IN THE HIGH COURT OF BELIZE

CLAIM No. CiV 614 of 2014

BETWEEN:

SCOTIABANK (BELIZE) LTD

Claimant/Judgment creditor

AND

ROSA ALAMINA

Defendant/Judgment debtor

Appearances:

Mark E Williams for the Claimant/Judgment Creditor
Rosa Alamina – litigant-in-person

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20 September 2024

1 October 2024

JUDGMENT

Law and Procedure – Judgment summons - Debtors Act, Cap 168 and CPR 52 – Use of judgment summons to enquire into a judgment debtor's means and ability to pay a judgment debt – Whether abuse of process – Form 21 must be supported by an affidavit and relevant evidence – Need for plea and evidence that a judgment debtor is able but refusing or neglecting to pay the judgment debt – Burden of proof on a judgment creditor – Costs – Litigant in person

[1] **HONDORA, J.:** This matter concerns a judgment summons issued by Scotiabank (Belize) Limited (Scotiabank) against Rosa Alamina (Ms Alamina) for failure to repay a judgment debt. Scotiabank is represented by Mr Mark E Williams and Ms Alamina is a litigant in person.

I. Context

[2] On 14 November 2014, Scotiabank secured a default judgment against Ms Alamina for the sum of $40,372.02 for failure to file an acknowledgement of service. Thereafter, on four separate occasions, Scotiabank instituted judgment summons proceedings against Ms Alamina, i.e., on 4 December 2014, 11 February 2015, 8 February 2016 and 27 March 2018. On each occasion, Ms Alamina agreed to settle the judgment debt by instalments and orders were issued to that effect with the agreement of the parties. On 24 May 2024, Scotiabank issued the fifth and most recent judgment summons against Ms Alamina, which is the subject of my decision. That judgment summons was given a hearing date of 18 September 2024. Owing to a congested list, the hearing was rescheduled to 20 September 2024.

[3] When the matter was called, Mr Williams informed the court that Scotiabank was not seeking any order committing Ms Alamina for non-payment of the judgment debt. Learned counsel stated that Scotiabank sought only to examine Ms Alamina as to her means and ability to pay the judgment debt. After hearing Mr Williams, I dismissed Scotiabank's judgment summons application and the request to examine Ms Alamina on the grounds of abuse of process. I undertook to provide reasons.

II. The law

[4] The law and procedure on judgment summons, i.e., *applications to commit a judgment debtor for failing to pay all or part of [a] judgment debt*" is set out primarily in the Debtors Act, Cap 168 and Part 52 of the Civil Procedure Rules (CPR).

[5] Section 2 of the **Debtors' Act** provides:

> "(1) No person shall be arrested or imprisoned for making default in payment of a sum of money, except in the following cases
>
> (a) default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract;
>
> (b) default in payment of any sum recoverable before a court within the meaning of the Inferior Courts Act, Cap. 94;
>
> (c) default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of

equity any sum in his possession or under his control;

(d) default by attorney of the Supreme Court, in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court;

(e) default in payment of sums in respect of the payment of which orders are in this Act authorised to be made."

[6] Although not expressly stated in Scotiabank's judgment summons, its application is based on section 2(1)(e) of the Debtors Act as read with section 4(1)(b) of the same. Section 4(1)(b) of the Debtors Act provide that this court's jurisdiction to commit a judgment debtor shall be exercised only:

> "…where it is proved to the satisfaction of the court that the person making default either 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, or refuses or neglects, to pay it." [Emphasis added]

[7] Tying back to sections 2(1)(e) and 4(1)(b) of the Debtors Act, Civil Procedure Rule (CPR) 45.2(e), provides:

> "A judgment or order for payment of a sum of money [ ] may be enforced by – (e) (subject to the restrictions of the Debtors Act) a judgment summons under Part 52." [Emphasis added]

[8] Relatedly, as noted above, CPR 52.1 affirms that that part of the rules "*deals with applications to commit a judgment debtor for non-payment of a debt where this is not prohibited by any relevant enactment*." The primary enactment in this regard is the Debtors Act, which outlawed the imprisonment of debtors save in the instances spelt out in the enactment (see section 2 of the Debtors Act).

