

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redacted

[2021] SCSC 705

MA89/2021

Arising in CS97/2018

In the matter between:

BENILDE CEDRAS
(rep. by Frank Elizabeth)

Applicant

and

1. WELL POINT DEVELOPMENT (PTY) LTD
Herein represented by its director Mrs. Margaret Hua Sun

1st Respondent

2. Mrs. Margaret Hua Sun
(both represented by Pesi Pardiwalla)

2nd Respondent

Neutral Citation: *Cedras v Well Point Development (Pty) Ltd & Anor* (MA89/2021) [2021] SCSC 705 (29 October 2021).

Before: E. Carolus J

Summary: Contempt of Court for non-compliance with a money Order. English law relating to enforcement of money judgments considered: Order 45 of the UK Rules of the Supreme Court, 1970 Edition of White Book.

Heard: 17 June 2021

Delivered: 29 October 2021

ORDER

The application is dismissed. Each Party shall bear their own costs.

JUDGMENT

E. Carolus J

Background & Pleadings

- [1] The Applicant filed a civil claim against the 1st Respondent Well Point Development (Pty) Ltd represented by its director Ms Margaret Hua Sun for breach of a building

contract in CS97/2018. Judgment was given in favour of the applicant on 27th March 2019 in the sum of SCR882,267.00 with interest and costs, as per paragraph 53 of the said judgment which reads as follows:

... I find that the Plaintiff has proved his case on a balance of probabilities and enter Judgment for the Plaintiff in the total sum of SCR882,267/- with interest and costs.

[2] The applicant has now filed the present application against Well Point Development (Pty) Ltd represented by its director Ms Margaret Hua Sun (1st respondent) and Ms Hua Sun (2nd Respondent) for summons to be issued on “*the respondent*” to show cause why she should not be committed to imprisonment for being in contempt of the court order dated the 27th March 2019, by failing to pay the judgment debt of SCR 882,267.00 plus interests and costs which remains due and payable. The application is made by way of Notice of Motion supported by an affidavit sworn by the applicant.

[3] Counsel for the respondents filed an answer to the application on their behalf raising a plea in *limine litis*, and reserving his answer on the merits. He pleaded that the application is incompetent, procedurally flawed and misconceived and should be struck out as against both respondents for the following reasons:

(a) There is no Court Order dated 27 March that would permit a Court in making a finding of contempt of Court and consequently an order for committal.

(b) There is no finding that the Second Respondent is a Judgment Debtor and this Application for committal is frivolous and vexatious and premature.

(c) The Application is in any event premature, the Applicant not having exhausted the remedies available in Seychelles laws in respect of execution of judgment.

Submissions

[4] Counsels for both parties made oral submissions on all three points raised in *limine litis* relying on several authorities in support of their respective positions. They both agree that

it is English common law that applies to contempt of court and that pre-Independence English civil procedural rules should be applicable to this case

- [5] The first point raised in *limine litis* is that the judgment in CS97/2018 dated 27 March 2019 is not a Court Order that would permit a Court to make a finding of contempt of Court and consequently an order for committal to imprisonment. Counsel for the respondent argues that this is because the said judgment merely states the Court's finding that the defendant owes the plaintiff a sum of money and does not, in addition to such finding, include or make a separate order for the defendant to pay the sum within a specified period of time. Counsel explains that the judgment in question only establishes that the defendant owes the judgment sum but that such judgment is not self-enforceable, enforcement proceedings having to be initiated by the judgment creditor. He submitted that while the judgement is a money judgment, only non-compliance with a specific order to pay within a specified period of time may trigger contempt of court proceedings. He relied on the English Rules of Civil Procedure to support his submissions in that regard.
- [6] Counsel for the applicant in his submissions in reply focused on the argument that contempt of court proceedings may only be triggered by a Court order for payment within a specified time. He submits that unless the judgment debtor files an appeal within 30 days of delivery of a judgment and files a stay of execution of such judgment, the judgment is enforceable within 30 days of the date of its delivery and becomes executable on that day. He submits that even though the judgment is not couched in language that makes it clear that the debt has to be paid within a time frame, there is a presumption that payment of the debt is due and becomes executable from the date when the right of appeal lapses. He further submitted that since execution will not be allowed by the Court unless the right of appeal has either lapsed or been exercised this provides a timeframe in the law for execution of Judgment.
- [7] The second point in *limine litis* relates to the propriety of the application as against the 2nd respondent on the basis that there is no finding in the judgment that she is a Judgment Debtor and the application for committal is therefore frivolous, vexatious and premature. Counsel for the respondents stated that there have been previous proceedings between the parties where application was made by the applicant for lifting the corporate veil and for

