

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. B. Domah (JA) , A. Fernando (J.A), J. Msoffe (J.A.)]

Civil Appeal SCA 11/2014

(Appeal from Supreme Court Decisions of MA29/2014 out of MA302/2013 Arising in
CS219/2010)

PAUL CHOW

LUCY CHOW

APPELLANTS

VERSUS

HEIRS JOSSLIN BOSSY

RESPONDENTS

Heard: 3 August 2016

Counsel: Mr. Frank Elizabeth for Appellants

Mr. Sammy Freminot for Respondents

Delivered: 12 August 2016

JUDGMENT

S. Domah (J.A)

- (1) This is an appeal from a Ruling of the learned judge of the Supreme Court who declined to refer an application made under Article 130 (6) (sic) to the Constitutional Court. The basis of the application was whether sections 251-253 of the Seychelles Code of Civil Procedure (“SCCP”) which provided for civil imprisonment for breach of a contractual obligation did not contravene Article 18(15) of the Constitution. This Article provides that a person shall not be imprisoned merely on the ground of the inability to fulfill a contractual obligation. The contractual obligation in this case was a judgment debt. Robinson J held that: (a) the application was frivolous and vexatious (underlining ours); (b) a judgment debt is not a “contractual obligation;” (c) Article 18(15) does not find its application in a case of a judgment debt.
- (2) Learned counsel for the appellants, Mr Frank Elizabeth, had submitted before her that the application following an order made in a civil judgment is a contractual obligation to which Article 18(15) applies. Learned Counsel for the respondents, Mr Sammy Freminot, was categorical and challenging: his application, based on an order made by the Court of Appeal which had remained unsatisfied, was not a contractual obligation. The latter view was endorsed by the learned Judge who, rather than referring the matter to be decided by the Constitutional Court, decided it herself. Learned counsel for the Appellants challenge her course of action as well as her decision.
- (3) The following are the grounds of appeal:
1. *The learned judge erred when she failed to address the issue raised by the Appellants that the Court can only examine the Appellants on their means on the day fixed in the Summons when the Appellants first appear before the Court.*
 2. *The learned judge erred in law when she dismissed the Appellant’s application to immediately adjourn the proceedings and refer the matter to the Constitutional Court.*
 3. *The learned judge erred in law when she dismissed the Appellant’s application on the basis that the Application was frivolous and vexatious.*
 4. *The learned judge erred in law when she ruled that the matter has passed the stage of “contractual obligations” and has reached judgment*

stage and therefore the Appellants cannot have recourse to Article 46(7) of the Constitution.

- (4) We shall consider the above grounds in the order in which they have been raised. But before we do so, we need to set out the few facts which gave rise to this application. On 3 May 2013, this Court handed down a judgment against the Appellants where it ordered them to pay to the Respondents SR185,000 as an indemnity for the period of an overstay on a property which had been vindicated between the parties and which had been decided in favour of the Respondents. The Appellants did not comply with the judgment. On 9 January 2014, accordingly, the Respondents applied for a Summons praying for the relief so that the appellants either disburse the judgment sums or undergo imprisonment for non payment. This is a special procedure referred to as SAUJ (Summons After Unsatisfied Judgment) under sections 251, 252 and 253 of the Seychelles Code of Civil Procedure.
- (5) On the Summons day, the Appellants submitted to jurisdiction through their Counsel but were themselves not present. The learned Chief Justice before whom the matter came was empowered by that very fact to commit them for default of personal appearance to civil imprisonment, whether or not their Counsel was present. Conveniently, however, on this day, learned counsel representing them made a motion that the law which governs the issue of imprisonment for contractual obligations be referred to the Constitutional Court. The learned Chief Justice eventually assigned the case to Robinson J. to consider the application, with the result we have indicated above.

GROUND 1

The learned judge erred when she failed to address the issue raised by the Appellants that the Court can only examine the Appellants on their means on the day fixed in the Summons when the Appellants first appear before the Court.

(6) The matter as outlined above had not reached the stage of examination of the judgment debtor as yet. But the question which this ground raises is whether imprisonment may be ordered for default of appearance at any other time than the time stated in the Summons.