[9] CPR 52.2(1) sets out *some but not all* of the essential requirements for a judgment summons application. It provides:

> "An application to commit a judgment debtor for failing to pay all or part of the judgment debt must be made by way of judgment summons in Form 21 and must state –
>
> (a) the date and details of the judgment or order requiring payment of the debt;
>
> (b) what payment has been made by the judgment debtor; and
>
> (c) the amount of interest claimed to the date of the application and the daily rate thereafter." [Emphasis added]

[10] I use the phrase "some but not all" advisedly. Missing from CPR 52.2(1) is the statutory requirement

set out in section 4(1)(b) of the Debtors Act that a judgment summons application must demonstrate, i.e., prove that the judgment debtor is able but has neglected or refused to pay the judgment debt. I shall return to this issue below.

III. Issues arising

[11] When the matter was called, Mr Williams' first submission was that Scotiabank was not seeking the committal of the Ms Alamina. Learned counsel informed the court that Scotiabank was seeking only to make enquiries on how much Ms Alamina could pay towards settling the outstanding judgment debt. Learned counsel also indicated that prior to the matter being called, he had entered into discussions with Ms Alamina and that Ms Alamina had apparently indicated her willingness to discharge the judgment debt through periodic instalments.

[12] Learned counsel's submission and the contents of Scotiabank's judgment summons application raised the following issues:

(a) whether it was appropriate for Scotiabank to use the judgment summons procedure to undertake enquiries into Ms Alamina's means and ability to pay the judgment debt;

(b) whether Scotiabank continued to be and was a legal entity, i.e., a body corporate, capable of suing and being used;

(c) whether Scotiabank's judgment summons satisfied the essential requirements set out in the Debtors Act and CPR 52; and

(d) whether judgment summons applications should, as a general rule, be supported by affidavit evidence.

(a) Use of judgment summons to undertake enquiries into a judgment debtor's means and ability to pay judgment debt

[13] I requested learned counsel to address the court on why, if Scotiabank was not seeking Ms Alamina's committal, it had not utilised the provisions of Part 44 of the CPR, i.e., for: (a) the oral examination under oath or affirmation of Ms Alamina to obtain information that would assist in the enforcement of the judgment debt (CPR44.2 to CPR 44.4); and/or (b) the issuance of a "financial position notice" (CPR 44.7).

[14] In response, learned counsel referred the court to CPR 52.4(b), which provides that: "*At the hearing*

of the judgment summons, the court may – (a)…(b) receive evidence as to the means of the debtor in any manner that it thinks fit". In essence, learned counsel's submission was that Scotiabank could elect to use the judgment summons procedure for the specific purpose of undertaking an assessment of the means and ability of Ms Alamina to pay the judgment debt. He argued that this was permitted by CPR 52.4(b). I disagree. I hold that Scotiabank is not entitled to use CPR 52.4(b) for the purpose of undertaking an oral examination of Ms Alamina after withdrawing its application for her committal and that Scotiabank's application is an abuse of the judgment summons process and procedure.

[15] A judgment creditor that intends to obtain information "to assist in enforcing a judgment" (CPR 44.1) may apply for the issuance by the court office of (a) an order for oral examination (CPR 44.3 and (4); and/or (b) a financial position notice" (CPR 44.7).

[16] An application for oral examination under CPR 44 must comply with the general rules on applications as set out in CPR 11, i.e., the application must, among other requirements (a) be made in Form 6 (CPR 11.6(1); (b) state the order sought; and (c) state the grounds on which the application is based (CPR 11.7(1)(a) and (b)). The application must also be supported by affidavit evidence (CPR 11.9). The oral examination will be undertaken in the first instance by the Registrar of the High Court, or an officer of the court authorised by the Chief Justice (CPR 44.5(1). If the judgment debtor does not attend the hearing or refuses to be sworn or to affirm or to answer any question, the Registrar may adjourn the hearing to a judge (CPR 44.5(5). These are the rules prescribed for the specific purpose of oral examinations of judgment debtors in aid of efforts to enforce a judgment debt. Save in exceptional circumstances and in the exercise of the court's inherent jurisdiction and power, a judge will only get involved in an oral examination in the event that the matter is referred to the judge by the Registrar of the High Court or an authorised officer on the grounds set out in CPR 44.5(5).

