IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. Civ 31 of 2015 (No.2)

BETWEEN:

SCOTIABANK (BELIZE) LIMITED

Claimant/Judgment Creditor

AND

BRIAN M WALKER

Defendant/Judgment Debtor

Appearances:

Mark E Williams for the Claimant/Judgment Creditor
No appearance by Defendant/Judgment Debtor

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20 March 2024

28 June 2024

JUDGMENT

Practice and Procedure - Judgment summons – Judgment debtor not served as of the date fixed in the judgment summons – Adjournment request to serve stale judgment summons - Judgment summons not supported by an affidavit or statement of account on judgment debt – No plea that judgment debtor has means but neglecting or wilfully failing to pay judgment debt – Abuse of process - Application for committal struck out

[1] **HONDORA J:** This is an undefended matter whose issues touch on the law, practice and procedure on judgment summons. The issue arising for resolution in this matter is narrow and it turns on the court's discretion to grant an adjournment request of judgment summons proceedings to allow a

judgment creditor more time to serve a judgment summons bearing an expired hearing date, i.e., a stale judgment summons.

I. Context

[2] On 13 February 2024, Scotiabank (Belize) Limited (the judgment creditor) issued a judgment summons against Mr Brian M Walker (the judgment Debtor). The court office inserted in the judgment summons a return date of 20 March 2024. Thereafter, it sealed and returned the judgment summons to the judgment creditor's legal representative for service on the judgment debtor.

[3] On the return date, Mr Williams, the judgment creditor's legal counsel, informed the court that he had been advised that the judgment debtor was not in Belize. Consequently, his client had not managed to serve the judgment summons on the judgment debtor. The judgment creditor did not file any return of service.

[4] Thereafter, Mr Williams proceeded to apply for what he called "a suitably long adjournment" of the proceedings on the judgment summons to grant the judgment creditor more time to gather information on the judgment debtor's whereabouts and, if located, to effect service.

[5] I dismissed Mr Williams' application in an extempore decision and struck the matter off the roll with no order as to costs. At Mr Williams' request I am providing written reasons for my decision.

II. Issues falling for determination

[6] In response to Mr Williams' adjournment request, I requested him to address the court on the purpose served by an adjournment since the judgment summons would be stale on any future date set for the resumed hearing. In other words, the judgment summons would on its service on the judgment debtor at some point in the future bear an expired hearing date.

[7] In summary, Mr Williams submitted that an adjournment would (a) give his client more time to locate the judgment debtor; (b) enable his client to serve the judgment summons on Mr Walker; and (c) enable his client to undertake an enquiry into the judgment debtor's ability to repay the judgment debt. He also indicated that in his experience this court routinely granted such adjournment requests to enable service of judgment summons in situations where the judgment debtor had not been located by the date fixed in the summons. Notably, the court office issued the judgment summons on 20 February

2024 and inserted 20 March 2024 as the return date. Mr Williams did not state that the date fixed in the judgment summons was unreasonably short or that it breached any of the Civil Procedure Rules.

[8] Mr Williams' application raised numerous questions on:

(a) the appropriateness of granting an adjournment to give a judgment creditor more time to serve on a judgment debtor a judgment summons bearing an expired hearing date;

(b) the appropriateness of granting an adjournment of judgment summons proceedings where the judgment creditor's primary objective is a court-facilitated assessment of the judgment debtor's ability to pay the judgment debt or order;

(c) whether the court has power and/or should exercise its discretion to permit the disapplication of Civil Procedure Rules (CPR) 52.3(1) and (2);

(d) whether judgment creditors are without adequate remedy save for the judgment summons process; and

(e) the appropriateness of granting an adjournment request where the judgment summons is not accompanied by any affidavit and contains no averment that the judgment debtor is able but is neglecting or wilfully opting to not discharge the judgment debt or order.

