

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**

2007/HP/1052

BETWEEN:

MATAKALA MUBITELELA



APPLICANT

AND

BARBARA MWELWA

1ST CONTEMNOR

EVANS MWANSA KILWA

2ND CONTEMNOR

Before Hon. Mrs. Justice M.S. Mulenga this 18th day of September 2014.

For the Applicant : Mr. C. Sianondo of Messrs Malambo and Company
For the Contemnors : Ms.M. Kalela, Legal Aid Counsel, Legal Aid Board

J U D G M E N T

Cases cited:

- 1. Mapiko and another v Channde (2010) ZR vol 1 402**
- 2. Zulu v The People (1990-1992) ZR 59**
- 3. Balogh v Crown Court at St Albans [1974] 3 All ER 238**

This Judgment is on the contempt proceedings held against the 1st and 2nd Contemnors on 12th May 2014.

The Applicant filed a Notice of Motion dated 5th December 2008 for an Order of Committal for Contempt of Court, pursuant to Order 52 Rules 1 and 3 of the Rules of the Supreme Court 1999 Edition following the granting of leave. The Notice of Motion states that the Contemnors

herein should be committed to prison for their contempt for the following reasons:

- 1. Refusing to comply with the Ex Parte Order of Injunction and Interlocutory Injunction handed down by this honourable Court on 27th November 2008 and 21st January 2009 respectively; and*
- 2. Interfering in the Plaintiff's authority to operate the shop in Valley View Estate Lusaka*

The Applicant in his Statement accompanying the application herein states that the grounds for the application are that both the 1st and 2nd Contemnors have disobeyed the injunction order restraining them whether by themselves, their agents or servants from trespassing, committing any nuisance or operating any business on the subject property pending. That in defiance of the said injunction order the 2nd Contemnor had gone ahead to threaten physical violence on the Applicant.

The Applicant further states in his affidavit in support of the Notice of Motion for Committal dated 8th December 2008 that when he attempted to effect service of the ex-parte order of injunction on 1st December 2008, the 2nd Contemnor refused to receive the documents and threatened to beat him up together with a clerk from his advocate's firm. That he later went back to effect service in the company of his advocate and the 2nd Contemnor's mother acknowledged receipt of the documents in the presence of his young adult brother.

That further in the evening of that day around 20:00 hours, the 2ⁿ Contemnor took the court documents to Nyirenda Complex where the Applicant owns a shop and left them at the door and threatened to kill the Applicant if he continued to take court documents to his house or continue with the case. That the Contemnors have continued to disobey the Court order by trespassing and operating on the subject property and are threatening to kill the Applicant. Hence the application for an order of committal.

When the matter came up for hearing on 12th May 2014, the Applicant and 2nd Contemnor both testified. The Applicant adopted the affidavit accompanying the contempt application, dated 8th December 2008 as his evidence in chief.

Under cross examination, the Applicant testified that he effected service of the ex-parte order of injunction on the 2nd Contemnor's mother. He admitted not having personally served the order on the 2nd Contemnor. He further stated that he was not aware that the 2nd Contemnor was working out of town, in Ndola at the time but only knew that he was a soldier working at Arakan Barracks. He did not see the 2nd Contemnor receive the documents which but he served on his mother. The Applicant (PW) could not say for certain that the Respondent received the documents.

In re examination PW testified that when he first went to serve the documents he was accompanied by a clerk from his advocates' office. The second time he was accompanied by his advocates and that is when

they served the documents on the 2nd Contemnor's mother. Later on they brought back the documents and threatened him.

DW was the 2nd Contemnor herein who testified that in the year 2006 he was sent by the Government on assignment with the UN to Sudan. He left all his property, that is, a house and shops with his wife. He was in Sudan for 9 months. On his return in May 2007 he went to the area where his shops were situated and discovered that PW (the Applicant) had claimed ownership of the area having bought it. DW then went to pick the Ward Chairman who had sold him the land.

Further, he testified that in 2008, he did not receive any court documents. He was then posted to Tag Argan Barracks where there was no accommodation for his family. Whilst there, he received a phone call from his tenant Saudi Musa to the effect that the court had grabbed the shops. He asked how they were seized when he had not received any summons or gone to Court. He then obtained permission from work and he went to Kalikiliki police post. He informed the officers that he had not received any summons to attend Court or any seizure notice. They all went to the shops and found them locked. The tenant complained that he had lost a lot of items. The police advised him to seek assistance as the people who seized the property used Court officials. He then engaged the services of Legal Aid.

Under cross examination, DW testified that had he received the documents he would have taken them to Legal Aid. In 2008 when they went to his house they did not bring any documents. That he submitted

a list of the items that went missing together with the money to Legal Aid. He did not know that there was an injunction in place. He came to know about the injunction when the lawyer brought it to sign for it and he refused to do so. He further testified that the shops are his property and he cannot surrender them to anyone.

