

CHAMUNORWA C. MUTYAMBIZI
versus
JOSE MASELINO GONCALVES & ANOR.
and
THE SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 2 OCTOBER AND 9 OCTOBER, 2013

Ndudzo, for the applicant
C.Venturas, for the respondent

Unopposed Matter

DUBE J: This is an application for an order for contempt for court against 1st respondent. The terms of the order sought are as follows;-.

TERMS OF THE ORDER SOUGHT

“IT IS DECLARED THAT:

1. The 1st respondent is guilty of contempt of court of the order of this honourable court granted under case no. HC 99052/11 and HC 6661/13 in that:-
 - (a) he has willfully disregarded that orders refused to comply with it and has deliberately continued to prevent the applicant from enjoying his rights as established in the court orders;
 - (b) he has also expelled all the applicant’s employees from the farm

IT IS ACCORDINGLY ORDERED THAT:

2. The 1st respondent is sentenced to 60 days imprisonment with labour until full compliance by the 1st respondent and all persons acting through him with terms of the orders of the court in case no. HC 9052/11 and HC 6661.13.

Provided that that term of imprisonment shall be wholly suspended on condition:

- (a) 1st respondent does not return to or enter upon the farm, unless the applicant has voluntarily vacated the farm or been evicted therefrom in terms of an order of a competent court having final effect; and
- (b) 1st respondent that does not aid and abet anybody in any way in any attempt to evade the terms of this order or the order in case no. HC 9052/11 and HC 6661/13 while these orders are in place

3. This order shall itself constitute and serve as a writ for the arrest and detention of the 1st respondent.
4. The costs of this application shall be borne by the 1st respondent.”

The 1st respondent is alleged have defied court orders in HC 9052/11 and HC 6661/13 respectively.

The application for contempt of court was served P. Kapfumbe at Granger and Harvey Legal Practitioners. It is the applicant’s contention that the 1st respondent is now barred for failure to file opposing papers in terms of Order 43. The 1st respondent also failed to appeared in court today to answer the contempt charges. *Mr Venturas* who appeared in court for the 1strespondent advised the court that he now acts for the respondent in this matter .He has dealt with other matters for the respondent. He was unaware that this matter had been set down for today. When he saw it on the roll, he decided to appear on behalf of the respondent but he had no instructions. The matter was stood down to chambers .When the matter resumed *Mr Venturas* advised the court that he now acts for the 1strespondent. He enquired from *Mr Harvey* whether he was aware of the case. *Mr Harvey* confirmed receiving the contempt of court papers but he has since renounced agency.

Mr Ndudzo submitted that contempt of court process is governed by Order 43 and that order 5 r 39(1) does not apply to the service of this application as that rule relates to summons and other documents. Order 5 r 35(1) states thus:-

“Manner of service of process generally

- (1) Process in relation to a claim for an order affecting the liberty of a person shall be served by delivery or a copy thereof to that person personally”

Order 5 R 35 (1) defines “process” as follows,

“ In this order-

- (1) “process” means any document which is required to be served on any person in terms of these rules.”

The rule is clear that the term “process” is inclusive of any document which is required to be served on any person in terms of the rules. Order 5 r 39(1) therefore applies to the application before the court. The rule specifically provides for service where the liberty of an individual is affected and contemplates personal service. Rule 39 (1) has not been complied with as there has

been no personal service of the application on 1st respondent. The application was not brought to the personal notice of the respondent.

This being an application for contempt of court wherein applicant seeks that 1st respondent be imprisoned for 60 days if he does not abide by the order of this court, and that the order granted by this court serve as a warrant for the arrest of the 1st respondent, it is the court's view that service of the contempt of court papers was not proper as service was effected on *Mr Kapfunde* and not on 1st respondent personally. Imprisonment is a harsh form of punishment and deprives a person of their liberty and is therefore a grave consequence the respondent may have to endure. It is imperative, in contempt of court applications, where the remedy sought is likely to result in imprisonment that process is served personally.

The likelihood that these proceedings may result in a court imposing a custodial sentence is real... In the case of *Macheke v S. Moyo 2003 (2) ZLR 49 (H)* the court stated that;

“it is trite that the principal objective of civil contempt of court process is to compel, by means of personal attachment and committal to goal, the performance of the court order. The imprisonment imposed is very often suspended pending fulfillment by the defaulter of his obligations.”

The respondent's argument that personal service was not necessary because it is unlikely that a court will impose a custodial sentence because there is a proviso in the order sought that enables the court to suspend the imposition of a custodial sentence, if he vacates the property does not find favour with this court. He is supposing that the respondent will vacate the farm.

The court must satisfy itself that the respondent has been properly served. The rationale for requiring personal service in a case where a person's liberty is likely to be affected arises from the realization that an order for imprisonment is harsh and has drastic consequences. The courts have emphasized on the need for personal service in civil imprisonment and contempt of court proceedings. As was put in *National Insurance Company of Zimbabwe v Dhlamini 1999(2) ZLR 196 (HC)*,

“Civil imprisonment for a debt, it goes without saying, (is) a drastic remedy. Personal service of a civil Imprisonment summons is (in the absence of unusual circumstances) a necessity.”

The approach has always been to require personal service in contempt of court proceedings. In *Scheelite King Mining Company (Pvt) Ltd v Mahachi 1998(1)ZLR 173(HC)* the court dealt with an application for contempt of court. Process had been served on the

respondent's attorneys and the respondent had defaulted. The court refused to grant the order as there had been no personal service. The court being alive to the need for personal service ordered and directed the Deputy Sheriff to place under arrest the person of the respondent and bring him before the court.

In the case of *Wilson v Ministry of Defence and Others 1999* (1) ZLR 144 (H) the court had issued a provisional order against respondents calling upon them inter alia, to show cause why they should not be declared to be in contempt of court and fined specified amounts. The order required personal service on the respondents.

The sentiments of the court in the above cases confirm that contempt of court proceedings do restrict the liberty of a person and hence it is my view that compliance with r 39(1) is therefore mandatory. Where there is likelihood that the liberty of a person may be restricted, r 39(1) should be strictly complied with.

The court in this case was alive to the requirements of r 39(1). It is therefore the court's view that by their very nature, contempt of court proceedings do require personal service and are rightfully governed by order 5 r 39(1) because they are a claim for an order affecting a person's liberty. It did not appear to the court that 1st respondent was aware of the hearing.

In the result it is ordered as follows,

The application is removed from the roll for want of compliance with r 39(1). The applicant is directed to comply with order 5 r 39(1) before enrolling this application for consideration by this court.

Mutamangira and Associates, for the applicant

Venturas and Samukange, for the 1st respondent