(a) Adjournment to facilitate service of a stale judgment summons

[9] I requested Mr Williams to address me on the fact that if I granted his application for an adjournment, I would in effect be granting Scotiabank permission to serve on the judgment debtor a stale judgment summons, i.e., a judgment summons containing a hearing date that had expired. Learned counsel did not make any submissions addressing this particular concern.

[10] I am not persuaded that an adjournment to grant a judgment creditor more time to serve on a judgment debtor a stale judgment summons can be justified on any principle of law or that any adjournment in the circumstances would serve any useful or valid purpose. I am also of the view that an adjournment in this situation accompanied by a Notice of Hearing issued by the court office could breach the rule against abuse of legal process.

[11] Certainly, a judgment debtor served with a stale judgment summons will not be able to comply with the order outlined in that legal process. In addition, the judgment creditor will not be able to plead non-compliance during any trial on the application for committal off the back of a stale judgment summons. Relatedly, the court may not rely on the service of a stale summons to exercise jurisdiction over a judgment creditor. These realities undermine any benefits arising from an adjournment.

[12] In this case, there is an additional and more serious concern. Granting the requested adjournment would create the unfortunate and unintended impression that the court sanctioned the service of the stale judgment summons. This is because the stale judgment summons will be served together with a Notice of Hearing, which will convey to the judgment debtor the impression that the court overruled and/or disapplied the statutory requirement for service of a valid judgment summons, i.e., a summons bearing, among others, a prospective summons hearing date.

[13] In my view, granting the requested adjournment for the purpose of enabling the service of a stale judgment summons would bring the administration of justice into disrepute. The court will not be an unwitting participant in the unnecessary vexing of a judgment debtor through its acquiescence to the service of a stale judgment summons. An adjournment of the judgment summons proceedings followed by the issuance by the court of a Notice of Hearing will undermine the public's confidence in the justice system. It would also undermine the stability of the statutory framework regulating judgment summons and erode compliance with the statutory conditions that judgment creditors are required to satisfy when invoking the court's jurisdiction to secure payment of judgment debts through the judgment summons procedure.

[14] In the circumstances, I dismiss the judgment creditor's application for an adjournment because it serves no useful or valid purpose, and none has been identified for the court's consideration.

(b) Use of judgment summons for an assessment of the judgment debtor's ability to pay

[15] As noted in para. 7 above, in his submissions, Mr Williams indicated that his client was primarily seeking to enquire into Mr Walker's means and ability to discharge the judgment order and that consequently, an adjournment would allow for that process to take place once service of the judgment summons had been effected on the judgment debtor.

[16] That submission established that the judgment creditor had used the wrong procedure to achieve its intended goal. To undertake a formal and court-facilitated enquiry into a judgment debtor's means to satisfy a judgment debt or order, a judgment creditor is required to make a CPR 44 application, which "deals with the examination of a judgment debtor to [enable a judgment creditor] to obtain information [that] assists in enforcing a judgment" (See CPR 44.1). Illustrative cases on CPR 44 include (i) ***Esso Standard Oil S.A Limited v Beez Imports Limited***, Claim No. 758 of 2011; and (ii) ***Acosta and Another v Caruso and Another***, Claim No. CV 205 of 2015), at para. 4. See also the instructive Antigua and Barbuda Supreme Court case of ***Tower Hill Merchants Ltd. V Central Marketing Corporation***, Claim No. ANUHCV2014/0281, in particular at para. 13).

[17] On the facts of this case, an adjournment would serve no purpose other than to lend a veil of legality to the judgment creditor's inappropriate use of the Part 52 of the CPR judgment summons procedure for an enquiry into the judgment debtor's ability to pay the judgment debt. In compliance with the civil procedure rules and in pursuant of the overriding objective of resolving matters justly and proportionate cost, formal enquiries into judgment debtor's financial position and ability to discharge a judgment debt or order should be undertaken pursuant to CPR 44. A tendency to rely on the CPR 52 judgment summons procedure eschewing for no apparent good cause the use of CPR 44 can amount to an abuse of process.

