

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2011/0602

**IN THE MATTER of Sections 5,15 and 18 of the Antigua
and Barbuda Constitution Order 1981**

and

**IN THE MATTER of Section of 127 of the Magistrate's Code
Of Procedure Act**

and

**IN THE MATTER of a decision of the Chief Magistrate that Tesfa Joseph be detained at Her
Majesty's Prison pending the payment of the sum of \$3,500.00**

and

IN THE MATTER of an application for Judicial Review

and

IN THE MATTER of an application for an Administrative Order

BETWEEN:

Tesfa Joseph

Claimant

-and-

**[1] The Superintendent of Prisons
[2] The Chief Magistrate
[3] Attorney General**

Defendants

Appearance:

**Dr. O. Dorsett for the Claimant
Ms. Alicia Aska for the Defendants**

2014: September 24

JUDGMENT

[1] **HENRY, J.:** The claimant seeks judicial review of the decision of the defendants to order and implement an order that he be detained in prison from 15th September 2011 until 30th September 2011. He also brings a claim for constitutional relief with respect to the infringement of his fundamental rights and freedoms as guaranteed by sections 5 and 15 of the Constitution.

On 15th September 2011, the applicant was brought before the Magistrate's Court for being in arrears on his child maintenance payments. His arrears amounted to \$7,000.00. At the hearing, he was ordered to pay the sum of \$3,500.00. When he was unable to do so, he was ordered detained at Her Majesty's Prison. He was released on 30th September 2011. On 27th January 2012, he was granted leave to file a claim for Judicial Review. In his claim he seeks the following relief:

- a) A declaration that the hearing on 15th September 2011, before the 2nd defendant which led to the detention of the claimant was illegal in that it was procedurally unfair, there being no opportunity granted to the claimant to present evidence prior to the decision to detain.
- b) A declaration that the decision made by the 2nd defendant that the claimant pay the sum of \$3500 before any representations on his behalf be made was illegal in that it was irrational.
- c) A declaration that the order of the 2nd defendant that the claimant be detained, he not having paid the sum of \$3500.00 was illegal in that it was contrary to section 127 of the Magistrate's Code of Procedure Act.
- d) A declaration that the detention by the 1st defendant of the claimant from 15th September 2011 to 30th September 2011 was in breach of Section 5 of the Antigua and Barbuda Constitution in that claimant was deprived of his right to personal liberty when there was no lawful order in place.
- e) A declaration that the Detention of the claimant constituted the tort of false imprisonment.
- f) An order that the claimant is entitled to compensation for deprivation of his right to personal liberty whilst being detained in execution of an unconstitutional and unlawful order pursuant to section 5(7) of the Constitution.
- g) An order that the 3rd defendant pay compensation for the unlawful detention of the claimant, including exemplary and/or vindictory damages to be assessed.
- h) Damages for the tort of false imprisonment, to include exemplary/vindictory damages.
- i) Costs.
- j) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act and pursuant to section 7 of the Judgments Act;
- k) Any other relief that the court may deem fit.

The Claimant's Evidence

[2] In his affidavits dated October 31, 2011 and February 7th 2012, the claimant admits that he is the father of one Joedy Joseph, a minor, in respect of whom an order for the payment of maintenance

in the amount of \$175.00 per/week was made. He alleges that he is a construction worker, but that due to the downturn in the economy he is no longer gainfully employed. As a result of not being gainfully employed, he fell heavily into arrears with respect to the sums due under the court order. He admits that he ought to have applied for a variation of the court order, but that he failed to do so.

