SHARPSTONE GARANDE
and
PRECIOUS GARANDE
and
GARIKARI CHIRINDA
and
MELODY CHIRINDA
and
SMART KAGORO
and
DOREEN KAGORO
and
DESMOND MUPFIGA
and
MUFARO MUPFIGA
and
MARTHA HOKONYA
and
FARAI HOKONYA
and
PERCY NYAMUPIGODHI
and
TIGHTEN MUTEKEDE
versus
EASTBOY FASHIONS (PVT) LTD
and
TONDERAI KAPONDORO
and
DIRECTOR OF URBAN PLANNING SERVICES N.O
and
THE CITY OF HARARE
and
THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 06 November 2018 and 14 November 2018

Opposed Application

D.C Kufaruwenga, for the applicant
S Manyangarekwa, for the 1st and 2nd respondents

MATHONSI J: An order of this court granted by consent on 8 November 2017 in Case No. 3185/17 following the signing of a deed of settlement by the parties to that action on 26 September 2017, has not been complied with. The applicants have therefore brought these contempt of court proceedings in a bid to enforce the court order. They desire that the first and second respondents, who should be the ones complying with the court order, be held in contempt of the court order and that a monetary penalty be imposed against the first respondent, being a company, while a terms of 90 days imprisonment be imposed on the second respondent. The second respondents' imprisonment should be suspended on condition he fully complies with the court order within 60 days of the grant of the order for contempt.

In opposing the application the first and second respondents have not denied that the court order has not been complied with. They give excuses for non-compliance and in the end assert that there has been substantial compliance with the order. For that reason the application should be dismissed with costs. The question which arises therefore is whether substantial compliance with a court order can excuse a party from its obligation to perform in full satisfaction of the court order. I shall return to that to question later.

On 26 September 2017 the parties signed a deed of settlement to regulate their relationship following a dispute that erupted between them in respect of certain undeveloped stands created by the first and second respondents on a piece of land being Lot 98 of Meyrick Park Marlbereign which were sold to the applicants, but could not be transferred to them owing to non-compliance with subdivision and development procedures. The applicants had sued the first and second respondents seeking to enforce their rights of transfer in terms of the sale agreements. It was a term of the deed of settlement (Clause 11 thereof), that it had to be ratified and confirmed by a judge of this court and then made a court order.

That was done and on 8 November 2017 CHATUKUTA J issued the following court order by consent:

"IT IS ORDERED BY CONSENT THAT:

1. The 1st and 2nd respondents be and are hereby ordered to complete the 3rd, 4th and 5th respondents' requirements necessary to facilitate the creation of shares from a certain piece of land situate in the district of Salisbury called Lot 98 of Meyrick Park of Marlbereign measuring 7546 square metres in extent within 90 days from the date of service of this order on the 1st and 2nd respondents.
2. The 1st and 2nd respondents be and are hereby ordered to transfer the following shares to the respective applicants within 120 days from the date of this order:
   a. Share No. 11 to the 1st and 2nd applicants.
   b. Share No. 12 to 3rd and 4th applicants.
   c. Share No. 13 to 5th and 6th applicants.
   d. Share No. 2 to 7th and 8th applicants.
   e. Share No. 9 to 9th and 10th applicants.
   f. Share No. 10 to 11th applicant.
   g. Share No. 4 to 12th applicant.
3. Applicants be and are hereby ordered to pay transfer costs and conveyancing fees to the 1st and 2nd respondents' legal practitioners of record.
4. In the event of the 1st and 2nd respondents' failure or refusal to comply with Clause 2 hereof, the Sheriff of the High Court or his lawful deputy be and is hereby authorised to sign in 1st and 2nd respondents' place and stead, all such documents and all necessary papers as shall transfer title and ownership of the shares to the applicants as stipulated in Clause 2 hereof.
5. The Deed of Settlement signed by the parties on 26 September 2017 shall regulate the procedure to be followed by the 1st and 2nd respondents in complying with the requirements of the 3rd, 4th and 5th respondents.
6. Each party shall pay its own cost(s)."

There are other provisions of the deed of settlement which are incorporated in the court order by the virtue of Clause 5 of the order. These are Clauses 1 to 7 relating to the obligation of the first and second respondents to advertise and sell Unit 5 of the property within 45 days, to pay the purchase price realised to Dzimba Jaravaza and Associates Trust account to enable the said lawyers to disburse the purchase price solely for paying service providers, local authorities, government departments to achieve the registration of a Notarial Deed to create individual and undivided shares for the applicants in Lot 98 Meyrick Park Marlbereign. In the event that the purchase price for Unit 15 was exhausted before the completion of the task, the first and second respondents were required to avail another immovable property to be sold within 45 days. The proceeds of that second sale were to be channeled towards attaining transfer to the applicants.

