

PLACIDE MASENGESHO
versus
CHIEF IMMIGRATION OFFICER
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 10 November 2020 and 17 February 2021

Opposed Application

S. Chako, for applicant
A. Magunde, for respondents

TAGU J: This is a Court Application for contempt of court, in particular the High Court Order issued against the respondents by JUSTICE FOROMA, sitting at Harare on the 18th December 2019 under HC 8736/19. This application for civil contempt is based on the fact that the actions and conduct of the respondents are both willful and *mala fide* in their refusal or failure to comply with an order of this court.

The facts are that the applicant is a national of Rwanda. He entered Zimbabwe in 2007 with his mother, brother and two sisters fleeing internecine violence that had wrecked his country of Rwanda. He was then aged 12 years. They were accorded refugee status in terms of the Refugees Act [*Chapter 4.03*]. As a minor his name was registered under his mother's refugee status card. In 2009 he came back from school and found his family missing from Tongogara Refugee Camp without trace. He ended up in Harare where he tried to seek sanctuary from people whom he feared were after his life. Under surveillance by one Giramata of Tutsi ethnicity whom he had known at Tongogara refugee camp, he was reported to Police working under C.I.D Law and Order and was charged and taken to Court where he was convicted of contravening the immigration Act. He was duly sentenced to pay a fine of \$500.00 with a concomitant penalty that he should be deported back to Rwanda. After the authorities communicated with his legal practitioners, they indicated

they would not comply with the court order, but preferred to hold him on an expulsion notice which was issued by the Minister of Public Service, Labour and Social Welfare on the 18th of October 2019 way before the judgment of this court. The Expulsion Notice given in terms of section 13 (1) (b) of Zimbabwe Refugees Regulations, 1983 from Tongogara Refugee Camp stated among other things that the applicant was to be expelled from Zimbabwe in terms of section 15 (1) of the Refugees Act, 1983 for-

1. “Harbouring undesirable Rwandan elements in Zimbabwe
2. Identity Fraud
3. Possessing counterfeit National Registration documents (birth certificate & identity Card)

That in terms of section 15 (3) of the Act, he was allowed to make written representations to the Minister of Public Service, Labour and Social Welfare, either by himself or through a legal practitioner within fourteen (14) days from the date of service of this notice.”

The judgment by FOROMA J which the applicant is now saying the respondents are in contempt of reads as follows-

“IT IS ORDERED THAT

1. The order of deportation of applicant by the Magistrates Court in sentencing applicant in case Number CRB 8372/19 is set aside as incompetent and the Magistrate Court had no jurisdiction to pass on the applicant.
2. Consequently the applicant is to be released from and referred to Tongogara Refugee Camp”

The respondents are opposing the application. They content that they are not in contempt of court and that their non-compliance of FOROMA J’s order is not willful or *mala fide*. Their argument is that the court order set aside the Magistrate’s order, but did not set aside the applicant’s expulsion order from Tongogara Refugee Camp, nor his conviction. The first respondent indicated that he has to release the applicant but however, it is practically impossible for him to comply with the second part of the order that says he has to be referred to Tongogara Refugees Camp because the expulsion order from Tongogara Refugee Camp is still extant. The applicant did not challenge that order. They argued that they do not know where to send the applicant because it is only the Minister of Public Service, Labour and Social Welfare who has the mandate to reverse the expulsion order and accept the applicant back into Tongogara Refugee Camp. As such they are in

a predicament. They cannot refer him to Tongogara Refugee Camp nor just release him into the streets.

It is therefore clear that the applicant was not candid with this court in his founding affidavit. He merely said when he failed to find his relatives when he came back from school he later found himself in Harare. He did not explain the circumstances that led him to leave Tongogara Refugee Camp and found himself in Harare. He had actually been expelled from there.

In my view a person will be committed for contempt of court where his disobedience for the court order is willful and malafide. See Herbstein and Van Winsen: *Civil Practice of the Superior Courts*, 3rd Edition, p 657. In *Rita Marque Mbatha v Messenger of Court* HH-562/18 the learned Judge referred to the case of Clement 196 (3) SA 861 where it was stated that a person 's disobedience must not only be willful but *mala fide*.

In *casu* it is clear that the second part of FOROMA J's order is a *brutum fulmen*. It cannot be enforced in the face of the Expulsion Order by the Minister of Public Service, Labour and Social Welfare which the applicant did not challenge and was not reversed. The applicant cannot be accepted back at Tongogara Refugee Camp. For these reasons the respondents' actions cannot be said to be in willful and mala fide, disregard of the court order. The application will fail on this basis alone.

IT IS ORDERED THAT

1. The application is dismissed.
2. The applicant to pay costs.

Mushangwe and Company, applicant's legal practitioners
Civil Division, Attorney General's Office, respondent's legal practitioners