

DISCOUNT STEEL ZIMBABWE
versus
JOHANNES GYSBERTUS HART (PRIVATE) Ltd

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 May 2025

Summons for Civil Imprisonment

T Zhuwara for the applicant
C Mogowani for the defendant

CHITAPI J: The plaintiff Discount Steel Zimbabwe (Private) limited a body corporate registered in terms of the Laws of Zimbabwe obtained judgment against the defendant Johannes Gysbertus Hart, a male adult of Harare. The judgment was sounding in money and was granted by this court on 8 November 2022 suffering the Defendant to pay to the plaintiff the sum of US\$550 000.00 with interest thereon calculated at the prescribed rate 5% per annum payable from 31 August, 2021 to the date of date of full payment and costs of suit on the scale of legal practitioner and client.

The applicant in an endeavor to recover the amount of the judgment caused the issue of a writ of execution against property. The Sheriff executed the writ on 15 March 2023 at 969 Chishawasha Hills. The sheriff rendered a *nulla bona* return of service. A second attachment took place at Anglesea Farm Matopos which was the place of employment of the defendant. Several assets were attached in the second attachment. The defendant averred that save for an aircraft identified as Z-STU which is jointly owned by the defendant and one Wayne Moss in equal shares, none of the other attached goods belonged to him. The Sheriff valued the aircraft at US \$150 000. The defendant valued the aircraft at US\$ 50 000 and stated in his opposing affidavit, thus provided the co- owner is agreeable, I am prepared to sell the aircraft and tender my half share to the judgment creditor. To maximize its sale value, however it will need to be moved to Harare to be sold.

The plaintiff aroused the issue of writ of civil imprisonment which is the matter before the court. The defendant resisted strenuously the granting of a warrant for civil imprisonment. I postponed the matter on several occasions to allow the parties time to come to an agreed position. The parties failed to reach any compromise or agreement.

The onus to resist a decree of civil imprisonment being made rest upon the judgment debtor or defendant. Rule 73 of the Court Rules, 2021 provides for the procedure for civil imprisonment referred to therein as “imprisonment for debt.” The rule starts with the narrative that it is subject to the provision of s 49 (2) of the constitution. The section

“49 Right to personal liberty

(1) -----

(2) No person may be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

The effect of the above provision is that there is more that is required to be interrogated by the court before a warrant of civil imprisonment may be granted by the court. Rule 73(2) provides that

“73 (2) Where the Sheriff has issued a return of *nulla bona* or not sufficient goods on a writ of execution the judgment creditor may cause to be issued a summons commanding the judgment debtor to pay the amount of the judgment and, unless he or she does so, to show cause at a time and place stated why an order for personal attachment shall not be decreed against him or her.”

Thus if the judgment debtor has not paid the amount of the judgment in answer to the summons, he or she must “show cause why an order for personal attachment shall not be decreed against him or her.” The judgment debtor therefore has the burden to present to the court justiciable or satisfactory grounds why the court should not commit him or her to prison.

In the case of *Zimbabwe Leaf Tobacco v Cooke* HH 412/21 DUBE JP traversed the subject of Civil imprisonment as follows in paragraph 4 of the cyclostyled judgment:

“4. A summons for civil imprisonment calls upon a debtor to show cause why he should not be imprisoned for failure to pay a debt. The new High Court Rules, 2021 published under Statutory Instrument 202 of 2021 make the provision for imprisonment for a debt in r 73. In terms of r 73 (4); before a court makes an order for civil imprisonment. It should satisfy itself that the judgment debt has not been paid. In most civil imprisonment proceedings liability is not an issue in which case the courts enquiry is limited to the debtors ability to service the debt and the appropriateness of civil imprisonment. Where a debtor challenges civil imprisonment proceedings on the basis that he does not have a contractual obligation or has cleared it, it is incumbent upon the court to resolve the dispute regarding liability first before delving into of (sic) appropriateness of civil imprisonment.”

