

**Essack v Auto Clinic (Prop) Ltd
(2000) SLR 125**

Philippe Boulle for the plaintiff
John Renaud for the defendant

Ruling delivered on 17 January 2000 by:

PERERA J: The petitioner, David Essack commenced proceedings before this court upon a commandment being served on the respondent company, Auto-Clinic (Pty) Ltd under section 2 of the Immovable Property (Judicial Sales) Act (Cap 94). In the memorandum of charges, the petitioner seeks a "sale by licitation" of "the leasehold interest of a portion of land at Providence, Mahe, known as Parcel v. 6788 of the extent of approximately 1171 sq metres with buildings thereon, valued by Guilly Anacoura, Process Server at R 1,200,000". The sale is sought in execution of a judgment of this court dated 20 October 1998 in case no 186 of 1998, wherein one of the directors of the respondent company, namely, Dennis Ward-Horner had consented to judgment being entered in a sum of R240,403. The costs in that case having been taxed at R4,340 and the interest being calculated at R11,218.80, a total sum of R255,961.80 is sought to be recovered from the sale. The sale is fixed for tomorrow, 18 January 2000 at 11 a.m before this court.

There is presently before the court, a motion and affidavit filed by one Alan Horner, who is admittedly a director of the respondent company. He moves to intervene in these proceedings for the purpose of stopping or postponing the sale, or for an order to quash the whole proceedings.

In his affidavit the intervenor, Allan Horner, avers that he and his brother Dennis Ward Horner are the only two directors of the respondent company. He denies that David Essack the judgment-creditor (petitioner in these proceedings), is a director of the company. On a perusal of the plaint in case no, 186 of 1998, it appears that David Essack had averred that he was a director, and that the company "represented by Dennis Horner, a director" was the lessee of premises on the Providence Industrial Estate. In that case, Essack in his capacity as a director sued the company for a sum of R147, 000 lent by him to the company and R40,000 for unpaid salaries of 20 months. The judgment entered was therefore a "judgment for a sum of money," as envisaged in section 240 of the Code of Civil Procedure.

Intervention

Mr J.Renaud, counsel for the intervenor relied on section 117 of the Code of Civil Procedure (Cap 213) which is as follows:

117. Every person interested in the event of a pending suit shall be entitled to be made a party thereto in order to maintain his rights, provided that his application to intervene is made before all parties to the suit have closed

their cases.

The term "suit" is defined in section 2 of the said Code as "a civil proceeding commenced by a plaintiff". Clearly, the proceedings in the instant matter was commenced by a commandment under the provisions of the Immovable Property (Judicial Sales) Act, and hence section 117 does not apply, as these proceedings do not constitute a "suit."

Mr Renaud however urged the court to exercise the inherent powers and grant leave to intervene on a consideration of the interest of the intervenor as a director of the company. He relied on the case of *Teemooljee & Co. Ltd v. Whit-wright* (1965) SLR 165 wherein the court allowed the intervenor of a third party (the government) where a lease entered between the government and the defendant which had been provisionally seized was being validated. In that case the court held that the validation proceedings was "a pending suit" within the meaning of section 122 (section 117 of the present code). It was also held obiter that where section 122 did not apply, section 15 of the Courts Act empowered the court to allow the intervention of an interested party.

Section 17 of the present Courts Act (Cap 52) is as follows:

In civil matters, whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules and practice of the High Court of justice shall be followed as far as practicable.

In this respect, Mr Renaud cited the case of *Raffaut v Mauritius Marine Insurance Co* (1886) MR 108, wherein a practice similar to that of the High Court of Justice of the United Kingdom was followed. The court in that case held that "any person whose interest can be affected by the result of law proceedings between other parties can intervene in those proceedings."

In the instant case there is no dispute that Alan Horner, the intervenor is a director of the company against which judgment has been entered by consent of one of the directors. It does not fall on this court to consider the dispute between the directors of the company and the validity of the claim made by one director against the company in case no. 186 of 1998. What is pertinent for present purposes is that the intervenor has an interest in the present proceedings. A sale of the leasehold interests of the company would affect such interest. Hence it is equitable that he be allowed to intervene to protect his interests. Accordingly, Alan Horner is added as the intervenor - defendant, and is therefore entitled to prosecute the motion.

The Procedure

Case no. 186 of 1998 of this court where David Essack was the plaintiff, and the Auto-Clinic (Pty) Ltd was the defendant, was an action for a claim of money. Hence the provisions of the Seychelles Code of Civil Procedure (Cap 213) applied. That code lays down the practice and procedure in civil suits, including the procedure for execution of judgments. Accordingly section 240 of the Code provides that:

240. If the judgment is for a sum of money, the Registrar shall, on receipt of the application, issue under the seal of the court a warrant of execution to one of the Process Servers of the court, who by warrant shall be empowered to levy such sum of money and also the costs of execution by distress and sale of the movable property of the party named in the warrant.

Section 246 is as follows:

246. If the movable property of the judgment debtor be insufficient to satisfy the judgment and the costs of execution, the Registrar shall on the application of the judgment creditor issue a writ of execution against the immovable property, if any, of the judgment debtor, such immovable property shall be seized and sold in accordance with the procedure laid down by the Immovable Property (Judicial Sales) Ordinance and any other law relating to the seizure and sale in execution of immovable property in force for the time being in Seychelles".

