

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1088 OF 2022

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RICHARD ODOI ADOME **APPLICANT**

VERSUS

10 UGANDA ELECTRICITY GENERATION } RESPONDENT
COMPANY LIMITED (UEGCL) }

Before: Hon Justice Stephen Mubiru.

RULING

- a. Background.

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By a contract dated 4th March, 2019 the respondent contracted M/s Top Class Engineering Limited for the construction of Out Patient Department Blocks, Staff Houses and VIP Latrines at selected health facilities in Kayunga District. By Clause 48.1 of the Special Conditions of the Contract, the respondent was obliged to retain part of the contractual sum to the tune of shs.

20 29,831,756.14 inclusive of VAT as retention money until the Defects Liability Period provided
for in the said contract terminates and all defects/snags identified have been rectified to the
satisfaction of the respondent. The applicant sued for recovery of that sum and judgment was
entered in his favour.

25 The applicant sued M/s Top Class Engineering Limited for recovery of shs. 401,250,000,000/= Judgment having been delivered in his favour, the applicant applied for the attachment of the debt owed by the respondent to the judgment debtor, M/s Top Class Engineering Limited. On 23rd August, 2021 the respondent transferred a sum of shs. 108,848,068/= it owed to the judgment debtor, onto the applicant's bank account. The decree not having been fully satisfied,
30 the applicant sought and obtained another attachment order. On or about 24th May, 2022, a Garnishee Order Nisi was issued and on 9th December, 2021 it was made absolute, directing the respondent to pay a sum of shs. 29,831,756.14 by the 15th July, 2022. Upon the respondent's failure to comply with the order, the applicant filed this application.

b. The application.

This application is made under the provisions of article 28 (12) of *The Constitution of the Republic of Uganda, 1995*, section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks an order holding the respondent in contempt of Garnishee Order Absolute issued by this Court on the 24th May 2022 in Misc. Application No. 1692 of 2021, and to direct the respondent to purge themselves of that contempt by promptly complying with that order by requiring it to pay a sum of shs. 29,831,756.14 being due under an interim payment certificate. The applicant further prays that the respondent's Chief Executive Officer, Dr. Eng. Harrison E. Mutikanga, and its entire Board of Directors, to wit; Eng. Proscovia Margaret Njuki, Eng. Gilbert John Kimanzi, Mr. Paul Patrick Mwanja, Mr. Ronald Dravu, Dr. Nixon Kamukama, Mrs. Hope Bizimana, and Eng. Julius Namusanga Wamala, together with its Chief Finance Officer, Mr. Joshua Karamagi, be committed to civil prison. Furthermore, that the respondent pays to the applicant onto his Stanbic Bank account Number 9030000562997, exemplary or punitive damages of a minimum of shs. 350,000,000/= and General Damages of a minimum of shs. 150,000,000/= for Civil Contempt of Court, and interest thereon at the Court rate from the date of the ruling until payment in full.

20. The affidavit in reply:

In the respondent's affidavit in reply, it is averred that although, the Defects Liability Period was completed in June, 2022 and the Certificate of Completion, Final Account-Release of retention, and tax invoice subsequently submitted to the respondent for payment, this could not be done due to the absence of the Snag List Rectification Review report as required in order to conclusively certify, review and verify the documents for final payment. The Snag List Rectification Review Report was eventually submitted on 15th August, 2022 and the complete set of documents were then forwarded to the Chief Executive Officer who is the Accounting Officer of the respondent to approve payment. As part of quality assurance, the Chief Executive Officer for the respondent requested the Chief Audit Officer (CAO) to verify that all snags/defects were

successfully completed before payment could be approved. Upon clearance of the payment Certificate by the Chief Audit Officer, the Chief Executive Officer shall forward to the Chief Finance Officer the complete set of documents to follow through with payment as stipulated in the respondent's Finance and Accounting Policies and Procedures Manual. All this was brought

5 to the attention of the applicant and the applicant was requested to be patient. The respondent has not acted in contempt of the court order but is only following the internal payment process before the applicant receives the Garnishee Order sum on his account.

d. Submissions of counsel for the applicant.

