

SUPREME COURT OF SEYCHELLES

Reportable

MA414/2023

(Arising in CS01/2011)

In the matter between:

CHARLES DESAUBIN

(represented by Mr. France Bonte)

Judgment Creditor

and

ROSY MAGNAN

(represented by Mr. Basil Hoareau)

Judgment Debtor

Neutral Citation: *Desaubin v Magnan* (MA414/2023) 17th February 2025

Before: Adeline J

Summary: Execution of Judgment – Objection to legal proceedings/plea in limine litis raised – Section 251, 252, 253 and 254 of the Seychelles Code of Civil Procedure – Prescription under Section 2271(2) of the Civil Code of Seychelles Act. Section 233(1) of the Seychelles Code of Civil Procedure.

Heard: By submissions of Counsels

Delivered: 17th February 2025

FINAL ORDER

The plea in limine litis raised is sustained, and accordingly, the application seeking to execute the judgment dated 29th March 2012 is dismissed.

RULING

Adeline j

[1] Under the caption "*Petition under Section 251, 252, 253 and 254 of the Seychelles Code of Civil Procedure*, one Charles Desaubin, the Judgment Creditor, (then Defendant in the main case, CS No:1/2011) commenced legal proceedings before this Court against one Rosy Magnan, the Judgment Debtor (then Plaintiff in the main case CS No:1/2011) by which proceedings, the former purports to execute a judgment entered in his favour against the latter.

[2] As per the pleadings, the Judgment Creditor's prayer is written as follows;

"WHEREFORE, the Judgment Creditor prays this Honourable Court to summons the Judgment Debtor to show cause why she should not be committed to civil imprisonment for her default in paying the said sum of RS 784,488 plus cost and to effect payment of the said sum and for the arrest and imprisonment of the Judgment Debtor"

[3] The basis for the relief sought for is averred in an affidavit sworn by the Judgment Creditor/deponent dated 16th November 2023. In the affidavit, the Judgment Creditor in part deposes as follows;

1. Judgment was entered on the 29th March 2012, whereby the Judgment Debtor/Plaintiff would pay me the sum of RS 784,488 less 10% after which I shall vacate the said property one month after receipt of the said sum of money.

2. The Judgment Debtor/Plaintiff has not paid the above sum and I am still occupying the property. "

[4] In response, on the 13th February 2024, the Judgment Debtor, through learned Counsel, filed in Court her objection to the proceedings. The Judgment Debtor also filed an affidavit in reply.

[5] The objection is based on the following plea in limine litis, notably;

1. The present proceedings has not been commenced by Petition contrary to the mandatory requirement of the law.

2. Further and in the alternative to paragraph (1) above, the Petition ought to have been supported by an affidavit of facts which is not the case in respect of the present proceedings, as the affidavit is defective and bad in law.

3. The relief prayed for is wrong and not in accordance with the law.

4. The right of Charles Desaubin (hereinafter the Judgment Creditor) to enforce and execute the judgment is prescribed in accordance with Article 2271(2) of the Civil Code of Seychelles Act, and consequently the Judgment Creditor has lost the right to enforce/or execute the judgment.

5. In the alternative to the averments in paragraph (4) above, since more than six years have elapsed from the date of the judgment, and the Judgment Creditor was obliged to seek leave of this Honourable Court prior to execution of the Judgment.

[6] On the merits, learned Counsel's proposition is that the right of the Judgment Creditor to enforce and execute the judgment is prescribed by virtue of Article 2271(2) of the Civil Code of Seychelles Act, and therefore he has lost his right to enforce and execute the judgment.

[7] In the alternative, learned Counsel pleads, that since more than six years have elapsed from the date of judgment and the date of execution of the judgment, the Judgment Creditor was obliged to seek leave of this Honourable Court prior to execution of the judgment.

[8] In her affidavit in reply, the Judgment Debtor, *inter alia*, makes the following averments;

4. I have been informed by my Attorney-at-law, Basil Hoareau, and verily believe that the application is defective and bad in law;

(a) the present proceedings has not been commenced by Petition contrary to the mandatory requirement of the law.

