

BERTHA TARIRO MUZANENHAMO
versus
TEVASON INVESTMENTS (PVT) LTD t/a FRESHPRO
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 11 October 2017 and 29 November 2017

Opposed application

N. Munetsi, for the applicant
Ms E.T Mandaza, for the 1st respondent
F. Chingwere, for the 2nd respondent

MWAYERA J: The applicant approached the court seeking a declaratur that civil imprisonment by common law is unconstitutional. The applicant further sought that s 16 of the High Court Act [*Chapter 7:06*] hereafter referred to as the Act as well as Order 41 of the High Court Rules 1971 be declared unconstitutional. The respondents opposed the application. The issues that fell for determination are basically the constitutionality or otherwise of provisions which the applicant raised concern about.

The background facts of the application have to be put into perspective. The respondent obtained a judgment HC 4597/16 against Munava Enterprises Private Limited, the applicant and her mother Joyce Muzanhenhamo. The applicants were ordered to make good the outstanding debt emanating from a contractual relationship jointly and severally the one paying the other to be absolved. The respondent sought to execute that extant court order without success. This culminated in the issuance of summons for civil imprisonment on 16 September 2016 by the respondent. The service could not be effected and as at the date of hearing it was conceded by the applicant that no order for civil imprisonment had been issued. The applicant sought the annulment of civil imprisonment procedure in general, on the basis that it is viewed

by the applicant as unconstitutional. It is important in this case to focus attention on Order 41 of the High Court Rules, s 16 of the High Court Act and s 49 of the Constitution.

Section 16 of the High Court Act states that;

“No writ of Civil imprisonment for non-payment or non-satisfaction of any judgment or decree shall be granted or issued by the High Court in cases in which the person against whom such writ of civil imprisonment is sought to be issued proves to the satisfaction of the court that he does not have the property or means sufficient to satisfy in whole or in part the said judgment or decree”.

The section in summary spells out that a writ of civil imprisonment shall not be issued where the person against whom such writ of civil imprisonment is sought shows to the satisfaction of the court that he does not have the means. The section is unambiguous and clearly shows the picture that civil imprisonment is not granted by mere asking but the requirement of whether a person is able to pay or not is central to the consideration. Order 41 of the High Court on imprisonment for debt prescribes in clear terms the procedure to be followed before civil imprisonment is effected. It is apparent from a reading of the order that these debtors or persons who lack means and capacity to fulfil the debt are excluded from civil imprisonment. In other words just like s 16 of the High Court Act, where it is proven that the person has no means then civil imprisonment is not available as a remedy by operation of law.

The court in assessing whether or not the debtor has the means to discharge the obligation looks at a broad spectrum of considerations. Order 41 allows for adducement of evidence in the enquiry to determine the suitability or otherwise of the debtor for civil imprisonment. If there are no means to settle then, civil imprisonment is not an option simply because there is an outstanding debt and that the creditor has asked for it. The court is in the exercise of its discretion given guidance on aspects which fall for consideration Order 41 r 269 (2) is instructive. It states:

“(2) In determining the ability of a judgment debtor to pay the amount due, the court shall take into account the following matters:-

- (a) The nature and extent of his income and assets;
- (b) The amounts needed by him for his necessary expenses and those of his dependants, and
- (c) Any amounts needed by him to make payment in terms of any court order or agreement, and
- (d) If he is unemployed, the reasons therefore and
- (e) If he is employed whether a garnishee order would be appropriate, in which event the court may adjourn the enquiry to enable proceedings for such an order to be instituted in terms of Order 42.”

A reading of what falls into consideration in my view reveals that civil imprisonment is not lightly resorted to. It is a preserve for those with means but unwilling to render to Caesar what belongs to Caesar. It is a tool of encouraging people to own up their dues. Civil imprisonment is not resorted to in circumstances where it is proven that the person involved has no ability or means to discharge the debt. See *Robert F. Baddeley v Lawrence Gleamingson* HC 3176/12 [2013] 2 WBHCI.

The question that was to be answered then is whether or not s 16 of the High Court Act and Order 41 run fold of the Constitution of Zimbabwe provisions that relate to civil imprisonment. The relevant constitutional provision s 49 (2) reads

“No person may be imprisoned merely on ground of inability to fulfil a contractual obligation.”