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M/s Litmus Advocates on behalf of the applicant submitted that civil contempt consists of failure to comply with the judgment or Order of a court or breach of an undertaking of the court. it is clear from the applicant's affidavit evidence that there was a lawful order (Garnishee Order Absolute) which was duly received by the respondent having been issued in presence of the

15 respondent's Legal Representative. However, the respondent having had full knowledge of the Order directing payments to be made before the 15th July, 2022 ignored the lawful order despite several reminders by the applicant's Counsel. No efforts were made by the respondent to perhaps extend the order or give communications for non-compliance within the stated time. The respondent went silent and all these assertions of internal processes should be disregarded by this

20 honourable Court as it is an afterthought. The applicant has indeed suffered mental anguish, been left in total suspense of whether he may or not recover his money, and immense loss has indeed been occasioned. A loud and clear message should therefore be sent to the Garnishee, corporate bodies and the public at large that court orders are not or should not be seen to operate in vain, hence the claim for general, punitive and exemplary damages.

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e. Submissions of counsel for the respondent.

The Legal and Board Affairs Department of the respondent on behalf of the respondent submitted that the respondent has not acted in contempt of the court order but is only following

30 the internal payment process before the applicant receives the Garnishee Order sum on his account. Although the Respondent does not dispute the first and second elements above, that is;

the existence of a lawful Court order, and its knowledge, it disputes the third element. the Respondent neither failed to comply nor disobeyed the Garnishee Order Absolute, but is in the process of complying with the order. Although the order provided a timeframe for compliance, the nature of the contract with the applicant, its execution, verification and certification is

5 independent of the said timeframe provided in the Order. In order to comply with the Order, the works of the applicant had to be properly completed, verified and certified by all the responsible parties who include the Ministry of Health as the in-charge, the Contractual Resident Engineer and the Project Manager. All signatures and the complete required documents were forwarded to the Respondent for Payment on 15th August, 2022. A date past the deadline indicated in the

10 Order. By failure to follow the right procedure to ensure value for money for the services provided by the applicant, the Respondent not only risks facing penalties that arise from mismanaging tax payers' monies following an upcoming Annual Audit from the Auditor General's audit recommendations but will also cause loss to Government because the respondent derives its budget from the Consolidated Fund.

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They submitted further that the respondent has an internal payment process that is provided for by the respondent's Finance and Accounting Policies and Procedures Manual 2019 which is being followed in processing the applicant's payment, at the conclusion of which, the applicant shall have the monies on his account. The respondent has not in any way demonstrated malice or

20 arrogance and neither has the Applicant suffered injury to warrant general damages. The timeframe in the Garnishee Order Absolute is a mere technicality to the process of complying with the said Order. They prayed that this Court invokes Articles 126 (e) of *The Constitution of Republic of Uganda, 1995* and section 98 of *The Civil Procedure Act* to extend the time of the said order to Allow the Respondent complete the payment process

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f. The decision.

“Contempt of court” is a generic expression descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from

30 availing themselves of it for the settlement of their disputes (see *A. G v. Times Newspapers Ltd. [1974] A.C. 273 at 307*). In law, contempt of court is defined as an act or omission tending to

“unlawfully and intentionally violate the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it” (see *Principles of Criminal Law* 1 ed (Juta, Cape Town 1991) at 627; *R v. Almon* (1765) 97 ER 94 at 100; *Ahnee and others v. Director of Public Prosecutions* [1999] 2 WLR 1305 (PC); *R. v. Gray*, [1900] Q.B. 5 36, at p. 40 and *R v. Metropolitan Police Commissioner, Ex parte Blackburn* (No 2) [1968] 2 All ER 319 (CA). Any act of disobedience or disrespect toward the court, or any obstruction of the judicial process, can be considered contempt. The recognition given to contempt is not to protect the tender and hurt feelings of the judge, rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have 10 business before the courts is likely to be weakened, if not destroyed.

