

ANTIGUA AND BARBUDA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO ANUHCV2014/0281

BETWEEN:

TOWER HILL MERCHANTS LTD

Claimant/Judgment Creditor

AND

CENTRAL MARKETING CORPORATION

Defendant/Judgment Debtor

AND

CLAIM NO ANUHCV2014/0561

BETWEEN:

TOWERHILL MERCHANTS LTD

Claimant/Judgment Creditor

AND

CENTRAL MARKETING CORPORATION

Defendant /Judgment Debtor

Appearances

Ms Safiya Roberts and Kamilah Roberts for the Claimant/Judgment Creditor

Mrs Carla Brookes-Harris for the Defendant /Judgment Debtor

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2016: May 30

2017: March 22
.....

DECISION

Introduction and background

- [1] **LANNS, J [AG]:** The main issues that arise for decision in these two matters are (1) whether the Defendant/Judgment Debtor, Central Marketing Corporation (CEMACO) had the means to pay two judgment debts since the date of the judgments, but has willfully failed and or neglected to do so; and (2) whether CEMACO now has the means or the ability to pay to the Claimant Judgment Creditor, Tower Hill Merchants Ltd (TML) more than US\$1,000.00 per month towards satisfaction of the judgment debt of EC\$281,364.25 plus interest, fees and costs, in the case of Claim No. 0281 of 2014; and the judgment debt of EC 178,638.05 plus interest, fees and costs, in the case of Claim No. 0561 of 2014.
- [2] On the 13th May 2014 TML filed a Claim Form and Statement of Claim numbered 0281 of 2014 against CEMACO claiming the sum of US\$84,218.30 or EC \$274, 203.33 plus interest, costs and court fees, being the amount allegedly due for goods sold and delivered. CEMACO did not acknowledge service, nor did it file a Defence, and thus, Judgment in default of Acknowledgment of Service was entered up against it on the 22nd July 2014 for the sum of \$274,203.33; interest on the sum of \$274,203.33 in the amount of \$4,560;and costs in the sum of \$2,600.00
- [3] On the 23rd October 2014, TML filed another Claim Form and Statement of Claim numbered 0561 of 2014 against CEMACO, claiming damages for anticipatory breach of contracts in the sum of US\$65,201.13 or EC176,043.05, plus interest and court fees. As in the previous claim, CEMACO failed to acknowledge service or file a Defence, and thus, Judgment in Default of Acknowledgement of Service was entered up against it in the sum of EC178, 638.05 inclusive of court fees, personal service, and fixed costs.
- [4] CEMACO failed to pay the judgment debts;¹ consequently, TML filed two Judgment Summonses on the 27th April 2015, and 10th December 2015 against CEMACO, in Claims 0281 of 2014, and 0561 of 2014. In support of the Judgment Summonses, TML filed two Affidavits of Marvette Richards, a paralegal in the Law Offices of Roberts & Co, in which she deposed that CEMACO has failed to pay the judgment debt, and asserting, among other that CEMACO has the means to pay, but has willfully failed and or neglected to do so.
- [5] Ms Richards deposed to the fact that CEMACO is a statutory Corporation, which operates a retail supermarket, a wholesale division, a Farmer's Depot and also supplies sugar to the Government of Antigua and Barbuda and other customers. The affidavit also asserts that CEMACO has access to funding from the Government of Antigua and Barbuda by virtue of the provisions of the Central Marketing Corporation Act.

¹ The Requests for Judgment asked for the judgment sums to be paid forthwith; however, the judgment itself did not specify the time within which the judgment debts were to be paid.

