

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ... 64
CM132021

In the matter between:

CHINNAKANAN SIVASANKARAN
(rep by Mr Joel Camille)

Plaintiff

and

GREGOIRE CHRISTIAN PAYET
DIRECTOR, GREGOIRE'S
COMPANY (PTY) LIMITED
(rep by Mr Olivier Chang Leng)

Defendant

Neutral Citation: *Sivasankaran vs Payet* (CM 13/2021) [2021] SCSC (64)

Before: Govinden C J

Summary: Preliminary Objections; seizure of immovable; Immovable Property (Judicial Sales) Act

Heard: Written submissions

Delivered: 31st January 2022

ORDER

The court exercises its powers to revise the Memorandum of Charges under Section 30 of the Act, by ordering the Execution Creditor to revise the *mise à prix* so as to reflect the true price for the property.

RULING

GOVINDEN CJ

Background

- [1] The Plaintiff is a Creditor he had prior to the filing of this case commenced a similar proceeding in case CM08/20 before Vidot J, however, because of lapses of time, occasioned by the Court Ushers being unable to serve the processes on the judgment debtor, Gregoire 's Company (PTY) Ltd , represented by Mr Gregoire Payet of Anse Reunion, La Digue, due to the COVID 19 pandemic, he lost the time prescribed under the Immovable Property (Judicial Sales) Act, herein after also referred to as "*the Act*", to properly prosecute the matter timely before the court. As a result Vidot J could not proceed further with the case.
- [2] This has led to the filing of a new Commandment under Section 2 of the Act. In this Commandment the Judgment Creditor direct the document to the Defendant (the Judgment Debtor) and avers that Gregoire's Company (Pty) Ltd is a company incorporated under the Companies Act 1972 and by virtue of a charge dated the 13th March 2007 and registered on the 9th of May 2007 in the Land Register, it charged the charged property in favour of the Plaintiff and creditor in order to secure the repayment to the Defendant of a loan by the Plaintiff to him in the principal sum of Seychelles Rupees thirty five million with interest at the rate of 8 percent payable every three months from the date of signing of the said charge. The charged property of the Defendant consist of LD23, LD128, LD152, LD153, LD216, LD223, LD917, LD980 and LD1041. Herein also collectively referred to as "*the Property*".
- [3] In the Commandement the Creditor avers that the Debtor is in breach of the said agreement for the loan by and between the Debtor and the Creditor in that the Debtor has failed to comply with the terms of repayment agreed upon in the said loan agreement and as on the 31st May 2021, the Debtor is indebted to the Creditor in the sum of Seychelles rupees forty million and one hundred and sixty two thousand four hundred and sixty two (SR 40,162,462), which sum is increasing and despite notices the Debtor to pay the indebted sum, the Debtor has failed to pay all of the outstanding debt.

- [4] As a result, the Creditor has informed the Debtor that it is required and summoned to pay to the Creditor the sum of SR 40,162,462 being the principal sum and interest as of the 31st of May 2021 which is increasing and the sum of SR 150,000 being untaxed costs.
- [5] Learned counsel for the Creditor then proceeded to inform the Debtor that default by it to pay the aforesaid money with interest due thereon from the 1st June within 10 days of the date of service of the Commandement, will cause the property to be seized and sold in accordance with the provisions of the Act.
- [6] On Thursday 22nd of July the Chief Process Server of this court executed the Commandement on the Debtor under special authority of counsel for the Creditor. His presence there was to seize the property under the custody of law. Upon seizing the property the Process Server valued the property in the sum of approximately of SR 220,000,000.00.
- [7] The Memorandum of Seizure was certified on the 24th of August and Registered on the 1st of September 2021. Thereafter the Judge entered the date for reading of the Memorandum of Charges on the 22nd of September 2021. After the Memorandum was read Learned counsel for the Debtor gave indications that he was going to raise a number of objections as to the procedure.
- [8] - This was done through an affidavit of the director of the Debtor company, The objections are as follows;
- The memorandum of charges does not state whether the memorandum of seizure was transcribed with the Office of the Registrar General and a restriction entered as a result, let alone if it was done within 15 days of notification thereof as provided by law.
 - The Execution Creditor has not provided evidence that the Memorandum of Charges was deposited within 30 days of the transcription of the memorandum of seizure as provided by law. The Memorandum was filed and deposited on the 2nd September 2021 whereas the memorandum of seizure was seemingly served on

the 18th August 2020, more than a year prior and no application to the court was made by the Execution Creditor to forgive this lapse of time

