



Chinamora v Angwa Furnishers (PVT) Ltd, et al. (Attorney-General intervening)

1997 (2) BCLR 189 (ZS), [1997] 1 LRC 149, (1996) 2 CHRLD 100

Country: Zimbabwe

Region: Africa

Year: 1996

Court: Supreme Court

Health Topics: Prisons

Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to liberty and security of person

Facts

The first respondent had obtained a default judgment against the applicant and a warrant of execution against his property in respect of a debt but was unable to satisfy the judgment debt because the applicant had by that time divested himself of all property. The first respondent then took out a summons calling upon the applicant to show cause why a decree of civil imprisonment should not be made against him pursuant to ss 26 and 27 of the Magistrates Court Act and Order 28 of the Magistrates Court (Civil) Rules 1980.

The applicant, who was gainfully employed at the time but simply unwilling to pay the debt, failed to appear before the magistrate on the day of the hearing despite having been served with the summons. The court made an order of civil imprisonment and issued a warrant for the applicant's arrest and detention but he avoided all attempts to serve the warrant upon him and left the jurisdiction for approximately a year. When he returned, he approached the court for an order declaring that the civil imprisonment procedure established by the Act and its Rules violated, inter alia, his constitutional right to personal liberty (s 13(1)).

The applicant argued that the obligation in question was imposed on him by the parties' own contract and not "by law", as required by s 13(2)(c). He also submitted that the relevant provisions of the Act and Rules are overbroad since they fail to distinguish between contractual and other debts and since judgment debtors who are unable to pay are just as likely to be sent to prison as those who are simply unwilling to pay. The applicant also pleaded a violation of the constitutional prohibition on torture and inhuman or degrading treatment or punishment (s 15(1)) on the ground that imprisonment for debt, even where decreed against a recalcitrant debtor, constitutes degrading treatment.

The first respondent and the second respondent (the Minister of Justice, Legal and Parliamentary Affairs) opposed the application and the Attorney-General was granted leave to intervene.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

In dismissing the application, the Court held that:

An obligation imposed "by law" within the meaning of s 13(2)(c) was an obligation placed upon a person by the law as distinct from any other type of obligation, such as a social, moral, ethical or religious one.

There was an obligation under common law to abide by the terms of a contract entered into with another party. As the common law falls within the definition of "law" laid down in s 113(1) of the Constitution, a contractual obligation was, therefore, one "imposed by law".

In addition, regardless of the antecedent contractual obligation, a judgment of a competent court dictating that a debt was to be paid novates the rights and obligations of the parties. It created an independent debt enforceable as such in a court and was, therefore, an obligation imposed on the judgment debtor by law.

Section 27(ii) of the Act appears to place the onus of proving inability to pay on the debtor but in actual fact the effect of rule 1B(1)(a) was to place the onus of establishing the debtor's means or ability to pay on the creditor (separate dicta of Kriegler and Didcott JJ in *Coetzee v Government of the Republic of South Africa*

1995 (10) BCLR 1382 (SA CC); [1996] 2 CHRLD 253 distinguished). Viewed from this perspective, s 27 contained a prohibition: the court should not order civil imprisonment if the debtor proved inability. Rule 1B then filled in the missing detail of when the court could order imprisonment; namely, when it had been established positively that the debtor could but would not pay.

Nor could the possibility of granting a decree of civil imprisonment if the judgment debt remained unsatisfied for seven days (and before the creditor had exhausted all other lawful means of enforcing the judgment) result in a poverty-stricken judgment debtor being consigned to jail. The safeguards afforded by the Rules ensured that the civil imprisonment procedure was, on the whole, manifestly fair in all the circumstances and capable of distinguishing adequately between the two categories of defaulting debtors (dicta of Didcott J in *Coetzee v Government of the Republic of South Africa* (above) distinguished).

“Degrading treatment”™ for the purposes of s 15(1) meant treatment of individuals that grossly humiliated them before others or drove them to act against their will or conscience (*Denmark et al v Greece* (1969) 12 Ybk Eur Comm 186 (ECmHR) applied). It referred not only to physical acts but to any act of a certain level of severity which lowered a person in rank, position, reputation or character (*Patel et al v United Kingdom* (1981) 3 EHRR 76 (ECmHR) applied). A determination of whether the minimum level of severity of the treatment violated s 15(1) would depend on such circumstances as the duration of the treatment, its physical and mental effects and, perhaps, the sex, age and state of health of the victim.

A sentence of imprisonment in itself, while perhaps humiliating and degrading to the person imprisoned, could not be considered a violation of s 15(1) unless it was blatantly disproportionate to the quality of the offence, or the conditions under which the imprisonment was endured were degrading (for example, in overcrowded cells or with inadequate access to sanitation).

Imprisonment of a judgment debtor was designed to compel the performance of an obligation, not to punish. In the case of recalcitrant debtors, sufferance of such imprisonment was not compulsory; it was the choice of the debtor, who had the ability to secure immediate release at any time by paying the debt (*Hicks v Feiock* 485 US 624, 633 (1988) (US SC) and dicta of majority in *Coetzee v Government of the Republic of South Africa* (above) considered).

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Decision Excerpts