

SUPREME COURT OF SEYCHELLES

Reportable

[2023]

MA 191/2023

Arising in CS 10/21

In the matter between:

COLVY UNDERWOOD

(rep. by Guy Ferley)

Plaintiff

and

ANNE MARIE ESPARON

Defendant

(rep. by Joshua Revera)

Neutral Citation: *Underwood v Esparon (CS10/21) [2023].....7th..... November 2023*

Before: Pillay J

Summary: Summons to Show Cause – summons after unsatisfied judgment – section 251 of the Seychelles Code of Civil Procedure – plea in limine litis – application does not meet requirement of civil contempt

Heard: 8th September 2023 in addition to submissions

Delivered: 7th November 2023

ORDER

- [1] The Pleas in limine litis fail.
- [2] The application to summon the Respondent to show cause as to why she should not be committed to prison fails.
- [3] Seeing that the judgment debtor is making efforts to pay I make no order as to costs.

JUDGMENT

PILLAY J:

- [1] The Petition, supported by an affidavit of the Petitioner, calls upon the Court to summon the Respondent to show cause as to why she should not be committed to prison for failing to comply with the judgment of the Court.
- [2] The Petitioner avers that on 28th March 2022 the parties entered into a judgment by consent which was made a judgment of the Court, by which the Respondent agreed to pay the Petitioner the sum of SCR 405, 000 at the rate of SCR 50, 000.00 every three months commencing in June 2022. He further avers that no appeal has been filed against the judgment and the Respondent has made no payment towards the satisfaction of the said judgment.
- [3] The Respondent raised a plea in limine on the basis that:
- a) *contempt is a measure of last resort and the Application and its supporting affidavit are defective in that they do not satisfy the test for civil contempt.*
 - b) *this application does not meet the criteria for case when imprisonment may be decreed for the recovery of a judgment debt in the Supreme Court.*
- [4] The matter was heard on 8th September 2023.
- [5] Learned counsel for the Respondent submits that money judgments are not self-executable. He grounds his submission on section 225, 239, 240 and 251 of the Seychelles Code of Civil Procedure. He submits that the Application is immature since the Petitioner has failed to show that “the modalities for execution of Judgment has been undertaken.” He further submits that the Application fails to demonstrate that the Application falls within the ambit of Imprisonment for Debt Act.
- [6] Learned counsel relies on the case of *Cedras v Well Point Development (Pty) Ltd & Anor (MA89/2021) [2021]*. Counsel also relied on the case of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (MA100/200 & MA 101/2020 (arising in CS 23/2019) [2020] SCSC 476 (24 July 2020), Essack v Auto Clinic (Prop) Ltd (CS331/1999) [2000] SCSC 2 (17 January 2000)*.

[7] In terms of the first limb of the plea in limine litis, this Court fails to see the application of the case of ***Eastern European Engineering*** above to the present matter. The Application before the Court was for execution of judgment on the ground of extreme urgency for a number of reason amongst which was a fear that the debtor was about to frustrate the judgment creditor from recouping the fruits of its judgment by “dispos[ing] of or dissipate[ing] its assets in Seychelles.” Furthermore, the Application was made under section 225 of the Seychelles Code of Civil Procedure whereas the current Application is made under section 251 of the Seychelles Code of Civil Procedure.

[8] There is nothing in the judgment of ***Eastern European Engineering*** above that states that section 251 of the Seychelles Code of Civil Procedure is subject to the previous provisions of the Seychelles Code of Civil Procedure when it comes to execution or that it is a measure of last resort.

[9] Section 251 reads as follows:

A judgment creditor may at any time, whether any other form of execution has been issued or not, apply to the court by petition, supported by an affidavit of the facts, for the arrest and imprisonment of his judgment debtor and the judge shall thereupon order a summons to be issued by the Registrar, calling upon the judgment debtor to appear in court and show cause why he should not be committed to civil imprisonment in default or satisfaction of the judgment or order. (highlighting my own)

[10] It is clear on a reading of the provision that the judgment creditor may choose to invoke the provisions of section 251 “at any time, whether [or not] any other form of execution has been issued”. There is no restriction on the time at which the judgment creditor may apply for an order of committal consequent to section 251.

[11] The rule of section 251 as provided for in ***Chow v Bossy (SCA 11/2014) [2016] SCCA 20 (12 August 2016)*** is that:

The day indicated in the Summons is a critical day. If he does not appear, an order of imprisonment may issue.

At the end of the examination, the Court decides whether the judgment debtor should be committed to prison. If his inability to pay is genuine, no committal to imprisonment may issue, in compliance with Article 18(15) of the Constitution. But if his inability arises from the fact that he has attempted to frustrate the orders of the court by a post-judgment defalcation of property, he may be committed. He may be committed if, in the oral examination, he refuses to make disclosures. He may be committed if the Court finds that he is refusing or neglecting to abide by the order made.

- [12] Learned counsel for the Respondent relies on the case of ***Cedras v Well Point Development Pty Ltd and Anor (MA89/2021) [2021] SCSC 1037 (29 October 2021)*** for the proposition that “for the applicant to file a first instance for contempt of court and committal to civil imprisonment is turn off, exhausting the provision of our civil law, is somewhat short circuiting our judicial procedures.”