the 2nd respondent to discharge the obligations of the 1st respondent, but that these proceedings were subsequently withdrawn. He further submitted that in any case lifting the corporate veil would engage the liability of the owners of a company and not that of its directors. Consequently the lifting of the corporate veil would not assist in an application for committal of a director of a company. In reply Counsel for the applicant admitted that such an application had indeed been filed previously but stated that it was withdrawn because of difficulties with the application, although he expressed the view that the applicant could still consider filing an application of that nature at a later date

[8] The issues arising for the Court's determination are as follows and will be addressed in the analysis below:

- (a) Whether money judgments are self-enforceable in Seychelles;
- (b) Whether non-compliance with money judgments is capable of triggering contempt of Court;
- (c) Whether summons to show cause can be issued against a director of a company and/or whether a director can be subject to civil imprisonment due to a company's failure to pay a judgment debt;
- (d) Whether the present application is premature.

[9] Points (b) and (d) will be considered together.

Analysis

Whether Money Judgements are self-enforceable/self-executable

[10] The Seychelles Code of Civil Procedure ("SCCP") contains provisions for execution of judgments. An analysis of these provisions clearly shows that money judgements are not self-executable, a procedure being prescribed in order for them to be executed. Of particular relevance are sections 225, 239 and 240 which are reproduced below:

Execution

Procedure on application for execution. Urgency

225. *If the party liable fails to satisfy the judgment or to comply with the order of the court, application may be made to the Registrar by the judgment creditor, forty-eight hours after such default, for the enforcement of the judgment or order by means of execution. Before applying for execution, the judgment creditor must have his bill of costs taxed by the Registrar and where the judgment is for a sum of money exceeding sixty rupees or for the delivery of property exceeding sixty rupees in value, the judgment creditor may also obtain from the Registrar a formal judgment stating the substance of the judgment or order and must cause the same to be registered at the Registration Office:*

Provided that the court may, on grounds of urgent necessity, direct that a judgment or order be enforced by execution, except in so far as it relates to the costs of the suit, immediately after judgment has been given and before the costs incurred in the suit can be ascertained by taxation, and that the judgment or order, in so far as it relates to the costs, be enforced by execution so soon as the amount of the costs shall have been ascertained by taxation."

[...]

Particulars to be contained in application for execution

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

Procedure when judgment is for a sum of money

240. *If the judgment is for a sum of money, the Registrar, on receipt of the application, shall issue under the seal of the court a warrant of execution to one of the ushers of the court, who by such 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.*

[11] It was explained in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (MA 100/2020 & MA 101/2020 (arising in CS 23/2019)) [2020] SCSC 476 (24 July 2020) at para [8] of the Judgement, that the Judgment Creditor has two options under section 225 of the SCCP: an application forty-eight hours after default of payment and application immediately after judgment is delivered on grounds of urgent necessity. The application for execution in that case was dismissed on the basis that the ground of urgent necessity had not been made out. The Court also made the observation that “[i]n any event, there is an attachment order in force in respect of most of Vijay’s bank accounts, which was made on the application of EEEL”.

[12] Section 240 of the SCCP was considered in *Essack v Auto Clinic (Prop) Ltd* (CS 331/1999) [2000] SCSC 2 (17 January 2000) where proceedings were commenced under section 2 of the Immovable Property (Judicial Sales) Act (Cap 94) for the judicial sale of immovable property of the judgment debtor in execution of a judgment. The Court stated that the SCCP makes specific provision for the recovery of money awarded in a judgment, and with reference to section 240 of the SCCP observed that the judgment debtor is first given an opportunity to pay the amount decreed by a warrant to levy being served on him, and if he has no money the usher is empowered to seize his movable property and sell it in accordance with the procedure laid down in the SCCP. The Court stated that:

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).

