

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 94

MA 261/2020

(Arising in MC NO. 16/2015)

In the matter between:

Julie Laporte
(*rep. by Ms. L. Pool*)

Applicant

and

Anne Marie Lise Boysen & Ors
(*rep by Ms. A Benoiton*)

Respondent

Neutral Citation: Laporte v Boysen & Anor (MA 261/2020) [2022] SCSC 94 (7 February 2022)

Before: ANDRE J

Summary: Ruling– Procedure for arrest and imprisonment of judgment debtor– Section 251 of the Seychelles Code of Civil Procedure (Cap 213)

Heard: 4 January 2022

Delivered: 7 February 2022

ORDER

The following orders are made by the court:

- (i) The plea in limine litis succeeds and the application is dismissed for want of procedure accordingly; and
- (ii) Costs are awarded to the Respondents.

RULING

ANDRE J

Introduction

- [1] This ruling arises out of an application for summons to show cause dated 18 December 2020 by Julie Laporte ('Applicant'), moving the court to order that a summons be issued by the Registrar of the Supreme Court calling upon the 1st Respondent to appear in court to show cause why she should not be committed to civil imprisonment for defaulting in the satisfaction of the Judgement of the court issued on 7 October 2019.
- [2] Anne Marie Lise Boysen and Ors ('Respondents') by way of reply to the summons to show cause, dated 27 May 2021, raised a *plea in limine litis* that the application is not proper as it is not supported by an affidavit as is required under section 251 of the Seychelles Code of Civil Procedure (SCCP) and should be dismissed.
- [3] Both Counsels filed written submissions and the Court has duly considered the same for the purpose of this Ruling.

Background to the pleadings

- [4] The Applicant, being the Judgment Creditor in the main case, has filed an application for Summons to Show Cause. The application filed by the Applicant does not state the provision under which the application is being brought. The prayer of the Applicant is for "an order that a summons to show cause by the Registrar of the Supreme Court be issued calling upon the 1st Respondent to appear in Court and show cause why she should not be committed to civil imprisonment in default of satisfaction of the judgment of the Court." The Application dated 18 December 2020 was filed on 22 December 2020 and it was not supported by an affidavit.
- [5] The Respondents, in their reply filed on 16 June 2021, raised the plea in *limine litis* that the application is not proper as it is not supported by an affidavit as is required under section 251 of the SCCP and should be dismissed.

[6] The Applicant then proceeded to file an ‘*Answer to the Respondents*’ Reply upon leave of the court of the dated 27 May 2021, in which it is averred at paragraph 1 that:

“*With regard to the plea in limine litis, the Applicant/Judgment Creditor has sworn an Affidavit of facts in support of her Application for summons to show cause, which Affidavit has been filed and fees paid in the Registry of the Supreme Court (...)*”(Emphasis is mine),

[7] I note at this juncture, that the stated affidavit dates ‘30June 2021’, five months after filing of the application (supra).

[8] The Respondents raised the issue whether the alleged defect raised in their *plea in limine* can be cured by the party simply filing the missing affidavit, after it was highlighted by the opposing party that it had not been filed. The Court considered the issue resolved, but the Respondent raised the concern that leave of the court was never sought by the applicant to file the affidavit, at which point the Court determined that the parties ought to be heard on the *plea in limine* hence the current Ruling.

[9] In their written submission the Applicant submits that the application complies with section 239 of the SCCP, and further refers to sections 241-243 of the SCCP.

Legal analysis and findings

[10] The main issues arising from the above pleadings read in light with the *plea in limine litis* as raised by the Respondents are as follows:

(i) *was an affidavit required in this instance; and*

(ii) *can a defect in pleadings be cured by the party filing the appropriate documents at a later stage?*

[11] The law relevant to this issues at hand is the SCCP, and the following provisions are of relevance:

239. *Every application for execution shall be in writing and signed by the judgment creditor or by his attorney, if any, and shall contain the following particulars:*

(a) the title and number of the suit;

(b) the date of the judgment or order;

(c) whether any appeal has been entered.

(d) the amount for which judgment has been given and of the costs;

(e) what sum, if any, has been paid in satisfaction of the judgment or order;

(f) the name of the party against whom the enforcement of the judgment is asked for;

(g) the nature of the execution asked for.

The taxed bill of costs shall be attached to the application.

The Registrar shall note on the application the date and time when the application is received.

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 fails 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. Witnesses may be heard in support of the application and on behalf of the person summoned.*

Procedure for arrest and imprisonment of judgment debtor

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 of satisfaction of the judgment or order.*

[12] It is to be noted that the Application failed to cite the legal provision under which it is being brought. In the absence of reference to specific provisions under the SCCP, the Court must rely on the averments of the pleadings as filed by the parties and be guided by the relief sought to determine whether a cause of action exists.

