[2023] JMSC Civ 87

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV07867

BETWEEN	**THE BANK OF NOVA SCOTIA LIMITED**	**CLAIMANT**
AND	**GLOBAL ARCHITECTURE DRAUGHTING LIMITED**	**1ST DEFENDANT**
AND	**GREGORY DUNCAN**	**2ND DEFENDANT**

IN CHAMBERS

Kathryn Williams instructed by Livingstone Alexander Levy, Attorneys-at-Law for the Claimant.

The 2nd Defendant in person on his own behalf and on behalf of the 1st Defendant.

Heard: DECEMBER 1, 2022 AND JANUARY 11, 2023

Civil Procedure – Interlocutory Applications – Fresh Evidence, setting aside Final Charging Order - Sale of Land – Civil Procedures Rules 46.1, 46.2 (c), 48.11 (1), 48.10 (1) and Rule 55 considered.

O. SMITH, J (AG.)

[1] There are three applications currently before the Court. I will mention them in chronological order. On June 29, 2021, the 2nd Defendant filed a Notice of Application to tender into evidence Fresh Evidence in support of Application to Set Aside Judgment and Consequential Orders. Then on October 6, 2021, the Claimant filed a Notice of Application for Order for Sale of Land. On October 28, 2022, the Claimant filed an Amended Notice of Application for Order for Sale of Land. Finally, the Defendant filed an Amended Notice of Application for Declaration on December 13, 2021.

NOTICE OF APPLICATION TO TENDER INTO EVIDENCE FRESH EVIDENCE IN SUPPORT OF APPLICATION TO SET ASIDE JUDGMENT AND CONSEQUENTIAL ORDERS

[2] On June 29, 2021, Mr. Duncan filed this Application for Fresh Evidence in which he is seeking the following orders:

> "1. That the July 24th, 2020, Judgment of the Honourable Justice Natalie Hart-Hines (Ag) be set aside.
>
> 2. That the Claimant be ordered to compensate the 2nd Defendant the sum of $6,852,300.00 in reimbursements of payment for unnecessarily incurred Legal Fees and other cost.
>
> 3. That the July 24th 2020 Final Provisional Charging Order of Hon. Justice Natalie Hart-Hines (Ag) and further consequential Orders of the Court be set aside.

[3] The application is made on the grounds;

> "1. That the whole of the Claim was satisfied before judgment was entered, hence the Defendants have a real prospect of successfully defending the Claim.
>
> 2. That the Claimant's Letter dated June 28, 2021, stated that in relation to 8000411 and 800461 all sums owed by the Defendants were paid out on July 22, 2014, and those accounts have since been closed, within six years prior to the date of the judgment. Therefore, the Defendants held no liability on July 24th 2020.
>
> 3. That Mr. Anthony Boyd misled the Courts to believe that as of July 24th 2020 the sums existed on the banks books."

AMENDED NOTICE OF APPLCATION FOR SALE OF LAND

[4] The Claimant filed this application on October 6, 2021. It pertains to, ALL THAT parcel of land part formerly known as part of HELLSHIRE now known as ST. GEORGES in the parish of SAINT CATHERINE being Strata Lot numbered THREE on the Strata Plan numbered Two Thousand Four Hundred and Twenty-Six and Eight undivided 1/71 share in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1144 Folio 828, registered at Volume 1432 Folio 79 of the Register Book of Titles. The Claimant seeks an order for the land to be sold for the purpose of the enforcement of a judgment. $14,573,529.04 - principal $5,000,000.00. Interest $9,573,529.05

[5] The grounds on which the application is being made are among others, Rule 46.2 (1) (a) and Rule 55.1 (1) (b). The third ground is that the Claimant obtained Default Judgment on May 15, 2013, in the sum of $11,247,467.81 which remains unsatisfied to date.