The learned Judge President in para 6 (supra) after observing that the r 73 is subject to 49(2) of the Constitution stated as follows:

- “6 “..... The constitution bars imprisonment of a person simply on the basis of a failure to fulfil a contractual obligation. Section 49(2) protects the right to personal liability and enjoins a court dealing with a summons for civil imprisonment where it is satisfied that the debtor has not paid the amount due to enquire into the question of the judgment debtors failure to pay the amount due.
7. What this entails is that an indigent person will not be imprisoned for a debt simply because she owes. In terms of r 73 it must be shown that the debtor has the means to pay, earn the amount due and his failure or refusal to pay the amount due is wilful. The fact that a debtor owes a contractual obligation does not necessarily call for his imprisonment. Civil imprisonment is a drastic measure which should be resorted to only as a last resort and only in instances where a debtor is able to service the debt but has shown an unwillingness to discharge the obligation. It is for this reason that the court is enjoined to carry out an enquiry to establish the financial position of the debtor and attitude to payment of the debt. The manner in which the debt will be cleared is considered in a case where the debtor is able to service the debt and shows a willingness to settle it”

It is noted that the judgment debtor cannot properly challenge the judgment debt in substance since this can only be done on appeal or where there is rescission of judgment where the judgment order of the court was granted in default. Challenges to liability in this sense will involve such considerations as the person served with the civil imprisonment summons pleads that he or she is not the person named in the judgement order of the court, that the judgement debt has in fact been paid up or in part, so that the court determines the correct amount still due, or some other challenge which does not challenge the correctness of the extant judgement of the court on which the summons for civil imprisonment is founded.

Rule 7(s) provides for what the court must do upon the judgement debtor being summoned and appearing before it on a summons for civil imprisonment. The provision is peremptory. The section reads as follows:

“(5) In an enquiry in terms of sub rule (4), the court shall –

- (a) call the judgment debtor to adduce evidence as to his or her financial position; and
- (b) receive any evidence that may be adduced by or on behalf of the Judgement debtor or Judgement creditor in regard to the Judgement debtor financial position and his or her ability to pay the amount due. Whether such evidence is adduced orally or by affidavit or in any manner that the court considers appropriate and ; where
- (c) Where evidence is adduced orally, permit the cross examination of the witness concerned.”

The enquiry therefore starts with requiring the judgment debtor to provide evidence of his or her financial position. The court then permits other evidence from the judgment debtor or Judgement creditors on the issue of the financial position of the Judgement debtor and a fortiori, the Judgement debtors ability to pay. Strict rules of evidence do not apply in relation to how the evidence may be led and the nature of the evidence for as long as the court considers that the particular manner of adducing evidence as either party may adopt is appropriate.

In relation to the factors which the court takes into account in determining the ability of the judgment debtor to pay the amount, the court is enjoined to take into account factors listed in r 73 (7) and these are :

- “(a) the nature and extent of his or he income and assets; and
- (b) the amount needed by him or her for his or her necessary expenses and those of his or her dependents; and
- (c) any amounts needed by him or her to make payments in terms of any court order or agreement; and
- (d) if he or she is unemployed, the reason therefore ;and
- (e) if he or she 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 r 74”

Reverting to the merits of this case, the Judgement debtor pleaded that he had a credit balance of USD \$546.33 in his offshore account in Australia as at 02 October 2023. He pleaded that he was involved in divorce proceedings filed by this wife on 28 August 2023 under case No HC 5364/23 and that the nature of the claims by his wife to property left his financial position uncertain in relation to assets. I would observe that the items of property listed in the divorce matter are *res-tiligosa*. It would be improper for this court to make orders relating to that property as would result in their disposal. The divorce proceedings must in such circumstances be protected. In the event that the divorce proceedings are determined and the judgment debtor is awarded attachable property, such would be executable. It was not suggested that the defendant

had any other assets available to liquidate apart from a half share in an aircraft which he valued at USD \$50 000.00 albeit the Sheriff priced it at USD \$ 150 000.00.