It is an accepted principle of law that where an enactment provides the practice and procedure, those provisions should first be exhausted before invoking any parallel provisions for relief under any other enactment. Admittedly, the plaintiff in case no. 186 of 1998, the judgment creditor, did not comply with sections 240 and 246 of the said Code. Instead, he "short circuited" that procedure and commenced proceedings under the Immovable Property (Judicial Sales) Act (Cap 94),

The Code of Civil Procedure contains specific provisions for the recovery of money awarded in a judgment of the court. The judgment debtor is first given an opportunity, upon a warrant to levy being served on him, to pay the amount decreed. If he has no money, the Process Officer is empowered to seize movable property of the judgment debtor and proceed to sell them following the procedure laid down in section 255 et seq. Section 246 provides that:

If the movable property of the judgement debtor be insufficient then a writ of execution against immovable property be issued, and such immovable property shall be seized and sold under the procedure laid down by the Immovable Property (Judicial Sales) Act, or any other law relating to seizure and sale in execution of immovable property.

Chapter 1 sub-heading 1 of the Immovable Property (Judicial Sales) Act is titled "seizure of immovable property in general". The procedure laid down thereunder is primarily applicable to special privileges upon immovables set out in article 2103 of the Civil Code and not to an execution of a judgment for money. Hence the general provisions of Cap 94 should be followed only to the extent they are applicable from the stage of the seizure of the immovable property as envisaged in section 246 of the Code of Civil Procedure, Such proceedings then become a "sale by levy".

The present proceedings have commenced by a commandment, and the memorandum of charges is for a "sale by licitation." This is utterly misconceived when what is sought is the enforcement of a judgment for payment of money. Article 1686 et seq of the Civil Code provide that licitation is done when two or more co-owners find that the common property cannot be divided conveniently or without loss, and hence seek a public auction to recover the value and share in equal terms. Article 1688 provides inter alia that the procedure in the Immovable Property (Judicial Sales) Act be followed. Section 98 et seq of that Act provides the procedure.

The petitioner has a judgment to recover R255,961.80 from the respondent company. According to the memorandum of seizure, the Process Server has seized the entire property and the buildings thereon. He states in the memorandum that he seized Parcel V. 6788 and the buildings, namely one concrete block building 30m x 15m comprising of one workshop, one store and one bonded warehouse. As regards the valuation, he states - "I valued Parcel No. V.6788 with buildings, appurtenances and dependencies thereof at the sum of R1,200,000". Obviously that was the value of the entire property, and not the "leasehold interest" of the respondent company which the petitioner seeks to sell. The mise a prix in the memorandum of charges is also given as R1,200,000. The memorandum of charges in any event is defective as the entire property of the lessor has been seized and valued for sale.

The petitioner in his affidavit dated 7 January 2000 avers that respondent company leased the property from the Seychelles Industrial Development Corporation (Sidec) and that the lease, at paragraph 7(10) thereof contains a condition that the company shall not assign, under let or part with the possession of the premises or any part thereof without the express permission in writing of the lessor, which consent shall not be unreasonably withheld in the case of a respectable and responsible person. Admittedly, the lease between Sidec and the respondent company is a "building lease" as envisaged in article 1778 - 1 of the Civil Code. Mr Renaud raised the issue of propriety of a director of the company, consenting to judgment thus permitting the leasehold interests being sold by auction to third parties without the consent of the lessor. Mr Boule submitted that Sidec consented to the sale, and has since adjourning this matter for this ruling, produced a letter from the Managing Director of Sidec, which is in following terms:

We, Seychelles Industrial Development Corporation, hereby confirm in our capacity as lessor, that permission has been granted for the Judicial Sale of the leasehold interest in Parcel V. 6788 which will take place on the 18th day of January 2000.

The permission is granted, subject to compliance with the obligations and other covenants contained in the lease.

This, in effect, purports to be an exercise of the discretion of the lessor to permit the lessee to assign or part with the possession of the premises, but the proviso to that

consent seems to reserve the right of Sidec to withdraw consent if at the sale, the rights are purchased by someone who in their opinion does not fall into the category of a "respectable and responsible person". Although under section 5(3) of the Seychelles Industrial Development Corporation Act (Cap 216), the managing director is the chief executive officer of the corporation, and has, inter alia the power to sign documents on behalf of the Corporation the court is called upon to assume that the decision to grant permission was taken at a meeting presided by at least three directors as required by section 13(3) of the said Act. The court is reluctant to consider this document especially as counsel for the intervenor had not been given an opportunity to make his submissions, and as he has already made allegations of complicity and fraud on the part of David Essack and Dennis Ward-Horner, who are two directors of the respondent company. The consent of the lessor makes those allegations worse confounded.

Hence there are several procedural and substantive irregularities in the present proceedings. Section 36 of the Immovable Property (Judicial Sales) Act empowers this court to postpone the sale sine die or to a specified day, "upon strong grounds of necessity or expediency". This Section came up for interpretation in the case of *Lorenzo Appiani v Mary Geers* (unreported) Civil side 35 of 95) where the respondent (Mary Geers) had charged two lands in Praslin in favour of Appiani in consideration of a loan for R2,710,000, and defaulted payment. The proceedings commenced correctly on a commandment for a "sale by levy", and on the authority as a "creditor" under article 2103 of the Civil Code. In that matter, the mere application for further time to pay was considered to be inadequate for purposes of postponing the sale under section 36 of the Act. In the instant matter, no useful purpose would be served by postponing the sale as the entire proceedings are flawed. Accordingly, I grant prayer of the motion and quash the whole proceedings. The petitioner is however free to take necessary steps to execute the judgment in case no. 186/98 according to law.

The registrar shall forthwith publish a notice on the notice boards of the court that the proposed sale of the leasehold rights in Parcel V.6788 situated at Providence has been cancelled by an order of this court,

Record: Civil Side No 331 of 1999