- [3] On September 15th, 2011, pursuant to a warrant duly issued the claimant was picked up by the police and taken to the Magistrate's Court. He was brought before the Chief Magistrate. At the hearing on that date, he alleges that his Attorney sought to present the facts of his situation to the court. However, the Chief Magistrate made it clear that he was in arrears on his child maintenance in the amount of \$7,000.00 and that the Court's position in these matters is that once the arrears was over \$5000.00, the court would require an immediate payment of at least half of the outstanding arrears. In his case, this amounted to \$3500.00. He further alleges that, the Chief Magistrate stated that only after this amount had been paid would the court entertain any submissions on the matter. He states that the Chief Magistrate insisted that the only thing she wanted to hear was how the money would be paid. He was not allowed to explain his circumstances. As a result of his inability to pay the \$3500 demanded by the Chief Magistrate, an order was issued for his detention and he was detained from September 15th, 2011 until September 30th, 2011. Later the claimant states that the reason he has been unable to pay the child maintenance is because he has been unemployed and his efforts at self-employment in farming have been thwarted by poor weather conditions. He says he was not given an opportunity to explain any of this.

The 2nd Defendant's Evidence

- [4] In her affidavit, dated April 20th 2012, the Chief Magistrate alleges that the claimant was heavily in arrears on his child maintenance. He was free to apply for a variation order of the maintenance order but never did so. The Claimant was therefore picked up and brought before the court on a warrant on 15th September 2011. When asked by her why he was in arrears of his child maintenance he never at any time indicated to the court the issues raised in his affidavit. According to her it was made clear to him that he was in arrears of \$7000.00 and that he was required to pay half of the amount. The Chief Magistrate denied the other allegations.
- [5] According to the Chief Magistrate, when asked by the Court why he was in arrears his only response was, "I was not working". He said nothing else when asked by the Court why he was in that position, therefore he was ordered to pay the sum of \$3500 forthwith. Being dissatisfied with the Claimant's response and the Claimant's failure to pay half of the amount owed, he was sent to prison for a period of 14 days.
- [6] According to the Chief Magistrate, it was on or about the 19th September 2011 that Counsel appeared before her on behalf of the claimant. It was not a day scheduled for child maintenance matters. Counsel indicated to the court that his client was sent to prison as a result of non-

payment of child maintenance and that he was making an application to have a payment plan with respect of the arrears. She informed Counsel that the applicant was already on a payment plan vis the original order; that what he sought was refinancing which the court was not prepared to entertain at that point. She is adamant that on the 15th September, when the applicant was brought before the court on the warrant, he was not represented by an Attorney. When Counsel approached the court, the matter was already disposed of some days before, and the matter was not listed to be heard on that day.

- [7] The Chief Magistrate reiterates that the Claimant was given the opportunity to explain the reasons for his default, but his only response was that he was not working. This she found to be insufficient and deliberate on the part of the claimant.

The Claimant's Submissions

- [8] The claimant's concedes that there was no false imprisonment on the part of the Superintendent of Prisons; that he is protected by the warrant issued by the Chief Magistrate. He admits that the Superintendent, in obeying the warrant, was simply doing his duty.
- [9] The claimant's asserts that the enforcement of an order to pay child maintenance is like any other conviction; he is therefore entitled to the protection of the laws as provided by section 15 of the Constitution.
- [10] It is the claimant's assertion that the actions of the Chief Magistrate were illegal in that they were procedurally unfair and contrary to section 127 of the Magistrate's Code of Procedure Act, resulting in the unlawful and unconstitutional deprivation of the personal liberty of the claimant, contrary to section 5 of the Constitution.
- [11] Finally he asserts that the claimant is entitled to damages, including exemplary and vindictory damages.

The Committal Warrant

- [12] The Claimant asserts non-compliance of the Chief Magistrate with section 127 of the Magistrate Code of Procedure Act (MCPA) in the issuance of the warrant. The Chief Magistrate asserts compliance not only with that section but also with sections 15 and 16 of the Maintenance of and Access to Children Act¹ (MACA). I therefore set out these provisions in full.
- [13] Section 127 of the Magistrate Code of Procedure Act provides:

127. "(1) If the application be made before the birth of the child or within two calendar months after the birth of the child, the magistrate may order the payment of the weekly sum to be made from birth of the child; and if at any time after the making of such order as aforesaid it be made to appear to a magistrate upon oath that any sum payable in

¹ No. 1 of 2008 of the Laws of Antigua and Barbuda

pursuance of such order is one month in arrear the magistrate may proceed to enforce such order in like manner as if such order were a conviction, and the provisions of this act shall apply in all respects as fully as though such order as aforesaid were a conviction:

Provided that a warrant committing a person to prison for non-payment of any sum ordered to be paid in full shall not be issued by a magistrate if (having regard to all the circumstances of the case) he is satisfied that the person who has failed to pay is not in gainful employment and has made reasonable efforts to obtain employment but has failed to do so and has no other means out of which the sums due might reasonably be paid.