- [13] The proceedings were quashed due to several procedural and substantive irregularities, but it was stated that the petitioner was still free to take necessary steps to execute the judgment according to law.
- [14] On the basis of the abovementioned provisions and authorities, it is clear that money judgments are not self-executable and consequently, it can be argued also not self-enforceable. The prescribed procedure has to be followed in order for execution to ensue.
- [15] However the procedure for enforcement by execution of such judgments is not always simple and straight forward. In his article *Contempt of Court: A Valuable Tool in Judgment Enforcement* Richard Evanns states that after the judgment creditor wins a case and obtains judgment in his/her favour, the creditor needs to somehow collect the judgment sum but it becomes a case of "*catch me if you can*". He explains that this is because although logically speaking, when a Court issues a money judgment the judgment debtor must pay the amount of the judgment, "*must pay the judgment is a matter of opinion - because failure of the debtor to do so will only result in the debtors assets being levied, wages being garnished, etc*". He proceeds to explain that the remedy of contempt of court where a debtor has not complied with an order and is therefore punished with imprisonment, is not available (in California) on a money judgment. Hence, because "*only the most extreme remedies such as jail, are the only remedies which a recalcitrant judgment debtor will understand ... in some enforcements, it becomes a matter of figuring out how to get a debtor to be in contempt of court, so the threat of jail can be leveraged against them to make them pay*". He further explains that one of the ways in which a creditor may enforce the judgment is to obtain other orders of the court, which failure to comply with, will trigger contempt of court as a result of which "*when jail finally looms, the debtor "sees the light" and pays the money*".
- [16] It would appear that in the present case, the applicant is attempting as stated in the article, to leverage the threat of jail against the respondents to make them pay, as it is evident from the record of the Court proceedings that counsel for the applicant is well aware of other

potential avenues available to the applicant to enforce the judgment. It does not appear however that the judgment in the present case is, or contains an order of the kind to trigger contempt of court which brings us to the next issue for consideration.

Whether non-compliance with money judgments is capable of triggering contempt of Court and whether this Application is premature

[17] As stated, both Counsels agree that civil contempt of court is “*a creature of English Law*”. In that regard, the Court of Appeal in *Ramkalawan & Anor v Nibourette & Anor* MA 178/2017 (arising in MC 86/2012) [2018] SCSC 618 (28 June 2018) cited by Counsel for the respondents, stated that:

[31] *There are no statutory provisions with respect to contempt in the laws of Seychelles. Contempt procedures and remedies are received from England. Section 4 of the Courts Act (Cap 52) with regard to the jurisdiction and powers of the Supreme Court provides that -*

“The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the Powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England”.

[32] *It is settled law that this provision has imported into the laws of Seychelles the common law of England. In this respect the courts of Seychelles recognise and maintain the common law concept of contempt of court. As a court of record, it has an inherent power to punish for contempt, whether criminal or civil and as it has been said: “A court without contempt power is not a court” (Lawrence N. Gray, Criminal and Civil Contempt: Some Sense of a Hodgepodge, 72 ST. JOHN’S L. REV. 337, 342 (1998) and the power of contempt “is inherent in courts, and automatically exists by its very nature” (Ronald Goldfarb, The History of the Contempt Power, 1 WASH. U. L. Q. 1, 2 (1961).*

[18] Vide also *Mancienne v Government of Seychelles* (10 of 2004) [2005] SCCA 11 (19 May 2005) at paragraphs [17]-[18].

[19] It is further not disputed that the applicable procedural law in contempt proceedings is the English Law enacted prior to 1976, as established in *Kimkoon & Co Ltd v R* (1969) SCAR 60 and endorsed in *Gracie Pillay v Anthony Pillay* (MA 141/2018) [2018] SCSC 79 (3

September 2018)]; *Elmasry & Anor v Hua Sun* (SCA 28/2019) [2020] SCCA (30 June 2020); and *Finesse v Banane* [1981] SLR 103. In the Pillay case (supra) the Court stated:

[15] *Where there is a lacuna in our laws on a specific issue, section 17 of the Courts Act provides:*

“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 in England shall be followed as far as practicable.”

[16] *The above provision is of course subject to the qualification in Kimkoon & Co. Ltd. v R (1969) SCAR 60, namely, that subsequent legislation or amendments in England to the referential law do not apply. In respect of our civil procedure, rules and laws passed in England after Seychelles’ independence in 1976 would not apply. Hence our laws, frozen in time as it were in this respect, cannot take into account subsequent orders and rules of the White Book containing the Civil Procedure Rules of the High Court for the handling of civil litigation after that date. It may only take into account orders and rules and jurisprudence on those rules that have survived amendments.*

[20] The English law relating to enforcement of money judgments prior to 1976 is found in Order 45 of the UK Rules of the Supreme Court contained in the 1970 Edition of the White Book.