AMENDED NOTICE OF APPLICATION FOR DECLARATIONS

[6] The Defendant filed this application on December 13, 2021. It seeks several declarations. The more relevant declarations are 1-4. They are;

> "1. That subsequent and pursuant to the Hon. Justice Hart-Hines's Order numbered (1) of the Judgment dated June 24th 2020, the Bank of Nova Scotia Jamaica Limited confirmed that loan accounts numbered 800411 and 800461 were paid out in full.
>
> 2. That subsequent and pursuant to the Hon. Justice Hart-Hine's Order numbered (1) of the Judgment dated June 24th 2020 the Bank of Nova Scotia Limited confirmed that the loan accounts numbered 8000411 and 8000461 were closed.
>
> 3. That the loan accounts numbered 8999411 and 8000461 were therefore redeemed.

4. That the Final Charging Order granted to the Claimant by the Hon. Justice Hart-Hines pursuant to Order numbered (1) of the Judgement dated June 24th, 2020, against the 2nd Defendant's property Registered at Volume 1432 Folio 79 be declared discharged…"

[7] The second defendant based his application on the ground;

"1. That the certified Statements of Accounts dated June 28, 2021, which were issued by the Bank of Nova Scotia Jamaica Limited to the Defendants after the June 24th, 2020, Judgement state that accounts no. 800411 were paid out and closed on or before July 22, 2014.

2. That the Bank of Nova Scotia Jamaica Limited in responding to Order (1) of the July 24th 2020 Judgment by the Hon. Justice Hart-Hines, issued the June 28, 2021 Statement of Accounts disclosing the information which can only be attained from the Bank of Nova Scotia Limited."

BACKGROUND

[8] This matter has a long history which goes beyond December 15, 2011, the date when the Claimant filed the Claim Form and Particulars of Claim in this case. For expediency I do not intend to recite the entire history of this case. I will give enough background so that there can be a true appreciation of the applications before the Court.

[9] The 1st Defendant was/is a limited liability company with offices at Shop 7, Congrieve Park, Bridgeport in the parish of St. Catherine. The second defendant was/is the Managing Director of the first Defendant with his address given as Lot 167 Vera Cruz Square, Hellshire Heights in the parish of St. Catherine.

[10] On January 12, 2009, and January 27, 2010, the 1st defendant signed promissory notes in relation to two loans and agreed to pay to the Claimant the sums of $5,000,000.00 and $2,900,000.00 respectively together with interest at a rate of 18.75%

per annum on demand. By written agreement dated March 23, 2010, the Claimant loaned to the 1st Defendant $7,900,000.00 with an interest rate of 3% above the base lending rate of 19.875% per annum. This loan was to develop the property, the subject of this application. On March 3, 2010, the 2nd Defendant executed a personal guarantee by which he guaranteed to pay "all debts and liabilities present or future at any time owing by the 1st Defendant to the Claimant limited to the sum of $5,000,000.00" with interest. This loan was to be repaid by June 30, 2010, from the proceeds of the sale of Units 3 & 4 on Lot 68 Woodpecker Avenue, St. Georges, Hellshire, St. Catherine, owned by the Defendants.

[11] The guarantee of Mr. Duncan was accompanied by an undertaking from his attorneys, Patrick Bailey & Co that they would forward the proceeds of the sale to BNS, Spanish Town in the amount of $7,900,000 with interest. It was further supported by legal mortgage documents on property situated at Apartment 5, Lot 68 Woodpecker Avenue, St. Georges, St. Catherine registered at Volume 1144 Folio 828.

[12] The 1st Defendant defaulted on the loan. As a result, the Claimant sent two letters of demand dated July 14, 2011. However, the sums remained unpaid.

[13] The 2nd Defendant was personally served with the pleadings and Acknowledgement of Service of Claim on April 23, 2012, at the registered offices of the 1st Defendant. However, the defendants did not file an Acknowledgement of Service and as such the Claimant obtained judgment in default on May 15, 2013, in the sum of $11,268,025.00 /$11,247,647.81 inclusive of interest and cost and interest at 18.75% per annum on $4,872,000.00 and $2,900,000.00 from ruling to payment.