Wilful disobedience to any judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court or the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) or any matter or the doing of any 15 other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or prejudices or interferes or tends to interfere with, the due course of any judicial proceeding; or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner, will constitute contempt of court

20 To be found in contempt, it must be proven that the party accused: (i) knew the order existed, (ii) had the ability to comply with the order but violated it knowingly, and (ii) lacks just cause or excuse for the violation. Civil contempt is a strict liability violation; all that must be proved is that the order was served on the respondent, and that a prohibited action (or a failure to carry out an order) occurred. Once the applicant has proved noncompliance with the court's order, by 25 showing the existence of the order and the respondent's noncompliance, the burden then shifts, and the potential contemnor must prove inability to comply or justifiable cause.

If the contempt primarily benefits the opposing party, it is civil. On the other hand, a criminal contempt primarily benefits the court itself, by vindicating the dignity or authority of the court. A 30 civil contempt is designed to coerce the contemnor into compliance, whereas a criminal contempt punishes the contemnor. Civil contempt is prospective because it focuses on getting the

contemnor to comply with the court order in the future, while criminal contempt is retrospective because it focuses on punishing the contemnor for past conduct. However, the fact that conduct occurred in the past does not necessarily imply that the contemnor must be held in criminal contempt. In a civil contempt sanction, the contemnor must hold the “keys to his cell,” in that no further contempt sanctions are imposed upon the contemnor’s compliance with the pertinent court order, e.g., imprisonment until the contemnor complies with the court order. In criminal contempt, sanctions are fixed and the contemnor has no chance to avoid such sanctions once imposed. A contingent sanction, such as being jailed until compliance with a court order, serves to coerce the contemnor and benefits the opposing party hence it is for civil contempt while vindication of the court’s authority by way of punishment of the contemnor is criminal contempt.

In *Scott v. Scott [1913] AC 417*, the House of Lords identified a third form of contempt, contumacious civil contempt which is a hybrid of criminal and civil contempt. The proceedings, such as the ones in the instant case, are launched by the party as in civil contempt, but the character of the contempt has a criminal aspect so that the provisions of criminal contempt attach to it. Therefore, orders of court must be strictly construed and any ambiguities in the interpretation of the order claimed to have been flouted should be resolved in favour of the person accused of contempt.

Contempt proceedings occupy a unique procedural position because they are often classified as *sui generis*. Any direct contempt may be summarily punished, a process where the judicial officer immediately finds the contemnor in contempt and announces a sanction, unless the judicial officer wishes to impose serious criminal penalties, where the contemnor would have a right to trial. In contrast, in direct contempt, if it is unnecessary to punish the contemnor immediately to preserve courtroom order, the judicial officer has the option of waiting until the end of the proceeding before imposing punishment. Should a judicial officer wait until the end of a proceeding to impose punishment, the contemnor must be given notice and an opportunity to be heard. If a contempt is not summarily punished and the contempt consists of a personal attack on the judicial officer, another judicial officer may be required to hear the proceeding. The key difference between the two rests in the contemnor’s ability to abate or purge himself out of contempt. In civil contempt, the contemnor is said to “hold the keys to his own jail cell.”

Whereas interference with the course of justice includes interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments, the courts have stressed

5 that the summary power of punishing for contempt in should be used “sparingly and only in serious cases” (see *Parashuram Detaram Shamsdani v. King-Emperor*, [1945] AC 264, at 270 (PC). Court should be reluctant to use its contempt powers when the object of the litigation can be achieved by other means (see *Danchevsky v. Danchevsky* [1974] 3 All ER 934 (CA). Civil contempt sanctions are said to be coercive in nature. Their purpose is remedial, and for the

10 benefit of the complainant. Penal sanctions should be considered only where the disobedience of the party impedes the course of justice.