- Failure to comply with any of the time lines set out in the law relating to judicial sales, especially those above-mentioned, renders the judicial sale null.
- In the alternative, in the event that this court does not hold with the Execution Debtor on those points , it argues that the *mix a pris* for the charged property to be significantly below their actual value and ought to be amended as a result to allow for higher bids. He averred that he note that from the Memorandum of Charges that the Process Server has valued the charged property at SR 535,000.000 which is more in line with the actual value given the charged properties encompasses many parcels of land .
- As a result the Execution Debtor prays to this court to declare the procedure null and void.
- In the alternative, the Execution Debtor prays that the sale be post phoned in order to allow the *mise à prix* to be in line with the real value of the charged properties

[9] In order to counter these objections the Execution Creditor has filed an affidavit in reply. Firstly, he objected to the validity of the affidavit in support of the objections by arguing that the said affidavit does not fall within the mandate of the deponent, allegedly given to him by a Power of Attorney. According to the Plaintiff, the affidavit is deponed to by Mr Jean Marie Moutia, in his capacity as Director of ACM Associates Limited, on the basis of a Power of Attorney granted by Mr Gregoire Payet. However, according to him, this document does not grant to ACM Associates Limited power and /or authority to act for and on behalf of the Execution Debtor, but rather it is only an authority to represent the Execution Debtor.

[10] In specific response to the observation of the Execution Debtor he further proposed the following argument;

- [11] The requirement to state whether the Memorandum of Seizure was transcribed with the office of the Registrar General is not prescribed in law and hence is misconceived. In any event, he averred that the Memorandum and the application for restriction was deposited with the Registrar General's office on the 23rd of August 2021 after the Registrar of the Supreme Court had certified the Memorandum of Seizure on the 27th of July 2021.
- [12] That the Memorandum of Seizure and the Transcription were deposited with the Registrar of Lands on the 26th August 2021 and both documents were registered and transcribed on the 1st of September 2021.
- [13] That the Memorandum of Charges was filed on the 2nd September 2021 and hence within the period of 30 days.
- [14] That the *mise à prix* was fixed by the Process Server as valued by the Court and hence cannot be attributed adversely against the Execution Creditor.
- [15] On this basis, the Execution Creditor moves that this court dismiss the Observations and grant that the sale be proceeded with by way of Reading of the Memorandum of Charges.
- [16] The court has carefully scrutinised the "Observation" and the reply thereto in the light of the facts and circumstances of the case and the provisions of the Act and has come to the following findings and determinations.
- [17] The Execution Creditor has raised objections to the seizure, however these objections can only be raised by way of a petition given the provisions of Section 53 and 213 of the Act. He has not done so by petition but instead he did so by way of "Observations". This as it may I am prepared to condone such an irregularity as it does not appear to be a formality for which its non-observance is at the pain of nullity under Section 47 of the Act. This Section prescribed that the formalities and periods prescribed by sections 2, 3, 4, 5, 6, 7, 21, 22, 23, 24, 27, 28, 29, 31 and 37, shall be observed under pain of nullity, conformably with the provisions hereinafter contained in sections 67, 68 and 214
- [18] I also find that Section 214 of the Act prescribes that any nullities enacted by any of the provisions of this Act can only be raised in objection by parties prejudiced thereby.

Therefore, it is insufficient for one party to petition an irregularity in the process under the Act. The Petitioner has also to prove that he or she has been prejudiced by the said irregularity in order for the court to nullify the process.

[19] I will first address the issue relating to the competency of the Execution Creditor's reply based on the alleged invalidity of the affidavit in support. In that regards I have scrutinised the entire provisions of the General Power of Attorney given by the Judgment Debtor, attached as R1 to the Judgment Debtor's Affidavit in Support. Having done so I am of the view that contrary to the submission of counsel for the Execution Creditor, this document does give to the ACM & Associates Pty Limited power to be the agent and proxy of the Judgment Debtor with full power and authority to act both for and on his behalf and to represent him in court. As such, Mr Jean-Marie Moutia could have properly attested to the affidavit in support, in the way he did. I therefore dismiss this objection.

[20] This said, I will now proceed to address the merits of the objections.

[21] The 1st objection is that the Memorandum of Charges does not state whether the Memorandum of Seizure was transcribed with the Office of the Registrar General and a restriction entered as a result, let alone if it was done within 15 days of notification thereof as provided by law.

