

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 485

MA 152/2019

(Arising in MA 305/2019 and CC 08/2015)

In the matter between:

DAVID ESSACK
(rep. by France Bonte)

Applicant

and

EDGAR MOREL
(rep. by Guy Ferley)

Respondent

Neutral Citation: *Essack v Morel* (MA 152/2019) [2021] SCSC 485 (3rd August 2021)
Before: Burhan J
Summary: Civil imprisonment under the Imprisonment for Debt Act. Contempt of Court.
Heard: 9th July 2021 and 18th July 2021
Delivered: 3 August 2021

ORDER

RULING

BURHAN J

- [1] Judgment was given in favour of the Plaintiff (Respondent in this application) against the Defendant (Applicant in this application) in case **CC 08 of 2015 Edgar Morel v Convoy (Pty) Ltd** (represented by Mr. David Essack) on the 29th of October 2018 ordering that the Defendant pay the Plaintiff a sum of SCR 838,200/-(eight hundred and thirty eight

thousand two hundred) with interest at the commercial rate of 10% from the date of filing
plaint.

- [2] Thereafter a Miscellaneous Application was filed by the Judgment Creditor (Plaintiff Edgar Morel) MA 305 of 2019 on the 30th of September 2019, seeking that summons be issued on the Judgment Debtor Mr. David Essack to appear in Court and show cause why he should not be committed to civil imprisonment in default of payment of the aforementioned judgment debt ordered by Court.
- [3] An objection was taken by Mr. David Essack who was the director of the defendant company that he was not personally liable for the said claim. This court, by ruling dated 30th January 2020, ruled that Mr. David Essack was personally liable for the said debt and gave him time to show cause as to why he should not be committed to civil imprisonment for the said debt. The case was fixed for the 26th of March 2020.
- [4] On the 19th of February 2020, another Miscellaneous Application MA 35 of 2020 was filed by Mr. David Essack for a stay of execution of the ruling of 30th January 2020 as an appeal had been lodged in respect of the said ruling. After hearing both parties to the application for stay by way of ruling dated 17th November 2020, a stay of execution was granted on the basis that a bank guarantee was to be provided by Mr. David Essack, the Applicant in this application. Mr. David Essack, thereafter produced several bank guarantees in case MA 35 of 2020 but as the bank guarantees were not in order they were rejected. Thereafter the Mr. David Essack was given time to show cause in respect of the application MA 305/2019.
- [5] On the 8th of July 2021 learned Counsel Mr Ferley on behalf of Mr. David Essack filed an application in MA 152 of 2021 that in terms of Section 7 of the Imprisonment for Debt Act CAP 96 that imprisonment for a debt shall not be decreed against men who have commended (completed) their 70th year. It is the contention of learned Counsel Mr. Ferley that the need for his client to show cause as to why he should not be sent to civil imprisonment for failure to pay the judgment debt does not arise, as he is covered by this provision of the Imprisonment for Debt Act as he has passed his 70th birthday. A copy of

the birth certificate of Mr. David Essack has been tendered with an affidavit in the notice of motion dated 8th July 2021 to affirm the fact that Mr. David Essack is 76 years old.

- [6] Learned Counsel for the Judgment Creditor Mr. Bonte has submitted that Mr. David Essack may be imprisoned for Contempt of Court, for failure to satisfy the judgment debt as it amounts to contempt. He further submitted that Section 7 of the Imprisonment for Debt Act CAP 96 did not apply as it did not apply to the facts of this case.

The law:

- [7] Firstly it would be proper when analyzing the arguments put forward by both Learned Counsel to refer to Sections 2, 5 and 7 of the Imprisonment for Debt Act [CAP 96]. Section 2 of the Imprisonment for Debt Act states that:

“Imprisonment for debt in civil and commercial matters and against foreigners is abolished in Seychelles, except in the cases hereinafter provided for.”

- [8] The instances provided for which imprisonment for civil debt where a court could be empowered to impose imprisonment for debt are set out in Section 5 of the Imprisonment for Debt Act.

“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.”

[9] In the case of *Chow v Bossy* (SCA 11/2014) [2016] SCCA 20 (12 August 2016), it was held that in Section 5 of the Imprisonment for Debt Act, the idea of fraud, impecuniousness is inherent. Domah J.A further states the words “shall be lawful” indicate Section 5 is empowering in nature not prohibitive, nor exhaustive.

[10] When one considers the facts of this instant case, it has been held by this court that there was a personal guarantee of the obligations on the part of Mr. David Essack and it was his acts that resulted in the Judgment Creditor being defrauded and therefore Mr. David Essack is personally liable on the basis of a fraudulent act being committed on the Judgment Creditor Mr. Edgar Morel, refer Ruling dated 30th January 2020. Therefore this court is satisfied that the sum of money ordered to be paid to the Judgment Creditor has been given by this court on the basis of the Judgment Debtor having defrauded the Judgment Creditor. Therefore Section 5 of the Imprisonment for Debt Act is applicable to the facts of this case and court is empowered by Section 5 to decree that its judgments shall be enforced by imprisonment.

[11] It follows that when the Imprisonment for Debt Act is applicable to the facts of this case Section 7 of the said Act would also apply. Section 7 of the Imprisonment for Debt Act reads as follows:

Imprisonment for debt shall not be decreed in suits between husbands and wives, ascendants and descendants, and brothers and sisters

It shall not be decreed against minors, against women, or against men who have commended their 70th year.

[12] It clearly states therefore that if a Judgment Debtor reaches the age of 70 imprisonment for debt shall not be ordered by a Court.

[13] In this instant case learned Counsel for Mr. David Essack filed Mr. Essack’s birth certificate, confirming that he is now 76 years which document was not challenged by the Judgment Creditor. Therefore this court is of the view that considering the reasoning given by this court herein, it is not possible to decree a term of imprisonment on him due to his age being over 70 years. In such circumstances it would be purposeless, to call for

summons to show cause as to why civil imprisonment should not be imposed for failure of Mr. David Essack to pay the judgment debt.

- [14] In respect of learned counsel for the Judgment Creditor's submission that the Judgment Debtor could be sent to imprisonment on the basis of being held in Contempt of Court for failure to pay the judgment debt, it is the considered view of this court that when there is substantive law i.e. Imprisonment for Debt Act in relation to recovery of proceeds from a judgment debt, the necessity to revert to Contempt of Court procedure does not arise. In ***Development Bank of Seychelles v Morel (MA 173 of 2016 arising in CS 4 of 1999) [2016] SCSC 473 (06 July 2016)*** Twomey CJ (as she was then) held that "*the substantive law of Seychelles in relation to civil imprisonment is provided by the Constitution and the Imprisonment for Debt Act*".
- [15] Civil contempt of court is "a creature of English Law" and White Book Order 45 applies, (also see paras [31]-[32] in ***Ramkalawan & Anor v Nibourette & Anor MA 178/2017 (arising in MC 86/2012)) [2018] SCSC 618 (28 June 2018)*** and paras [17]-[18] in ***Mancienne v Government of Seychelles (10 of 2004) (of)[2005] SCCA 11 (19 May 2005)***). However as the provisions of the Imprisonment for Debt Act is applicable to the facts of this case, the reason to look into English law in this regard or Order 45 as contained in the White book does not arise.
- [16] Therefore this court holds that Mr. David Essack cannot be committed to civil imprisonment in terms of section 7 of the Imprisonment for Debt Act as he is over 70 years old.
- [17] A copy of this Ruling to be filed in MA 305/2019 and CC 08/2015 for purposes of clarity.

Signed, dated and delivered at Ile du Port on 3rd August 2021.



M Burhan J