(i) Contempt proceedings against a corporation;

15 A command to a corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the order directed to the corporation, prevent compliance, or fail to take appropriate action within their power for the performance of the corporate duty they, less than the corporation itself, are guilty of disobedience and may be punished for contempt (see *Wilson v. United States*, 221 U.S. 361 (1911). It is clear that the

20 courts will pierce the corporate veil and hold directors, including *de facto* directors, personally responsible for failing to act on court orders that are made against their companies. An order against a corporation wilfully disobeyed may be enforced by one or more of the following: (a) imposition of a fine upon the corporation; (b) committal of one or more directors or officers of the corporation; (c) imposition of a fine upon one or more directors or officers of the corporation.

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A director of a company which has had a court order made against it is under an obligation to take reasonable steps to ensure that the order is obeyed (see *Templeton Insurance Ltd v. Motorcare Warranties Ltd and others* [2012] EWHC 795 (Comm)). A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate

- action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. To find a corporate officer or shareholder in civil contempt of a court order made against a company though, the court must specifically determine that the officer or shareholder bore personal
- 5 responsibility for the contemptuous conduct. The standard applied in determining when an individual may be held in contempt for the violation of a court order by a company that person controls requires proof that a person who controls a company personally violated a court order, for example by directing a company he or she controls to violate that court order.
- 10 Penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires as regards a fair trial. A person cannot be deprived of life, liberty, or property, without a fair trial. Because civil contempt sanctions are not considered punishment, they do not trigger many of the constitutional protections that accompany sanctions for criminal contempt or
- 15 other criminal offenses. An alleged contemnor is thus entitled to a rudimentary procedural due process, by being informed of the nature of the offense, given notice of the charges (the charges need not be set forth in the form and detail of a criminal charge), afforded a hearing regarding the charges, and a reasonable opportunity to prepare and present a defence. The limited procedural rights of a civil contemnor are based on the notion that the civil contempt sanction is coercive. A
- 20 notice of motion on a contempt motion must set out concrete facts of a nature to identify the particular acts alleged to constitute contempt with sufficient particularity to permit the alleged contemnor to purge the contempt.
- In the instant case, the applicant seeks committal to civil imprisonment, of the respondent's Chief
- 25 Executive Officer, its entire Board of Directors, and its Chief Finance Officer, yet none of them was joined to the proceedings, notified of the charges against each of them, have neither been afforded a hearing regarding the charges, nor a reasonable opportunity to prepare and present their respective defences. To grant the reliefs sought against any f them individually would be a travesty of justice. In the circumstances, reliefs can only be granted against the corporation by
- 30 way of attachment of its property or imposition of a fine.

(ii) The existence of a clear and unambiguous court order capable of being complied with.

The first requirement in proceedings for contempt of court is for the applicant to prove the existence of a clear and unambiguous court order. It is a fundamental requirement to all proceedings for contempt of court that there was a clear and unambiguous court order. The order must be clear and unambiguous so that it is easily understood by all. The order should not be unclear or vague. The language and expressions used must be free of ambiguity or vagueness. Its scope must be specifically and explicitly stated so as not to lead to confusion or be open to various interpretations. The Court will only punish for disobedience of an injunction if satisfied that the terms of the injunction are clear and unambiguous. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence.

A person should know with complete precision what it is they are required to do or abstain from doing. The order should therefore be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it. It should plainly indicate to the respondent all of the acts which he or she is restrained from doing, without calling on him or her to make inferences about which persons may well differ (see *Alken Connections Limited v. Safaricom Limited and 2 others, Nairobi Miscellaneous Application 450 of 2012 [2013] eKLR*).

25 The order must state clearly and unequivocally what should and should not be done. This ensures
that a party will not be found in contempt where an order is unclear. An order may be found to
be unclear if, for example, it is missing an essential detail about where, when or to whom it
applies; if it incorporates overly broad language; or if external circumstances have obscured its
30 meaning.

The garnishee order absolute that was issued on 24th May, 2022 required the respondent to pay a sum of shs. 108,848,068/= into the applicant's bank account not later than 15th July, 2022. I find that the order is definite, clear, precise and free of ambiguity or vagueness. Its scope is specifically and explicitly stated so as not to lead to confusion or be open to various 5 interpretations. The applicant has satisfied this requirement.