[18] The judgment summons procedure is, of course, an application for a committal order, i.e., an application for the imprisonment of the judgment debtor. As a rule, this court will dismiss committal proceedings instituted by a judgment creditor that (a) fails to make any fact-based positive assertions about a judgment debtor's ability to satisfy a judgment debt or order; and (b) cannot demonstrate on the facts that a judgment debtor can but has neglected or intentionally opted to not pay the judgment debt or order.

[19] Such an application stands to be dismissed (a) on its merits, i.e., for the judgment creditor's failure to discharge its onus and the burden of proof on the judgment debtor's ability and wilful refusal to pay the judgment debt or order; and (b) because the inadequately pleaded case may, depending on the facts, constitute an abuse of process.

[20] The CPR 52 judgment summons procedure should not be used primarily for preliminary enquiries into judgment debtors' ability to satisfy judgment debts, which process is governed by CPR 44.

[21] In view of Mr William's submissions on, and concession regarding, the judgment debtor's primary objective, the fact that the judgment creditor used the wrong procedure, and (as I show below) has not made any case that would remotely justify proceedings for the committal of Mr Walker, I have little option save to dismiss the application for an adjournment. No valid purpose is served by granting an adjournment of a case incorrectly initiated under CPR 52 and in relation to which no application has been made for the case to be deemed as brought under CPR 44.

[22] For completeness, I should add that a judgment summons serves several key purposes, i.e., the summons:

(a) notifies the judgment creditor that legal action for committal has been initiated;

(b) provides (and it must provide) on its face a valid basis for the application for committal of the defendant;

(c) establishes the court's jurisdiction over the defendant judgment debtor, including by giving the judgment debtor proper notice as set out in CPR 52.3(1) and an opportunity to respond; and

(d) in setting out a fixed hearing date, communicates to the judgment debtor, the timeframe within which they are required to respond to the committal application.

[23] It is certainly the case that service of a stale and legally inoperative judgment summons will give a judgment debtor notice that the judgment creditor approached the court and secured the issuance of a judgment summons. But a stale judgment summons cannot be used to and does not establish jurisdiction over a judgment creditor. In addition, a stale summons does not pass the test of a valid legal notice. In this regard, the date stipulated in a judgment summons on which the judgment debtor is required to attend court must be prospective, i.e., it must be a clear and definitive date in the future.

[24] This statutory framework, which is set out in the Debtors Act, Part 52 of the CPR and Part 53 of the CPR will be undermined by adjourning proceedings to permit service of a stale judgment summons.

(c) Improper disapplication of CPR 52.3(1) and (2)

[25] Mr William's application also raised the question on the court's power to disapply CPR 52.3(1) and (2). Although I asked learned counsel to address me on this issue, his submissions concentrated on the

challenges encountered by judgment creditors in enforcing judgment orders and his previous success in getting adjournments in similar situations.

[26] CPR 52.3(1) and (2), state:

> "(1) The judgment creditor must serve the judgment debtor with the judgment summons in accordance with Part 5 not less than 7 days before the date fixed for the hearing of the application to commit.
>
> (2) The judgment creditor must file an affidavit of service not less than 3 days before the hearing." [Emphasis added]

[27] In my view, granting an application for an adjournment of proceedings to enable a judgment creditor to serve stale judgment summons on a judgment debtor will result in the improper disapplication of the peremptory rules set out in CPR 52.3(1) and (2).

[28] In practical terms, an adjournment of the hearing will result in the court issuing a notice of the hearing through the electronic case management system. The notice of hearing will not be served or brought to the attention of the judgment debtor because they will have no notice of the on-going legal proceedings and will have no reason to log on to the electronic case management system. And, even if the notice was eventually served on the judgment debtor, a notice of hearing is a very different legal document and process to a judgment summons. Unlike a judgment summons, a notice of hearing does not compel an individual to attend court, nor does it establish the court's jurisdiction over the judgment debtor *for committal proceedings*. In my view, it would be improper for the court to use that contraption and/or process (i.e., the hearing date notice) to aid a judgment creditor that seeks to initiate an enquiry into a judgment debtor's ability to make good on a judgment debt and has used the CPR 52 judgment summons process and not the CPR 44 oral examination process.

