is a 2016 case, the draft also seeks variation on the United States dollars being maintenance. On the immovable property, the respondent has done all that is required of him personally to do. He paid the purchase price in advance and he has no control over the choice of conveyancers. These were chosen by the bank. Regarding payment of \$700 maintenance, the applicant concedes in a letter that payments were being done. The only issue relates to adequacy of the amount due to the rise in cost of living. The money for CIMAS though not in the consent paper goes direct to the applicant's bank account.

Contempt of court is committed intentionally and in relation to the administration of justice. The aim is to punish disobedience by any party of an order to do or not to do something – see *Mukambiwa and ors v Gospel of God Church International* 1932, 2014 (1) ZLR 207. The disobedience must be wilful and *mala fide*. In my view, the respondent cannot be said to be in contempt of court. He has paid fully for the immovable property. He has paid in full the conveyancing fees. The assertion by the applicant that the respondent must ensure that the transfer has been done is fallacious. As opined by TSANGA J in *Karneec Investments (Pvt) Ltd and anor v Econet Wireless (Pvt) Ltd*, 2016 (1) ZLR 502 at 507E, all that a respondent need to establish that it did not act wilfully or with *mala fides* is to raise a reasonable doubt. The respondent has produced proof of full payments. He has substantially complied with the extant consent paper. There was no evidence placed before the court on what action the applicant's legal practitioners took to enquire from Messrs Dube Manikai and Hwacha on the status of the transfer even after they became aware of the payment of the full purchase price and the conveyancing fees. They were content to say that the respondent should give them the information. The onus still remains on the applicant to prove that the respondent is in contempt of the order.

An order that is complained of must create an enforceable obligation, see *Munhumutema v Tapambwa and ors*, 2010 (1) ZLR 509. In *casu*, paragraph 3 of the consent paper mandated the respondent to pay the full purchase price of US\$152 00 for number 57 Kennedy Drive, Greendale, Harare. Respondent paid in full. Clause 3 (b) is to the effect that respondent should 'cause' the property to be transferred into the names of the plaintiff within three months from the date of payment of the full purchase price. It is not clear what 'cause' means. In conveyancing, the duty of the respondent would be to pay the required fees. The only sanction in relation to non-payment appears in paragraph 3 (d) of the consent paper that

if the respondent defaults in any one of his obligations the applicant is entitled to sue for the balance of the purchase price. The sanction therefore specifically relates to non-payment.

With reference to the maintenance arrears, in my view the issue as rightly pointed out by Mr *Kuchena* is more to do with the cost of living increase rather than non-payment. The letter dated the 19th of July 2019 from the applicant's to the respondent's legal practitioners clearly indicated that the respondent was paying \$700. It proposed contrary to the laws of the country that payment be in United States Dollars. The letter was written on a 'without prejudice' basis. In my view, applicant cannot hide behind this given the fact that contempt of court is a drastic remedy that can potentially curtail someone's freedom. Another letter dated the 12th of December 2019 written on a without prejudice basis states that the respondent is in arrears to the tune of \$2443. It also states that the respondent has been paying amounts less than the stipulated ones since February 2019. This letter contradicts the one dated the 19th of July 2019 that states that the respondent had continued to pay \$700. Accordingly, without a convincing figure being indicated as being the arrears, the respondent cannot be held in contempt of court.

Costs are always at the discretion of the court. Accordingly, the applicant must bear the respondent's costs. This is in particular because the application for contempt of court is not well thought or laid out. The elephant in the room remains the poorly drafted consent paper.

DISPOSITION

It is ordered as follows:

1. The application be and is hereby dismissed.
2. The applicant shall pay the costs.

Phillips Law, applicant's legal practitioners
Chinyama & Partners, respondent's legal practitioners