

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2020] SCSC  
MA 305/2019  
(Arising in CC 08/2015)

In the matter between:

**EDGAR MOREL**  
*(rep. by France Bonte)*

**Plaintiff**

and

**CONVOY (PTY) LTD**  
*(rep. by Antony Derjacques)*

**Defendant**

This application between:

**EDGARD MOREL**  
*(rep. by France Bonte)*

**Judgment Creditor (Applicant)**

and

**DAVID ESSACK**  
*(rep. by Antony Derjacques)*

**Judgment Debtor (Respondent)**

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**Neutral Citation:** *Morel v Essack* [MA 305/2019] [2020] SCSC [30 January 2020]

**Before:** Burhan J

**Summary:** Judgment debtor liable to pay judgment debt in his personal capacity due to his personal guarantee and undertaking of the obligations which resulted in the judgment creditor being defrauded.

**Heard:** [06 November 2019, 13 December 2019]

**Delivered:** [30 January 2020]

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**ORDER**

Judgment debtor given time to show cause as to why civil imprisonment should not be imposed, for failure on the part of the judgment debtor to pay the sum ordered in the judgment of the Court (judgment debt).

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**RULING**

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## BURHAN J

- [1] On the 29<sup>th</sup> of October 2018, this Court gave judgement in favour of the applicant ((judgment creditor) and against Convoy (Pty) Ltd (hereinafter referred to as the Company) represented by Mr. David Essack. The judgment debtor named in this application Mr. David Essack is the Managing Director of the said Company. The matter presently before Court is an application for cause to be shown as to why the judgment debtor David Essack (hereinafter referred to as the respondent) should not be committed to civil imprisonment in default of satisfaction of the judgment of the Court.
- [2] It is the contention of the learned Counsel for the respondent that the separate legal personality of the company makes the company liable to pay the debt and that the respondent mentioned in the application David Essack is not liable in his personal capacity to pay the debt incurred by the Company. He however does not seek to deny that the respondent David Essack was a director of the said company Convoy (Pty) Ltd. It is clear that the respondent relies on the principle in the case of **Salomon v A. Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22**, where the two basic legal concepts of the company i.e. its existence as a “corporate entity” and the “limited liability” of its directors were established. It further held that the company is vested with separate legal personality from its directors and as such, the directors are shielded from personal liability for the company’s debts by a “corporate veil”.
- [3] It is the contention of the applicant, that Courts have been willing to disregard the Salomon principle and that the “corporate veil “ is in itself, not necessarily a shield that could be used at all times to protect the directors of a company from liability. The applicant further contends that the respondent having admittedly been a director of the said Company and having represented it in the original case, has not shown the Court why the debt has not been paid or whether there was ever any undertaking by the Company to satisfy the judgment debt. The applicant states at paragraph 5 of the submissions that a warrant to levy was executed on the Company but the process server made a return of “*nulla bona*” as no goods of the defendant Company were found for

seizure and sale to satisfy the judgment debt totaling with interest a sum of SCR 1,018,375.48.

- [4] Having considered the submissions of both parties, the main issue to be decided is whether the respondent being a director of the said company, may be civilly imprisoned for the debt of the Company. It would be pertinent at this stage to refer to the relevant law contained in section 251 and 253 of the Seychelles Code of Civil Procedure which read as follows:

Section 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.*

- [5] Section 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.*

[6] This Court is aware that a company is vested with separate legal personality from its directors, and as such, the directors are shielded from personal liability for the company's debts by a "corporate veil". However this shield is not impregnable as under certain circumstances, the corporate veil may be pierced/lifted to reach the person behind the veil or to reveal the true form and character of the concerned company, and a director of a corporation held personally liable for its debts. The rationale behind this is that the law will not allow the corporate veil to be misused as a masquerade by unscrupulous individuals to swindle and defraud others, and escape from the clutches of law by hiding behind the corporate veil (*Cultreri v Eible and Another* (361 of 1999) [2007] SCSC 17).

[7] In *Swiss Renaissance v General Insurance* [1999] SLR 17, it was held that directors act as agents of the company which means that directors who act as agents of a company will not incur personal rights or obligations to the counterparty under a contract, unless explicitly provided for. It held further directors may be rendered bound to a contract in their personal capacity, if the directors failed to make known to those with whom they are dealing that they are acting as director of the company rather than in their individual capacity. If a director personally guarantees obligation of a company such director will incur personal liability. There are also instances where the corporate veil has been lifted for reasons of fraud. *Gilford Motor Company Ltd v Horne (1933) ch 935* and *Jones v Lipman (1962) 1 WLR 832*. In the present matter, therefore, it must be determined whether there has been fraud by the respondent, or whether he had personally guaranteed obligations of the company Convoy (Pty) Ltd.