(iii) The contemnor knew the order existed;

One of the key requirements in proceedings for contempt of court is notice of the existence of a 10 clear and unambiguous court order. The law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally on him or her (see *Hon. Sitenda Sebalu v. Secretary General of the East African Community Ref No. 8 of 2012 (EACJ)* and *Stanbic Bank (U) Ltd and another v. Commissioner General Uganda Revenue Authority H.C. Misc. Application No. 42 of 2010*); and there must be 15 prominently displayed on the front of the copy of an order served, a warning to the person on whom the copy is served that disobedience to the order would-be a contempt of court punishable by imprisonment, or (in the case of an order requiring a body corporate to do or abstain from doing an act) punishable by attachment of the assets of the body corporate and by imprisonment of any individual responsible (see *Republic v. Commissioner of Lands and 12 others, Ex Parte 20 James Kiniya Gachira alias James Kiniya Gachiri, Nairobi HCMA No 149 of 2002 and Jacob Zedekiah Ochino and another v. George Aura Okombo and 4 others, [1989] KLR 165*). The order must have been personally served upon the respondent against whom sanctions for contempt of court are sought to be enforced.

25 In the instant case, the copy of the order attached to the application bears a "received" stamp of the respondent dated 24th May, 2022. The applicant averred in the affidavit supporting the application that the order was delivered in court in the presence of the respondent's Legal Officer. These facts are not controverted by the affidavit in reply. I therefore find that the respondent had effective notice of the existence of the clear and unambiguous garnishee order 30 absolute.

(iv) The contemnor had the ability to comply with the order but violated it knowingly;

A contempt of court is not a wrong done to another party to the litigation. It is an affront to the rule of law itself and to the court. A civil contemnor can avoid sanctions if he can show that it is
5 impossible to comply with the court order. For example, a person cannot be held in civil contempt for failing to produce documents that are not in his control. Similarly, an insolvent individual cannot be held in civil contempt for failing to pay a judgment. The burden, however, is placed on the contemnor to show he cannot obey the court order, and courts generally reject such claims absent compelling evidence that compliance is impossible. Generally, a party cannot
10 be held in civil contempt for the non-payment of money unless evidence is introduced sufficient to establish that he has the actual present ability to pay (see *Tigani v. Tigani*, 805 SE 2d 546 (2017) and *Chiang (Trustee of) v. Chiang* (2009), 2009 ONCA 3 (CanLII), 93 O.R. (3d) 483 (C.A.) at para. 9, var'g (2007), 2007 CanLII 82789 (ON SC), 85 O.R. (3d) 425). It is the reason why once jail has lost its coercive effect, continued incarceration is purely punitive and requires
15 the increased procedural protections of criminal contempt. Incarceration for civil contempt thus must cease once the court determines that there is no realistic possibility of compliance or coercion in the future.

The applicant must state exactly what the alleged contemnor has done or omitted to do which
20 constitutes a contempt of court with sufficient particularity to enable the respondent meet the accusation. An element of contempt is that the conduct in question must have been wilfully committed. Intent may be inferred from the circumstances accompanying the conduct and need not be proven directly. There should be sufficient evidence to show that the alleged contemnor intended to embarrass, hinder, or obstruct the trial court. It must be made clear what the
25 respondent is alleged to have done and that constitutes a wilful (rather than casual, accidental or unintentional) breach of an order or undertaking by which a person is bound and of which the person has notice (see *Australasian Meat Industry Employees Union v. Mudginberri Station Pty Ltd* (1986) 161 CLR 98; 60 ALJR 608; 66 ALR 577). The test to be applied in determining whether or not the conduct constitutes a contempt of court is the tendency of that conduct to
30 obstruct the administration of justice. There is no need of proof of actual obstruction resulting

from an act, but only the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty.

Factors likely to support a finding of contempt in relation to the enforcement of a debt will

5 include evidence the debtor is living a lavish lifestyle beyond his or her means, transfers of assets to family members, corporations or others with an intent to place assets beyond the reach of creditors, false or misleading evidence provided at an examination in aid of execution or elsewhere, and a refusal to produce documents or to provide responsive answers with respect to assets.