[21] I will first consider the provisions pursuant to which a judgment debtor may be committed to imprisonment in proceedings for enforcement of a money judgment which are not contempt proceedings. Order 45, Rule 1(1) provides for the various modes of enforcement of a judgment or order for the payment of money to a person. Two of these modes of enforcement under Rule 1(1)(e) and (f) “*in the case in which rule 5 applies*” are respectively by an “*order of committal*” and by “*writ of sequestration*”. The aforementioned Rule 5 relates to enforcement of judgment to do or abstain from doing and act. It would seem therefore that an order for a judgment debtor to pay a sum of money to a judgment creditor in satisfaction of a judgement (i.e. a judgment to do an act) could fall under the purview of Rule 1(1)(e) (for committal) and (f) (for sequestration). Note 45/1/1A explains the effect of Rule 1 as follows:

*Rule 1 replaces the former O. 42, rr. 3 and 4, and O. 43, r. 6. It deals with the enforcement of money judgments, and since all such judgments will be expressed in the form that “the defendant do pay the plaintiff £x,” it does not refer to a judgment or order for the recovery of money from a person, which is dealt with by Rule 13 (1). *Infra*. Emphasis added.*

[22] As seen from the above, a distinction is made between a judgment or order for the payment of money to a person and a judgment or order for recovery of money from a person. It is also clear from the above that a judgment or order for the payment of money to a person is couched in the form “*the defendant do pay the plaintiff £x*” and is dealt with under Order 45 Rule 1. On the other hand, a judgment or order for recovery of money from a person is not expressed in that form and is dealt with under Rule 13.

[23] The judgment in the present case appears to fall under the category of judgment or order for the recovery of money as opposed to a judgment or order for the payment of money as it is not couched in the form “*the defendant do pay the plaintiff £x*” but rather states that:

... I find that the Plaintiff has proved his case on a balance of probabilities and enter Judgment for the Plaintiff in the total sum of SCR882,267/- with interest and costs.

[24] Note 45/1/2 regarding Modes of Enforcing Judgment or Order for payment of money to a person further states that, “*A judgment or order for the payment of money to a person may be enforced by any of the 6 methods listed in para. (1), which are not alternative but cumulative remedies. On the other hand if the judgment or order does not and as a general rule it will not, specify a time for the payment of the money to a person, the method of enforcement by way of an order of committal or writ of sequestration will not be available*”. Emphasis added. It is also pointed out that in addition to methods of enforcement provided under Order 45(1) other methods of enforcement of a judgment or order for the payment of money to a person exist, namely under the provisions of the Debtors Act 1869 and 1878, in the case of bankruptcy of a person or partnership and winding up of companies, and under the County Courts Act 1984. The following is further stated in regards to judgment for recovery of money:

It will be noted that a judgment for the recovery of money from a person cannot be enforced by order of committal or writ of sequestration, nor can a supplemental order be made fixing a time for payment by a certain day or limiting the time within which it is to be made, so as to found a right to sequestration or committal in default of payments (Re Oddy [1906] 1 Ch. 93; Hulbert v. Cathcart [1984] 1 Q.B. 244. Emphasis added.

- [25] This is repeated in Note 45/1/3 dealing with Modes of Enforcing Judgment or Order for Recovery of Money which explains that:

The common law form of judgment for the recovery of money from a person, which was the ordinary form of money judgment entered before October 1, 1966, is not the same thing as a judgment or order for payment of money to a person ...

It will be noted that a judgment for the recovery of money from a person cannot be enforced by an order of committal or writ of sequestration, nor can a supplemental order be made fixing a time for payment by a certain day or limiting the time within which it is to be made, so as to found a right to sequestration or committal in default of payments (Re Oddy, [1906] 1 Ch. 93; Hulbert v. Cathcart [1894] 1 Q. B. 244. Emphasis added.

- [26] Rule 13 of Order 45 (referred to at paragraph [21] and [22] above) is entitled “*Enforcement of Judgments and orders for recovery of money, etc.*”. Rule 13(1) provides that Rule (1)(1) of Order 45, with the omission of sub-paragraphs (e) and (f) thereof and Orders 46 to 51 shall apply in relation to a judgment or order for the recovery of money as they apply in relation to a judgment or order for the payment of money. As explained previously, sub-paragraphs (e) and (f) of Rule (1)(1) of Order 45 deal with the enforcement of judgments to do or abstain from doing any act (for example a judgment ordering a judgment debtor to pay a sum of money to a judgment creditor) by way of an order of committal and by way of writ of sequestration respectively.