(b) further, and in the alternative to paragraph (a) above, the Petition ought to have been supported by an affidavit of facts which is not the case in respect of the present proceedings, as the affidavit is defective and bad in law.

(c) the relief prayed for is wrong and not in accordance with the law.

(d) the right of Charles Desaubin (hereinafter referred to as the Judgment Creditor) to enforce and execute the judgment is prescribed in accordance with Article 2271(2) of the Civil Code of Seychelles Act, and consequently, the Judgment Creditor has lost the right to enforce the judgment, and

(e) In the alternative to the averments in paragraph (d) above, since more than six years have elapsed from the date of judgment and the date of execution of the judgment, the Judgment Creditor was obliged to seek leave of this Honourable Court prior to execution of the judgment.

- [9] Learned Counsel for the Judgment Creditor did tender written submissions. As regards to the proposition that these proceedings have not been commenced by petition as is required by law, it is the submission of learned Counsel, that there has been full compliance with Section 251 of the Seychelles Code of Civil Procedure, in that, it is clear from the caption of the petition that the Judgment Creditor has commenced proceedings by petition, which petition is supported by an affidavit. Learned Counsel is of the view, that learned Counsel for the Judgment Debtor's objection on that basis is frivolous and vexatious and should therefore be dismissed.

- [10] It is also submitted by learned Counsel, that the proposition of Counsel, that the petition is not supported by an affidavit because the affidavit meant to be in support of the application is defective, and that the relief being sought for is wrong and not according to the law, is devoid of merits given that the affidavit in support of the petition is in line with the legal requirements under Section 170 of the Seychelles Code of Civil Procedure. Learned Counsel contends, that in his affidavit, the Judgment Creditor avers facts which are within his knowledge and belief. Learned Counsel sought for dismissal of the 2nd and 3rd points of objection, contending, that the objection based on these two points is merely a delaying tactic.
- [11] As regards to the fourth point of objection which is that the Judgment Creditor is prescribed under Article 2271(2) of the Civil Code of Seychelles Act, and has therefore lost his right to enforce and execute the judgment, it is the submission of learned Counsel, that such proposition is flawed, in that, “the Court did not provide an end date to the execution of the judgment for payment of compensation by the Judgment Debtor”. It is contended by learned Counsel, that the decision of the Court in the judgment which the Judgment Creditor seeks to enforce and execute in these proceedings, is based on equity and as such, this operate as a suspension of the prescription period under Section 2271 (2) of the Civil Code of Seychelles Act. Learned Counsel submits, that the objection based on this point is devoid of merits and ought to be dismissed too.
- [12] As regards to the fifth point of objection raised by learned Counsel for the Judgement Debtor in the alternative, that in view that 6 years have since elapsed from the date of the judgment and the date of execution of the judgment, the Judgment Creditor ought to have sought for leave of this Court to proceed with execution of the judgment. It is the submission of learned Counsel for the Judgment Creditor, that this point is also frivolous and vexatious, and that it should be dismissed given that the provisions under Section 251 of the Seychelles Code of Civil Procedure clearly states “whether any other form of execution has been issued or not” and “a Judgment Creditor may at any time apply.....”