[29] It would also be improper, and I was not pointed to any authority that permits the court, to authorise the use of a notice of hearing in place of, and to excuse non-compliance with, the provisions of the Civil Procedure Rules requiring a judgment creditor to serve a valid judgment summons on a judgment debtor not less than seven days before the date fixed for the hearing (CPR 52.3(1) and to file an affidavit of service (CPR 52.3(2).

[30] Relatedly, the unwitting or intentional disapplication of CPR52.3(1) and (2) would undermine the due process safeguards contained therein for no purpose save to enable a judgment creditor to serve a stale judgment summons and to use that process to undertake an oral examination of a judgment debtor.

[31] Mr Williams did not dispute that if the judgment creditor was to serve the stale judgment summons on the judgment debtor at some point in the future bearing (as it does) an expired date, the judgment creditor would not be able to comply with the peremptory rules set out in CPR 52.3(1) and (2). CPR 52.2(2) requires the hearing date to be stated in the judgment summons. The date fixed in the judgment summons is the one that is and must be used to determine the judgment creditor's compliance with the dates set out in CPR52.3(1) and (2).

[32] In addition, Mr Williams did not make any submissions on how the court should rule on any objections arising from non-compliance with CPR 52.3(1) and (2) when the judgment debtor is given notice of the stale judgment summons.

[33] It is worth noting that in many cases that come before the court, judgment debtors are unrepresented. This reality explains my reluctance to accede to a request for an adjournment whose effect undermines the due process requirements set out in CPR 52.3(1) for the primary purpose of enabling service of a stale judgment summons and ultimately to undertake a Part 44 oral examination.

[34] Certainly, justice and fairness require parties to litigation and the court to not be slaves to procedure. But the procedural requirements set out in CPR 52.3(1) and (2) play a critically important role in safeguarding litigants' due process rights. They also enable the court to proceed only if satisfied that actual and prospective notice of ensuing committal proceedings was given to a judgment debtor and that they were given an opportunity to secure legal advice and/or take action to protect their rights and/or demonstrate their inability to repay and/or to repay the judgment order or judgment debt due. In addition, the timeline set out in CPR 52.3(2) gives presiding judges an opportunity to properly assess the merits of the matter and to make appropriate and just decisions after a careful consideration of all relevant facts. These remarks must not be considered as giving judgment debtors a free pass. Far from it, a judgment debtor that negligently or wilfully fails to satisfy a judgment debt or order when they can may be imprisoned for contempt. Imprisonment does not eliminate the debt burden or the requirement to pay interest.

[35] I am not persuaded that on the facts of this matter, it is appropriate to (unwittingly or otherwise) disapply the peremptory statutory provisions of the civil procedure rules to accommodate a request for an adjournment to enable service of a clearly stale judgment summons. In fairness to Mr Williams, he did not argue that I have power and/or discretion to disapply CPR 52.3(1) and (2) and neither did he expressly request the court to disapply the same. This issue was not fully ventilated before me, and I make no definitive ruling on the High Court's jurisdiction or discretion in this regard.

[36] On the peculiar facts of this matter, an adjournment would, in my view, serve no useful or legally valid purpose. Additionally, it would give rise to procedural difficulties regarding compliance with CPR 52.3(1) potentially giving rise to a multiplicity of unnecessary litigation over technical objections relating to compliance with the CPR 52.3(1) and (2).

[37] Further, strict compliance with the provisions of Part 52 of the Civil Procedure Rules is required in part because the judgment debt or order satisfaction procedures outlined therein may result in the imprisonment of a judgment debtor – a process that engages a judgment debtor's due process and fair trial rights.

