

IN THE COURT OF APPEAL OF SWAZILAND

Civil Appeal Case No.15/01

In the matter between:

ELIAS VONKO NDZINISA Appellant

VS

THE COMMISSIONER OF TAXES 1st Respondent

SHEGE SAMUEL SHABANGU 2nd Respondent

THE SENIOR REGIONAL - OFFICER PIGGS PEAK 3rd Respondent

CORAM : BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The appellant approached the High Court on Notice of Motion for an Order that the Third Respondent (The Senior Regional Officer at Pigg's Peak) be committed to prison for failing to comply with a previous order of the High Court requiring him to supply certain information to the First Respondent (the Commissioner of Taxes) within a period of 14 days. His application was dismissed with costs, and it is against this order that he now appeals to this court.

2

The facts of the matter are that Chief Prince Mnikwa advised the Third Respondent by letter dated 1st February 1997 that he had appointed the appellant as the new Indvuna for the Herefords/Mayiwane area to replace Samuel Shege Shabangu (the Second Respondent). It then became necessary for the Third Respondent to advise the Commissioner of Taxes (the First Respondent) of this new appointment. He however failed to do so.

On 5th November 1999 the First Respondent addressed a written memorandum to the Third Respondent in the following terms; "Kindly send me a copy of the Memo introducing Vonko Elias Ndzinisa Graded Tax Number 1016-03-0156644 as the new Indvuna replacing Shege Shabangu". This memorandum from the Commissioner of Taxes elicited no response from the Third Respondent.

The appellant then approached the High Court and obtained the order which he alleges has not been complied with by the Third Respondent. The order reads as follows:

"IT IS HEREBY ORDERED THAT

The Senior Regional Officer - Pigg's Peak should make available the necessary' information to

the Commissioner of Taxes to effect the changes in his Tax Register within fourteen days from today".

The said order was delivered in court on 17th March 2000, and it is common cause that the information which the Third Respondent was required to make available to the Commissioner of Taxes was that the appellant had been appointed Indvuna in place of Shabangu (the Second Respondent).

It is not disputed that the Third Respondent's legal representative was in court when the order was made, that a copy of the order was served on the Third Respondent by the appellant on 20th March 2000, and that a further copy of the same order was served upon him by the Deputy Sheriff on 14th April 2000.

It is common cause that the Third Respondent has failed to comply with the said order.

An order for committal of a person to prison for contempt of court resulting from his failure to comply with a court order will be granted only if the purpose thereof is to coerce

3

the respondent into compliance with the said court order. See e.g. Cape Times Ltd v. Union Trades Directories (Pty) Ltd & Others 1956 (1) S.A. 105 (W); Food & Allied Workers Union v Sanrio Fruits CC & Others 1994 (2) S.A. 486 (T). This is quite clearly the purpose of the order sought by the appellant in this case.

Once it is established that there has been a disregard of the order of court the respondent, to avoid committal, must show on a balance of probabilities that the disregard was not wilful. See e.g. Waterston v Waterston 1946 W.L.D. 334. It has also been held that the disobedience of the order must not only be wilful, but also mala fide. See Clement v. Clement 1961 (3) S.A. 861 (T). However in the case of Consolidated Fish Distributors (Pty) Ltd v. Zive & Others 1968 (2) S.A. 517 (C) it was held that in cases of disobedience of orders of Court mala fides will be implied if wilfulness is proved.

The fact that the State may be indemnified against execution or attachment to satisfy a judgement does not mean that an official of the State cannot be committed for contempt of court if he fails to comply with a court order. A committal for contempt is not an attachment. See e.g. Mjeni v. Minister of Health and Welfare, Eastern Cape 2000 (4) S.A.446(TKHC).

The Third Respondent's defence to the Appellant's application in the present case is a denial that his failure to comply with the court order has been wilful. He makes various allegations in this connection. He alleges that after receiving the court order he invited Prince Mnikwa, together with his inner Council, to meet him at his office. He alleges that the purpose of the meeting was to solicit the information which he was required to convey to the Commissioner of Taxes. He states further that on the day of the meeting his efforts to get the necessary information were wilfully frustrated by the Prince and his delegates, and that he had no information to convey to the Commissioner to enable him to effect the necessary changes in the Tax Register book. He alleges accordingly that he tried unsuccessfully to comply with the court order, and that his failure to comply therewith was not wilful.

In a replying Affidavit the appellant disputes the fact that the Prince failed to give the necessary information to the Third Respondent at the meeting mentioned by the Third

4

Respondent, at which meeting the appellant was also present. It is however not necessary to resolve this factual dispute for the reasons which follow.

The court order was communicated to the Third Respondent's legal representative on 17th March 2000. A copy of the order was served on the Third Respondent on 20th March 2000. He had 14 days within which to comply with the order. He did nothing during this period of 14 days. After the lapse of this period, on 20th April 2000, he addressed a letter to Prince Mnikwa requesting a meeting with him on 3rd May 2000. These are not the actions of a person who has honestly attempted to comply with an order within the time stipulated by the order.

An essential element of the Third Respondent's explanation as to why he failed to comply with the court order is his allegation that he did not have the information which he was required to pass on to the Commissioner of Taxes. This allegation cannot be accepted. The memorandum to him from the Commissioner of Taxes makes it quite clear what information he required from the Third Respondent, namely a copy of the Memo introducing the appellant as the new Indvuna. This information he had. On 1st February 1997 Prince Mnikwa had advised him in writing of the appellant's appointment. He merely had to pass this information on to the Commissioner.

In his replying affidavit the appellant attached a list of Indvuna appointed over various areas to show that Prince Mnikwa had the necessary authority to make such appointments. The list goes back to 1962 and reflects an entirely different person as the then Indvuna of the Hereford area. In his submissions to us Mr Dlamini seized upon this list to argue that Prince Mnikwa's memorandum to the Third Respondent confirming the appellant's appointment was open to question because in his memorandum Prince Mnikwa states that the appellant is appointed in place of the Second Respondent (Shabangu) and not the person mentioned in the 1962 list. Apart from the fact that this point was not taken by the Third Respondent in his opposing Affidavit there is nothing on the papers to suggest that the Second Respondent was not the Indvuna at the time of the appellant's appointment. It is interesting to note that the Second Respondent did not oppose the application and he has not filed any papers suggesting that the allegations made by the appellant are not correct.

5

The papers before us satisfy us that the Third Respondent had the necessary information which he was ordered to furnish to the First Respondent. He failed to do so, and he has not shown that his failure was not wilful. The appellant is accordingly entitled to the order he seeks.

In the result the appeal is allowed, with costs. The order dismissing the appellant's application is set aside and the following order is made.

The Third Respondent, namely Gcokoma A. Dlamini, the Senior Regional Officer at Pigg's Peak, is committed to prison for contempt of court for a period of 10 days. This committal is suspended on condition that within 14 days of the date of the service of this order upon the Respondent, he furnishes the Commissioner of Taxes with the information that the appellant, Elias Vonko Ndzinisa, has been appointed as the Indvuna for the area Herefords/Mayiwane in place of Shege Samuel Shabangu.

N.W. ZIETSMAN J.A.

I agree

J. BROWDE J.A.

I agree

J.H. SYEYN J.A.