The constitutional provision on the right to personal liberty is clear and straight forward. It is apparent from a reading of s 16 of the High Court Act, Order 41 of the High Court Rules and the Constitution that the legal provisions are not divergent or parallel. It is clear that debtors who lack capacity and with no means to satisfy their contractual obligations should not be arbitrarily deprived of their right to liberty. Civil imprisonment as envisaged from the legal instruments referred to by the applicant is certainly not in place as a punishment to debtors but a mutual process meant to safeguard creditors from debtors who have the ability and capacity but do not wish to pay what is due and at the same time the process safeguards those debtors who lack ability and capacity to satisfy the debt. The law as propagated in Zimbabwe is clear that no civil imprisonment follows where it has been proven the person concerned has no means s 16 of the Act and order 41 of the High Court rules are consistent with the constitutional provisions as outlined. To that extent therefore there is no basis for declaring provisions which are in conformity with the Constitution to be unconstitutional.

The circumstances of this case, given the brief history reveal that the applicant did not pay what is due and has evaded service for an enquiry to be conducted on whether or not the applicant has the means to pay when viewed together with the application to have civil imprisonment declared unconstitutional borders on abuse of court process. The applicant created the impression that she does not wish to explain her failure to pay. It is apparent from current legal instruments such an explanation does not mean civil imprisonment follows. If the applicant has no means then no civil imprisonment will follow as vividly provided for in s 16 of the High Court Act and Order 41 High Court Rules as read together with s 49 of the

Constitution. It should be noted that not agreeing with legal provisions and due process does not render a piece of legislation unconstitutional. The wording of s 49 (2) of the Constitution resonates well with the International Convention on Civil and Political Rights 1966 hereafter called ICCPR. Worth noting is the fact that Zimbabwe is a party to Article 11 of the ICCPR which states in similar terms with our Constitution that “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. This presupposed if an individual does not have the ability and or capacity to discharge a contractual obligation they should not be civilly imprisoned. The converse is true if one has ability to fulfil a contractual obligation but they are wilfully unwilling to perform their part then civil imprisonment process should be initiated to cojole an able but unwilling party to fulfil their part of the agreement. In the case of *Chinamora v Angwa Furnishers (Pvt) Ltd* 1996 (2) ZLR 664 the court had occasion to determine whether s 16 of the High Court Act and Order 41 of the High Court Rules were inconsistent with ICCPR International standards as provided for that “No one shall be imprisoned merely on the grounds of inability to fulfil the contractual obligation.” It was held that order 41 of the High Court Rules and s 16 of the High Court Act were not in violation of provisions of Article II of the ICCPR. The provisions of article II of ICCRP are the same as our s 49 (2) of the constitution. The same reasoning in *Chinamora* case applies with equal force in the present case. The central aspect for consideration is whether one has the ability, means and capacity. If the means is lacking then no civil imprisonment follows. Given such clear progressive stance as provided for by the relevant provisions there is no basis for declaring the relevant provisions unconstitutional. Civil imprisonment is not granted by mere asking even at common law. Further as provided for in s 16 and order 41 the procedure to be followed is to establish the ability or otherwise of a party who is owing. If the party is proven unable then no civil imprisonment follows. The wording of the constitution is unambiguous on the centrality of “ability”. The common law and codified process takes into account the ability as a point on which the notion of civil imprisonment is anchored. This then puts a nail to the applicant’s claims that the relevant law and or civil imprisonment is unconstitutional.

I am alive to the fact that some jurisdictions have argued and advanced that civil imprisonment is a breach of fundamental rights to liberty, the right to equal protection before the law and the right to humane treatment. Given the context in which civil imprisonment is brought into effect in Zimbabwe, civil imprisonment process cannot be viewed as a threat or punishment but rather a means to ascertain ability or otherwise of a debtor or to settle. It is a

process which does not short change an individual's rights as enshrined in the Constitution. As a way of protecting the liberty of an individual the cycle starts with the serving of summons. The rules require that the debtor is personally served. Order 5 r 39 (1) provides that service where the liberty of an individual is at stake ought to be personal. Rule 39 (1) reads:

“Process in relation to a claim for an order affecting the liberty of a person shall be served by delivery of a copy thereof to that person personally contempt of court proceedings would have an effect on the liberty of an individual and to safeguard such liberty the debtor is given chance to be heard after herein personally served.”