- [6] On the 20th January 2016, CEMACO filed an Affidavit of Means which was affirmed by Ms Heatherlyn Millett who describes herself as the General Manager of CEMACO. There was one document attached to that Affidavit. Pursuant to an order of court dated 27th January 2016, CEMACO filed a 'Supplemental Affidavit of Means' on the 19th February 2016; with 7 documents exhibited thereto. The Affidavits detailed CEMACO's financial performance for the period January 2015 to October 2015, as well as its monthly operating income and expenses and its assets and liabilities. In the end, Ms Millet deposed that CEMACO was only able to pay a minimum monthly installment of US\$1,000.00 or EC\$2,717.00 towards settlement of each of the two judgment debts.
- [7] On the 12th April 2016, TML filed a Further or Second Affidavit with one document exhibited thereto. In it, TML challenged the statements made in the Affidavit of Means of CEMACO, as deposed to by Ms Millet.
- [8] TML through Ms Roberts, cross examined Ms Millet on her Affidavits. During cross-examination it emerged that there were mathematical errors contained in the second affidavit of Ms Richards; in that the second affidavit was premised on a miscalculation of earnings of CEMACO using a three month period rather than a four month period.
- [9] Was CEMACO in a financial position since the date of the judgments to settle the judgment debts, and if so, should its General Manager be committed to prison for failing to comply with the judgments or order? In addition, or alternatively, does CEMACO have the ability to pay more than the monthly sum of \$US1000.00 amount it has proposed in settlement of each judgment debt?

Positions of the Parties

- [10] CEMACO maintains that due to its current financial situation, it can only pay to TML the monthly sum of US\$1,000.00 towards satisfaction of each of the outstanding judgment debts. In summary, the position of CEMACO is based on the following points:
1. The second Affidavit of TML reflects a miscalculation by TML of monthly revenue. It should be \$558,204.27 instead of \$744,272.33.
 2. The evidence as presented gives a true picture of what is going on financially with CEMACO.
 3. The evidence establishes that the residual balance gross profit of EC\$2,269.70 is the operating capital available to CEMACO. This amount is less than the operational expenses which for the period January 2015 to October 2015 amounts to EC\$2,534,162.00. Consequently, CEMACO has an operational deficit of EC\$264,392.15 and this has been the pattern of its financial performance over the last ten years. The

deficit is offset by Government subvention ranging from EC\$250,000 - EC\$300,000.00 over the last two years

4. The total monthly cash needs of CEMACO is approximately EC\$547,915.50 of which EC\$75,000.00 is not available as it represents credit sales with an average 60 days pay term. CEMACO's monthly income of EC\$520,447 does not cover its monthly cash needs which reflects a deficit of approximately Twenty Seven Thousand Four Hundred Thirty-Nine Dollars and Fifty Cents (EC\$27, 439.50)
5. Cogent evidence was adduced to substantiate the dire financial health of CEMACO. The evidence demonstrates that there is an imbalance in income versus expenditure and CEMACO has serious monthly cash flow challenges which it is only able to offset as a result of contributed capital which CEMACO receives from Central Government, its sole owner on an unscheduled basis.
6. CEMACO has made every effort to address the present financial situation, including bringing the debt situation to the Government through Special Warrant and Circulation Note to the Cabinet.

[11] Significantly, there is nothing to say what if any response CEMACO received from the Government in relation to the Special Warrant and Circulation Note allegedly forwarded to Government.

TML

[12] In summary, the position of TML is grounded on the following submissions:

1. On the evidence before the court as to CEMACO's operating income and expenses, in addition to the ability of CEMACO to obtain funding under the Central Marketing Act, CEMACO has the means to pay more than US\$1,000.00 or EC\$2,700.00 monthly in liquidation of the judgment debts.
2. CEMACO gave evidence that it earns approximately EC\$520,000 per month. Of this amount, it spent EC\$334,000 on cost of goods sold, and the balance is spent on operating expenses. These expenses are unsubstantiated and unreasonable in some cases.
3. The court should place little weight on the accuracy of the figures because CEMACO has failed to provide documentary evidence to support the larger expenses detailed in its statement of accounts.
4. CEMACO has provided no evidence of the actions it has taken to curb expenses or future plans to reduce its monthly expenses in order to be in a position to service the two

judgment debts owed to TML. As CEMACO has admitted to earning approximately EC\$520,000, it means that it has the means to pay the judgment debts, having not substantiated the expenses claimed.