[17] A judgment creditor has no entitlement to any oral examination before a judge as to the means and ability of a judgment debtor to pay a debt outside of the rules of procedure set out in CPR 44. An oral examination is a one-sided inquisitorial procedure that focuses exclusively on the means and financial ability of a judgment debtor. The same is not true for judgment summons proceedings, which is an adversarial process in relation to which evidence is required both from the judgment

creditor and the judgment debtor pursuant to CPR 52.4(e).

[18] In judgment summons proceedings, a judgment creditor is required to give evidence on the judgment debtor's means and ability to pay a judgment debt. If they establish a prima facie case, the onus shifts to the judgment debtor, who is required to provide information justifying and providing reasons and evidence, why they should not be committed to prison for their failure to pay the judgment debt. In discharging its onus, a judgment debtor will need to produce evidence on means and inability to pay the judgment debt and demonstrate that it has neither neglected nor refused to pay the debt.

[19] In simple terms, CPR 52.4(b) restates the High Court's inherent power to "*receive evidence as to the means of the debtor in any manner that [the court] thinks fit*". Depending on the facts, the court may decide to proceed on the basis of affidavit evidence or require the parties to give oral evidence. CPR 52.4(b) is not invoked at the instance of a judgment creditor to undertake an oral examination or for that matter simply because a judgment creditor has issued a judgment summons. Relatedly, CPR 52.4(b) is not, and should not be used as if it were, an alternative or additional oral examination procedure to that set out in CPR 44.

[20] It is an abuse of process and a sheer waste of the court's time and resources for a judgment creditor to cause to be issued a judgment summons with the sole or primary objective of seeking information from a judgment debtor on their means and ability to pay a judgment debt. The use of judgment summons for the purpose of undertaking oral examinations and/or seeking agreements to settle a judgment debt through instalments is improper and clogs-up the case-list. It also adds to case backlogs. The rules are clear: oral examination proceedings should be undertaken by the Registrar and/or the court office and not by judges. Relatedly, the Registrar and officials in the court office are enabled and are well equipped to assist parties to agree to a settlement following an CPR 44 oral examination (CPR 44.6).

[21] The assumption that all what a judgment creditor needs to do is to issue a Form 21 and that on the hearing day the judgment debtor will be required to provide information on their means and ability to pay the judgment debt is misplaced.

[22] If a judgment creditor notifies the court that, although they issued a judgment summons, they are no longer seeking the committal of a judgment debtor for failure to pay a judgment debt, that submission will bring the CPR 52 judgment summons proceedings to an end and the court will not permit any oral examination of a judgment debtor pursuant to CPR 52.4(b). That is because, CPR 52.4(e) is used only in the context of ongoing, i.e., live proceedings seeking the committal of the judgment debtor.

[23] Where, as in these proceedings, the court was informed by the judgment creditor, that it no longer sought the committal of the judgment debtor and was instead seeking an oral examination of the judgment debtor, the judgment creditor was required to pursue that judgment-enforcement process using CPR 44. In addition, in such situations, the judgment creditor is required to withdraw/discontinue its judgment summons application and tender costs. In the absence of any such withdrawal/discontinuance, the judgment summons application will be struck out or dismissed with costs. In either situation, the general rule on costs (CPR 63.6(1) will apply save where grounds are shown justifying a departure from the general rule.

[24] In the circumstances, I struck out Scotiabank's judgment summons application and declined to undertake any oral examination of the judgment debtor. In short, following learned counsel's confirmation that Scotiabank was not seeking the committal of Ms Alamina, there was no relevant CPR 52 application before me requiring a decision by the court justifying the invoking of CPR 52.4(e) and the undertaking of a judge-supervised oral examination.

[25] Although my decision on this aspect of the case disposed of the matter, it is important that I address several other aspects of this judgment summons application. I do so with an eye on future judgment summons applications by Scotiabank in particular and other judgment creditors and to provide general guidance on the relevant law and practice.

(b) Whether Scotiabank continues to be a legal entity

[26] I requested legal counsel to address the court on whether Scotiabank, the alleged judgment creditor, was a legal entity. I informed learned counsel of reports that Scotiabank was no longer operational as a legal entity and that it appeared that Scotiabank's operations and assets had been transferred to one or more entities. As a general rule, it falls on legal counsel to inform the court of all material

issues relating to their case, which might militate against the court issuing an accurate and just decision. I needed learned counsel to clarify whether Scotiabank continued to be a legal person at law, including whether it remained capable of suing and being sued. This was necessitated in part by the sparse information contained in Scotiabank's judgment summons Form 21 none of which was affirmed on oath or a statement of truth and the fact that it is a matter of public record that Scotiabank is no longer operational in Belize.