[22] The requirements for transcription of seizures under the Act is found in the provisions of Sections 7 and 8 of the Act , which provides as follows:

Transcription of the seizure

7. *The memorandum of seizure shall be transcribed at the Mortgage Office within fifteen days after notification thereof, and at the same time mention of such notification and of the mode in which it has been made shall be inserted upon the margin of the transcription.*

Transcription of seizures of land registered under Land Registration Act

Notification of seizure

8. *The transcription of seizures in respect of land registered under the Land Registration Act shall be effected by delivering to the Land Registrar an application*

for a restriction under section 84 of that Act with a certified copy of the memorandum of seizure.

On the other hand the requisite of the Memorandum of Seizure is found in the following provisions of the Act;

Requisites of the memorandum of seizure

5. *The memorandum of seizure (procès verbal de saisie) besides the formalities common to all ushers' process shall contain.*
 - (i) *A description of the title in virtue of which the seizure is effected, the said description containing the date of the title, the name of the notary (if the act is notarial), the amount of the debt, and a reference to the transcription, if the title has been transcribed*
 - (ii) *Mention of the presence of the usher upon the property at the time of effecting the seizure.*
 - (iii) *A description of the property seized, viz.: In the case of urban property, the district, the street, and the street number, if such there be, of the property, and if there be no number, two at least of the meets and bounds (tenants et aboutissants) of the property.*

In the case of rural property, the district, the boundaries, the approximate area of the land, a description of the buildings, machinery and plantations thereon, and the enumeration of the carts and animals seized.
 - (iv) *The apparent value of the property as estimated by the usher.*
 - (iv) *Constitution of an attorney at law whose office shall be taken to be the domicile of the execution creditor, and at which domicile all acts connected with the seizure shall be served upon the said creditor.*

[23] Admittedly, the immovable property seized in this case consists of lands registered under the Land Registration Act. Accordingly, there was an obligation to deliver to the Land Registrar an application for a restriction under Section 84 of the Act together with a certified copy of the Memorandum of Seizure this is as per the statutory obligation under Section 84. As registered lands, the applicable provisions would be Section 8 and not 7 of the Act. Under Section 8 there is no time limit for the registration following seizures, however given the exigencies of time compliance under the Act, I find that this should be done as soon as reasonably after the seizure, the clear intent being to prohibit any subsequent dealings in the seized property. Further, I find that there is no legal requirement to state in the memorandum of charges that the memorandum of seizure was transcribed with the Office of the Registrar General and a restriction entered as a result, This argument

makes little sense especially given that the Memorandum of Charges precedes the memorandum of seizure.

[24] At any rate I am satisfied that the Memorandum and the application for restriction was deposited with the Registrar General's office on the 23rd of August 2021 after the Registrar of the Supreme Court has certified the Memorandum of Seizure on the 27th of July 2021. Further, I find that no prejudice have been proven to have been caused to the Execution Debtor by this irregularity as the registration of the restrictions only serve to protect the Creditor, who has so much to lose if the seized land is transferred to a third party after seizure. I note further that under Section 17 of the Act the Execution Debtor, from and after the date when the seizure shall have been transcribed, cannot alienate the property. By necessary implications this means prior to registration such dealings may happen to the detriment of the Creditor. Accordingly, I dismiss the first objection.

[25] The second objection of the Execution Debtor is that the Execution Creditor has not provided evidence that the Memorandum of Charges was deposited within 30 days of the transcription of the memorandum of seizure as provided by law. It is argued that the Memorandum was filed and deposited on the 2nd September 2021 whereas the Memorandum of Seizure appears to have been served on the 18th August 2020, more than a year prior and no application to the court was made by the Execution Creditor to forgive this lapse of time. It is the position of the applicant that this is a requirement of Section 21 of the Act.

[26] Section 21 of the Act provides as follows;

Deposit of memorandum of charges

21. *Within thirty days of the transcription of the memorandum of seizure, the execution creditor shall deposit at registry the memorandum of charges (cahier des charges) which shall contain*

- (i) a reference, to the title in virtue of which seizure has been made, to the usher's memorandum of seizure including the return of service, and to any procedure or judgments or orders which may have been rendered or made in the course of the proceedings:*
- (ii) the description of the property as set forth in the memorandum of seizure:*
- (iii) the conditions under which the property is to be sold:*

(iv) *a mise à prix on the part of the seizing creditor.*

The Judge shall, at the foot of the memorandum of charges, fix the day for the reading thereof, or for the sale of the property if the property seized is a small property which is to be sold conformably to subhead II of this Chapter.