- [27] The effect of Rule 13 of Order 45 is explained in Note 45/13/1 which states that:

This Rule is new. It makes provision for the enforcement of certain judgments entered in the old forms before October 1st, 1966. It has the character of a “transitional provision” since there will obviously be many judgments entered before October 1st, 1966 which will fall to be enforced after that date, and this position may well continue for many years. The effect of the Rule is, as far as possible, to preserve the full force and effect of such judgments and to make them

continue in operation and to be enforceable in the same manner, and by the same means, as far as possible, as they were before October 1st, 1966. In so far as may be necessary, the writ of execution may have to be amended so as to recite the judgment entered before October 1st, 1966, in the form in which it was in fact entered.

The judgments to which this Rule applies are (1) a judgment or order for the recovery of money (Para. (1), supra) ...

*The Rule, however, expressly excludes a means of enforcing such judgments an order of committal or writ of sequestration, thus preserving the law as it applied to such judgments before October 1st, 1966 (see *Hulbert v Cathcart*, [1894] 1 Q. B. 244; *Re Oddy*, [1906] 1 Ch. 93. Moreover Rule 6, supra, does not apply to such judgments, and therefore the Court has no jurisdiction to make an Order specifying the time within the judgment or order is to be performed (*Re Oddy*, supra), so that such judgments cannot be transformed into judgments which will become enforceable by writ of sequestration or committal order in the High Court ...*

- [28] As stated at paragraph [23] hereof, the judgment in the present case appears to be a judgment for the recovery of money and not for the payment of money because of its form. Consequently, pursuant to Rule 13 such judgment cannot be enforced by an order for committal, as sought by the applicant. I note further that even if the judgment could have been considered as one for the payment of money, since it did not specify a time for the payment of the money to the judgment creditor “*the method of enforcement by way of an order of committal or writ of sequestration will not be available*”. (See paragraph [24] above with reference to Note 45/1/2)
- [29] Having found thus, I now proceed to consider the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of Court which is governed by Rule 5 of Order 45, which provides as follows:

Enforcement of judgment to do or abstain from doing any act (O. 45 r. 5).

5.—(1) Where—

- (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or*
- (b) a person disobeys a judgment or order requiring him to abstain from doing an act,*

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say—

- (i) with the leave of the Court, a writ of sequestration against the property of that person;*
- (ii) where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;*
- (iii) subject to the provisions of the Debtors Act 1869 and 1878, an order of committal against that person or, where that person is a body corporate, against any such officer.*

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to the order made under rule 6. [. . .]” Emphasis added.

[30] Note 45/5/1 states the following on the effect of Rule 5:

This Rule governs the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of Court. It applies to both positive and negative judgments or orders i.e., those which require a party to do an act as well as those which require a party to abstain from doing an act, subject, however, to this important qualification, that the coercive methods of enforcement under this Rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time under O. 3, r. 5, supra, or fixing such time under Rule 6, infra. The effect of the qualification is, that a judgment or order to pay money to some other person ... which need not, and will not as a general rule specify, the time within which such act is required to be done ... will not come within this Rule, and so will not be enforceable by writ of sequestration or order of committal, unless and until a time is specified for the doing of that Act ... Emphasis added.

[31] According to the O. 45, r. 5, therefore, money judgments that find in favour of the judgment creditor for a specific sum but do not order such payment to be paid within a specified time cannot trigger contempt of court.