[27] Learned counsel did not give a clear answer that removed concerns on Scotiabank's legal status. He did not dispute reports that Scotiabank was no longer operational as a legal entity capable of suing and being used. In apparent agreement that Scotiabank was no longer a legal entity, learned counsel intimated that the financial institution may have sold some its assets, including judgment debts to a different legal entity. However, the judgment summons application did not contain any deed of assignment or any statement on affidavit deposed by an authorised officer employed by Scotiabank or a relevant third-party referencing Scotiabank's legal status and ongoing rights and interests, if any, in the 2014 judgment debt or the rights of any third party.

[28] This raised the following concerning and unanswered question of who, if not Scotiabank, had instructed learned counsel to apply for the committal of Ms Alamina for non-payment of the judgment debt. The facts of this case are all the more puzzling since learned counsel has been representing Scotiabank in this matter since 2014. It cannot be that learned counsel is unaware of the legal status of whoever it is that continues to give him instructions to pursue judgment summons proceedings against Ms Alamina. This lack of information and clarity was concerning.

[29] That said, it is, of course, not uncommon for financial institutions to transfer their assets, including loan portfolios and judgment debts to third parties and for those third parties to sue on those claims and assets. Assuming that this is what happened regarding some or all of Scotiabank's assets, it is for that third-party entity to disclose its existence and demonstrate its entitlement at law to the judgment debt. In addition, this would necessitate a change in the name of the judgment creditor cited in the judgment summons or at least an indication that although the application is being brought in the name of Scotiabank, this is being done by a named third party entitled to recover on the judgment debt.

[30] In the absence of an affidavit and other admissible evidence demonstrating the fact of a valid transfer of rights and interests over the 2014 default judgment order, it would be remiss for this or any court to proceed on an unsupported assumption or implied averment from the bar that a purported judgment creditor continues to be a duly constituted legal person capable of suing on a judgment debt. The judgment summons process depends (i.e., it is conditional) on the existence as a matter of law of a judgment creditor that is demonstrably entitled to recover on a judgment debt through, among others, committal proceedings.

[31] Had learned counsel not withdrawn his CPR 52 application via his statement that Scotiabank was not seeking the committal of Ms Alamina, I would have dismissed the judgment summons application on the basis that Scotiabank had not adequately demonstrated that it is a legal entity capable of suing and being sued and that it was entitled to a CPR 52 judgment summons committal procedure as against Ms Alamina.

(c) Whether Scotiabank's judgment summons satisfies the requirements set out in the Debtors Act and CPR 52

[32] In its application, the judgment creditor used prescribed Form 21 as stipulated in CPR 52(2)1. The contents of that judgment summons Form 21 merit restating. It provided as follows.

> To the Defendant, Rosa Alamina of [*address inserted*] of Belize:
>
> On the 13th March, 2015, the Claimant obtained a judgment or order against you.
>
> And 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 Tawanda Hondora on September 18th 2024 at 9:00 AM 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 of the judgment or order and also to give good reasons why you should not be committed to prison for failing to comply.
>
> Amount for which judgment summons is to issue……..$47,225.93
> Court fees on summons……$45.00
> Legal Practitioner's costs on summons……$500.00
> Together with interest at the rate of 6% from 11th January, 2023
> to 22nd May 2024……$3,493.70
> TOTAL……..$3,493.70
> Less payments made to date……$4,050.00
> Amount now due……$47,214.63"

[33] This was all the information provided by Scotiabank in its judgment summons. As I explain below, some of the information provided in Form 21 was materially incorrect and misleading. In addition, Scotiabank's application was not supported by any affidavit or evidence, and it was not possible to verify and determine with any degree of certainty what if any amount was in truth owing to Scotiabank as of the date of its judgment summons application and the basis thereof. If learned counsel had not in effect withdrawn his judgment summons application, I would have struck out the judgment summons on the basis that Scotiabank had not provided an adequate prima facie basis to proceed with committal proceedings and to place the stated judgment debtor on her defence.