[8] To decide on these issues, it would be best to consider the relevant parts of the judgment in this case dated 29 October 2018 namely paragraphs 13 to 15 that read as follows:

13) *When one considers the evidence in this case, it is apparent that the defendant Mr. Essack was well aware being an importer of vehicles himself, the economic significance of the transaction as he himself had provided the plaintiff with the details of the vehicle including its value as per documents P3 and P6, which the defendant admits was signed by him on his own Company letter head, "Convoy Pty Ltd" to assist in the importation of the said vehicle. The defendant further admits the information contained*

in P3 was provided by him to assist the plaintiff. Therefore Learned Counsel for the defendant's contention that "Convoy Pty Ltd" had nothing to do with the said importation bears no merit. It is also apparent from the evidence of the plaintiff that the plaintiff was relying on the assurance and the information given by the defendant in making his payment to a third party.

14) Being an importer of vehicles, it is clear that Mr. Essacks would have been aware that the plaintiff would suffer financial losses if he transferred the money to a third party and was not able to obtain the vehicle. The plaintiff in his evidence further states that it was the defendant who did everything for him and perusal of the said pro forma invoice given to him by the defendant, shows it contained clear instructions which the plaintiff followed exactly when making the transfer of money to the overseas supplier also named and recommended by the defendant as borne out by documents P4a and P4b. In fact such transfer of money was done in two instalments also on the recommendation and advice of the defendant. Mr. Essacks was well aware that the plaintiff was relying on the details provided by him, in the importation of the vehicle which the defendant himself admits he provided in order to help the plaintiff, as he was an old friend and customer.

15) When one considers the evidence before Court, it is apparent that the initial and subsequent conduct of the defendant from the very outset, in taking all steps to ensure and advise the plaintiff in respect of the importation of the vehicle, by obtaining the import permit, preparing the pro forma invoice on his own letter head and advising the plaintiff to make payments in two instalments to a third party recommended by him, clearly indicate the existence of a contractual obligation to import the said vehicle cf. **Chetty v Chetty SCA 15/2009**. In fact in document P3, the defendant has signed after the words "Thanking you for your business" on his own Company letterhead. It is apparent that the plaintiff on his part, acted and made the necessary payment as instructed by the defendant as borne out by document P4a and P4b and suffered a loss as he had not received the vehicle. In terms of the Aitkinson case (supra), the defendant is liable as he had assured the plaintiff by his conduct that the third party would perform the obligation under the contract.

- [9] On consideration of the above findings made in the said judgment, this Court is satisfied that Mr. David Essack had personally guaranteed the obligations he had undertaken while using the Company letterhead to formalise the said transaction. It is also clearly established that the judgment creditor acted on this personal guarantee given by Mr. David Essack in importing the said vehicle and sending the funds to the foreign company on the instructions and personal recommendation of Mr. David Essack. Further, Mr. Essack admits he did so as the judgment creditor was an old friend and customer of his. It clearly appears from these findings that the respondent Essack whilst being a director of the said Company acted more in his individual capacity as a personal friend to the plaintiff.
- [10] From the above, I am inclined to accept the claims of the judgment creditor, the applicant, that he had been “deceived by the corporate mask” and that the respondent “as a friend committed “breach of trust”” and “played a double role to induce payment of the price and defrauded the plaintiff”. From the aforementioned findings it is clear that there was a personal guarantee of the obligations on the part of Mr. Essack and it was his acts that resulted in the judgment creditor being defrauded and therefore the respondent should be personally liable for the fraud committed on the judgment creditor.
- [11] The case of *State Assurance Corporation of Seychelles v First International Financial Company Ltd* (Civil Side 409 of 1998) (SACOS case) concerned an application for execution of a judgment and the judgment-creditor (SACOS) had applied to the Court for the arrest and imprisonment of the judgment-debtor for having defaulted to satisfy the judgment in that, the respondent refused or neglected or evaded the payment of the judgment-debt. The respondent director in this matter refused to show cause (refused to answer questions put to him) and further, the Court was satisfied that he had acted fraudulently. The Court found, considering the “totality of circumstances”, that the corporate veil of the company had been misused by its shareholder/director and therefore disregarded the Salomon principle and lifted the corporate veil to reach the natural person behind, holding the director personally liable for the judgment-debt.

[12] For the aforementioned reasons, I dismiss the contention of the respondent that he is not personally liable for the judgment debt and hold that this is a fit and proper case for the corporate veil to be lifted and hold the director David Essack personally liable to pay the said judgment debt to the applicant.

[13] Having thus ruled on this ground raised by the respondent in his submissions, I make order the judgment debtor David Essack show cause on the next date as to why he should not be committed to civil imprisonment in default of satisfaction of the judgment of the Court.

Signed, dated and delivered at Ile du Port on 30 January 2020.

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Burhan J