[38] It is certainly the case that a judgment creditor must prove to the criminal standard that a judgment debtor has the means to pay the judgment debt or order but has refused or neglected to do so. In the circumstances, given the fact that judgment summons proceedings are to all intents and purposes criminal in nature, strict compliance with the relevant statutory framework is mandatory (see ***Acosta and Another v Carusso and Another***, Claim No. CV 205 of 2015), at para. 4). This is more so because the days when debtors were imprisoned for their inability to pay (rather than their wilful neglect or refusal to pay judgment debts or orders) are long-gone. The Debtors Act has placed this reality on a statutory footing (see section 2 thereof). For a persuasive restatement of the law in this regard and how it has evolved in England and Wales in response to the Human Rights Act and the fact that judgment summons procedures are criminal in nature, see the case of ***Prest v Prest***, [2015] EWCA Civ 714 at 53-56. The principles outlined in that case constitute persuasive jurisprudence, which applies with equal if not more force in this jurisdiction governed as it is by a human rights framework set out in its grundnorm, i.e., its Constitution as opposed to an Act of Parliament.

(d) Judgment creditors are not without remedy

[39] Mr Williams pointed out the challenges that judgment creditors face in their efforts to recover judgment debts, including of judgment debtors who deliberately evade service of judgment summons or falsely plead impecuniosity. I agree with the issues that learned counsel raised. However, judgment creditors that are not sure about the judgment debtor's ability to satisfy a judgment debt or order or that have failed to locate a judgment debtor and wish to be given more time to serve relevant legal process are not without remedy.

[40] First, judgment creditors must and do have recourse to Parts 45 to 51 of the Civil Procedure Rules. It is not unusual for a judgment debtor to not have cash but have other assets against which a writ of execution may be levied. Receivership, bankruptcy or insolvency proceedings are alternative judgment debt recovery options. Debt restructuring initiatives particularly with judgment debtors with rights to periodic income or fixed assets are not unusual mechanisms.

[41] Second, invoking the court's inherent jurisdiction, judgment creditors can apply pursuant to Part 11 of the CPR and request the amendment of the judgment summons issued to them and the insertion therein of a prospective hearing date. Such an application, if granted, will extend the life and validity of the judgment summons and enable a judgment creditor to comply with the peremptory requirements set out in CPR 52.3(1) and (2). But any such application must be based on a bona fide and reasonable belief that the judgment debtor can but is avoiding or refusing to pay the judgment debt or order. Judgment summons issued for the sole purpose of undertaking an assessment of the judgment debtor's ability to pay will be dismissed on procedural grounds.

[42] Third, a judgment creditor can issue a new judgment summons, as has clearly happened on several occasions in this matter. That said, and with the greatest of respect, I am not confident about the merits of the judgment summons previously issued in this case, which it appears were issued for the purpose of making enquiries into Mr Walker's ability to satisfy the judgment debt.

[43] As noted by Farnese J in ***Acosta and Another v Carusso and Another***, Claim No. CV 205 of 2015, at para. 7), there appears to be a practice where judgment creditors use the threat posed to judgment debtors' personal liberty by judgment summons proceedings to get the latter to agree to settlement of the judgment debt by instalments in situations where they may not in fact be able to satisfy the relevant judgment debt. If such a practice does indeed exist (and I make no ruling in this regard) this raises

serious questions about the propriety and legality of such a practice. Certainly, use of the judgment summons legal process to vex (nay terrorise) judgment debtors to agree to pay debts they cannot afford in fear of imprisonment runs counter to the spirit of the Debtors Act. The threat or reality of imprisonment should be reserved for those judgment debtors who can in fact settle judgment debts or orders but neglect or opt to not do so. Young J correctly noted ***in Esso Standard Oil S.A Limited v Beez Imports Limited***, at para. 3 that:

> "It is clear from the [Debtors Act] that no one is to be imprisoned for the non-payment of a debt unless they fall within [the] legislated exceptions [listed in section 2 of the Debtors Act"

[44] Fourth, a judgment creditor may, depending on the facts, invoke the provisions of CPR 52.4(a), which provides that at the hearing of a judgment summons application, a court may:

> "(a) if satisfied that all reasonable efforts have been made to serve the judgment debtor and –
>
> (i) the summons has come to the knowledge of the judgment debtor;
>
> (ii) that the judgment debtor is wilfully evading service,
>
> proceed in the absence of the judgment debtor as if he had been personally served.