5. The order of court for payment of the amount owing takes priority over the other debts of CEMACO. CEMACO is prioritizing its debts by giving preferential treatment to a debt owed to PDV Caribe by CEMACO. According to Ms Millet, CEMACO pays PDV Caribe EC\$10,000 monthly. There is no evidence that PDV Caribe has gone through time and litigation and has obtained a court order for the payment of debt to PDV Caribe. While CEMACO is prioritizing debts owed to other creditors, it is ignoring the Orders of the Court in these matters.
6. CEMACO has other avenues of funding which will allow it to be in a position to liquidate the judgment debt.
7. CEMACO is a statutory corporation and is governed by the provisions of the Central Marketing Corporation Act, which specifically provides for the funding and resources of CEMACO. By not pursuing the avenues afforded for funding under the Act, CEMACO cannot succeed in persuading the court that it does not have the means to pay the judgment debts.
8. The evidence is that the government has in fact advanced funds to CEMACO which has not been applied to the judgment debts owing to TML.
9. CEMACO does have the means to pay the judgment debts through financial advances or loans from the Government to liquidate the debts in monthly payments plan in excess of the amount proposed. Furthermore, on the admission of CEMACO, and the provisions of the Act, the Government is the sole owner of CEMACO. Therefore, CEMACO cannot just rely on its operational income and expenses to claim that it does not have the means to pay the debt other than by minimal monthly payments of \$1,000.00.
10. In the light of the foregoing, CEMACO has the means to liquidate the debt within three to six months. In the interim, the court should order CEMACO to make minimum monthly payments of US5,000.00 or EC 13,500 until the debt is liquidated.

Discussion and conclusion

- [13] In a paper entitled 'Rules Relating to Enforcement'² Master Cheryl Maturin (as she then was) quite correctly pointed out that Judgment Summonses are misunderstood throughout the jurisdictions, and it is necessary to put in place some uniformity in their application and effect. Legal

² Paper prepared for the Annual Judicial Conference, 30th July to 3rd August 2007, Coconut Bay Beach & Spa, St Lucia.

practitioners, says Master Mathurin, customarily apply for a judgment summons in most instances to secure the attendance of the judgment debtor in court so that he or she may be examined as to their means of satisfying judgment debts. In other words, it is used casually and interchangeably with the oral examination procedure which is designed for the purpose of determining the means of a judgment debtor, and thereby undermining the nature of the enforcement nature of the judgment summons. Master Mathurin continues " It is only when a judgment creditor is aware of the disposable means of the judgment debtor and additionally shows that the judgment debtor chooses not to pay, that the method of enforcement by judgment summons can be effected. Master Mathurin opined that the judgment summons is not to be used as a means of determining these means as the CPR 2000 makes clear provision as to how this should be done.

- [14] CPR 52. 1 defines a judgment summons to mean "an application to commit a judgment debtor for the non-payment of a debt where this is not prohibited by any relevant enactment. The relevant enactment in this case is the Debtors Act, Cap 131, s. 4. of the Laws of Antigua and Barbuda, which permits the court to make an order for committal under a judgment summons where it is proved to the court that the judgment debtor has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected to pay the debt.
- [15] CPR 45.2 sets out how money judgments may be enforced: "A judgment or order for payment of a sum of money other than an order for payment of money into court, may be enforced by charging order, garnishee order, judgment summons, order for seizure or sale, or for the appointment of a receiver. Where, as in the present case a judgment debtor decides to proceed by way of judgment summons, he /she may lead evidence as to the judgment debtor's means as gleaned from an oral examination or otherwise. Still, the restrictions of the Debtors Act have to be taken into account whether or not the judgment debtor chooses to pay the debt.
- [16] No oral examination was conducted by TML to determine the means of CEMACO to pay the debt, yet TML says that it believes that CEMACO has the means to pay the debt. I am cognizant of the fact that the oral examination is not in and of itself a method of enforcement; that its sole purpose is to find out from the judgment debtor whether he or she has any assets and other debts, to provide the judgment creditor with relevant information so that the judgment creditor can select the best method of enforcement.³ In this case, TML did not see it fit to pursue the oral examination procedure. It proceeded straight to the judgment summons procedure. which, according to the Debtors Act, and CPR 52 deals with applications to enforce a judgment debt against a judgment debtor for non-payment, by a committal order where this is not prohibited by any relevant enactment. Notably, PD No 2 of 2007 directs "This Part (Part 52) deals only with committal of a judgment debtor for the enforcement of money judgments.