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A deliberate commission or omission that is in breach of the court's order will constitute wilful disobedience of the order unless it is casual, accidental or unintentional. It is trite that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings (see *Wild Life Lodges Ltd v. County*

15 *Council of Narok and another [2005] 2 EA 344*). Although an intentional act or omission that is, in fact, in breach of a clear order of which the alleged contemnor has notice is enough to establish a contempt of court, casual, accidental or unintentional acts of disobedience under circumstances which negate any suggestion of contumacy, should ordinarily not render the contemnor liable to punishment. A party acting due to misapprehension of the correct legal

20 position and in good faith without any motive to defeat or defy the order of the Court, should not be liable to a contempt proceeding. But when an act or omission in breach of a court order is done or made consciously, voluntarily and unaffected by any mistake i.e., not casually, or accidentally or unintentionally, it is immaterial that the breach was committed in reliance on a third party's advice, even legal advice.

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Lack of intent to not obey the order is not a defence. Intention to disobey the order is not a necessary element of the test; it is sufficient that a person has intentionally done the act the order prohibits or failed to do the act the order compels. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or

30 knowingly choosing to disobey the order, is not an essential element of civil contempt. All that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or

omission that is in breach of a clear order of which the alleged contemnor has notice. Civil contempt is unique in that it is of a quasi-criminal nature. This means that even in civil litigation all of the elements of civil contempt must be proved beyond a reasonable doubt rather than the usual civil standard of balance of probabilities. Intent or lack thereof only goes to the penalty to

5 be imposed following a finding of contempt, not to the finding of contempt itself.

There is no doubt in thus case that the respondent failed to do the act the order compels; i.e., to pay the sum of shs. 108,848,068/= into the applicant's bank account not later than 15th July, 2022. That failure was not casual, accidental or unintentional. The respondent though has

10 obliquely pleaded that it is its internal verification processes that led to its inability to pay within the stipulated time, rather than a contumacious refusal to pay.

(v) Lack of just cause or excuse for the violation of the court order.

The person must not have a legally acceptable excuse for the violation. While a contumacious

15 (wilfully disobedient) intent is not an essential element of contempt, in rare cases a civil contemnor can escape sanctions if a court finds there is "just cause" for disobeying the court order. To establish lack of just cause, the applicant need not prove that the alleged contemnor acted unlawfully but must prove that he or she acted with the predominant purpose of disobeying or manifest disrespect toward the court, or obstructing the judicial process. There can be no just

20 cause or excuse where a party uses unlawful means in order to advance his or her own economic interests by unlawful means, or for harming the economic interests of others. Any person subject to a court order is under an obligation to make a good faith or reasonable effort to comply. This includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour to comply. The finding therefore will turn on whether the alleged contemnor did

25 enough to bring about the required result. An alleged contemnor who tried diligently to obey an order but failed may avoid a finding of contempt.

Necessity is not a defence. Just as ignorance of the law is no excuse for not complying with it, a mistake of law is not a defence to an allegation of civil contempt. Likewise, reliance on legal

30 advice does not shield a party from a finding of contempt. The good faith inability to comply with a decree, as contrasted with the refusal to do so, is a complete defence to a contempt action.

The respondent raising this defence bears the burden, at least after some initial showing, of demonstrating an inability to comply. Self-induced impossibility is not a defence. A despondent asserting an “impossibility” defence must show categorically and in detail why he or she is unable to comply with the court’s order. In order to demonstrate that they have undertaken
5 reasonable and good faith efforts to comply, the party must pay to the extent that its finances would allow.