[45] I restate the options to underscore the fact that judgment summons should be used only in appropriate cases and after careful consideration of all available options. The facts of this case do not indicate that the judgment creditor tried to use any of the available remedies. Neither is there an explanation of why, on the facts, committal proceedings are an appropriate mechanism.

(e) Inadequate pleadings

[46] In dismissing the judgment creditor's application for an adjournment, I also considered the fact that the information contained in the judgment summons:

(a) is not supported by any affidavit and/or other objectively verifiable information or documentation; and

(b) (b) does not establish a sufficient basis for any enquiry into the judgment debtor's ability to pay or for any prima facie conclusion that he is able but neglects or refuses to pay the judgment debt or order.

[47] In the material part, which I restate for ease of reference, the judgment summons states:

> "On 19th September, 2019 the Claimant obtained a judgment or order against you.
>
> As you have failed to pay as ordered, the Claimant has requested this judgment summons be issued against you.
>
> You are therefore summoned to appear in this Court before Justice [] Hondora on Wed 20th March 2024 at 9:30AM [] to be examined on oath as to the means you have had since the date of this judgment or order to comply with the terms or order **and also to give good reasons why you should not be committed to prison for failing to comply**.
>
> | | |
> |---|---|
> | Amount for which the judgment summons is to issue…… | $17, 263.48 |
> | Court fees on summons…….. | $45.00 |
> | Legal Practitioner's costs on summons…… | $500.00 |
> | Together with interest at the rate of 6% from 30 March 2022 to 31st January, 2024…….. | $1,909.86 |
> | Total | $19, 718.34 |
> | Less payments made to date | NIL |
> | Amount now due | $19,718.34" |
>
> [Emphasis added]

[48] The above-quoted statement is the sum total of the averments made by and/or on behalf of the judgment creditor. The judgment creditor did not attach any affidavit or witness statement explaining the amounts claimed nor express any view or demonstrate as required by section 4 of the Debtors Act that:

(a) the judgment debtor has or has had, since the date of the order or judgment, the means to pay the sum due; and

(b) the judgment debtor has refused or neglected, or refuses or neglects, to pay the sum due.

[49] These essential averments must be proven by the judgment creditor to the criminal standard. In addition, the judgment creditor bears the onus because it is they who wish to have the judgment debtor imprisoned (see (i) ***Acosta and Another v Carusso and Another***, Claim No. CV 205 of 2015, at para. 5; (ii) Tower Hill ***Merchants Ltd. V Central Marketing Corporation***, Claim No. ANUHCV2014/0281, at para. 18); and (iii) ***Prest v Prest***, [2015] EWCA Civ 714 at para. 56).

[50] In my view, the reason for the criminal standard of proof is because a judgment debtor's negligent or wilful failure to pay the judgment debt or order constitutes contempt of court. And contempt of court is punishable in this regard with imprisonment subject to the contempt being proven by the judgment creditor to the criminal standard. In this matter, no attempt was made to make any averments that would establish the judgment debtor's culpability even to the lower civil standard of proof.

[51] To the extent that in many cases before the court there will be a dispute of fact as between the parties' pleas on the judgment debtor's ability to pay and their *mens rea* regarding payment of the judgment debt or order, the judgment creditor's averments of fact must also be on oath, i.e., submitted as part of its affidavit evidence.

[52] To initiate legal proceedings, parties should, as did Scotiabank in these proceedings, use the prescribed court forms. But prescribed forms should be modified as appropriate to ensure that all relevant and essential averments are made out. In addition, irrelevant or inapplicable prescribed statements contained in the prescribed form and especially those stated in the alternative must be deleted and/or amended as appropriate and relevant. Courts may overlook apparently contradictory statements in pleadings filed by self-actors in cases where their intentions are clear and can be gleaned from the record. However, more is expected from legal counsel representing parties to litigation. This mitigates against matters being riddled with technical objections to pleadings that do not establish a valid cause of action, do not contain essential averments or contain contradictory assertions of fact or law.