(i) Judgment or order

[34] I enquired from learned counsel whether Scotiabank had obtained a judgment or order sounding in money. Learned counsel indicated that it was a default judgment. I enquired why this had not been stated in clear and simple terms with relevant details restated in, and a copy of the relevant default judgment attached to the application.

[35] As appears above, in the judgment summons, Scotiabank stated that "*On the 13th March 2015, the Claimant obtained a judgment or order against you*", i.e., against Ms Alamina. I pointed out to learned counsel that on the court file there was no record of any judgment or order having been issued against Ms Alamina on 13 March 2015. After searching his file, learned counsel stated that a default judgment had been issued against Ms Alamina on 14 November 2014.

[36] Learned counsel informed the court that he was not the one that completed the judgment summons application. I accepted learned counsel's statement. However, that was not an adequate answer to the filing and use of a judgment summons that contained inaccurate and misleading information.

[37] While at first glance the failure to identify the relevant court judgment or order can be described as an easily curable error, it is not for the court to amend it without a relevant oral application being made by the judgment creditor. The judgment creditor bears the onus of presenting correct and accurate information on all material issues of law and facts relevant to an application to commit an alleged judgment debtor and to take necessary steps to correct misstatements or similar type errors. The role of the court in judgment summons proceedings is that of an adjudicator. While the court is entitled in the interests of justice to bring to the parties' attention apparent defects and to order the

rectification of pleadings, a valid basis must be provided or be readily apparent. However, that approach may not be appropriate where a party's pleadings are defective in a number of material respects and the court will be anxious to be objective and impartial in how it handles and decides a case not least in cases, which may result in a litigant in person losing their liberty for an alleged failure to pay a judgment debt but based on incorrect information.

(ii) Interest

[38] CPR 52.2(1)(c) provides that a judgment summons application "*must state…the amount of interest claimed to the date of the application and the daily rate thereafter*."

[39] In its claim form dated 23 October 2014, Scotiabank did not claim interest on the amount claimed of £37,078.04. In its statement of claim, it claimed interest at 25.5%. In the 14 November 2024 request for default judgment, Scotiabank claimed interest at 25.5%. In the 14 November 2014 default judgment, Ms Alamina was ordered to pay Scotiabank $40,372.92, which it would appear included interest at 25.5%.

[40] In its various judgment summons applications, Scotiabank claimed interest but did not indicate the rate thereof. However, in its latest judgment summons application, Scotiabank claimed interest at 6% calculated from 11 January 2023 to 22nd May 2024. I asked learned counsel to address the court on, and provide an intelligible account of, the rate and amounts of interest claimed and said to due and owing to Scotiabank by Ms Alamina from the date of judgment and to clarify why interest was being claimed from 11 January 2023 to 22 May 2024. I also sought clarification on whether Scotiabank applied the $4,050.00 said to have been paid by Ms Alamina to the capital amount or to interest and basis thereof.

[41] In her statement to the court, Ms Alamina stated that she paid some money to Mr Williams but complained that she had not been given receipts for those payments or a schedule of the amount due and owing and how her instalments had been applied to the said amount. I found that statement concerning, not least because learned counsel made no attempt to address it. It was also unclear and not explained why Ms Alamina was paying learned counsel and not Scotiabank. Law firms that collect debts for and on behalf of their clients must be alive to the risk that they may be called to give evidence, i.e., they become party to ongoing proceedings. They should also consider the risk

to their ability to properly represent their clients and to their role as officers of the court if they become parties to ongoing civil proceedings.

[42] The information contained in the judgment summons did not speak for itself on "*the amount of interest claimed to the date of the application and the daily rate thereafter.*" In the absence of any affidavit filed by Scotiabank in support of its judgment summons application explaining "*the amount of interest claimed to the date of the application and the daily rate thereafter*" and the interest calculations, learned counsel attempted to take it upon himself to fill in the gaps. That, of course, was improper. Learned counsel's submissions of facts were not admissible and he was not in any position to affirm that any of the submissions made from the bar on the interest said to be due and payable were true and accurate. Relatedly, learned counsel did not seek an adjournment to address these issues through the filing of relevant affidavit evidence.