[14] On June 27, 2014, the Claimant filed an application for Seizure and Sale of Goods of the goods and chattels of the 2nd Defendant. This did not bear fruit and as such on July 10, 2015, the Claimant filed a Notice of Application for Court Orders for the 2nd Defendant to be examined orally as to his means. For one reason or another, the oral examination did not take place. Mr. Duncan was ordered to pay $2,000,000.00 on or before September 30, 2016. However, on September 30, 2016, Mr. Duncan filed an

application for an extension of 60 days to pay on the grounds that he had not wasted the courts time by including the third party who undertook to pay, and that the defendant was in the process of selling the property to satisfy the judgment.

[15] On March 30, 2017, a notice for the commitment hearing was filed. A second notice was filed on January 31, 2018. However, the oral examination had still not taken place. This did not commence until January 25, 2018.

[16] In pursuance of the judgment summons, the 2nd defendant filed an affidavit of means on May 31, 2017, and another on March 22, 2018. On January 16, 2019, the court granted a Provisional Charging Order. The Provisional Charging Order was made in relation to orders 1, 2, 3 and 4 of Without Notice Application for Court Orders filed on August 16, 2018.

[17] On July 24, 2020, the court made an Order for the Provisional Charging Order, which was granted on January 16, 2019, to be made final. The Final Order Charging Order relates to the property the subject of this application. Order 1 reads:

> *"The Final Charging Order is granted in respect of the 2nd defendant, limited to the sum of $5,000,000.00 plus interest at the rate of 18.75% from July 14, 2011 until payment in full, over a parcel of land formerly known as part of Hellshire, now known as St. Georges in the parish of Saint Catherine being Strata Lot numbered Three on the Strata Plan numbered Two Thousand Four Hundred and Twenty Six and Eight undivided 1/71 share in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1144 Folio 828, now registered at Volume 1432 Folio 79 of the Register Book of Titles."*

ISSUES

The issues to be resolved are**:**

Whether an application for Fresh Evidence can be entertained at this level

Whether there are grounds on which the orders of Hart-Hines J can be varied or set aside.

Whether this is a fit and proper case for an order for sale of land.

NOTICE OF APPLICATION TO TENDER INTO EVIDENCE FRESH EVIDENCE IN SUPPORT OF APPLICATION TO SET ASIDE JUDGMENT AND CONSEQUENTIAL ORDERS

THE LAW

[18] The Civil Procedure Rules, 2002 as Amended, (CPR) makes no reference to applications to tender fresh evidence. However, in **Harold Brady v General Legal Council [2021] JMCA App 27, (Harold Brady)** the Court of Appeal examined the locus classicus on the principle of adducing fresh evidence. It found that the rule is applicable where there has been a trial or a hearing on the merits. The decision of the court should only be reversed if the applicant satisfies the court that the conditions stipulated in **Ladd v Marshall** [1954] EWCA Civ 1 have been satisfied. The Court of Appeal was of the view that the principles were applicable to civil proceedings. At paragraphs 38 to 40 McDonald Bishop JA expounded on the applicability of the principles in **Ladd v Marshall** in civil matters;

> *"This court has endorsed and applied those principles in many decisions, such as **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26 and **Russell Holdings Limited v L&W Enterprises Inc and Another** [2016] JMCA Civ 39, which the parties in these proceedings have cited. The principles extrapolated from **Ladd v Marshall** cases ('the **Ladd v Marshall** principles') establish that the court will only exercise its discretion to receive fresh evidence where:*
>
> > *1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;*
> >
> > *2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and*

> *3. although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.*

> *[39] **Ladd v Marshall**, therefore, laid down the rule that where there had been a trial or a hearing on the merits, the decision should only be reversed by reference to new evidence if it can be shown that the conditions it has stipulated are satisfied.*