- [27] Upon reviewing the facts of this case, the court finds that the Execution Creditor deposited the Memorandum of Charges (cahier des charges) with the registry of the Supreme Court on the 2nd of September 2021 in it at paragraph 3.1. Further, Counsel for the Execution Creditor makes reference to the fact that the Commandment has been duly “deposited” at the Land Registry on the 26th of August 2021. This would put him clearly within the 30 days prescription of Section 21 of the Act. At any rate, I further find that no prejudice has been proven to exist as a result of such alleged irregularity, if any, by the Execution Creditor. The fact remains that if he is out of time with filing of the restriction and deposit of the memorandum of charges, this omission ran contrary to the interest of the Execution Creditor and not the Applicant. For these reasons, I will also dismiss the second objection raised by the Execution Creditor.
- [28] The last objection, which is raised in the alternative relates to the “*mise à prix*”. The Execution Debtor argues that the “*mise à pris*” for the charged property to be significantly below their actual value and ought to be amended as a result to allow for higher bids. He averred that he noted that from the Memorandum of Charges that the Process Server has valued the charged property at SR 535,000.000 which is more in line with the actual value given the charged properties encompasses many parcels of land. The response is that the *mise à prix* was fixed by the Process Server as valued by the Court and hence cannot be attributed adversely against the Execution Creditor.
- [29] According to Section 21 of the Act, the Memorandum when it is deposited under the said Section, which is the case here, shall contain a “*mise à prix*” on the part of the seizing creditor. Hence, in law at this stage, it is the creditor that fixes the price as compared to the price in Memorandum of Seizure in which the estimated price would be effected by the Process Server. The question which arises here therefore is not whether or not the Execution Creditor can legally fixed the “*mise à prix*”, but whether the court can intervene

and revise the sum if a party by an ancillary application applies that this be so on the ground that it is just and necessary.

- [30] Having read the Act as a whole I am of the view that the court has such a power under Section 30 of the Act, which prescribes as follows:

“Whenever any inscribed creditor or the execution debtor may desire that the memorandum of charges, as drawn up by the attorney having the carriage of the proceedings, be rectified and amended in any respect, such party may apply by petition to a Judge, twenty one days at the least (unless cause be shown to the satisfaction of the Judge for entertaining such application, if made beyond the above period) previous to the day fixed for the sale, to appoint a day for the appearance of parties before him.”.

This alternative prayer of the Applicant therefore falls within this purview.

- [31] In the case of *Dr. Marie and another vs Development Bank of Seychelles (Civil Side: MA 13/2014 (arising in CM 5/2013)) [2014] SCSC 45 (05 February 2014)*, a case in which a similar issue arose, the then Hon Chief Justice had this to say -

“It is correct as submitted by Mr Frank Ally that the execution creditor is allowed by law to set the mise à prix. Nevertheless so is the court allowed to amend the memorandum of charges including the mise à prix , in light of the provisions of section 30 of the Immovable Property Judicial Sales Act where it is fair to do so and it is in the interests of justice. I have read nothing in the Act that sets the mise à prix stated by the attorney for the Execution Creditor in stone so as not to be immutable if sufficient cause is established.”

- [32] He thereafter went on to state the following, which I think is also relevant to this case,

“In the instant case I do not have the aid of the evidence of experts in relation to market value of land in Seychelles and the only figure to go by is that of the process server. Process servers may have some sort of experience in this area by virtue of their work in relation to court ordered sales of property which they

handle. On the other hand the execution creditor has opted to make no explanation at why the mise à prix he has fixed in the memorandum of charges should not be disturbed apart from the claim that it is his right to elect whatever figure he may choose. Such a position is susceptible to abuse and this is what is intended to be corrected by an application under section 30 of the Act.

[33] In this case the Process Server in his Memorandum of Seizure had valued the property at SR 220,000,000.00. On the other hand in the Memorandum of Charges the Execution Creditor has put the value of the same property at SR 38,018,794. I find therefore that the value placed by the Execution Creditor is more than five time less than the value proposed by the Process Server and no justification has been proposed why this is the case.

[34] On the other hand this court has not been given the benefits of having an expert evidence to assist it coming to a just amount as to the “*mise à prix*”. In the circumstances I find it just and appropriate to exercise my powers to revise the Memorandum of Charges under Section 30 of the Act, by ordering the Execution Creditor to revise the “*mise à prix*” so as to reflect the true price for the property. Bearing in mind that this is a forced sale as compare to a sale on the open market. The Execution Creditor shall deposit its new revised Memorandum of Charges before the next mention date. The sale of the property is post phoned accordingly.

[35] “To that extent, I will uphold the alternative objection of the Execution Creditor.

Signed, dated and delivered at Ile du Port on day...^{31st}... of January 2022.



Govinden CJ