[43] In the absence of an application for the adjournment of the hearing, I would have dismissed the judgment summons application on the basis that Scotiabank had not satisfied the requirements of CPR 52.2(1)(c).

(iii) No averment that the judgment debtor is able, but neglecting or refusing, to pay the judgment debt

[44] In its judgment summons, Scotiabank did not refer to or mention the Debtors Act. In addition, since it did not support its application with any affidavit opting instead to rely solely on Form 21, Scotiabank did not plead or provide any information demonstrating that Ms Alamina *"has the means to [but] has refused or neglected*" to satisfy the judgment debt.

[45] As noted above, the judgment summons procedure is an "*application to commit a judgment debtor for non-payment of a debt*" (CPR 52.1). The court's exercise of jurisdiction in this regard is regulated by section 4(1)(b) of the Debtor's Act. A judgment creditor will not have demonstrated any proper basis for judgment summons proceedings nor established a prima facie case, if it does not make relevant averments and provide evidence demonstrating to the appropriate standard that the judgment debtor is in effect in contempt of a judgment or order sounding in money. In other words, to establish a prima facie case, a judgment creditor must – in its application – (a) refer to and invoke the court's jurisdiction under section 4(1)(b) of the Debtors Act; (b) aver, advancing reasonable

grounds, that the judgment debtor is able, but is refusing or neglecting, to discharge the judgment debt. To establish a prima facie case in judgment summons proceedings, a judgment creditor must file affidavit evidence, which contains relevant and necessary averments.

[46] Granted, Form 21 does not contain any pro forma statement indicating that a judgment creditor must declare that they are of the reasonable belief that the judgment debtor is able, but refuses or neglects, to pay a judgment debt. That is an omission in Form 21. However, that omission does not excuse a judgment creditor from complying with the provisions of the Debtors Act and in particular to establish a prima facie case on the need to" *commit a judgment debtor for non-payment of a debt*."

[47] Scotiabank's judgment summons stood to be dismissed because its application did not demonstrate on its face that Ms Alamina was able, but was neglecting or refusing, to pay the judgment debt. In other words, the judgment summons application did not demonstrate any valid cause of action under the Debtors Act. A judgment summons application in which there is no averment on affidavit that the judgment debtor is able, but is neglecting or refusing, to pay the judgment debt stands to be struck out or dismissed on the basis that it does not establish any basis in law for the holding and progression of judgment summons proceedings.

(d) Should judgment summons be supported by affidavit evidence

[48] This case raises an additional issue, which arose in several cases relating to judgment summons issued by Scotiabank and on which I issued a ruling recently in ***Scotiabank v Walker*** Claim No. Civ 31 of 2023. That issue pertains to the question whether a judgment creditor is required to support its judgment summons application with an affidavit and other relevant evidence. As appears above, this is a recurring theme in this judgment.

[49] In ***Scotiabank v Walker*** (see para. 38), I stated:

> "Certainly, the rules do not appear to require judgment creditors to support their judgment [] summons with affidavits or witness statements. However, a judgment creditor must satisfy the court that the amount claimed is due both as a matter of fact and law. This is best demonstrated through an affidavit or a witness statement."

[50] Learned counsel, despite acknowledging that no appeal was lodged against my ruling in ***Scotiabank v Walker***, expressed disquiet at my decision. Learned counsel argued that the rules

did not require any affidavit evidence and that in his experience at the bar he had not been required to support such applications with affidavit evidence. It may be that to date it has been the practice that all what a judgment creditor needs to do is to issue a judgment summons in Form 21 and not support that application with any affidavit evidence. That practice, if such be the case, is in my view incorrect and will likely result in a judgment summons application being struck out or dismissed.

[51] There is no question that a judgment summons application is an application to the court. This much is clear from CPR 52.1, which provides that:

> "This Part [of the rules] deals with applications to commit a judgment debtor for non-payment of a debt where this is not prohibited by any relevant enactment."