> *[40] **Ladd v Marshall** remains good law in Jamaica and is usually the starting point in considering fresh evidence applications in civil proceedings, even though there is authority to suggest that the court is not bound in a straightjacket to apply these principles. The primary consideration, it is held, is that justice is done (see **Rose Hall Development Limited**). It should be noted, however, that although the CPR does not make express provision for fresh evidence applications, it is accepted that the **Ladd v Marshall** principles are not in conflict with the overriding objective of the CPR (see **Darrion Brown v The Attorney General of Jamaica and Others** [2013] JMCA App 17). Therefore, the Ladd v Marshall principles are consonant with the interests of justice in considering fresh evidence applications in civil cases. This is so, although civil appeals to this court are by way of rehearing. Indeed, the application of the principles of law relevant to the reception of fresh evidence in civil proceedings has been established in this court with no distinction drawn between appeal by way of rehearing or appeal by way of review.*

ANALYSIS

[19] This application is predicated on what the 2nd Defendant refers to as “fresh evidence”. It is grounded on the 2nd defendant’s assertions that the whole of the Claim was satisfied before judgment was entered. He argued that on June 28, 2021, he attended upon Scotiabank Branch, Oasis Plaza in Spanish Town and requested in writing by letter dated June 24, 2021, a Certificate of Repayment on loans #8000411 and # 800461. He received a letter dated June 28, 2021, which stated that in relation to accounts 8000411 and 800461 all sums owed by the Defendants were paid out on July 22, 2014, and that those accounts have since been closed. He used this as the basis to submit that the defendants held no liability on July 24, 2020, which is prior to the date of the judgment, as such he argued that Mr. Anthony Boyd misled the Courts to believe that as of July 24th, 2020, the sums existed on the bank’s books.

[20] Counsel for the Respondent/Claimant relied on the Court of Appeal Case of **Harold Brady** in support of their contention that the application to adduce fresh evidence is ill conceived as it is an application reserved for the Court of Appeal.

[21] Regardless of the basis for this application I agree with counsel for the Respondent/Claimant on this point. Applications for permission to adduce fresh evidence are not intended for first instance courts, they arise in the context of appeals. This is therefore not the correct forum for that kind of application.

[22] Despite this I will consider Mr. Duncan's applications in the context of the **Ladd v Marshall** principles. Let me just state for the record that there was no trial on the merits in this case. However, at each stage, Judgment summons, Provisional Charging Order and application for Final Charging Order the defendant was a participant. The applications were therefore heard on their merits.

The evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial.

[23] The loans in question were disbursed between 2009 and 2010. The Demand Letters were issued in July 2011 and this Claim was later filed in 2011. It would be remiss of me not to state from the outset that it appears that the defendant had no objection to the default judgment which was entered on May 15, 2013. At no time from the entry of the default judgment until 2018 did Mr. Duncan say that he had paid sums since the matter was brought to court, neither has he presented to this court any personal proof, other than the letter from Scotia Bank dated June 28, 2014, in support of his contention that he paid off the loan.

[24] For all intents and purposes, the 2nd Defendant was in agreement that the loans remained un-serviced. This remained the case until up to at least May 31, 2017, when he filed his affidavit of means and even up to March 22, 2018, when he filed yet another affidavit of means. It is the defendants who acquired the loans. Only they would know if the loans were repaid. I find that this information was always available to the Defendants and could have been obtained long in advance, even before the order for seizure and

sale was made in September 2014, before the Provisional Charging Order was made in 2019 and before the Final Charging Order was made in 2020 with an iota of due diligence. This is not to say that I accept that the loans have been satisfied. The evidence in this case proves the contrary.

The evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive.

[25] It has been repeatedly stated throughout this judgment that the three applications being considered in this judgment have their genesis in the loans mentioned at paragraphs 10 and 11 infra. Mr. Duncan did not make an application to set aside the default judgment. In fact, he went along and participated in the court proceedings on the basis that the default judgment was correctly entered. I see the following actions of the defendants as consistent with his certain knowledge that the loans remain outstanding. By Affidavit filed on January 10, 2017, Mr. Duncan confirmed that he owed the sum of $4,872,000.00 and indicated that he was taking steps to satisfy the judgment debt. He admitted that in or about January 2009 he guaranteed a loan in the amount of $5,000,000.00 and that only a portion had been paid as a consequence of which the loan fell into arrears. He advanced that he was attempting to sell property at 1 Hellside Drive, Belvedere, in the parish of Saint Andrew to satisfy the debt.