The judgment debtor pleaded that the property attached at Anglesea Farm was apart from the aircraft subject of an interpleader claim. There was no evidence led to dispute the assertion. In such circumstances it would again be improper for the court to anticipate the interpleader claims by making an order regarding the ownership of the goods involved in the interpleader process. The judgment creditor averred that the judgment debtor was making effort to hide his assets including the aircraft. The assets alleged to be hidden by the judgment debtor were not listed. It was averred that in the absence of an affidavit from the alleged co-owner of the aircraft referred to herein, the judgment debtor allegation that the aircraft was jointly owned was false. It was averred that the judgment debtor had prepared a false sale agreement wherein he purported to sell the aircraft to Wayne Host. A copy of the agreement of sale of the aircraft dated 15 August 2021 for USD \$ 43 000.00 was produced. The agreement does not in my view portray the judgment debtor as having executed the agreement to hide assets so that they are not liable to execution by virtue of the judgment on which the civil imprisonment summons is based because the agreement predates the judgment of the court. In any event it is not my understanding that the aircraft is subject of an interpleader claim. Consequently, in as much as the judgment debtor has disclosed it and offered to have it sold, it is proper for the court to consider the aircraft as an available asset for purposes of establishing the judgment debtor's ability to pay the debt.

The judgment creditor pleaded that he secured a consultancy at a farm in Matopos for which he was paid US\$1500.00 per month in salary. He stated that he however lost the job with effect from 31 October 2023. The judgment creditor averred that the judgment debtor was not being honest in relation to the loss of employment because he did not go into detail about his savings and benefits associated with loss of employment.

The judgment debtor attached a summary of his expenses with accompanying receipts for the period April to September 2023. His income and expenses schedules showed that he was always in the red during that period. The income which enabled the expenditure was realized from the salary of USD \$1500.00.

The judgment creditor noted that from the expenses receipts, the judgment debtors led a luxurious life style wherein he could spoil himself with biltong, chocolate, garlic cheese

boerewors. The summaries of the expenditure receipts added up to USD \$ 371.70 for April; USD \$ 349.96; for May was USD\$ 349.96 for June ; USD\$674.25 for July and USD\$ 720.08 for August 2023 and USD 664.03 for September 2023. He averred that although he made provision for income tax of US\$ 375.00 per month he could not pay it because he could not balance his income and expenditure to sustain himself.

The judgment debtor denied allegations that he lived an extravagant lifestyle whereby he flew to South Africa and Australia. He admitted that he went to Australia on a discounted ticket in February/March 2024 to visit his children after five years. He also averred that he went to South Africa in December 2022 for an aunt's funeral, in January 2023 for a business meeting in Cape Town at his clients expense and again to Australia to attend his stepson's wedding with expenses paid for by his wife. The judgment debtor then averred that in the face of his financial position he could pay US \$100 per month subject to annual reviews.

The judgment creditor in the answering affidavit persisted in its stance that the judgment debtor had ability to pay off the debt at once or in two instalments. In this regard the judgment creditor did not allege any known sources of income of the judgment debtor. It averred the ability to pay off the debt in one or two instalments was to be inferred from the fact that the judgment debtor made numerous trips locally and internationally between December 2020 and July 2023. The details of the trips were set out. I will not set them out individually. However trips were made to outside countries and to tourist resorts in Zimbabwe.

The judgment debtor did not deny the trips specifically. It was averred on his behalf by his counsel that there was no evidence to support the detailed trips. The Judgement creditor in-deed did not allude to the source of information on the alleged trips. No attempt was made by the Judgement creditor to give further information on the alleged trips in submission made to the court. Without facts on the sources of funding for the trips it cannot be said they show that the Judgement debtor has means.