(2) Where in any proceedings for the enforcement of such order the defendant is committed to prison then, unless the magistrate otherwise directs, no arrears shall accrue under the order during the time that the defendant is in prison. "

[14] Sections 15 and 16 of the Maintenance of and Access to Children Act provide:

"(1) A person may make an application to the court, on behalf of a child for whose benefit a maintenance order has been made, for an order that a person in default of the maintenance order be committed for being in default of that order.

(2) Where an application is made pursuant to subsection (1) the court shall issue a warrant addressed to the commissioner and to all police officers, that the person who contravened the maintenance order be arrested and brought before the court to show cause why he should not be committed for being in contravention of the order.

(3) A person who is arrested pursuant to subsection (2) who cannot show cause to the satisfaction of the court why he contravened the court's order, is liable to be committed for a period of 6 weeks.

A person who is in default of or contravenes an order, commits an offence and is liable on summary conviction to a fine of two thousand dollars or to be committed for a period of two years or both."

[15] Section 31 of the MACA expressly amends the MCPA. While it expressly repealed sections 123, 126 1 (b) and (2) along with sections 128, 131 and 134, it did not repeal section 127 consequently that section remains intact.

[16] Counsel for the Chief Magistrate admits that section 127 is still law but asserts that MACA was specifically created to deal with matters of maintenance of children and default payment thereof; that the intention of Parliament must be that the latter Act should take precedence over any earlier legislation when there is a conflict and/or when the Act addresses the same issues. Therefore MACA is the law which governs the actions taken by the 2nd Defendant in this situation.

- [17] The court acknowledges that where a later enactment does not expressly amend an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them. Inconsistent texts cannot both be valid without contravening the principle of contradiction². However, the court is of the view that there is no conflict or inconsistency between section 15 of MACA and section 127 of the MCPA.
- [18] Both provisions give Magistrates authority to enforce an Order for maintenance. Both authorize the Magistrate to issue a warrant. Section 15 (2) of MACA authorize the Magistrate to issue a warrant that the person who contravenes the maintenance order may be arrested and brought before the court to show cause why he should not be committed for being in contravention. Therefore at the hearing where the person is to show cause, the judicial officer would take evidence concerning the alleged failure or default in respect of the court's order.
- [19] The provision in section 127 of the MCPA speaks to the state of the evidence adduced. If the Magistrate is satisfied that the person is not in gainfully employment, 2) has made reasonable efforts to obtain employment and has failed and 3) he has no other means out of which the sum due might reasonably be paid, then the committal warrant shall not be issued. While the situation produces the need to conflate the two texts and arrive at the combined legal meaning, in the court's view, the two provisions are not in conflict.
- [20] Furthermore, there is no indication that Parliament intended that the latter should take precedence over the earlier legislation. The fact that the Legislators repealed other sections in Part IV of MCPA, but left section 127 untouched, suggest strongly that having reviewed Part IV, they deliberately choose to allow section 127 to remain in force.
- [21] In paragraph 14 of the affidavit of the 2nd Defendant she states:

"When the matter came up for hearing on the 15th September 2012, the claimant was not represented by an Attorney. The Claimant was asked by the court the reason why he was in arrears of his child maintenance. The Claimant's only response was 'I am not working'. He said nothing else when he was asked by the court why he was in that position so he was ordered to pay the sum of \$3,500.00 forthwith, being half of the amount."