³ Per Mitchell J in *Ashanti Edwards v Rholda Bhola et al*, GDAHCVAP2013/0021

[17] TML as previously stated, has chosen to employ the judgment summons procedure to enforce the judgment. It has not specifically asked for any committal order.⁴ It claims that CEMACO has the means to pay but is willfully neglecting or refusing to pay, and it urges the court to order CEMACO to pay the two judgment debts by monthly installments of US\$5000.00 or EC\$13,500.00). It is therefore incumbent on TML to prove that CEMACO had been refusing or willfully neglecting to pay the judgment debts even though that it had, or had since the date of the judgment the means to pay. In other words, the burden of proving that CEMACO has, or had the means to pay also rests with TML.

[18] In my judgment, the Affidavit of Ms Richards, without more, does not really assist in the discharge of the onus placed on TML to prove that CEMACO had, or has the means to settle the debts but has been willful and neglectful. Indeed, proof that CEMACO is not in a position at this point and time to fully settle the debts came from CEMACO, although from the evidence and submissions, there is no question in my mind that CEMACO is capable of reducing the judgment debts if it is inclined to do so, by reducing its monthly payments to PDV Caribe to allow for a portion of such payments to service the debts owing to TML. Also, by exploring the funding avenues open and available to it, and by organising and managing its business affairs, CEMACO should be in a position to service its debts to TML within the next 6 to seven months.

Conclusion

[19] After having read the judgment summons, and after considering the various affidavits which have been filed in this matter, and the documents exhibited thereto; and after having considered the evidence given by Ms Millett in the course of cross-examination, the court adopts the proposition that he who asserts must prove. The court is not satisfied that TML has proved that CEMACO had, since the date of judgment or order, the means to comply with the terms of the judgments or order and has willfully failed or neglected to do so.

[20] As previously noted, the Judgments did not specify a time within which they were to be paid. When the judgment summonses came on for hearing before me on the 27th January 2016, an order was made for a further affidavit of means to be filed with supporting documents to substantiate the averments contained in the first affidavit of means. In as much as CEMACO had indicated in its first affidavit of means that it can only pay US\$1,000.00, an order was also made that CEMACO makes an interim payment of US\$1,000.00 per month towards each of the outstanding debts until further order. There is no indication that CEMACO has been non-compliant with that order. In these circumstances, it cannot be said, at this juncture that CEMACO has had the means since judgment or order to satisfy the debts and has willfully failed or neglected to comply. And thus, the issue of committal as stated in the judgment summonses do not arise.

⁴ Although Form 21: Judgment Summons, summoned the Judgment Creditors to attend to give reason

[21] However, the court does not act in vain; it must conduct a balancing exercise. TML has calculated that it would take approximately nine (9) years to repay the debt in Claim No 561 of 2014, if the court were to order the said debt to be paid by monthly installments of EC2,700.00. Significantly, TML has pointed out that, (in relation to Claim No 561 of 2014), at the date of hearing, the accrued interest was EC\$12,485.86, and would continue to accrue at the rate of 5% per annum; As to Claim No 281 of 2014, TML calculated that it would take approximately 7 years to repay the debt if the court were to order the judgment debt therein to be paid by monthly installments of EC\$1,000.00. At the date of hearing, the accrued interest in that Claim was \$25,009.71. In those circumstances, counsel urged the court to find that the proposed payment is wholly inadequate to liquidate the judgment debt.