In the instant case, the respondent gas demonstrated that on 23rd August, 2021 it paid a sum of shs. 108,848,068/= that its finances could allow at the time. With the current garnishee order, it
10 has demonstrated in sufficient detail and with supporting documentation, the procedural requirements that must be met first before it will be in position to pay the retention money. The circumstances that have created its current inability to pay re contractual obligation by which it is bound. This is not a case of wilful disobedience but rather a present inability to comply with the court order. The only lapse is that the respondent did not handle the situation appropriately in
15 light of the 15th July, 2022 deadline set by Court. If a contemnor anticipates non-compliance with a court order, the proper course is to apply to vary, discharge or appeal that order, rather than launch a collateral attack or deliberately disobey it (see *Envacon Inc v. 829693 Alberta Ltd, 2018 ABCA 82 (CanLII)*). The attachments to the affidavit in reply though have satisfied the court that since being served with the order, the respondent has done enough to bring about the required
20 result. The respondent has tried diligently to obey the order but failed because of the red tape involved in approving release of the sum kept as a retention fund under a contract of construction with the judgment debtor. To direct payment before that compliance would be to direct the respondent to breach the contract and thereby cerate the possibility of the unnecessary loss of public funds.

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(vi) Whether the circumstances of the case require any measures to be taken against the respondent.

Punishment for contempt serves two functions: (a) enforcement of the process and orders of the
30 court, disobedience to which has been described as “civil contempt”; and (b) punishment of other acts which impede the administration of justice, such as obstructing proceedings in court while it

is sitting or publishing comments on a pending case, which have both been described as “criminal contempt.” The relevant factors to take into account when punishing for contempt include the following: whether the applicant has been prejudiced by the contempt, and whether the prejudice is capable of remedy; the extent to which the contemnor has acted under pressure
5 or was placed in breach by reason of the conduct of others; whether the breach of the order was deliberate or unintentional; the degree of culpability; whether the contemnor appreciated the seriousness of the breach; whether the contemnor has cooperated or apologised; whether the contemnor has admitted his or her contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made, the more credit the
10 contemnor is entitled to be given; the contemnor's previous good character and antecedents; and any personal mitigation advanced on his or her behalf.

According to some authorities, criminal, but not civil, contempt could be punished by the imposition of a fine. More recent decisions indicate that a fine may be imposed when the
15 contempt consists of wilful disobedience to a court order in the sense that the disobedience is not casual, accidental or unintentional. It is trite that the power of punishing for contempt should be used sparingly and only in serious cases or where court is compelled to punish by reason of persistent and obstinate defiance and interference of the contemnor or if the conduct will prejudice the trial (see *Shamdasani v. King Emperor* [1945] A.C. 264; *Weston v. Courts
20 Administrator of the Central Criminal Court* [1976] 2 All E.R. 875; [1976] 3 W.L.R. 103, and *Izoura v. R* [1953] 1 All E.R. 827, [1953] A.C. 327; [1953] 2 W.L.R. 700). A case is serious where the contemnor acts intentionally, with the purpose of either bringing the court into scorn, disrepute or by interfering with the administration or course of justice or where the conduct will prejudice the trial.

25

Furthermore, the contempt power is a discretionary one. If courts were to find contempt too easily, a court’s outrage might be treated as simply raising a storm in a tea cup that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. Contempt of court cannot be reduced to a mere means of enforcing judgments, as the applicants by their
30 prior applications seem to believe. The court though should be careful to keep away from ultra-sensitiveness by exercising circumspection and judicial restraint. Sanctions should be imposed

only as an option of last resort when it is necessary to vindicate the court's authority, to prevent obstructions of justice or in order to guarantee a fair trial.

A contempt order is not a tool of first resort. Contempt of court cannot be reduced to a mere
5 means of enforcing judgments. In enforcing a judgment, use of the statutory enforcement tools of the examination in aid of execution and garnishment will usually come first. Courts have consistently discouraged its routine use to obtain compliance with court orders. The power should therefore be used cautiously and with great restraint. It is an enforcement power of last, rather than first, resort. It is not necessary on the facts of this case to invoke that power, for
10 which reason the application is accordingly dismissed with no order as to costs.

Delivered electronically this 13th day of January, 2023 **Stephen**
Mubiru.....

Stephen Mubiru
Judge,
13th January, 2023.

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