(7) This takes us to the various stages of the execution of a judgment of the court where it is being resisted commonly known as an SAUJ. A person who has obtained a judgment which remains unsatisfied may make an application for execution of the judgment by way of petition, supported by an affidavit whereby he seeks the arrest and imprisonment of the judgment debtor. On such an application, the judge gives an order for a summons to be issued by the Registrar calling upon the judgment debtor to appear in court to show cause why he should not be committed to civil imprisonment in default or in satisfaction of the judgment.

(8) Section 251 reads:

“251. 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.”

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

“Civil imprisonment

243. Before any person is committed to civil imprisonment under section 241 or 242 such person shall be summoned to show cause why he should not be committed, and if he fail to appear or to show cause to the satisfaction of the court, the court may make such order as to committal as it considers just.”

(10) On the other hand, if on this day, he satisfies the judgment creditor, that is the end of the matter. However, the judgment debtor may plead that he is unable to

pay the debt, in which case sections 252 of the SCCP will kick in. This is the stage where the examination takes place. The debtor is subjected to a process of means-testing and integrity-testing through an oral scrutiny under oath or solemn affirmation. Its objective is to ascertain whether the judgment debtor's plea of inability to pay is genuine, dishonest or fraudulent. Section 252 reads:

“252. The judgment debtor on the day on which he has been summoned to appear, shall be examined on oath as to his means and witnesses may be heard on his behalf and on behalf of the judgment creditor.”

- (11)** 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. Section 253 has specified the reasons: .

“253. If the judgment debtor does not appear at the time fixed by the summons or refuses to make such disclosures as may be required of him by the court or if the court is satisfied that the judgment debtor-

(a) has transferred, concealed or removed any part of his property after the date of commencement of the suit in which the judgment sought to be enforced was given or that after that date he has committed any act of bad faith in relation to his property with the object or effect of delaying the judgment creditor in enforcing his judgment or order; or

(b) has given an undue or unreasonable preference to any of his other creditors; or

(c) has refused or neglected to satisfy the judgment or order or any part thereof, when he has or since the date of the judgment has had the means of satisfying it,

the court may order such debtor to be imprisoned civilly unless or until the judgment is satisfied.

- (12)** Section 243 of the SCCP, therefore, allows for civil imprisonment on a finding of default of appearance, refusal, neglect, fraud to frustrate a monetary judgment of a court determined through an oral examination as to means of the judgment debtor: means testing. It cannot be ordered if the Court finds that the judgment debtor has been genuine and honest in his conduct but is in all sincerity unable

to abide by the monetary burden imposed upon him: integrity testing. The last line of section 243 reads:

“Witnesses may be heard in support of the application and on behalf of the person summoned.”

- (13)** We have stated above that he may be committed to imprisonment if he does not appear on the day indicated in the Summons, at the time indicated. In this case, we note that the Appellants have submitted to jurisdiction, through their Counsel, Mr Elizabeth, but did not put in their personal appearance despite the insistence of the Court that they should do so. Default of appearance of the debtor on any day after he has submitted to jurisdiction should be visited by a committal order. Mr Sammy Freminot, Counsel of the judgement creditor, was only too kind in not having moved the Court for an order of committal on that ground alone. Any interpretation that once the day stated in the Summons is past for one reason or the other, no order may issue and no examination may take place belongs to the science of the absurd. Such an interpretation leads not only to nullify section 243 completely but, more importantly, creates a fissure in the dyke of the legal and judicial system. Its absurdity lies in the fact that, once the time indicated in the Summons is past, the Court judgment loses its value to thin air. Judgment debtors are released of their obligations to abide by court orders. They can rub their hands and raise their eyes to the skies and say they are better than the courts themselves. The legislator cannot have intended to give such a facile escape route to recalcitrant litigants bent upon frustrating court judgments by design. The only purposive interpretation is that the time in the Summons is indicated to enable the judgment debtor to submit to jurisdiction of the court forthwith. Once he has submitted to jurisdiction, the process will follow as laid down in the rest of the section 253, i.e. either due payment in satisfaction of the debt or means-testing and integrity-testing through an oral examination under oath or solemn affirmation to test the ability to abide. Ground 1 fails.