[22] Indeed, based on the material before me, I am totally in agreement with counsel for TML that CEMACO, needs to take necessary action to curb expenses and come up with a plan to reduce its monthly expenses in order to be in a position to service the debt owed to TML. CEMACO has admitted to servicing a debt to PDV Caribe in the sum of EC\$10,000 per month. Indeed, it is apparent that CEMACO is prioritizing its debts by giving preferential treatment to PDV Caribe, when there is nothing to suggest that PDV Caribe has obtained any judgment or court order in respect of the payments that are being made to it. CEMACO has not denied that it has avenues of funding available to it to allow it to be in a position to settle the debts owing to TML. Perhaps the most salient fact which emerges in these proceedings is that CEMACO is owned by the Government of Antigua and Barbuda, and that CEMACO is governed by the provisions of the Central Marketing Corporation Act (the Act) which specifically provides for the funding and resources of CEMACO. Section 9 of the Act provides as follows:

"9. The funds and resources of the Corporation shall consist of

- a) such sums as may be granted to the Corporation from time to time by the Legislature;
- b) such sums as may from time to time accrue from the operations of the Corporation;
- c) such sums as may from time to time be borrowed by the Corporation for the purpose of meeting any of its obligations or discharging any of its functions;
- d) such sums as may be advanced to the Corporation from time to time by the Government;
- e) moneys earned or arising from any property, investments, mortgages or debentures acquired by, or invested in the Corporation;

- f) all other sums or property which may in any manner become payable to or vested in the Corporation in respect of any matter incidental to its powers and duties.

[23] Additionally Section 10 of the Act allows for CEMACO to borrow or raise capital under the Act; and Section 11 specifically empowers CEMACO to borrow capital from the Government.

[24] Interestingly, Ms Millet gave evidence that CEMACO has approached the Government for assistance with financing the regular operations of the Corporation, but Ms Millet, during cross examination stated the Government was not approached specifically for funding to repay the judgment debt owed by CEMACO. According to Ms Millet, the normal approach was for orders to be brought to the attention of the Board and the Board will speak to the Government. However, no plausible evidence was forthcoming that a request was actually made to the Board of CEMACO for an advance or a loan to specifically liquidate the two judgment debts owed by CEMACO. However, Ms Millet has deposed to receiving subvention from Central Government in the last two years, in the sum of \$250,000 to \$3000,000 but it appears that none of it was applied to the debts owed to TML by CEMACO. According to Ms Millet, this sum of money was used to offset a deficit of EC264, 392.00, and indeed there is no evidence apart from her mere say so to substantiate it. This state of affairs does not speak well for the financial management of CEMACO.

The Order

[25] In all the circumstances, I make the follows orders and declarations

1. A declaration that TML is entitled to the fruits of its judgments, and it is high time that CEMACO take appropriate steps to substantially reduce or to settle the judgment debts.
2. A declaration that there is no, or no sufficient evidence that CEMACO has had the means since the date of judgment or order to settle the judgment debt, and has willfully neglected or refused to comply with the terms of any judgment or order.
3. A declaration that CEMACO is capable of organizing its business affairs to generate more income, and funding to enable it to reduce and or settle the debts owed by it to TML.
4. An order that CEMACO do continue to pay to TML the monthly sum of \$US1000.00 or EC\$2,700.00 towards each of the outstanding judgment debts for the next three months ending on the 1st day of June 2017.
5. Beginning on the 1st day of July 2017, CEMACO do pay to TML the monthly sum of US \$5000.00 or EC\$13,500.00 towards satisfaction of the two outstanding judgment debts, and continuing with a like sum on the 1st day of each and every month thereafter until the entire judgments debts, costs and interest are liquidated.

6. CEMACO do forthwith do all that is necessary and within its power to generate income and to seek funding as provided for in Sections 9, 10 and 11 of the Central Marketing Corporation Act, and that such funding assistance that may be given from here on by the Government of Antigua and Barbuda or otherwise, be applied to the reduction of the judgment debts in accordance with paragraphs 4 and 5 of this order, with liberty to pay more than the monthly amount as ordered to be paid, or to settle the judgment debt in full by payment of a lump sum. Such steps must include bringing to the attention of the Government the debt situation of CEMACO; and or making a specific request by way of Special Warrant and Cabinet Note for funds to settle the outstanding debt.
7. TML do serve a copy of this Decision on the relevant Minister of Government.
8. CEMACO do pay to TML the costs of these proceedings in the sum of EC\$1000.00 such costs to be paid within 30 days hereof.
- 9.. There shall be liberty to apply.

[26]

I am grateful to all counsel involved for their assistance.



PEARLETTA LANNS
HIGH COURT JUDGE [AG]