- [13] The case of ***Cedras*** above concerned an application “*for summons to be issued on “the respondent” to show cause why she should not be committed to imprisonment for being in contempt of the court order dated the 27th March 2019, by failing to pay the judgment debt of SCR 882,267.00 plus interests and costs which remains due and payable.*”

- [14] Distinguishing between an order for the payment of money and one for the recovery of money the Learned Judge found that the judgment could not be enforced by an order for committal. The Learned Judge then proceeded to consider other options available to the Judgment Creditor as follows:

Nevertheless there is another option open to judgment creditors where a judgment is for a sum of money, to apply for the civil imprisonment of the judgment debtor under section 251 of the SCCP. I note however this is not the remedy sought in terms of the present application which seeks the “issue of summons on the Respondent to show cause why she should not be committed to imprisonment for being in contempt of the court order dated the 27th March 2019, by failing to pay the judgment debt of SCR882,267.00 plus interests and costs which remains due and payable”. Under section 251, the summons is issued for the judgment debtor to show cause why he/she should not be committed to civil imprisonment in default of satisfaction of the judgment or order. Section 253 of the SCCP provides for the application of certain provisions of the Imprisonment for Debt Act in proceedings

under section 251. It is to be noted that imprisonment for debt under the latter Act is only permitted in limited cases.

- [15] In conclusion the Learned Judge found that “*given that the application was not made for civil imprisonment of judgment debtor for default of satisfaction of the judgment but rather for contempt, the Court being bound by the pleadings cannot consider the case otherwise than in accordance with such pleadings.*”
- [16] Clearly the **Cedras** case does not support the arguments of the Respondent but rather militates against her position. On the basis of the above therefore the first plea in limine fails.
- [17] Now to the second plea that; application does not meet the criteria for case when imprisonment may be decreed for the recovery of a judgment debt in the Supreme Court.
- [18] Learned counsel for the Respondent submits that the Judgment creditor is “attempting to leverage the threat of jail against the Respondent to make them pay.” I truly have difficulty following the arguments of counsel as regards the second plea in limine.
- [19] Other than to refer back to paragraph [10] above, suffice it to say that in the case of **Chow v Bossy** the Court of Appeal found that:

A judgment debt is an order of the Court which is meant to be obeyed. It may not be frustrated by design of the person against whom the order is pronounced but may only collapse by the genuine impecunious condition of the judgment debtor. The necessary procedural and substantive safeguards have been built in the relevant section of the Seychelles Code of Civil procedure and the Imprisonment of Debt Act.

- [20] The Court of Appeal went on to add that

In section 5 of the Imprisonment for Debt Act, that idea of fraud, impecuniousness is inherent... The words “shall be lawful” should be noted. Section 5 is empowering in nature not prohibitive, nor exhaustive.

- [21] With that said there was judgment entered against the judgment debtor and on her failure to pay, the judgment creditor moved for summons to show cause pursuant to section 251

of the Seychelles Code of Civil Procedure which he was entitled to do. In the circumstances the second plea in limine fails.

[22] The judgment creditor was examined as to her means on the same day as the hearing for the plea in limine. She testified that she is a teacher and earns about SCR 16, 000.00 to SCR 17, 000.00 per month. She has a house loan of SCR 8, 500.00. She has started a part time job in order to get SCR 5, 000.00 monthly to pay off the judgment debt. It was her evidence that the land that was to be sold in order for her to pay judgment debt is still in the process of being subdivided. She has no car and in her MCB account she has about SCR 2, 750/- and about SCR 400/- in her Seychelles Commercial Bank account.

[23] In the case of *Chow v Bossy (SCA 11/2014) [2016] SCCA 20 (12 August 2016)* Domah JA laid down the process for determination of an application for summons to show cause pursuant to section 251 of the Seychelles Code of Civil Procedure:

In practical terms, it means the steps are as follows:

1. *Where a judgment has been pronounced by a court and the debtor has not complied with it, it is open to the judgment creditor to apply for an Summons After Unsatisfied Judgment on the strength that the judgment debtor has the means to pay but is frustrating it by his conduct.*
2. *If the judgment debtor is not present albeit the Summons issued, an order for civil imprisonment may be made for default in submitting to court jurisdiction.*
3. *Once the SAUJ process is engaged, the judgment debtor is under an ensuing and continuing duty to submit to an examination as to his means and integrity.*
4. *If the facts in examination reveal that he has the means to pay, an order should be made for payment forthwith or such terms as are reasonable in the circumstances which terms, if not adhered to, may result in a committal.*
5. *If the facts in examination reveal that the judgment debtor is unable to pay account taken of his conduct since the judgment was pronounced, no order*

may be made for imprisonment. He is protected by Article 18(15) of the Constitution.

6. *On the other hand, if on examination it is found that his post-judgment conduct does not satisfy 253 (a), (b), and (c), the court may order the judgment debtor to be imprisoned civilly unless and until the judgment is satisfied.*

[24] On her evidence I am satisfied that she is not refusing to pay but simply does not have the means to pay. In accordance with section 251 of the Seychelles Code of Civil Procedure and the authority of **Chow** above the application fails.

[25] Seeing that the judgment debtor is making efforts to pay I make no order as to costs.

Signed, dated and delivered at Ile du Port on *7th November 2023*



Pillay J