

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2005/HP/D143

Between:



DIPIKA MANOJ PATEL

PETITIONER

AND

MANOJ JAGDISH PATEL

RESPONDENT

Before Hon. Mr. Justice C.F.R. Mchenga SC

For the Petitioner: A.A. Yousuf, AED Advocates

For the Respondent: C. Sianondo, Malambo and Company

RULING

Case referred to:

1. Andreas Panagiotis Xirocostas v Yolanda Guisanda Poma SCZ
Judgment No. 7 of 2014

Legislation referred to:

1. The Supreme Court Act, Chapter 25 of The Laws of Zambia

The petitioner has pursuant to the provisions of **Order 52 Rule 2** and **Order 45 of the Supreme Court Rules, 1999 Edition** applied for the committal of the respondent to prison for breaching the terms of the court's Judgment dated 18th May 2009. The application is supported by an affidavit deposed by the applicant on 4th October 2013. In addition, the applicant also gave oral evidence at the hearing.

The applicant's evidence was that on 26th August 2007, her marriage to the respondent was dissolved and on 18th May 2009, following a property adjustment hearing, Judgment was passed in her favour. Among other things, the respondent was adjudged to pay her what is now equivalent to K83,215.74 as unpaid maintenance and that despite having the capacity to do so, he has wilfully neglected to pay.

It was also her evidence that the respondent was the managing director of Triquint Limited, a working director and shareholder of Asopalav Limited and that he is also a working director of IWeld Limited and Wire King Limited. In addition, it was her evidence that since the said Judgment was delivered, the respondent only paid her K5,000.00 in 5 instalments of K1,000.00 each.

When cross examined, the petitioner said there are court records that show what the respondent earns. She also said she knew how much he

earned before they divorced but conceded that she did not have details of the precise amounts. She maintained that the respondent has a lot of money and he can manage to pay for the maintenance of his children with her.

When re-examined, the petitioner testified that the court arrived at K83,215.74 after considering the respondent's earnings.

In response to the application, the respondent relied on an affidavit deposed on 1st October 2013, he also gave evidence on oath. His evidence was that he currently resides in his brother's house and he has been allowed to leave there rent free until his financial problems are sorted out. In the case of the petitioner, she leaves in a house they jointly own, rent free and she has provided no details about her income. He also testified that though his children are school going, he is in debt as he only earns K13,350.00 and not the K40,000,00 claimed by the petitioner; he produced 3 pay slips which were admitted into evidence as Exhibits MJP 2(a)(b) and (c).

When cross examined, the respondent testified that the rent he was supposed to be paying to his brother is US\$1,000 per month. He also said he has remarried a widow who has 2 children; one is aged 13 years

and the other 15 years. He admitted that though he has not adopted his wife's two children, he pays K3,600.00 per term for their school and meets their daily needs. He maintained that he earns slightly over K13,000.00 per month and uses it to support his children, wife and mother.

It was also his evidence that when he recently travelled to India with his family, he took US\$2,000 spending money and that his mother contributed K7,000.00 towards the K17,000.00 travel bill. He said he managed to pay for the trip because it was pre planned. He testified that his mother is retired and his father is semi retired. He said his mother lives off a trust fund set up by his grandmother and he also helps her with about K8,000.00 every year.

In addition, he testified that his new family was not on a medical scheme. He admitted not paying the school fees for his children with the petitioner since they went into senior school. He said it was not possible for him to pay K12,000.00 per month and denied deliberately taking a low salary to avoid paying the maintenance. He said he offered to pay K2,000.00 per month but the petitioner declined it. He denied inheriting US\$ 133,000 from his grandparents. He said though Triquint Limited has some stock, it was not trading because of

disagreement between him and the petitioner. He admitted being a shareholder with others in Iweld, Wire King and Asopalav.

Further, the respondent testified that he has not paid the K83,217.74 because it is beyond his means. He said he at times receives help from his mother and has struggled to meet legal fees. He said he did not know exactly where the Chibombo property which is referred to in the Judgment is. He admitted jointly holding an industrial property with his brother which was given to Asopalav to use rent free; he said the decision was made by him and his brother because it was family property. He said he cannot raise a mortgage to pay the judgment debt because the only property that he has is that which he jointly owns with the respondent.