[53] On the facts as outlined in the judgment summons, I am surprised that the judgment creditor was unable to state in clear and simple terms whether on 19 September 2019, it obtained a judgment or an order or both and the terms of the ruling.

[54] Based on the little information there is on the court file, the statement that the judgment creditor obtained a judgment or an order is likely inaccurate and/or misleading because the judgment creditor obtained a judgment against the judgment debtor in 2015. That 2015 judgment was not attached to the judgment summons nor is the 19 September 2019 order or judgment to which the judgment creditor refers.

[55] Based on the court record, which regrettably contains sparse information, between 2015 and 2019, the judgment creditor issued several judgment summonses against the judgment debtor. It is apparent that on those occasions, the judgment debtor agreed to settle the debt in instalments. It is not clear if the judgment debtor made any payments towards settling the 2015 judgment debt or order and if so, how much he paid. Those agreements were not attached to the judgment summons and no explanation was tendered as to why those agreements were not, as appears to be the case, honoured.

[56] The reason for the judgment debtor's failure to honour those agreements in full or in part may go towards the question of intention and/or ability to pay. It was not argued that there is any presumption at law or that the facts of this case give rise to the presumption that the judgment debtor's failure to honour in part or full those agreements indicated an unwillingness to pay despite the judgment debtor having the capacity to do so. A judgment debtor is not sent to prison for a factual inability to pay. They are sent to prison for not paying the judgment debt or order when they can, in fact, settle the same but neglect or intentionally decide not to.

[57] It is also not clear why the judgment summons is claiming interest from 30 March 2022 when the judgment debt has clearly been owing since 2015. Was the interest that was awarded in the 2015 judgment capitalised? If so, when and under what circumstances and/or authority? Further, it is unclear whether the $17, 263.48 that is claimed represents capital, interest and costs and if so, in what proportion.

[58] Certainly, the rules do not appear to require judgment creditors to support their judgment debt summons with affidavits or witness statements. However, a judgment creditor's application for committal must establish a prima facie case disclosing that the amount claimed is due and owing both as a matter of fact and law. Per the best evidence rule, this is best demonstrated through an affidavit or a witness statement and relevant supporting evidence.

[59] It would certainly not be proper for a court to make a committal order based on a judgment creditor's untested statements not made under oath or those that can be established through objectively verifiable evidence such as the judgment order. In view of this, the provisions of CPR 52 must be read to require judgment creditors to support their committal applications at the very least with affidavit evidence and relevant evidence.

[60] The use of affidavit evidence by a judgment creditor seeking the committal of a judgment debtor reduces the time and legal costs associated with either dismissal of the committal application or adjournments to allow a judgment creditor to support their application for the committal of the judgment debtor.

[61] Additionally, in situations where committal applications are not adequately supported judgment creditors and their legal counsel must be alive to the risk of not being able to recover costs associated with any adjournment permitting them to provide affidavit evidence and the risk of being asked to pay the costs incurred by a judgment debtor. In appropriate cases, wasted costs may be awarded pursuant to CPR 63(8).

[62] In addition, a judgment creditor should provide relevant evidence such as a detailed statement of account indicating which of the aggregate amount claimed represents the judgment debt, interest and costs. Information must also be provided on any payments made by or on behalf of the judgment debtor since the judgment order was made by the court. Certainly, a judgment creditor must produce a true and accurate account of the money claimed as due and owing from the judgment debtor and in relation to which they seek enforcement through the option of imprisonment for contempt.