[52] Part 11 of the CPR sets out the general rules on applications for court orders. A judgment summons application is an application for an order for the committal of a judgment debtor for non-payment of a debt. CPR 11.9 provides:

> "Evidence in support of an application must be contained in an affidavit unless –
> (a) a Rule;
> (b) a practice direction; or
> (c) a court order
> otherwise provides [Emphasis added]

[53] There is, of course, no rule or practice direction that stipulates that evidence in judgment summons application need not be contained in an affidavit. Consequently, the general rule on the need for evidence in a judgment summons application to be contained in an affidavit applies. In addition, the reference in CPR 52.1 to the judgment summons procedure as an application is a clear signpost that that procedure is an application and that the application must comply with the general rules, as relevant, that are set out in CPR 11. There is no rule in the CPR to which my attention was drawn that excludes the use of affidavits and related evidence in judgment summons applications.

[54] That apart, there is no gainsaying that a judgment summons application requires averments and evidence:

(a) proving the existence of a specified and valid court judgment or order (CPR 52.(1);
(b) on the capital amount alleged to be due and owing on the judgment debt from the judgment debtor calculated from the date of the judgment or order;
(c) on payments alleged to have been made, if any, by the judgment debtor towards settling the

judgment or order (CPR 52.2(1)(b);

(d) on the interest claimed by the judgment creditor from the date of the judgment or order to the date of the judgment summons' application, including the daily rate thereafter (CPR 52.2(1)(b);

(e) affirming the judgment creditor's reasonable belief that the judgment debtor has the means and is able to pay the judgment debt (section 2(1)(e) of the Debtors Act); and

(f) affirming that the judgment debtor has neglected or refused to pay the judgment debt (section 2(1)(e) of the Debtors Act).

[55] A different way of asking the question on the need for an affidavit is arrived at by asking the question: how else, if not through an affidavit and relevant evidence, is a judgment creditor able to aver and prove to the appropriate standard the requirements that are essential for the demonstration of a prima facie case in an application for the committal of a judgment debtor for failure to pay a judgment debt (on the requirements, see para. 54 above).

[56] In the ordinary course, a Form 21 that is not accompanied by an affidavit and relevant evidence will likely not state in clear and simple terms all the essential averments and evidence necessary to sustain a prima facie case for a judgment summons application and will likely be struck out on that basis.

[57] The use by practitioners only of Form 21 (which has been my experience in all the judgment summons matters that have come before me) invariably results in:

(a) unnecessarily extended hearings in which the bench spends an inordinate amount of time seeking clarifications on issues that a judgment creditor should have set out in their application;

(b) requests for adjournments to cure defective pleadings and to file additional evidence;

(c) attempts at leading evidence from the bar on facts, which may not be pleaded by and are, in general, not in the personal knowledge of legal counsel; and

(d) attempts to place judgment debtors on their defence in the absence of any plea and proof that the judgment creditor is of the reasonable belief that the judgment debtor is able but is neglecting or refusing to pay the judgment debt.

[58] The fact or allegation in Form 21 that a judgment debtor has not paid a judgment debt is not, in and

of itself, a sufficient basis for judgment summons proceedings or for the placing of a judgment debtor on its defence in an application for committal. That approach improperly and unlawfully reverses the burden of proof. An essential element of CPR 52 proceedings is that the judgment debtor is able but is neglecting or refusing to pay the judgment debt. It is a matter of proof with the judgment creditor bearing the onus (see Farnese J in ***Acosta and Another v Caruso and Another, CLAIM No. CV 405 of 2015, at para. 3).*** The onus of proving that a judgment debtor is able but has neglected or refused to pay the judgment debt is not presumed or demonstrated by the judgment creditor's issuance of Form 21. Relatedly, the fact that a Form 21 has been issued by the court office (a) does not entitle a judgment creditor to undertake an oral examination of the judgment debtor on their means and ability to pay the judgment debt; and (b) will not result in the court itself undertaking an inquisitorial determination of a judgment debtor's means and ability to pay the judgment debt.

[59] Until the principle of law that I set out in ***Scotiabank v Walker*** (see para. 50 above) and in this judgment is set aside on appeal, this court expects Scotiabank and counsel to comply with the same. Relatedly, notice is given that judgment summons that do not comply with this ruling will be struck out on the basis that the application is incomplete and has not disclosed any of the essential requirements necessary to sustain a judgment summons application or to place a judgment debtor on its defence to an application for their committal for non-payment of a debt.

