

SUPREME COURT OF SEYCHELLES

Not Reportable
[2022] SCSC .1028
MA 51/2021
(Arising in CS23/19)

In the matter between:

EASTERN EUROPEAN ENGINEERING LIMITED
(rep. by Alexandra Madeleine)

Applicant

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED
(rep. by Bernard Georges)

Respondent

Neutral Citation: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd*
(MA51/2021) [2022] SCSC (25 November 2022).

Before: E. Carolus J

Summary: Application for injunction - Applicability of section 304 Seychelles Code of
Civil Procedure and section 6 of Courts Act

Delivered: 25 November 2022

ORDER

The preliminary points of law 1 and 2 raised by the respondent are dismissed and the application for injunction stands. It now remains for the Court to hear counsels on the third point raised by Vijay namely that “*t]he application is bad in law for not giving an undertaking in damages as a condition of the grant of an injunction*”, as well as on the merits of the application.

RULING

CAROLUS J

Background

[1] Judgment was delivered by the Supreme Court in the case of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) [2020] SCSC 350 (30 June

Injunction Application

- [3] The present application for an injunction was filed by EEEL on 12th March 2021 (MA51/2021). However it was agreed by counsels for the parties that some of the applications arising from the main case CS23/2017 including the present application should be kept pending whilst awaiting the decision of the Court of Appeal.
- [4] The application is made by way of Notice of Motion supported by an affidavit of Vadim Zaslonov who avers therein that he is authorised to make the affidavit as a director of EEEL. Exhibited to the affidavit are a number of documents. In terms of the Notice of Motion, EEEL seeks –

... an urgent order of injunction pending the determination of the applications for (i) execution of judgment and (ii) validation of attachment by the Supreme Court:

- (i) preventing the Respondent herein from disposing and/or transferring any of its assets including but not limited to the assignment of contractual rights and profitable contracts to any person;*
- (ii) preventing the use of any of the vehicles, machineries, plant and equipment of the Respondent by any person;*
- (iii) preventing the Respondent herein from disposing, dissipating and/or diverting any payment(s) due or received from the sale of any of its vehicles or other machineries, plant, and equipment or any payment due and payable for the use of any of its machineries, plant, and equipment including but not limited on any construction sites from 5th October 2020.*

- [5] The grounds for the application are set out in Vadim Zaslonov's affidavit. He avers that EEEL filed applications for execution of the Supreme Court Judgment and for validation of attachment which are now pending before the Supreme Court. Further that on 5th October 2020, VIJAY filed a winding up petition in the Supreme Court on the grounds of inability to pay its debt which was dismissed by Govinden CJ, on 2nd March 2021.
- [6] He avers that in an incidental application made by Vijay for a stay of execution of the Supreme Court Judgment, Vijay maintained that if the Court of Appeal dismisses its appeal against the said Judgment, the company's machineries, plant and equipment would be available to satisfy the Judgment Debt, and provided a valuation of its assets including the aforementioned plant and equipment to the Court and to EEEL in support of its application.

of Vijay to dissipate its assets so as to deprive EEEL the fruits of the Supreme Court Judgment and the Court of Appeal Judgment of 2nd October 2020, and circumvent the determination of the serious questions for determination by this Court in the application for validation of attachment.

- [9] He further avers that if the order of injunction prayed for is not granted as a matter of extreme urgency, all the assets of Vijay including its vehicles and other machineries, plant and equipment, and any income due and payable to Vijay under the various contracts that it had prior to the commencement of the winding up proceedings, income payable or paid in respect of the sale of Vijay's vehicles and the use of Vijay's plants and equipment by Vijay Seychelles on various construction sites after the 15th October 2020, will be dissipated to the detriment of EEEL who will not be able to execute the judgment debt.
- [10] Vadim Zaslonov states that the acts of Vijay as described in the affidavit are malicious, deliberate and calculative, and confirms the stance repeatedly taken by Vijay in proceedings between the parties in CS33/2015 that it would rather be wound up than settle the judgement debt.
- [11] He states that he is advised that based on the aforementioned matters the balance of convenience in granting the order of injunction prayed for lies in favor of EEEL, and given the judgment debt, the loss to EEEL cannot be adequately compensated by damages. Further, given the Vijay's declaration of cessation of business since 2nd October 2020 because of inability to pay its debts, VIJAY does not stand to make any loss by the granting of the orders of injunction prayed for, and in the very unlikely event of VIJAY incurring any loss through its own decision to commence the winding up and declaration of cessation of business, such loss can be compensated by way of damages.
- [12] Finally he avers that based on the matters stated in the affidavit, it is urgent and necessary in the interests of justice that this Court grants the orders of injunction prayed for as a matter of extreme urgency.