GROUND 2

The learned judge erred in law when she dismissed the Appellant’s application

to immediately adjourn the proceedings and refer the matter to the Constitutional Court.

GROUND 3

The learned judge erred in law when she dismissed the Appellant's application on the basis that the Application was frivolous and vexatious.

(14) Learned counsel under the above two grounds taken together has submitted before us that it was incumbent upon the learned judge to immediately adjourn the proceedings and refer the matter to the Constitutional Court. From the record, Mr Frank Elizabeth continued to invoke Article 130 (6) of the Constitution when Mr Freminot had challenged him on that from the very start. So had the Court. The Article applicable in this case is Article 46(7), as Fernando J pointed it out to learned counsel again inasmuch as he is invoking a Charter right. Article 130(6) deals with other rights under the Constitution.

(15) Article 46(7) reads:

(7) Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

(16) It is the argument of Mr Elizabeth that once an application under the enabling section has been made, the Judge has no option but to immediately transfer the matter to the Constitutional Court. He stressed on the word "immediately." We do not accept his interpretation as to the role of the court in an application under Article 46(7) or Article 130(6) for that matter. The word "immediately" is inserted there to emphasize on the fact that a Constitutional matter demands celerity and should not be constrained by any other additional procedure than the Court referral itself.

(17) However, before he may do so, the judge is called upon under these Articles to

make a judicial determination as to whether there is at all a constitutional issue involved. He or she needs to be satisfied that the application for reference to the Constitutional Court is: (a) neither frivolous; (b) nor vexatious; (c) nor is it one that has already been the subject of a decision of the Constitutional Court or the Court of Appeal. The referral Court does not play the role of an automatic transmission gear but one of judicious judicial screening. It should be satisfied in the first place that the application is one worth sending for a decision to the Constitutional Court. Only serious issues should be so sent such as those that have not been and those, albeit within the competence of the court, cannot be. Day to day matters should be resolved by the very jurisdictions where they are raised. Mr Freminot rightly commented that a referral on the matter would be standing to ridicule.

- (18) Mr Frank Elizabeth relied on a number of cases, past and recent, to argue that Robinson J erred in not having sent this case for determination before the Constitutional Court inasmuch as courts seem to be divided on the issue raised. He referred to the recent case of **Development Bank of Seychelles v Paul Morel 2016 SCSC 473** where Twomey CJ looked at the Imprisonment for Debt Act. She decided that the matter involved a judgment debt of SR2,081,186.00 with interest accruing at the rate of 12% per annum. The debt had arisen out of an unpaid loan by the Judgment Debtor from the Judgment Creditor. It was not therefore a matter falling within the parameters of the Act. She, accordingly, decided that “the court’s jurisdiction to commit for civil imprisonment is therefore excluded.” She also added that “the Judgment Creditor is at liberty to enforce the judgment debt by alternative means.” Learned counsel also referred to the case of **Avis Car Hire Ltd v Norbert Sinon and Ors [Civil Side 325 of 2003]**. In this case, the then Chief Justice had ruled that the court has “no power to commit for civil imprisonment for a “tortious debt.” If that is so, it should be all the more so for a contractual debt. So ran learned counsel’s argument.
- (19) On the other hand, Mr Freminot relied on the case of **State Assurance of Seychelles v First International Company Ltd [Civil Side 409 of 1998]** where the order for imprisonment had actually been made for a civil debt to be satisfied within six months, failing which the debtor should undergo

imprisonment for six months. A committal order had been issued under section 253 of the Seychelles Code of Civil Procedure for a judgment debt which remained unsatisfied out of default, neglect or evasion. The record reads: “Mr Paul Chow has not shown any cause – let alone a good cause – to the satisfaction of the Court why he should not be committed to civil imprisonment for having defaulted the payment of the judgment debt. In fact, he was adamant and refused to make such disclosures as required of him by the Court.” Whether the judgment debt arose out of tort or otherwise is not stated. To learned counsel, that difference of opinions of the Supreme Court warranted an authoritative pronouncement of the Constitutional Court for guidance of courts and counsel.

