

EVANGELISTA DIONISIO  
versus  
GEORGE FRANGOULIS

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 11 April 2018 & 30 June 2021

### **Application for Criminal Appeal**

*C McGown*, for the appellant  
*T Chiturumani*, for the respondent

HUNGWE J: On 11 April 2018 I gave an order couched in the following terms:

“After reading the documents and hearing counsel, it is ordered as follows:

1. An order for civil imprisonment is hereby granted in favor of the plaintiff
2. The Sheriff for Zimbabwe, or his deputy, is ordered to arrest the defendant, George Frangoulis of 86 Maungwe Street, Rusape, Zimbabwe, for a period of 90 (Ninety) days in the Remand Prison and deliver him together with a copy of this writ, to the Prison at Remand, where he shall be kept until:
  - (a) Defendant has paid the judgment debt, together with the interest and costs that are due or
  - (b) The period of 90 (ninety) days from the date of his delivery to the prison has elapsed, or
  - (c) A court has varied or revoked the Order of Civil Imprisonment.

The order will remain in force until the respondents has paid the sums of: -

- (a) USD 56 640,00 (fifty-six thousand six hundred and forty United States dollars) which the respondent owes to the applicant by virtue of a judgment of this court of the 20<sup>th</sup> day of September 2017, together with:-
  - (b) Interest on that sum at the rate of 16.8% (sixteen percent eight per cent) per annum from the 1<sup>st</sup> May 2017 to date of final payment.
  - (c) USD 340,00 (three hundred and forty United States dollars);
  - (d) Interest on that sum at the prescribed rate of 5% (five per cent) from the date of issue of summons (5<sup>th</sup> May 2017) to date of final payment, and
  - (e) The taxed costs and the further costs of the application for the order.
3. The defendant shall bear costs of suit.”

The respondent's legal practitioners thereafter requested for reasons for the order. These are the reasons for the order. This order followed an application for civil imprisonment instituted by the plaintiff against the defendant, who shall be referred to as applicant and respondent respectively. The salient facts of the case are the following. Under HC 3985/17 this court ordered the respondent to pay the applicant the sum of US\$56 640,00 together with interest thereon at the rate of 16.8% from the 1<sup>st</sup> May 2017, a further US\$340,00 together with interest at the prescribed rate on the latter sum. Defendant was also ordered to pay costs.

Thereafter the applicant sought to satisfy the judgment by attachment of the respondent's property without success. The Deputy Sheriff was unable to satisfy the exigencies of the applicant's writ as he was unable to locate any movable assets belonging to the respondent. The Deputy Sheriff rendered a *nulla bona* return on 5 January 2018. Applicant, as a result, instituted these proceedings seeking civil imprisonment of the respondent. The respondent 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 s 16 of the High Court Act [*Chapter 7:06*]. In the alternative the respondent prays that this Court suspends the warrant of committal on condition that the defendant pays plaintiff US\$200.00 *per* month. The respondent responded to summons for civil imprisonment by filing a notice of opposition and attending the inquiry in the company of his legal practitioner. He adduced evidence on his financial position. In his opposing affidavit he states that he had invested the borrowings from the applicant into an agricultural venture which failed and left him penniless. He is currently unemployed but assists his father in managing his properties. He offered to pay US\$200.00 out of his allowance of US\$250.00. He filed his bank statement in support of his claim of inability to pay. It emerged from cross-examination that in fact one of the properties he manages was initially supposed to have been sold to settle this debt. The respondent produced a letter penned by this father indicating his willingness to put up the flat for sale in order to pay his son's debt.

The Court enquired into the means of the Defendant in terms of Order 41 r 370 of the High Court of Zimbabwe Rules, 1971.

What became apparent during the inquiry and submissions from counsel was that the parties apparently had agreed to settle the matter well before litigation was contemplated on the understanding that respondent's interest in a flat in Avondale would be sold in order to meet this

debt. When it became clear that the defendant or those with who he shared or jointly held rights to the flat were unwilling to put up the flat for sale and that the proposal to sell was a ruse to avoid paying what was due, plaintiff then sued. It is clear to this Court that the respondent is able, to settle this debt but is not willing to do so.

It is trite law that, in terms of r 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 r 370C, the Court may suspend the order for committal on conditions as the Court may think fit. The onus rests upon the debtor to establish that he does not have the means or ability to pay the debt. *Civil Practice of Supreme Court in South Africa* – Herbstein and van Winsen 509 and *Mansour v Sorour Bros* 1912 EDL 208. In *casu*, the defendant offered to pay the sum of US\$200.00 *per* month. This offer was rejected by the plaintiff on the basis that it would take too long for the defendant to liquidate the debt. The defendant maintained that he is unable to pay a reasonable sum which would lead to an early retirement of this debt. He claimed in court that the flat in question was not his and therefore was unable to sell it without the consent of the other interested parties. Specifically, he claimed that his father has the control of the flat. It seems to me that whatever the rights status of the flat, the fact that parties had agreed that it would be sold to satisfy the debt indicated that the respondent has some interest in the flat which can be sold to meet this debt. With a little cajoling, the respondent can discharge this debt as he is able to so but is reluctant to sell his rights in the asset which the parties had indicated could be sold.

I conclude that the defendant is to some extent, able to pay his debt, so s 16 *supra*, is not applicable. In my view he can afford.

Accordingly, it ordered that:

1. An order for civil imprisonment is hereby granted in favor of the plaintiff
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    - (e) The taxed costs and the further costs of the application for the order.
3. The defendant shall bear costs of suit.



*Venturas & Samukange*, applicant's legal practitioners  
*Chiturumani & Zvavanoda Law Chambers*, respondent's legal practitioners