[60] This court recognises the reality in this and other jurisdictions that judgment debtors and especially those appearing as litigants in person are more likely than not to attend judgment summons hearings and, in the understandable apprehension of imprisonment, agree to pay a judgment debt in instalments (see generally, the opinions expressed in the case of ***Tower Hill Merchants Ltd. v Central Marketing Corporation,*** Claim No. ANUHCCV2014/0281, at para. 13). This court stresses that the judgment summons procedure should be used in cases where a judgment creditor can demonstrate (a) a reasonable basis for concluding that a judgment debtor is able, but is neglecting or refusing, to pay a judgment debt; and (b) it seeks, in good faith, the enforcement of its judgment or order through committal proceedings. Judgment summons must not be used for any other purpose and certainly not for oral examinations (as defined in Part 44). The information gathered through a Part 44 oral examination, or a financial position statement can be used in Part 52 judgment summons proceedings as evidence. Such evidence also enables a judgment creditor to express a

reasonable and considered view on the judgment debtor's means and ability to pay the judgment debt.

IV. Costs

[61] Scotiabank has been unsuccessful in its judgment summons application. The facts of this matter do not establish any basis to depart from the general rule that the unsuccessful party is required to pay the costs of the successful party (see CPR 63.6). Relatedly, learned counsel did not make any submissions to the contrary.

[62] Ms Alamina, who is a litigant in person, is unlikely to have incurred much in terms of costs associated with appearing in this case. However, she is entitled to, and it would be unjust to deny her, the actual costs she has incurred in the preparation of and in attending the hearing. In this regard, I order that Scotiabank should affirm in any future judgment summons application involving Ms Alamina, should any be made, that it has paid the costs order issued by this court in this judgment.

[63] In making these cost orders, I have also considered Scotiabank's conceded use of the judgment summons process for what I consider to be an improper purpose of undertaking an oral examination. It has done so in acknowledgment of my ruling in ***Scotiabank v Walker*** and the principle of law I outlined in that case, which it has disregarded although it is binding on Scotiabank. I have also considered the fact that the pleadings filed by Scotiabank were inadequate and did not demonstrate any proper basis for seeking the committal of Ms Alamina. Certainly, Scotiabank was required to but did not demonstrate to the appropriate standard that Ms Alamina is able but is neglecting or refusing to pay the judgment debt.

[64] In addition, these proceedings constitute the fifth judgment summons issued by Scotiabank against Ms Alamina – a litigant in person. Although well aware of its entitlement, Scotiabank has not at any point in the past ten years utilised Part 44 of the CPR to undertake an oral examination of the judgment debtor. Rather, it has repeatedly used the judgment summons procedure to undertake oral examinations and to seek and secure, under the overhanging threat of committal, Ms Alamina's agreement to pay the outstanding debt by instalments. Scotiabank, if it continues to be a legal entity, is likely entitled (although I make no ruling in this regard) to recover on the 2014 judgment debt. However, it must do so using the appropriate enforcement rules open to it, which may include the

judgment summons procedure. However, whatever decision it takes – assuming its continued entitlement at law to enforce the default judgment – Scotiabank must comply fully with the requirements set out in CPR 52.

[65] I hold that the above facts and considerations countermand a departure from the general rule on costs.

[66] In addition, following from the above, I order that Scotiabank serve a copy of this judgment on Ms Alamina on or before 15 October 2024. In addition, Scotiabank shall file an affidavit of service for this judgment on or before 30 October 2024. Service of this judgment on the litigant in person will facilitate agreement and settlement on costs, and relatedly on how the judgment debt may be repaid. In view of Ms Alamina's complaint that she was not given receipts for the payments that she says she made to learned counsel's law firm, consideration should be given to providing her with a detailed schedule of the capital and interest due on the judgment debt, inclusive of the interest rates used since the date of the default judgment and an indication of how her payments were applied to the capital and or interest. She should also be given receipts for each of the payments she stated that she made.

V. Summary

[67] In the circumstances, I rule as follows:

(a) Scotiabank's judgment summons application is dismissed.

(b) Scotiabank shall pay Rosa Alamina's costs, which if not agreed, shall be assessed.

(c) Scotiabank shall serve this judgment and order on Rosa Alamina on or before 15 October 2024 and shall file an affidavit of service with the court office no later than 30 October 2024.

(d) Scotiabank will bear costs incurred in the filing and service of this court's order on Rosa Alamina as outlined in para. (c) above.

Dr Tawanda Hondora
High Court Judge