In paragraph 15 she continues:

"The court having the discretion to exercise its powers and being dissatisfied with the response of the claimant and the claimant's failure to pay half of the amount owed for maintenance was sent to prison for a period of fourteen days."

Again in paragraph 24 the 2nd Defendant states:

² Benion on Statutory Interpretation, Part IV, section 80

"The claimant was given the opportunity to indicate to me the reason why he was in default and the claimant's only response to the court was that he was not working. This I found to be insufficient and deliberate on the part of the claimant, who obviously seemed not to have his child's wellbeing as an important and serious issue. . ."

[22] The provision in section 127 of MCPA, having not been repealed, was applicable. Even though the Chief Magistrate found the applicant's answers unsatisfactory, she was constrained by section 127 from issuing the committal warrant until she satisfied herself of the matters contained in the proviso. The claimant indicated to the court that he was not working. No other evidence in regard to the claimant employment was adduced. Based on the brief inquiry which took place, there is no indication in the record that the procedure required by the proviso was followed.

[23] This is not to say that each time a person says: "I am not working", it is necessarily so and therefore a Magistrate is constrained not to issue a warrant. This is not the holding of the court. On the record before the court there is no evidence that the Chief Magistrate made a finding contrary to what the claimant stated, that is, "I am not working. Or, that having accepted that he was not working that she applied her mind to the other requirements of the proviso in section 127. She only says that she found his answers "insufficient" and "deliberate".

[24] The Court is cognizant that this a Magistrate's Court matter where the procedure is summary in nature and where judicial time is at a premium, given the large volume of cases a Magistrate must deal with on a given morning. The court recognizes how important it is not to waste judicial time. However, the requirements of the Proviso are specific. Given the deliberate decision of the Legislators not to repeal the Proviso, it must have been the intention that before a person is committed to prison for non-payment of a maintenance order, the Magistrate must apply his/her mind to the terms of the proviso and is prohibited from issuing the committal warrant where the terms of the proviso are not met. According to the 2nd defendant, at the hearing the claimant was not represented by Counsel. Under the circumstances the brief inquiry from the court was insufficient to satisfy the proviso. The failure to satisfy the proviso renders the committal warrant unlawful.

Constitutional Claim

[25] The Court having found that the claimant's committal to prison was unlawful in that it was in violation of the provisions of section 127 of the MCPA, the issue is whether his constitutional right not to be deprived of his liberty except by due process of law has been contravened.

[26] In **Maharaj v AG of Trinidad and Tobago (No. 2)**³, the Privy Council, having previously found that the procedure adopted by a judge in committing the appellant to prison for contempt was unlawful, had to determine whether the procedure also contravened the constitutional right of the appellant not to be deprived of liberty except by due process of law. Their Lordships answered the inquiry in

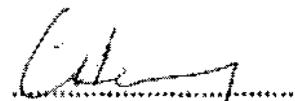
³ [1979] A.C. 385

the affirmative and further found that an order for payment of compensation is clearly a form of redress which a person is entitled to claim.

[27] Likewise, the committal warrant having been found to be unlawful in that it violated the proviso contained in section 127, the procedure also contravened the applicant's section 5 constitutional rights, for which the applicant is entitled to compensation. Such damages would include compensation for the inconvenience consequent on the imprisonment and for any distress suffered by the claimant. In keeping with section 5 (7) of the Constitution, liability to pay such compensation shall be a liability of the Crown.

[28] Accordingly, the court makes the following declarations and orders:

1. A declaration that the order of the Chief Magistrate that the applicant be detained was contrary to section 127 of the Magistrate's Code of Procedure and therefore unlawful.
2. A declaration that the order to detain the claimant was in breach of Section 5 of the Antigua and Barbuda Constitution in that he was unlawfully deprived of his personal liberty.
3. An order that the applicant is entitled to compensation for deprivation of his right to personal liberty, such damages to be assessed.
4. The matter is dismissed against the first defendant
5. The other declarations and orders sought are denied.
6. Cost to be prescribed cost.



CLARE HENRY
High Court Judge
Antigua and Barbuda