- (20) Learned counsel submitted that Robinson J. had missed the importance behind the application and rushed to the conclusion that his application was frivolous and vexatious. Nor did she substantiate in what way it was frivolous and vexatious. He referred to the case of **Elizabeth v President Court of Appeal** where the Constitutional Court referred to the Oxford Dictionary and Thesaurus meaning of this adjective as “1. *paltry, trifling, trumpery*. 2. *Lacking seriousness; given to trifling; silly*.” As to the meaning of “vexatious”, he referred to the Oxford meaning at p. 1750 “1. *Such as to cause vexation*. 2. *Law not having sufficient grounds for action and seeking only to annoy the defendant*.” The vexatious character in the application was stated to be the fact that it had no chance of success. He also referred to the refusal in the case of **Rene v Regard Publications & Ors and Rene v Seychelles National Party & Ors (2002) SLR 11**. Perera J explained the reason in the following words: “*the Constitutional questions raised therein have already been the subject of decisions of the Constitutional Court and of the Court of Appeal*.” In the case of **Republic v Agathine [2007] SLR 13**, the Supreme Court gave as reason for its refusal the fact that the application was unsustainable because there was no nexus between the act or omission complained of and the need for a constitutional court reference.
- (21) Having heard Mr Frank Elizabeth, we take the view that it is the facts of this case which militate against him. The strength and the weakness of the Ruling of

Robinson J lie in its brevity. It is not true to say that she did not motivate her judgment. She has given her reasons why she thinks the application is frivolous and vexatious.

- (22) Mr Frank Elizabeth may not rely on the judgments cited by him to argue that the Imprisonment for Debt Act is contrary to Article 18(15) of the Constitution for which a reference to the Constitutional Court has become necessary. In **Development Bank of Seychelles v Paul Morel 2016 SCSC 473**, the rationale of the judgment is latent even if not expressed in so many words. It was the “inability of the person to pay a loan of SR2,081,186.00 with interest accruing at the rate of 12% per annum” even if it was decided summarily. It is worthy of note here that the SAUJ process does not preclude a civil action for execution on property. In a number of cases, it helps.
- (23) Robinson J., in her reasoned ruling, made a distinction between the non satisfaction of a judgment debt and the non fulfillment of a contractual obligation *per se*. She declined to refer the matter to the Constitutional Court because it was one which she could competently deal with in her own right on the strength of the submissions and the content of the affidavits. She cannot be faulted for her interpretation.
- (24) We are not in disagreement with her, if account is taken of the conduct of the Appellants in the course of the proceedings. The mere fact that Appellants did not appear on the day of the Summons and his Counsel timed that day of all days to make the motion for referral speaks volumes. The issue was one which the learned Judge was competent and able to decide, whether or not there were differing interpretations of the law. It should be noted that the criteria for refusal to send are disjunctive and not cumulative. The Court may decline the application if it finds that the application is: (a) either frivolous; (b) or vexatious; (c) or is one that has not already been the subject of a decision of the Constitutional Court or the Court of Appeal. In this case, she saw that it was both frivolous and vexatious. On the facts, we would not come to a different conclusion. The conduct of the judgment debtor was giving a very different colour to the debate on article 18(15). He was not invoking the Article for the protection it affords but for a possible way of delaying and thereby annoying the

judgment creditors. They were being vexatious. Ground 3 has no merit and is dismissed.

GROUND 4

The learned judge erred in law when she ruled that the matter has passed the stage of “contractual obligations” and has reached judgment stage and therefore the Appellants cannot have recourse to Article 46(7) of the Constitution.