It is my view from the evidence and submissions that the nature and extent of the judgment debtor income and assets has not been established save for the admitted aircraft. The criteria in rule 73 (7) was not strictly traversed because the judgment debtor did not give details of the amount he needed for his sustenance nor how he sustained himself. It was submitted that the aircraft maintenance bill which the applicant paid was in the sum of USD\$250.00 per month. This was

not refuted it was an allegation which could not be refuted by a general denial since it is a fact that there is an aircraft in existence which must be maintained and accumulates maintenance costs. The impression given by the defendant is that save for the aircraft he otherwise has no income of any sort. It becomes a surprise that he is not starved and came to court well addressed and kempt. It is not bona fide for the judgment debtor to simply tell the court that he has no source of income but is offering US \$100.00 per month and proceeds of the sale of an aircraft. He did not even advise steps which he has taken to dispose of the aircraft but told the court that the disposal was conditional on what the co-owner stated.

From the fact and circumstances of the case the judgment debtor is not indigent. He has been about coy about his source(S) of income. The sources must be there because he lives and feeds. It is incumbent upon a judgment debtor to take the court into his or her confidence by being open, frank and candid with the courts. Where however the judgment debtor gives the impression that he or she is hiding the truth, he or she has himself or herself to blame if the court makes a determination which is not in his or her favour.

The judgment creditor picked from nowhere the figure of USD \$30 000.00 per month as the amount which the judgment debtor is able to pay per month. The court is not persuaded to accept such amount as being within the ability of the judgment debtor to pay. No facts are available from which to order payment of such amount as being a reasonable and affordable figure. The Judgment debtor also produced without prejudice letters exchanged between the parties legal practitioners wherein attempts were made to settle the issue including the involvement of other persons who offered to pay the amount. The communication which the judgment creditor objected to on account of their without prejudice nature are not of assistance because the judgment to be enforced is against the Judgment debtor. Without substitution of the debtor outsiders to the Judgment may only be relevant where such outsider pleads that he or she has paid off or part of the Judgment debt.

In all the circumstances of this case and taking into account the consideration that civil imprisonment should be considered as appropriate only where there is ability to pay and the judgment debtor refuses or frustrates payment, it is the court's founding that the Judgment debtor has an aircraft or interest in an aircraft which he can dispose of. He clearly can pay on the debt. His offer of \$100.00 per month pre supposes that he can raise money. One does not have to be in

regular employment for a civil imprisonment order to be made. The gravamen of the enquiry is the ability of the Judgement debtor to pay. An appropriate order in my view is one which orders civil imprisonment of the judgment debtor which is suspended on conditions as will be stipulated.

IT IS ORDERED THAT

1. A decree of civil imprisonment is issued against the judgment debtor/defendant Johannes Cysbertus Hast for ninety (90) days suffering him to remain in custody until he has satisfied the judgment of this court granted in case No 4354/21 by KATIYO J where the defendant pays USD \$550 000.00 to the judgment creditor/plaintiff with interest there on of 5% per annum from the date of issue of summons to the date of full payment and costs of such on the legal practitioners and client scale.
2. The warrant of committed to prison is suspended on condition that the Judgement debtor /defendant pays to the plaintiff USD\$ 5 000.00 per month effective 1 June 2025 for three months to August 31 July 2025 where after the Judgement creditor or Judgement debtor may set down the matter for review of the repayment conditions.
3. In the intervening period and by no later than 30 June 2025 the judgment debtor/defendant shall under the supervision or auspices of the sheriff dispose of the aircraft Registration Z-STU to best advantage failing which the sheriff shall sell the aircraft by public auction and file a report of such sale with the court, provided that following such sale, either party may if the sale happens before the three (3) months given for review of this order set, down the matter for review on a date which is earlier than 31 August 2023
4. The Judgement debtor/defendant shall pay the costs of its application.

CHITAPI J:.....

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Masisya Sheshe and Associates, Defendant Legal practitioner