As regards the injunction, DW stated that procedure was not followed. He did not sell the property and thus he cannot surrender it. The Plaintiff forged the documents. DW insisted that he was not aware of the injunction. He denied ever having gone to see the Plaintiff after 20:00 hours after seeing the shops.

His lawyers informed the tenant in 2008 over the injunction. His lawyer informed him about the injunction in 2010. He did not believe it as he was never taken to Court. He asked his lawyer about the possibility of someone grabbing something without going to Court and he denied such possibility. DW reiterated that he cannot surrender something when he has not appeared in Court.

In re examination, DW stated that he came to know when the Plaintiff went with Court bailiffs to lock the shops and he received a phone call to that effect.

The notion of contempt of Court as stated by Matibini J, in **Mapiko and another v Chaande (2010) ZR vol 1 402** is that the Courts have the power to coerce those who obstruct the administration of justice as contempt of court consists of interfering with the administration of justice. The

learned Judge further held that contempt can take many forms such as the disobedience by the contemnor of an order requiring him or her to take or refrain from taking specified action. Order 52/1/2 of the White book 1999 edition states that the chief instance of civil contempt (or “contempt in procedure”) is disobedience to an order of the Court by a party to the proceedings.

The Learned Judge in quoting **Stuart Sime, A Practical Approach to civil procedure, (Oxford University Press, 2005 at 487,** stated that given the nature of the punishments for contempt, which are imprisonment, fines and sequestration, the Courts have insisted on the establishment of mens rea and proof beyond reasonable doubt. The standard of proof is therefore higher than the balance of probability in civil matters.

In **Zulu v The People (1990-1992) ZR 59** the Supreme Court approved a passage by Lord Denning in the case of **Balogh v Crown Court at St Albans [1974] 3 All ER 238** as follows :

"This power of summary punishment is a great power, but it is a necessary power.....It is of course to be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt."

The question then to ask is whether it is clear beyond reasonable doubt that the 1st and 2nd Contemnors herein have committed a contempt by disobeying the injunction order in this matter.

No evidence was led as against the 1st Contemnor to the effect that she acted contrary to the injunction order, therefore she is not guilty of any contempt of court as alleged by the Applicant.

As against the 2nd Contemnor, the Applicant's evidence is that he has disobeyed the court order. The 2nd Contemnor denies having been served with the court documents in 2008. The Applicant's evidence is that the same were served on his mother and the affidavit of service duly filed into court.

However the 2nd Contemnor was made aware of the fact that there was an injunction over the shops in 2008 by his tenant Saidi Musa who was informed by the former's advocates over the same. The 2nd Contemnor however confirmed that he became aware of the injunction in the year 2010.

The Applicant stated that he has been a victim of threats of violence and has not been allowed to operate in his shops contrary to the injunction order. This is a general statement. The only particular incident he mentions is that stated in the affidavit in support that on 1st December 2008 when he served the ex parte order of injunction on the 2nd Contemnor's mother, they took back the documents and threatened to beat him. The people who threatened him are not particularized in the affidavit where it is only stated that the 2nd contemnor did so and the Applicant did not also mention the ones he termed "them" in his evidence. His evidence was that he did not know that the 2nd Contemnor was not in Lusaka or whether or not he received the court order. In light of the 2nd Contemnor's evidence that he was not in Lusaka on the date in issue but on the Copperbelt, the Applicant has not discharged the burden beyond reasonable doubt that the 2nd

Contemnor threatened to beat him on that particular day. The Applicant has not highlighted any other day or incident when he was threatened by the 2nd Contemnor.

The 2nd Contemnor in cross examination stated that he became aware of the injunction in 2008 when the bailiffs locked up his shop and his tenant phoned him to that effect. The Applicant has not adduced evidence on the 2nd Contemnor's trespassing and operating on the subject property after the service of the order. The affidavit states that the contemnors continued to disobey the court order in the manner stated. However, at the hearing no particulars were given. The 2nd Contemnor denied the same stating that after hearing from his tenant, he went to Kalikiliki police post and was later advised to seek legal assistance since the courts were involved. The 2nd Contemnor further stated that he never appeared in court and wondered how one could get something belonging to another without going to court. He maintained that the shops belonged to him.

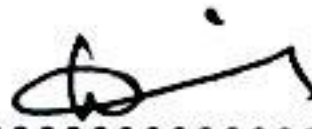
When holistically considered, the above does not prove beyond reasonable doubt that the 2nd Contemnor has refused to comply with the injunction order and that he is interfering with the Applicant's authority to operate the shops. The onus of proof is squarely on the Applicant and has not been discharged to the required standard.

The contempt proceedings against the 2nd contemnor have not been proved to the required standard and I accordingly dismiss the same. On

the facts of this case and the conduct of the parties, I order that the costs for this application will remain in cause.

Leave to appeal is granted.

Dated 18th day of September 2014



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M.S. MULENGA
HIGH COURT JUDGE