The applicants complain bitterly that the first and second respondents willfully refused to comply with the court order in that they have not created the shares by registration of a Notarial

Deed with the Registrar of Deeds. Registration cannot be done without obtaining certificates of compliance from the Director of Urban Planning Services cited herein as the third respondent and the City of Harare which is the fourth respondent. Those certificates of compliance can only be granted upon the first and second respondents developing the stands, a process involving the putting up the basic infrastructure like roads, water and sewer reticulation system, drainage pipes and provision of electricity. None of this has been done and this is a breach of the court order.

The applicants insist that the failure to abide by the terms of the court order is wilful because the first and second respondents have been evasive from the time of the court order. Although the court order required them to pay the proceeds of the sale of Unit 15 into the applicants' legal practitioners' trust account, they deliberately paid into their own legal practitioners' trust account, who, instead of forwarding to the former the whole deposit of $10 000-00, they only paid $7 200. As a result that sale was aborted. When another buyer for the Unit was found the first and second respondents resisted the sale.

The funds raised from the sale of Unit 15 were committed to development and were exhausted. Although the first and second respondents sold Unit 7 at the property, they refused to commit the purchase price to the development which would enable compliance with the court order. They refused to cooperate and/or work with the committee set up by the parties to spearhead development, instead disbanding that committee. Therefore, although they have the capacity to comply with the time lines specified in the court order, the respondents are willfully disobeying as shown by the decision to withhold money for Unit 7 instead of completing construction work.

I have said that the respondents' position is that there has been substantial compliance with the order. They deny willfully refusing to abide by court order and say that they are in the process of fully complying. The construction of the infrastructure to satisfy the requirements for the issuance of certificates of compliance "is work in progress" and the delay is being caused by funding challenges. In addition there has been meddling by the applicants who, at one stage, literally took over the project themselves. By doing so they waived their right to enforce the court order.

Regarding the sale of a second property to raise funds for completion of construction work, their view is that is it unnecessary given that road works are about 95% complete. If that were the case, given that the opposing affidavit was deposed to on 15 August 2018, and yet the matter was

only heard 3 months after that on 6 November 2018, surely the road works would have been completed. That is not the case.

Mr *Kufaruwenga*, for the applicants disputed that there has been any substantial compliance with the court order. According to him the court order set certain time lines to be followed in the road map towards satisfaction. None of those time lines have been met. In any event the court order must be fully satisfied as long as it remains extant. In his view the respondents' moral blameworthiness is very high given that they consented to the court order which they have since trashed. For that reason, Mr *Kufaruwenga* moved for the proposed penalty. Mr *Manyangarekwa* for the first and second respondents conceded the non-consistence with a court order but sought to excuse it on the basis that the respondents were financially crippled to complete the project and their activities were interfered with by the rains which made it impossible for them to complete the construction work.

Of course Mr *Manyangarekwa* was virtually leading evidence from the bar because nowhere in the opposing affidavits are these defences raised. Apart from that, the issue of financial incapacity cannot be taken seriously at all because in his sworn statement the 2nd respondent admitted making money from the sale of another piece of land but his self-serving argument is that because that land was not held as security for the project in issue, it had nothing to do with the applicants. He did not even attempt to dispute that funds held by the applicants' legal practitioners were released to him when the parties' relationship deteriorated.

Regarding the rains having played havoc with the respondents' plans, it is quite interesting that such an excuse is being made because the time lines were fixed by consent. The respondents were aware that the rains would fall during the rainy season but committed to those time lines. In any event, we are now in November 2018 and there has not been any drop of rain since the last rainy season. Surely this can only be a trifle.

In our law, there is a presumption, when interpreting a court order, that it means what it says and where the court order is unambiguous, no evidence would be admissible to contradict, alter or add to the contents of the court order. See *Baron* v *George* 1994 (2) ZLR 141 (S) at 145 C-D. A person who disobeys a court order is in contempt of court but before one is held in contempt, the court must be satisfied both that the court order was not complied with and also that

the failure to comply with it was wilful. That is the sentiment expressed by GILLESPIE J in *Sheelite King Mining Co (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H) at 177G-178A. He said:

> "Before holding a person to have been in contempt of court, it is necessary to be satisfied both that the order was not complied with and that the non-compliance was wilful on the part of the defaulting party."

See also *Haddow* v *Haddow* 1974 (1) RLR 5 (G) at 6A; *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) at 299 B; *Macheka* v *Moyo* 2003 (2) ZLR 49 (H).