[13] The Applicant on the one hand argues that an affidavit was not required as the Application had been brought under section 239 of the SCCP, and on the other

hand files an affidavit in an effort to correct the alleged defect with the Application. Section 239 of the SCCP follows from section 225 of the SCCP, which sets out the procedure on application for execution. Under this provision, an application is to be made to the Registrar within forty-eight hours of the default. In any event, execution may be issued within six years as per the provisions of section 233 SCCP).

[14] Sections 239 and 251 of the SCCP therefore present two distinct scenarios: the former being an application to be made to the Registrar, and the latter being an application to the court by petition, supported by an affidavit of the facts. Therefore, the issue as to whether an affidavit was required will be resolved by determining which of the two provisions the Applicant was relying on.

[15] Despite the averment in their written submission that the Application was being brought under section 239 of the SCCP, for all intents and purposes this does not seem to be the case. Firstly, the application was not made to the Registrar, as called for in section 239. However, recourse may be had to section 251 regardless of whether any other form of execution has been issued or not. In this case, the prayer in the application is quite specific, namely:

“an order that a summons to show cause by the Registrar of the Supreme Court be issued calling upon the 1st Respondent to appear in Court and show cause why she should not be committed to Civil Imprisonment in default of satisfaction of the judgment of the Court”.

[16] The Applicant thus brings to the table the issue of civil imprisonment, which is not specifically *contemplated* in section 239. Even if we are to generously interpret the Application in the Applicant’s favour and consider that it was indeed section 239 under which the application will be brought, section 239 (1)(g) calls for the application to disclose the nature of the execution asked for. The issue of disclosure does not arise in this case. The requirements and procedure specific to the relief sought must still be respected, where these exist. Therefore, the procedure for arrest and imprisonment of the judgment debtor as provided in

section 251 must still be adhered to, and therefore the proper form of the application should be a petition supported by an affidavit of the facts. (Emphasis is mine).

[17] We thus move to the second issue to be determined by this court, namely, whether the defect can be cured in the manner that was attempted.

[18] There was no affidavit attached to the application. It is not a question that an affidavit was prepared and not attached by some oversight by counsel. The affidavit that was rather nonchalantly attached to the Applicant's reply to the Respondents' Reply, the said affidavit titled "*Affidavit in support of my application for summons to show cause*" and dated 30 June 2021, clearly in response to the Respondent's Plea in *limine litis*. The Applicant was permitted by the court to file a reply after having had sight of the Respondent's reply. In these additional pleadings the Applicant begins by addressing the plea in *limine litis* in stating that the missing affidavit had (now) been filed. Counsel's request to the Court to file a reply was limited to a particular issue on the merits, but clearly took the opportunity to try to slip the missing affidavit in there.(Emphasis is mine).

[19] The scenario in this case is akin to the following example: if a respondent/defendant in a matter raises the argument that a plaintiff fails to disclose a cause of action, and the plaintiff goes on to file new pleadings disclosing a cause of action, without seeking any leave of the Court to do so. The court, in accepting the new pleadings by the plaintiff, has effectively given an advantage to the plaintiff without allowing both sides to be heard on the issue. Allowing the new pleadings would mean depriving the defendant the opportunity to defend their position fairly. Such ambiguity and laxity in proceedings would not only deprive the parties of equal opportunity to be heard but would also create bad precedence and allow counsel to get away with poorly drafted pleadings or failure to adhere to form and follow procedure.

[20] Moreover, it has been established that a court or tribunal should not ignore a point of law even if not raised by the parties, if to ignore it would mean a failure to act fairly or to err in law (See: *Banane v Lefevre (1986) SLR 110 and Bogley v Seychelles Hotels (1992) Ayoola 231/15*). In the present case, the issue was in fact raised by one of the parties and cannot be overlooked.

Conclusion

[21] It follows from the above analysis and findings, that the application should have been supported by an affidavit in line with the provisions of section 251 of the SCCP. Failure to do so may in certain instances not be fatal to the cause of action filed, but in this case, Counsel knowingly demonstrated complete disregard for procedure and attempted to rectify the defect in her original pleadings and essentially defeat the Respondents' plea in *limine litis* by sneaking the affidavit in with subsequent pleadings. The affidavit should therefore not be allowed at this stage of the pleadings for these reasons.

[22] The plea *in limine litis* succeeds and the application is dismissed for want of procedure accordingly.

[23] Costs are awarded to the Respondents.

Signed, dated, and delivered at Ile du Port on 7 February 2022.

Samia Andre

Judge of the Supreme Court

