

SITIMA TEMBO v NATIONAL COUNCIL FOR SCIENTIFIC RESEARCH (1988 - 1989) Z.R. 4 (S.C.)

SUPREME COURT
GARDNER, J.S., IN CHAMBERS
29TH APRIL, 1988
(S.C.Z. JUDGMENT NO. 21 OF 1988)

Flynote

Civil Procedure - Injunction - Penal notice required before committal.

Headnote

Although the respondent was aware of an injunction it continued to demolish the applicant's property contrary to its terms. Affidavit evidence showed that the respondent was shown and served with a copy of the order and refused to take notice of it. The order was not endorsed with a penal notice. The applicant applied for committal of a representative of the respondent.

Held:

Order 45, Rule 7(4) of the Supreme Court Practice provides that it is necessary for a written notice of an injunction to be endorsed with a penal notice. The exceptions referred to in the Note to the rule apply only when there has been insufficient time to prepare a written notice of injunction. Once a written notice has been prepared it must contain a penal notice in order to make the breach of injunction the subject of an order of committal.

Legislation referred to:

1. Rules of the Supreme Court, (Order 45 r. 7(4))

For the applicant: N. Simango, Legal Aid Counsel.

For the respondent: N. Kawanambulu, Messrs Shamwana and Company.

Judgment

GARDNER, J.S.:

In this case the applicant applies for an order of committal of the respondent's representative on the grounds that, being aware of an injunction continued to demolish the applicant's property contrary to the terms of the injunction. Affidavit evidence has been led to the effect that on the

p5

morning of the action complained of, the respondent's representative was shown a copy of this court's order and refused to take notice of it; such refusal taking the form of instructing his work force to continue to demolish the applicant's property. There was further affidavit evidence that a copy of the order was served upon the respondent in the afternoon of the same day.

The order was not endorsed with a penal notice in accordance with Order 45 Rule 7(4) the Supreme Court Practice (1976) Edition (The White Book).

Mr Simango argued that the note to Order 45 Rule 7(7) indicated that it was sufficient for the purpose of committal if the person whom it was intended to commit had knowledge of the injunction.

Mr Kawanambulu argued that the absence of the penal notice was fatal to the applicant's application, and that, where a person had known about an injunction, it was still necessary for that person to be warned of the possibility of committal if the injunction was disobeyed.

Order 45 Rule 7(4) provides that it is necessary for a written notice of an injunction to be endorsed with a penal notice, and in my view the exceptions referred to in Note 7 to the Rule apply only when there has been insufficient time to prepare a written notice of injunction. Once a written notice has been prepared it must contain a penal notice in accordance with Rule 7(4) in order to make a breach of the injunction the subject of an order of committal. To hold otherwise would be to render the provision requiring a penal notice valueless, in that all injunctions by their very nature are matters of urgency, and parties wishing to enforce injunctions would in all cases be able to avoid the necessity for a penal notice by relying on verbal notice.

As the applicant in this case did in fact have time to draw a written order, and, as such order did not contain a penal notice as required, the application for an order of committal is refused.

Application refused.