[63] Relatedly, as noted above, it is also for the judgment creditor to affirm that they are of the reasonable and bona fide belief that the judgment debtor can afford to pay the judgment debt but is neglecting or wilfully refusing to do so (***Acosta and Another v Carusso and Another***, Claim No. CV 205 of 2015, at para. 6). A basis for such an affirmation must be demonstrated, including through the examination under oath of a judgment debtor or on the provision of evidence demonstrating contempt of the relevant court order.

[64] The information contained in the judgment summons in this matter is insufficient to warrant any undertaking by this court of committal proceedings for failure to discharge a judgment debt or order. In the circumstances, it would be inappropriate to adjourn the proceedings to allow service of the defective judgment summons on the judgment debtor more so because all what the judgment creditor wants is an examination of Mr Walker's ability to pay and thereafter decide how best to proceed in the circumstances.

[65] For completeness, assuming that the judgment debtor had been properly served with the judgment summons and had attended court, I would as a preliminary point and prior to taking any further action on the matter, have directed the judgment creditor to:

(a) provide an affidavit and a properly detailed statement of account on the debt said to be due and owing;

(b) address in its application, the question of the judgment debtor's ability to pay the judgment debt and the basis for any plea that the judgment debtor can but has neglected or wilfully decided against paying the judgment debt.

[66] As noted in the case of ***Prest v Prest*** (para. 55), a judgment creditor bears the onus of demonstrating and satisfying the court that it is entitled as a matter of fact and law to the amount claimed in the judgment summons. This does not mean that the court will engage in a re-trial of the issues that resulted in the judgement order: it most certainly will not. However, considering that the judgment debtor bears the onus of proof and considering the overriding objective on resolving matters justly, a judgment creditor must provide sufficient information and evidence in support of their application for committal of the judgment debtor.

[67] Judgment creditors should also be aware that the judgment debtor cannot be compelled to give evidence in the contempt of court criminal committal proceedings and that the onus of proving relevant facts lies on them and to the higher criminal standard. To avoid judgment summons being dismissed or struck off, judgment creditors must decide whether their application is a CPR 44 assessment of the judgment debtor's ability to pay the judgment debt or in truth an CPR 52 application for committal. The judgment summons process should not be used, and the court will not accede to its use, for purposes only or predominantly of assessing a judgment debtor's ability to pay the judgment debt or order or for pressuring judgment debtors to propose and agree to debt settlement terms in fear of imprisonment.

III. *Summary*

[68] It follows that I am unable to accede to the judgment creditor's request for an adjournment of the proceedings for the purpose of serving a stale and inadequately pleaded and defective judgment summons. A judgment summons with a hearing date that has expired has no validity beyond the date stipulated on its face. An expired judgment summons cannot at law be used together with a Notice of

Hearing for the exercise of jurisdiction over a judgment debtor and to compel them to attend court. Relatedly, a court will not – as a rule – impose any sanctions on, nor necessarily draw adverse inferences against, a judgment debtor who is served with an expired judgment summons. While such service may notify the judgment debtor that the judgment creditor is seeking to recover their judgment debt, for purposes of the exercise of jurisdiction and consideration of imposing a fixed term of imprisonment for contempt of court, it is imperative that Part 52 of the CPR be strictly complied with.

[69] Consequently, I dismiss the judgment creditor's specific application for an adjournment. In addition, I declare that the judgment summons issued on 13 February 2024 with a hearing date of 20 March 2024 is not valid beyond that date, i.e., 20 March 2024. Since no application was made to amend the fixed hearing date stipulated in that judgment summons and in view of the deficiencies I have highlighted above, I have decided to strike off the matter from the roll. This is, of course, without prejudice to the judgment creditor's right to approach the court with an application for committal that is properly supported on the basis that the judgment debtor can, but neglects to or is wilfully refusing to satisfy the judgment debt or the court's order.

[70] **In the circumstances, I make the following orders, i.e.:**

(1) The judgment creditor's application for an adjournment is dismissed.

(2) The judgment creditor's 13 February 2024 judgment summons, i.e., the application for committal of the judgment debtor, is struck off from the roll.

(3) I make no order as to costs.

Dr Tawanda Hondora
High Court Judge