- [13] It is the contention of learned Counsel, that the law under Section 251 is clear as to timing, and therefore, there is no need to re-invent the law. Learned Counsel holds the view, that the procedure followed by the Judgment Creditor should be accepted as is and that the Judgment Debtor should be called upon to explain why she should not be civilly imprisoned for breaching orders of the Supreme Court. Learned Counsel maintains, that the Judgment Creditor's petition should be allowed.
- [14] In his oral submissions canvassing the different points of objection raised in plea in limine by learned Counsel for the Judgment Debtor, on the point that the Judgment Creditor has not commenced proceedings by petition, learned Counsel submitted, that based on the wording of the provisions of Section 251 of the Seychelles Code of Civil Procedure, such proceedings should mandatorily commenced by petition supported by an affidavit of facts. It was the submission of learned Counsel, that in the instant case this is not the case as proceedings have commenced by way of an application. Learned Counsel proceeded to add, that the Judgment Creditor may rely on the principle that "procedure is a handmade of justice not its mistress" to get away with it but emphasised, that this doesn't change the legal requirement that it has to be by way of a petition.
- [15] As regards to his belief that the affidavit in support of the application is defective because it is not an affidavit of facts, it is the submission of learned Counsel, that the principle that procedure is "handmade of justice not its mistress" cannot be relied upon by the Judgment Creditor because affidavit is evidence. Learned Counsel submitted, that all that the Judgment Creditor avers in the affidavit in support of the application, is that "Judgment was entered, judgment has not been paid, and the prayer, rather than setting out all the necessary facts to justify the reliefs sought for in the application.
- [16] Learned Counsel also took issue with the relief sought for by the Judgment Creditor, stating, that the relief prayed for is wrong in law and not in accordance with the law because the Judgment Creditor prays the Court to summons the Judgment Debtor to show cause "why she should not be committed to civil imprisonment for her default". It is contended by learned Counsel, that the relief that should have been sought for is to arrest and imprison

the Judgment Debtor, and the Judge will then order the Registrar to issue a summons calling upon the Judgment Debtor to show cause why he should not be committed to imprisonment.

- [17] In addition, learned Counsel submitted, that his strongest argument against the continuance of these proceedings, is based on his firm belief, that the execution of the judgment by the Judgment Creditor is prescribed under Section 2271 (2) of the Civil Code of Seychelles Act because the 10 years prescription period has elapsed since the 29th March 2022, given that judgment was delivered on the 29th March 2012. Learned Counsel stated, that on that basis alone, this application should be dismissed. Learned Counsel went on as to say, that another impediment to these proceedings is the law under Section 233 (1) of the Seychelles Code of Civil Procedure which he submitted, says, that execution as between the original parties to a judgment has to be at any time within six years from the date of the judgment, and that once the six years has elapsed, the parties alleging himself to be entitled to execution has to have obtained leave of the Court to proceed with execution which has not been the case in these proceedings.

DISCUSSIONS OF THE LAW AMID THE OBJECTIONS

- [18] The essence of learned Counsel for the Judgment Debtor first point of objection in plea in limine, is that this application should fail in view that the Judgment Creditor seeks to enforce and execute the Judgment pursuant to Section 251 of the Seychelles Code of Civil Procedure and therefore, it ought to have commenced proceedings by way of a petition supported by an affidavit. Learned Counsel for the Judgment Debtor seems to hold the view, that proceedings have commenced by way of an application rather than a petition because the words “Judgment Creditor and Judgment Debtor” are used to describe the parties rather than the words Petitioner and Respondent. Learned Counsel for the Judgment Creditor disagrees, arguing, that the use of the word “petition” in the caption of the application is indicative of the fact, that proceedings have been commenced by petition in accordance with Section 251 of the Seychelles Code of Civil Procedure (the SCCP).

- [19] Learned Counsel for the Judgment Creditor goes further as to say, that the so called affidavit attached to the application is not an affidavit of facts and evidence, and is therefore defective. From the point of view of learned Counsel for the Judgment Creditor, there has been full compliance with Section 251 of the SCCP because it's a petition supported by an affidavit, and the affidavit is in accordance with the provisions of Section 170 of the Seychelles Code of Civil Procedure. Although not addressed by Counsel for the Judgment Creditor, learned Counsel for the Judgment Debtor also expressed concerns about the relief sought for by the Judgment Creditor, stating, that the relief prayed for is wrong in law, in that, it seeks to require the Judgment Debtor to show cause why she should not be committed to prison, instead of to summons the Judgment Debtor to show cause why she should not be committed to civil imprisonment for her default.
- [20] Although learned Counsel for the Judgment Debtor maintains, that the Judgment Creditor has not commenced proceedings by petition but by application instead, and that he may get away with it based on the principle that procedure is a "handmade of justice not its mistress", nonetheless, I hold the view, that to commence any proceedings by way of an application when the law expressly provides that it should be by petition is fatal.
- [21] However, in the instant case, the use of the word "Petition" in the caption of the application does at least provide the Judgment Creditor with something to argue about in his effort to persuade this Court that the application is by way of a petition as required by law. However, whether it is a petition or not, that must be decided on the form of the application rather than the words used, and the parties in a petition are described as the Petitioner and the Respondent. For these reasons, therefore, the objection is sustained.
- [22] On the point raised by learned Counsel for the Judgment Debtor that the affidavit is defective and bad in law because it is not an affidavit of facts, it is my considered opinion, that the fact that the Judgment Creditor has not averred all the facts that one would have expected, doesn't necessarily render the affidavit defective.