[26] Then on May 31, 2017, in response to an application for oral examination Mr. Duncan filed an Affidavit of Means in which he had no objection to the debt but instead outlined that he had property with a value of $17,000,000.00 which exceeded the outstanding sum owed on the loan.

[27] In his affidavit filed on March 22, 2018, Mr. Duncan among other things reiterated his intention to sell units at the Barbican property in order to satisfy the debt. He promised a lumpsum payment of $4,000,000.00 towards the outstanding loan. However, by March 1, 2019, Mr. Duncan filed an affidavit exhibiting correspondence with copy cheques between his then attorney Mr. Patrick Bailey and BNS as well as a statement of accounts issued by BNS.

[28] The affidavits also reveal that sums of money were in fact paid by Mr. Patrick Bailey to BNS; $302,285.56 in July 2009, $100,000.00 in January 2010, $350,000.00 in June 2010 and $563,583.26 in August 2010, all totalling $1,315,868.82. Said sums were paid to BNS account No. 600505, which is a current account in the name of the 1st Defendant. The letter of Demand for the loans in the case at bar were issued on July 14, 2011.

[29] The affidavits also reveal that mortgage No. 1788424 registered in October 2012 was discharged in July 2019. However, the sum secured by the mortgage of the Woodpecker Property was $5,900,000.00 which is an entirely different sum from the case at bar. The loan accounts in the matter at bar do not relate to account No. 600505. There is no indication that this account was to be used to satisfy the two loans, the subject matter of this claim. In any event, even if I am wrong, the amounts recorded do not extinguish the collective loan amount of $7,900,000.00 plus interest. As such the only reasonable conclusion is that the sums used to satisfy mortgage No. 1788424 relates to another loan.

[30] I took the time to examine the documents. The affidavit and exhibits demonstrate that there was an existing loan which was secured by a letter of undertaking dated December 2008. In fact, the March 23, 2010, agreement indicates;

> "*We are pleased that, the Bank of Nova Scotia Jamaica Limited [The Bank], <u>will renew and make available</u> to Global Architecture Draughting Limited [the "Borrower'] the following credit facility in the amount of seven million Nine Hundred Thousand Jamaican Dollars…"* (Emphasis mine)

[31] This presupposes that the facility had already been given to the 1st Defendant and this March 2010 Agreement was a continuation. The existence of a previous facility is also supported by the Term headed 'Purpose'. The document notes, that the purpose is the,

> "…*<u>continuation of facility granted</u> to provide interim financing for ongoing works on development of property located in Hellshire, St. Catherine."*

[32] When the application for the Provisional Charging Order to be made final came on for hearing Mr. Duncan raised the issue that the judgment debt had been satisfied on or before December 31, 2010, this is in contradiction to the letter he received from Bank of Nova Scotia Spanish Town, which gave the 'paid up' date as July 14, 2014. In support of that position, he relied on the fact that mortgage No.1788424 which was registered on the Certificate of Title registered at Volume 1432 Folio 79 on October 25, 2012, had been discharged. (the Woodpecker Property) This discharge, numbered 2200634, was entered on the Certificate of Title on the 29th of July 2019. However, a thorough examination of the judgment of Hart-Hines, J in **The Bank of Nova Scotia Limited v Global Architecture Draughting Limited and Gregory Duncan** [2020] JMSC Civ. 161, reveals that she specifically addressed the issue. She found that mortgage No. 1788424 related to a different loan. She observed that the sum borrowed on mortgage number 1788242 did not match the amounts borrowed in 2009 and 2010.