I have said that the failure to comply with the court order has been conceded. Once the failure to comply with the court order is proven, yet another presumption kicks in, namely that the failure was wilful and *mala fide*. The onus then shifts to the defaulting party to prove that the failure to comply was not wilful and *mala fide*. See *Mapfumo* v *Director of Community Services and Ors* HH 274-14 (unreported). I associate myself with the remarks made by CHATUKUTA J in *John Strong (Pvt) Ltd and Anor* v *Wachenuka* 2010 (1) ZLR 151 (H) at 156 D that:

> "Once the applicant has established that the respondent has failed to comply with the order, the onus shifts to the respondent to establish that he or she was not wilful or *mala fide.* See Herbstein and Van Winsen, *The Civil Procedure of the Superior Courts in South Africa* 1st ed p.657 and *Macheka* v *Moyo* 2003 (2) ZLR 49 at 53G-54A"

As already stated, in attempting to establish lack of wilfulness and *mala fides*, the respondents allege that there has been substantial compliance in that 95% of the roadworks has been done, a claim strongly disputed by the applicants. The respondents have not put the court into confidence as to what they have done. In my view, substantial compliance is not a feature of the defence required to ward off contempt of court proceedings. Only lack of wilfulness and *mala fides* is. Unfortunately, the substantial compliance issue is all that can be gleaned from the opposing papers and it is simply not enough.

Mr *Manyangarekwa* tried to introduce the aspects of some supervening factors like financial incongruency and the rains which were not pleaded. They should be rejected for that reason alone. But then, as I have already said, they do not even pass the test either. I conclude therefore that the respondents have failed to discharge the onus resting on them to show that their failure to comply was not wilful and *mala fide*. They are held to be in contempt of court order.

Regarding how to respond to the contempt in question, it would be appreciated first and foremost that the first respondent is an incorporation which cannot be committed to prison. Although the imposition of a fine is not usual, it is however competent. For artificial persons like

the first respondent, if a fine would not be imposed there would be no way of dealing with them. That should not detract from the primary object of contempt of court proceedings, which is to compel compliance with the court's orders. For that reason, any order of committal to prison is suspended to afford the intransigent party a strong inducement to fulfil his or her obligations in terms of the court order. See *Harare West Rural Council* v *Sabawu* 1985 (1) ZLR 179 (H) at 183D.

Commenting on that policy consideration GILLESPIE J added in *Scheelite King Mining Co (Pvt0 Ltd, supra* at 178 E-F:

> "That is not to say, however, that enforcing compliance is the only purpose of committal. There remains an interest in protecting and upholding the dignity and respect of the court. Although the contempt may be referred to as 'civil' contempt, it remains a criminal offence wilfully to disobey the order of the court with intent to violate its dignity or authority. Where such a contempt is established, the purpose of securing compliance with the flouted order, while it may remain the main, is not necessarily the only, purpose of committal for contempt."

In the present case what is sought to be enforced is an order granted by consent after the parties had weighed their options and without any pressure of court proceedings, agreed on a certain road map to achieve transfer of the stands to the applicants. More than a year after the grant of the consent order the respondents have not complied, and they have not even rendered any reasonable explanation for their intransigence. It becomes necessary to step in and, not only enforce compliance, but to protect the dignity of the court. We cannot have a situation where orders of the court remain unsatisfied because those that are their subject do not take them seriously and believe they should channel their resources to other needs at the expense of the court order.

This is a case in which a moderate fine in respect of the 1st respondent will act as a reminder to those who control it that the court should be respected. In so far as the 2nd respondent is concerned an order of committal suspended on condition of compliance will meet the justice of the case. In light of the contempt, costs should be on a punitive scale to register the court's displeasure.

In the result, is ordered that:

1. The 1st and 2nd respondents are hereby held to be in contempt of the court order issued by this court on 08 November 2017.
2. The 1st respondent is hereby fined $1000-00 for contempt of court.

3. Of the fine of $1000-00, a sum of $600-00 is suspended on condition the 1st respondent fully complies with the court order in Case No. HC 3185/17 within 60 days from the date of this order.
4. The 2nd respondent is hereby committed to prison for a period of 90 days which is wholly suspended on condition the 2nd respondent fully complies with the court order in Case No. HC 3185/17 within 60 days from the date of this order.
5. The 1st and 2nd respondents shall bear the costs of this application on a legal practitioner and client scale, jointly and severally, the one paying the other to be absolved.

Dzimba Jaravaza and Associates, applicants' legal practitioners
P. Takawadiyi and Associates, 1st and 2nd respondents' legal practitioners.