- [32] Counsel for the respondents further supports his argument that the judgment in the present case cannot give rise to a contempt order with the Canadian article “*Civil Contempt and Enforcement of Judgments: A Primer and Review of Recent Case Law*” by Neil Wilson, Stevenson Whelton MacDonald & Swan LLP. This paper entitled “*Enforcing Judgments*” was prepared for the Law Society of Ontario's Continuing Professional Development program held on May 22, 2018. It provides an overview of the law of contempt specifically in the context of enforcement of monetary judgments, and reviews case-law relevant thereto, although it must be borne in mind that under the law in that jurisdiction (Rules 60.05 and 60.11(1) of the Rules of Civil Procedure) the power of the courts to enforce court orders through imprisonment or other criminal penalties specifically excludes orders for the payment of money. Contempt of court is referred to in that paper as the “*big stick of civil litigation*” which describes it as an exceptional remedy to be deployed where all else has failed and a party is disobeying a court order.
- [33] It reiterates the point discussed at paragraph [15] above that although a party cannot be found in contempt for failure to satisfy an order for payment of money, it is possible for a party to be found in contempt as a result of failure to comply with orders made to facilitate enforcement of a monetary judgment. Hence it concludes that “*there does remain some scope for the application of contempt process vis-à-vis a party able but unwilling to pay a judgment debt*” and that “*contempt remains a necessary tool in enforcement proceedings to ensure compliance with orders relating to enforcement of debt*”.
- [34] According to that article “[c]ontempt of court encompasses both the act of disobeying a court order as well as conduct tending to disrespect the court’s authority”. It sets out the test for civil contempt for breaching an order as follows: (1) the order must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have had actual knowledge of it; and (3) the party must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels (*Greenberg v. Nowack*, 2016 ONCA 949, at para. 25). It however goes on to explain that simply satisfying the test does not guarantee a finding of contempt, and that contempt being a measure of last resort, it is within the court’s discretion to decline to make such a finding even where the requirements are met. It is further stated that as a practical

matter, a debtor who actively resists paying a judgment debt will be given multiple opportunities to comply with the order and that, “*a finding of contempt is generally made after a demonstrated pattern of unwillingness to comply*”.

- [35] As for Counsel for the applicant’s argument that where an order does not specify a time for payment, “*there is a presumption that payment is due and becomes executable from the date that the right of appeal lapses*” and hence non-compliance with such order may be subject to contempt, I take note of section 230 of SCCP which provides that an appeal does not operate as a stay of execution and therefore in the absence of a Court Order staying execution of a judgment, it remains executable from the time that this is permitted under the provisions of the SCCP relating to execution/enforcement of judgments. Section 225 permits application for execution forty-eight hours after failure to pay a judgment debt or in urgent cases immediately after delivery of the judgment. In light of these provisions a money judgment becomes executable before the expiry of the 30 days period to appeal unless as stated there is an order for stay of execution pending appeal.
- [36] It is to be noted that our Courts have found defendants in contempt of court for non-compliance with their orders in a number of cases, for example in *Ramkalawan & Anor v Nibourette & Anor* (supra) and *Church v Francoise* (CS 5 of 2003) [2011] SCSC 45 (21 July 2011), although the orders which were not complied with in those cases, differ from the judgment subject matter of the present proceedings.
- [37] The Judgement in *Ramkalawan* (supra), was not a money judgment per se as in the present case. The plaintiffs had averred that the defendants were in contempt of court for failing to comply with their undertaking given in judgment by consent, in which “*the Court declared that the Deceased’s children were entitled to the reserved portion of his succession and that within a month of the judgment by consent, the First Defendant would return to the hotchpot any monies from the succession and provide a full statement of accounts of the succession together with a statement of all property found in the UK. It was further agreed that upon the inventories of the Deceased’s estate being completed the Defendants in their capacities as joint executors of his succession would distribute the Deceased’s succession.*” Emphasis added. The defendants were found in contempt of court and ordered

to render full accounts within three months of the order and “*to pay the liabilities of the succession and distribute assets [...] not later than 30 December 2018*”, failing which a fine would be imposed on them. However this case can be distinguished from the present one as the judgment which the plaintiff sought to enforce in *Ramkalawan* was for specific performance within a specified period of time, and the Court did not order imprisonment for non-compliance with its order within the time limit imposed, but made a new order default of which, would render the defendants liable to a fine and not imprisonment.

[38] *Church v Francoise* (supra) concerned a judgment by consent in which the defendant had undertaken to build an access road. The Court refused to order committal of the defendant to prison for contempt of Court, although the defendant had failed to comply with the judgment and the Plaintiff had brought proceedings for contempt of court several times. The court stated that if Plaintiff is of the view that the Defendant has breached the original agreement or the judgment by consent, “*she will have to take other appropriate legal action to rectify or be compensated in damages for any breach*”.