[33] Further, that by October 25, 2012, the date the mortgage on the title was registered, the Defendant had already defaulted on the loan and in fact two demand letters had been issued by BNS in 2011. Having received no payment this claim was commenced on December 15, 2011. On those undisputed facts Hart-Hines J found that it would be unusual for the claimant not to have registered the mortgage at the time of the commitment letter, which is dated March 23, 2010, and even more unusual for the mortgage to be registered in October 2012 after the matter had commenced in this Court. She therefore concluded that the mortgage which was registered and discharged on the title related to a different loan. In light of the foregoing, it is highly unlikely that had the evidence produced at this late hour by the 2nd Defendant been made available that the outcome of the several applications that have been made before this court would have been different.

Although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.

[34] On October 14, 2020, Mr. Duncan filed an Amended Application to Discharge the final charging order. It was heard by Mott Tulloch-Reid J, who dismissed the application on June 23, 2021. He did not appeal that decision. However, on that occasion it appears

that after the Mott Tulloch- Reid J, dismissed his application, Mr. Duncan visited the Bank of Nova Scotia, Spanish, Town Branch and requested a status letter on loan accounts #8000411 and 8000461. The bank issued a letter dated June 28, 2021, confirming that the loan facilities had been paid out and the loan accounts closed. The letter was signed by Nastassia Brown, Relief Service and Support Officer and Sherron Meghoo, Officer in Charge, Service and Support.

[35] Mr. Anthony Boyd, Manager of the Loan Recoveries Unit for BNS filed an affidavit in response to this application on December 3, 2021, confirming that the sums remained outstanding and exhibited a letter to the defendant dated November 19, 2021 which outlined that Mr. Duncan has always known that his account was handled by the main office in Kingston and not by the branch because it had been classified as a bad debt. This was followed by another affidavit from Mr. Boyd, filed on October 13, 2022, in which he outlined the procedure and the effect of a loan account being classified as a bad debt.

[36] An affidavit was also filed on behalf of Ms. Nastassia Brown in which she indicated her error and confirmed the procedure outlined by Mr. Boyd. It is therefore patently clear to this court that this is yet another attempt by the 2nd defendant to revisit matters which have determined thrice against him in this Court. The first being the entry of the default Judgment the second being the Provisional Charging Order and the third, the granting of the Final Charging Order. I accept the evidence of Mr. Anthony Boyd and Ms. Nastassia Brown in relation to the classification of the defendants' loan as a bad debt and what obtains after such a classification. The previous discussions have also cemented in my mind that the debt remains unsatisfied. The evidence submitted by Mr. Duncan has failed in all three categories outlined in Ladd **v Marshall**.

AMENDED NOTICE OF APPLICATION FOR DECLARATIONS.

[37] One of the declarations sought in this application is for the Final Charging Order to be discharged. The CPR allows for a Final Charging Order to be discharged under specific circumstances. Rules 48.10 (1) states that:

> *An application to discharge or vary a final charging order may be made by –*

(a) the judgment creditor;

(b) the judgment debtor; or

(c) any interested person.

(2) Notice of application must be served on the –

(a) judgment creditor if made by the judgment debtor;

(b) judgment debtor if made by the judgment creditor; or

(c) judgment creditor and judgment debtor if made by an interested person.

(3) Any order must be served on every person on whom the final charging order was served.

Enforcement of charging order by sale

48.11 (1) This rule applies where a judgment creditor wishes to enforce a

charging order by sale.

(2) The judgment creditor may apply to the court for an order for sale.

(3) The application must be supported by evidence on affidavit.

(4) Notice must be served on the judgment debtor.

(5) The court may give such directions as seem appropriate to secure the expeditious sale of the land, stock or property charged at a price that is fair to both judgment creditor and debtor.