In the case of *Wilson v Ministry of Defence and others* 1999 (1) ZLR 144 it was stated that the provisional order against the respondent calling upon them *inter alia* to show cause why they should not be declared to be in contempt of court and fined specified amounts required personal service to be effected. The same reasoning was followed by DUBE J in *Chamunorwa Mutyambizi v Jose Maselino Goncalves and another and the Sheriff of Zimbabwe N.O.* The judge in *Chamunorwa* case stated that the court must satisfy itself that the respondent has been properly served. The notion to require 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 court proceeding.

As was put in *National Insurance Company of Zimbabwe v Dhlamini* 1999 (Z) 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 court has even declined to deal with applications for civil imprisonment or contempt of court where service was made on lawyers and the respondent is not in attendance for the enquiry. See *Sechelite King Mining Company (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173.

Given the safeguards available from the manner of service procedure and process of enquiry as outlined in s 16 and of the Act and order 41 of the High Court rules in as far as the Zimbabwean situation is concerned, it would not be only absurd but also anomalous to argue that civil imprisonment as provided for by common law and codified is unconstitutional. It's worth mentioning that the individual right is to be responsibly exercised so as to avoid over stretching and abusing the other citizen's right. A debtor personally served and subjected to an enquiry to determine whether or not they have the ability to discharge the debt on arrangements cannot cry foul and hide behind the argument that civil imprisonment is unconstitutional. The

enquiry establishes the means or otherwise where there are no means or there is no capacity civil imprisonment does not apply and where there is capacity but the individual is not willing to pay then civil imprisonment is a tool to induce discharge of a contractual obligation voluntarily entered into.

A close look at s 49 of the Constitution and the process and procedure of civil imprisonment enquiry make it clear that the procedures and process as laid out in common and statute law in Zimbabwe is consistent with s 49 (2) of the constitution and s 51 on right to human dignity. It is settled that provisions of the constitution must be given a purposive interpretation so as not to strangle the right being protected. See *Smyth v Ushewokunze and Anor* 1997 (2) ZLR 544 and also *S v Makwanyane* 1995 (3) SA 391 (CC) a general and progressive interpretation of the constitution was succinctly expressed as follows:

“... Whilst paying due regard to the language that has been used, the approach must be generous and purposive and give expression to the underlying values of the constitution.”

Given the values underpinning the Zimbabwean Constitution, the supreme law of the land, the changing conditions, social norms and values, one cannot impute civil imprisonment as unconstitutional. The relevant s 49 (2) recognizes the right to individual liberty and by no means seeks to perpetuate irresponsible conduct of not discharging a contractual obligation were the individual concerned has a right given the constitutional provision similar to international convention ICCPR. One should distort the meaning by narrowly interpreting it to mean were due process is followed, personal service effected, enquiry carried with the result that the debtor is able but unwilling to pay, the constitutional provision is there to protect such a debtor. The provision entails protection of the incapacitated debtor from civil imprisonment.

The former would lead to anarchy and dysfunctional economy where the courts would sanction illegality by not carrying out an enquiry as regards the ability or otherwise of the debtor fulfilling his part of the obligation. The instruments available in Zimbabwe and the common law do not support the notion propagated by the applicant that civil imprisonment is unconstitutional. What is important is the fact that the fundamental rights are exercised responsibly. One cannot be allowed to infringe the other's rights by hiding behind the unconstitutionality of a process. Moreso in circumstances where there is in place a procedure and process laid out to allow full ventilation so as exclude civil imprisonment in circumstances where the person has no ability and no means. In the United States although it varies from one state to the other, criminal sanction is prohibited for any honest but insolvent debtor. This is

the scenario depicted by s 16 of the High Court Act and Order 41. The procedure laid out there is to ensure that an incapacitated debtor is not imprisoned. Surely it was not the legislative intention in enacting s 49 (2) of the constitution to allow irresponsible dishonest and solvent debtors to get away with debts under the umbrella of “violation” of right to liberty and human treatment. The purpose of civil imprisonment in our context is to allow execution in circumstances where an able and solvent debtor refuses or is unwilling to fulfil their contractual obligation. It is not a tool to punish people or debtors who lack capacity or means. Given the legal framework section of the Act 16 order 41 and precedent, and the Zimbabwean society values underpinned in the constitution the process is still relevant in our context. Accordingly the application cannot succeed.

It is ordered that:

The application be and is hereby dismissed with costs.

Tendai Biti Law, applicant's legal practitioners
Muhonde & Attorneys, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, for the 2nd respondent