

ROBERT F. BADDELEY

Versus

LAWRENCE CLEMINSON

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 25 OCTOBER 2012 & 24 JANUARY 2013

T. Masiye-Moyo for plaintiff

N.T. Mashayamombe for defendant

Judgment

NDOU J: This is an action for civil imprisonment instituted by the plaintiff against the defendant. The salient facts of the case are the following. Under HC 982/12 this court ordered the defendant to pay the plaintiff the sum of US\$81 488,00 together with interest thereon at the prescribed rate. Defendant was also ordered to pay costs on an attorney-client scale. Thereafter the plaintiff sought to satisfy the judgment by attachment of the defendant's property without success. The Deputy Sheriff was unable to satisfy the exigencies of the plaintiff writ as she was unable to locate any movable assets belonging to the defendant. The Deputy Sheriff rendered *a nulla bona* return on 13 September 2012. Plaintiff as a result, instituted these proceedings seeking civil imprisonment of the defendant. The defendant has opposed the action and has instead prayed that the warrant of committal be dismissed on the basis that he is unable to pay the debt in terms of section 16 of the High Court Act [Chapter 7:06]. In the alternative the defendant prays that this court suspends the warrant of committal on condition that the defendant pays plaintiff US\$ 1 000,00 per month. The defendant responded to summons for civil imprisonment by attending the inquiry in the company of his legal practitioner. He adduced evidence on his financial position. The court enquired into the means of the defendant in terms of Order 41 Rule 370 of the High Court of Zimbabwe Rules 1971.

It is trite law that, in terms of Rule 370A, this court may issue an order for the committal of the defendant where it is satisfied that the defendant has the means and/or the capacity to pay the debt in issue but willfully neglects to do so. In terms of Rule 370C, the court may suspend the order for committal on conditions as the court may think fit. The onus stands upon the debtor to establish that he does not have the means or ability to pay the debt. *Civil practice of Supreme Courts in South Africa* – Herbstein and Van Winsen 509 and *Mansour v Sorour Bros* 1912 EDL 208. *In casu*, the defendant initially offered to pay the sum of US\$500,00 per month. This offer was rejected by the plaintiff on the basis that it would take too long for the defendant to finalise payment. The defendant later increased his offer to US\$1 000 per month. The

defendant evinced on the indebtedness to other people and institutions. He showed that a company Impala Enterprises (Pvt) Ltd where he is director, is currently under judicial management and nothing was coming from it by way of income. The defendant also testified that he was in the process of wooing investors in order to enhance his financial position. Having regard to the evidence placed before me, I conclude that the defendant is to some extent, able to pay his debt, so section 16 supra, is not applicable. In my view he can afford US\$2 000,00 per month. Accordingly it is ordered that:

1. Civil imprisonment is hereby granted in favour of the plaintiff against defendant for the defendant to be lodged at Bulawayo Prison for a period of ninety (90) days unless the defendant sooner satisfies the judgment granted against him by this court under HC 982/12.
2. The order in paragraph (1) is suspended on condition the defendant pays US\$2 000,00 per month with effect from the end of the month of January 2013.
3. The defendant shall pay costs of this suit on the ordinary scale.

Mashayamombe & Co, applicant's legal practitioners

Hwalima, Moyo & Associates, defendant's legal practitioners