[39] Although the facts of the two aforementioned cases differ from the present case, they illustrate the Courts’ reluctance to order imprisonment for contempt even when a judgment/order may qualify to trigger contempt, especially when other methods to enforce the judgment are available. As noted earlier in the article “*Civil Contempt and Enforcement of Judgments: A Primer and Review of Recent Case Law*” (supra) parties actively resisting paying a judgment will where possible be given multiple opportunities to remedy the contempt by complying with the Court Order and “*a finding of contempt is generally made after a pattern of unwillingness to comply*”.

[40] In conclusion, on the basis of the above I find that if a money judgment does not order payment of a sum of money within a specified time, it cannot trigger contempt of court. Further unless other avenues have been explored such as the use of other statutory enforcement mechanisms, or at least valid reasons for not exploring them provided, an application such as the present one may be considered premature. Although, in view of these findings, there is no necessity to address the third point in *limine litis*, I will proceed to say a few words on the issue.

Whether the summons to show cause for contempt can be issued against a director of a company and/or whether the director can be subject to civil imprisonment due to the Company's failure to pay a judgment debt

[41] The applicant does not provide much in his submissions as to the basis on which the 2nd respondent who is a director of the 1st respondent company, should be held personally liable for the company's judgment debt arising from proceedings to which she was not a party. The affidavit in support of the application states that the 2nd respondent has knowledge of the judgment and in her capacity as the director of the 1st respondent is able but unwilling to perform her legal obligation to pay the said judgment debt. Section 2 of the SCCP defines "judgment debtor" as "*a party to a cause or matter against whom a judgment or order of the court has been given*". Therefore, strictly speaking, if the judgement was given against the 1st Respondent i.e. the company as a party to the proceedings, it is the company which is the judgement debtor although represented by its director, and not the 2nd Respondent. Furthermore directors are not generally and automatically liable for the debts of the company, unless they have breached their duties or where there are allegations of misconduct or fraud etc. It is noteworthy that the applicant has not brought any evidence of the same.

[42] O. 45 Rule 5 reproduced at paragraph [29] above deals with methods for enforcement in circumstances amounting to contempt of Court. It is important to note that Rule 5(1)(a) (iii) only allows an order of committal to be made against a director or other officer of a company in the case where the company "*is required by a judgment or order to do an act within a time specified in the judgment or order*" and "*refuses or neglects to do it within that time*". Emphasis added. Note 45/5/1 (see paragraph [30]) explains that "*the coercive methods of enforcement under this Rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time ... or fixing such time ... The effect of the qualification is, that a judgment or order to pay money to some other person ... which need not, and will not as a general rule specify, the time within which such act is required to be done ... will not come within this Rule, and so will not be enforceable by writ of sequestration or order*

of committal, unless and until a time is specified for the doing of that Act ...". Emphasis added.

- [43] Clearly, the 2nd respondent (director) cannot be held liable for the 1st respondent company's failure to pay the judgment debt under this provision as the judgment did not specify a time within which to effect the payment.
- [44] Nevertheless there is another option open to judgment creditors where a judgment is for a sum of money, to apply for the civil imprisonment of the judgment debtor under section 251 of the SCCP. I note however this is not the remedy sought in terms of the present application which seeks the "*issue of summons on the Respondent to show cause why she should not be committed to imprisonment for being in contempt of the court order dated the 27th March 2019, by failing to pay the judgment debt of SCR882,267.00 plus interests and costs which remains due and payable*". Under section 251, the summons is issued for the judgment debtor to show cause why he/she should not be committed to civil imprisonment in default of satisfaction of the judgment or order. Section 253 of the SCCP provides for the application of certain provisions of the Imprisonment for Debt Act in proceedings under section 251. It is to be noted that imprisonment for debt under the latter Act is only permitted in limited cases.
- [45] The personal liability of directors of a company has been considered in the context of civil imprisonment of a judgment debtor in a number of cases by our courts. See for example *State Assurance Corporation of Seychelles v First International Financial Company Ltd* (409 of 1998) [2006] SCSC 1 (13 June 2006); *Morel v Essack* (MA 305/2019) [2020] SCSC 63 (30 January 2020); *Khi (Seychelles) 01 Ltd Trading as Raffles Praslin v Elite Club Limited & Ors* (MA 275/2018) [2019] SCSC 427 (30 May 2019). Most of these cases also address the concept of separate legal personality of a company and lifting of the corporate veil. As stated, given that the application was not made for civil imprisonment of judgment debtor for default of satisfaction of the judgment but rather for contempt, the Court being bound by the pleadings cannot consider the case otherwise than in accordance with such pleadings.