(25) Under this ground, learned counsel submitted before us that when Article 18(15) provides that a person shall not be imprisoned for the failure of his contractual obligations, it refers to the source rather than to the outcome. Thus, a judgment debt which is the outcome of a contractual obligation is caught at its source because it flows from the contractual obligation. The moment the debt emanates from a contract, the prohibition of Article 18(15) operates, in his submission. We disagree. The mischief this Article seeks to prevent is not a civil debt as such, howsoever emanating. The mischief is that no imprisonment may be ordered merely because the debtor is unable to pay. Genuine impecuniousness is the mischief being catered for. If the judgment debtor has the means to pay and is evading payment, Article 18(15) does not protect him. This is what the Imprisonment for Debt Act seeks to clarify. Article 18(15) is not a Charter for all manner of debtors but a protection for the genuinely impecunious debtor. The impecuniousness is looked at by his conduct since the time judgment debt was pronounced.

(26) We agree with the submission of Mr Sammy Freminot, that Article 18(15) was not meant for cases such as the present one. The wordings of Article 18(15) should be borne in mind:

“(15) A person shall not be imprisonment merely on the ground of the inability to fulfill a contractual obligation.”

(27) The crucial word in this provision is “inability.” The mischief it seeks to prevent is sending someone to prison for impecuniousness which preventing him from fulfilling his contractual debt. This is a matter that has to be gone into by the Court to which an application is made for enforcement. The facts of this case do

not show the existence of such “a mere inability to fulfill a contractual obligation.” On the face of it, it looks much more to be a subtle device to flout a court order. The Constitution does not come to the rescue of such applicants but sanctions them for breach.

(28) This is covered under Article 18(16) which provides:

“18 (16). Clause (15) shall not limit the powers of a court under any law in enforcing its orders.”

(29) 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.

(30) In section 5 of the Imprisonment for Debt Act, that idea of fraud, impecuniousness is inherent. It reads:

“In any civil suit or action before the Supreme Court, it shall be lawful for the said court to decree that its judgments shall be enforced by imprisonment, whenever the said court shall have condemned to the payment of a sum of money or to the restitution of property any of the parties to the said suit or action, in any of the following cases:-

(i) when a contract is annulled, as having been obtained by fraud or violence, or as having been made for the purpose of defrauding third parties;

(ii) when damages have been given by the court as amends for a prejudice caused by a fraudulent act, or by an act of bad faith;

(iii) when lessees of property do not produce at the expiration of their lease the cattle leased to them under a contract of mutual profit, or the farming or agricultural implements, or the chattels which have been entrusted to them, unless they prove to the satisfaction of the court that such cattle, implements or chattels have perished or are deficient by no fraud of theirs;

(iv) when damages have been obtained on account of any fraudulent possession of property.”

The words “shall be lawful” should be noted. Section 5 is empowering in nature not prohibitive, nor exhaustive.

(31) In the light of the above, we hold that sections 251, 252 and 253 of the Seychelles Code of Civil Procedure do not contravene Article 18(15) of the Constitution inasmuch as the Imprisonment of Debt Act has specifically abolished the law which empowered the Court to order imprisonment for civil debt. As per section 2, imprisonment for debt in civil and commercial matters and against foreigners has been long abolished in Seychelles, except in the cases provided for. In section 11, it provides for time to be accorded to a judgment debtor to satisfy the debt of a judgment debtor. The section reads:

“It shall be lawful for the court, in decreeing that its judgment shall be enforced by imprisonment, to grant a reasonable time to the debtor to satisfy the judgment.”

(32) At the expiration of such time, the Registrar of the Supreme Court is expected mandatorily, *ex officio*, to issue a writ or warrant for the arrest of the debtor by forwarding same to the Commissioner of Police for execution.

(33) What the law seeks to prevent is the frustration of judgments pronounced by the courts by dishonest and fraudulent judgment debtors. That has been duly provided for under Article 18(16) of the Constitution.

(34) 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.

(35) In the light of the above, we refer the matter to the Supreme Court for the purpose of examination of the debtor who, it must be said, has submitted to jurisdiction through his Counsel. If they fail to show up on a day fixed by the Court or only appear through counsel, a warrant may be issued against them for their personal attendance failing which a warrant should be issued for imprisonment for default of personal presence.

(36) The appeal is dismissed with costs.

S. Domah (J.A)

I concur:.....

A. Fernando (JA)

I concur:.....

J. Msoffe (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016