[23] It is clear, however, that the supported affidavit to the application lacks the facts required for a determination on the merits of the application, the Judgment Creditor's case would be impeded by the lack of facts and evidence. In a wider perspective, however, I do subscribe with the view of learned Counsel for the Judgment Debtor, that in law a petition has to be supported by an affidavit, and that the affidavit which is evidence, must be one that contains averments of facts. Therefore, although the Court can dismiss the proceedings on the ground that the affidavit is defective for lack of substance required in terms of facts and evidence, I would rather prefer to leave that consideration later when the Court would consider the merits of the application should the proceedings reach that stage.

[24] Learned Counsel's proposition that the Judgment Creditor is prescribed by virtue of Section 2271 (2) of the Civil Code of Seychelles Act, 2020 and as such he has lost his right to enforce and execute the judgment, means, that the Judgment Creditor is barred from enforcing that judgment and that these proceedings should be a non-starter. Section 2271 (1) of the Civil Code of Seychelles Act, 2020 is couched in the following terms;

"2271 (1) All rights of action shall be subject to prescription after a period of five years except as provided in article 2262."

[25] Section 2271 (2) is couched in the following terms;

"2271 (2). In the case of a judgment debt, the period of prescription shall be ten years."

Therefore, on account of the evidence laid before this Court by way of affidavit it is the finding of this Court that the judgment pertains to an action and that the same was delivered on the 29th March 2012. This application having been filed on the 21st December 2023, means, that the Judgment Creditor is out of time given that the 10 years limitation period elapsed on the 29th March 2022. Therefore, the objection raised by learned Counsel for the Judgment Debtor is sustained, and accordingly, the application is dismissed for being prescribed.

- [26] The last point of objection to the proceedings raised by learned Counsel for the Judgment Debtor, albeit in the alternative, is based on the provisions of Section 233 (1) of the Seychelles Code of Civil Procedure. It is contended by learned Counsel for the Judgment Debtor, that by virtue of Section 233 (1) of the Seychelles Code of Civil Procedure, execution of such a judgment has to be within six years from the date of the judgment and that after the six year period elapses, leave of the Court is required to proceed with execution. For ease of reference, Section 233(1) of the Seychelles Code of Civil Procedure is couched in the following terms;

“233 (1). As between the original parties to a judgment or order, execution may issue at any time within six years from the date of the judgment or order.”

- [27] Furthermore, Section 233(2) (a) (1) is couched in the following terms;

“233 (2) (a) In the following cases, namely;

(i) Where six years or more have elapsed since the date of the judgment or order, the party alleging himself to be entitled to execution may apply to the Court for leave to issue execution accordingly, and the Court may, if satisfied that the party so applying is entitled to execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties in relation to the application for leave, to issue execution shall be tried, and in either case, the Court may impose such terms as to costs or otherwise as shall be just.”

- [28] In essence, based on the statutory provisions of Section 233(2) (a) (i) of the Seychelles Code of Civil Procedure, the Judgment Creditor had six years from the date of the judgment on the 29th March 2012 to proceed with execution. Having not done so within the six years limitation period, he ought to have sought for leave of this Court to proceed with execution which he has failed to do. Therefore, for this reason, the objection raised by learned Counsel for the Judgment Debtor to these proceedings on that particular ground is sustained, and accordingly, the application is dismissed.

Signed, dated and delivered at Ile du Port 17th February 2025.