On behalf of the petitioner, it was submitted that the evidence clearly shows that the respondent has not been truthful on his income, he has assets and is maintaining his present wife, step children and parents on an income he claims to be K13,000.00. He is not charging rent for his industrial property and he is taking care of his step children but neglecting his own children. Counsel also submitted that it was impossible for one who earns such an amount to afford international travel and that if the respondent had no capacity to pay the amount, he should have applied for variation of the order.

It was also submitted that **Section 51 of the Supreme Court Act** provides that an appeal does not operate as a stay, this being the case, the respondent is not excused from paying on the ground that he appealed against the Judgment to the Supreme Court. He prayed that the respondent be committed to prison for failure to comply with the Judgment.

On behalf of the respondent, it was submitted that the burden of proof rests on the petitioner and that in cases of contempt, the standard of proof is higher than it is an ordinary civil case. Counsel submitted that the petitioner has not led any evidence of how much respondent earns. He also submitted that **Order 42** which sets out the ways by which a Judgment can be executed, does list instituting contempt proceedings as being one of them. He submitted that the proper application in this case should have been one to examine the respondent's means and thereafter an appropriate way of executing the Judgment could have been determined.

Further, counsel submitted that the respondent is ready to sell the property they jointly own with the petitioner to satisfy the Judgment. He also referred to the case of **Andreas Panagiotis Xirocostas v Yolanda Guisanda Poma (1)**, and submitted that the amount the respondent is required to pay, is beyond his means and one cannot be

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expected to spend beyond his means. He submitted that his payslips, which show how much he earns, have not been challenged and that there is no evidence that the Chibombo property even exists.

In reply, it was submitted that the respondent volunteered to pay K2,000 but he has not done so and even if the petitioner rejected it, he could have paid into court. Counsel submitted that he has been evasive and not forthcoming on his income; he has deliberately and intentionally not complied with the court order and should be committed to prison for being in contempt of the court's Judgment.

I am indebted to both counsel's for their submissions and I have taken them into account in arriving at my decision.

On the evidence before me, I find that it not in dispute that following a property adjustment hearing, the respondent was on 18th May 2009, ordered to pay the petitioner K83,215.74 in maintenance and maintenance areas. It is also not in dispute that to date, the respondent has only paid K5,000.00. I also find that the respondent is a director and/or shareholder in a couple of companies and jointly holds real property with his brother. Further, I find that he has been paying fees for the children of his current wife and also financially assisting his mother.

The respondent's position is that he has not been able to pay the Judgment sum because it is beyond his means and he has provided pay slips to show how much he earns. His income has been disputed by the petitioner who however concedes that she does not know precisely how much he earns. Though an income of K13,250.00 does raise eyebrows, the burden is on the petitioner to show that the respondent in fact has an income that can enable him pay the judgment debt. However, crucial to the determination of the petitioners application are the provisions of **Order 45 Rules 1/3** and **Rule 5/1**; they must be looked at before any further consideration of the evidence before me.

Before I deal with the aforementioned provisions, I will address counsel's submission, on the respondent's behalf, that contempt proceedings have never been a way of enforcing a Judgment. **Order 45 Rule 1**, sets out the following as being the means by which a judgment can be enforced: a writ of fieri facias; garnishee proceedings; a charging order; the appointment of a receiver; an order of committal; and a writ of sequestration. It follows that the Judgment of 18th May 2009 can be enforced by means of committal proceedings.

Order 45 Rule 5/1 provides that committal cannot be employed to enforce a Judgment or order to do an act unless that act is required to be done, but is not done, within a specified period which has been

fixed either by the original Judgment or a subsequent order setting out such time. Further, Order 45 Rule 1/3 provides that where a Judgment does not provide or specify the time for the payment of money to a person, the method of enforcement by way of an order for committal is not available.

I have examined the record of proceedings in this case and I find that the Judgment which is the subject of this application does not indicate or specify the period within which the respondent was supposed to pay the adjudged sum. Neither did the petitioner subsequently apply for an order for such period to be determined. Consequently, committal proceedings, cannot, in this matter, be employed to enforce the respondent's failure to pay.

The application is therefore dismissed with Costs.

Delivered in Chambers at Lusaka this 5th day of August, 2014


C. F. R. MCHENGA SC
JUDGE