[38] The CPR does not outline the circumstances under which a Final Charging Order can be discharged. As such I find it necessary to look to case law. In **Parr v Tiuta international ltd** [2016] EWHC 2 (QB), Mr. Justice Dingemans had to examine the judgment of HHJ Mitchell in which he denied an application to Discharge the Final Charging Order. At paragraph 26 he observed that;

"*There are obvious potential difficulties if judges set aside or vary orders made by judges of co-ordinate jurisdiction. I was referred to a number of authorities dealing with circumstances in which it is appropriate to set aside or vary an earlier order. These authorities establish that the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud."*

[39] Despite the views expressed by Justice Dingemans, on a reading of Rule 48.10 of the CPR a judgment creditor, a judgment debtor or an interested party may apply for a final charging order to be discharged. However, I agree that before an order of a judge of co-ordinate jurisdiction is varied or set aside there must exist a definitive change of circumstance or fraud. I am therefore confident that this kind of application is one that can be entertained at this level.

[40] The Certificate of Title exhibited by the Judgment Creditors in the Affidavit of Anthony Boyd filed on October 6, 2021, demonstrates that the subject property is solely owned by Mr. Duncan. Based on the discussion above I see no basis to conclude that any court/judge has been misled nor has any fraud been alleged by the defendants. There has been no material change in the circumstances. The evidence before this court discloses that the debt remains unsatisfied to date. It stands to reason from the discussions above that the declarations sought in this Amended Notice of Application for Declarations cannot be granted.

AMENDED NOTICE OF APPLCATION FOR SALE OF LAND

[41] The Default Judgment in this matter was handed down on March 15, 2013, as such the claimants require the permission of the court to make an Application under Part 55 for an order for sale of land. Rule 46.2 (1) states that;

> *A writ of execution may not be issued without permission where -*
>
> *(a) six years have elapsed since the judgment was entered;*
>
> *(b) the judgment creditor is no longer entitled to enforce the order;*
>
> *(c) any party against whom a judgment or order was liable to be enforced is no longer liable to have it enforced against it;*
>
> *(d) the judgment debtor has died and the judgment creditor wishes to enforce against assets of the deceased person which have passed to that person's personal representatives since the date of the order;*
>
> *(e) the goods against which it is wished to enforce the judgment or order are in the hands of a receiver or confiscator appointed by the court;*
>
> *(f) the judgment was made subject to conditions;*

(g) any statutory provision requires the permission of the court to be obtained before judgment is enforced; or

(h) where any goods sought to be seized under a writ of execution are in the hands of a receiver or commissioner for confiscation appointed by the court.

[42] Rule 46.1 defines "writ of execution" as follows:

(a) …

(b) …

(c) an order for the sale of land;

[43] Rule 48.11 (2) of the CPR gives a judgment creditor the right to apply to the court for an order for sale and sets out the procedure to be followed in making such an application. The subsequent subsections outline the procedure to be followed. Part 55 of the CPR goes a little further and details what must be contained in the affidavit. Specifically, rule 55.2 (2) states that the affidavit must identify the land in question, state the reason for seeking an order for sale, the grounds on which the court should order a sale of the land, the full names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land, the nature and extent of each such interest, the proposed method of sale and why such method will prove most advantageous, any restrictions or conditions that should be imposed on the sale for the benefit of any adjoining land of the judgment debtor or otherwise, who it is proposed should have conduct of the sale; and exhibit a current valuation of the land by a qualified land valuer or surveyor.

[44] The several affidavits filed by the applicant/claimant have satisfied in great detail the requirements of Rules 46.2 (1) and 55. The defendants have not provided any evidence to the contrary. The fact that the 2nd defendant's son resides on the property is not a basis for denying the claimants application.

[45] In the circumstances the applications filed by the 2nd defendant on the 29th of June 2021 and the 13th of December 2021 are refused.

[46] Order granted in terms paragraphs 1 to 6 of the Amended Notice of Application for Sale of Land filed on October 28, 2022.

[47] Cost to the Claimants in relation to the applications filed on June 29, 2021, and December 13, 2021

[48] Leave to Appeal is refused.

[49] Claimants Attorney to prepare file and serve the orders herein.