- [16] He admits that Vijay authorised the use of its machineries, plant and equipment by Vijay Seychelles but avers that they need to be utilized to keep them functioning and that all such use is accounted for by Vijay. Additionally, some of Vijay's assets were retained by clients when Vijay filed for liquidation, and are being used by these clients in pursuance of valid construction contracts, to complete works started by Vijay.
- [17] He denies that the sale of Vijay's vehicles and authorising the use of its machineries, plant and equipment by Vijay Seychelles was done with malicious and deceitful intent and with the intention of denying EEEL the fruits of the Supreme Court Judgment. He further denies that such use is calculated to dissipate income due and payable to Vijay and to divert them to Vijay Seychelles or other entities and persons. In that regard he states that Vijay is challenging the judgment ordering it to pay damages to EEEL, and that until these challenges are exhausted, Vijay is continuing to operate within the law and it is neither disposing of this assets nor damaging them and reducing their value. Further, insofar as concerns the operation of Vijay Seychelles, the affairs of that company are kept separate from those of Vijay and any use of Vijay's equipment by Vijay Seychelles will be accounted for. In addition, although some of Vijay's plant and equipment will be used by Vijay Seychelles pending the acquisition by Vijay Seychelles of its own plant and equipment, the use of Vijay's plant and equipment are accounted for financially to Vijay as the two companies are separate.
- [18] Kaushalkumar Patel avers that contrary to what is averred by Vadim Zaslonov, Vijay has no intention of dissipating any of its assets or rendering them incapable of being seized and sold in execution of judgment, or diminishing their value. He states that in fact, Vijay's assets have increased in value since the judgment in 2020 by the acquisition of new vehicles. He denies that there is any need for an injunction to be granted in this matter, and states that Vijay's assets have not and will continue not to be reduced in value.
- [19] Finally he avers that he is informed by Vijay's lawyer and believes that the application for an injunction is wrongly brought and an injunction is not capable of being issued in this matter for legal reasons.

- [24] Relying on these provisions, Counsel for Vijay Mr Georges, submits that three conditions must be satisfied in order for an injunction to be granted.
- [25] Firstly that “*there must have been an action commenced (action being defined as a civil proceeding commenced by plaintiff)*”. He concedes that this first condition was satisfied in that EEEL had filed an action by plaint seeking recognition of a judgment of the High Court of England.
- [26] The second condition is that “*the action must be based on a wrongful act, breach of contract or injury*”. In that regard he submits that section 304 is restricted in its scope and is meant to deal with “*the cessation of behaviour on the part of a defendant prompting the issuance of an action by a plaintiff ... pending the determination of the action or continuing even after judgment*”. He gives examples of such behaviour such as trespass, blocking of a right of way, eviction of a tenant and nuisance. He submits that in order to obtain an order of restraint – which is what an injunction is – there must have been behaviour which requires restraining, or in the words of section 304, behaviour the “*repetition or continuance*” of which is sought to be prevented. Mr. Georges submits that the action in the present case was not based on a wrongful act, breach of contract or injury and that “[t]he Plaint was simply an application ... seeking the mechanistic recognition of a UK Order by reason of the alignment of a checklist of conditions necessary for this to happen” and further that “[t]he prayers sought do not seek anything other than an executory order and orders deriving therefrom, namely registration and execution”. In his view the second condition is therefore not satisfied.
- [27] The third condition is closely related to the second and is that “*the need for an injunction must arise from the same contract or relate to the same property or right*”. This means that the behaviour the “*repetition or continuance*” of which is sought to be prevented by an order of injunction, must be the same behaviour i.e. the “*wrongful act, breach of contract or injury of the like kind*” which gave rise to the action in the first place. It is Mr. Georges position that given that the second condition has not been met, the third cannot arise and the injunction cannot be obtained.

arbitral award, enforceable in Seychelles. The plaintiff does not seek a remedy for a wrongful act or breach of contract or *“injury of a like kind, arising out of the same contract or relating to the same property or right”* for which section 304 permits an injunction to be granted, to prevent the repetition or continuance of such act, breach or injury. The breach of contract was dealt with at arbitration and culminated in an arbitral award which EEEL sought to enforce by means of filing of the plaintiff in CS23/2019. The proceedings commenced by plaintiff is therefore more a means of enforcement than seeking a remedy, which as stated was obtained in the arbitration proceedings.

[32] The present application for an injunction is to prevent Vijay from continuing to dispose of or dissipate its assets and funds and thereby deprive EEEL the fruits of the Supreme Court Judgment. It is not to prevent the continuation of the breach of contract which gave rise to the arbitral award which was rendered enforceable by the British Judgments and which in turn was subsequently rendered enforceable in Seychelles by the Supreme Court Judgment. I am therefore of the view that section 304 is not applicable in the circumstances.

[33] Ms Madeleine has submitted that *“if ever this Court should find that section 304 is inapplicable to the present application given that its scope is limited as submitted by the respondent, then section 6 of the Courts Act would find application in the very circumstances of the present case as then there would be no sufficient legal remedies when civil proceedings are brought outside the limited scope of section 304 ...”*

[34] Section 6 of the Courts Act provides for the equitable powers of the Supreme Court:

Equitable powers

6. *The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.*

[35] Injunctions are equitable remedies. Mr Georges submits that it could be argued that the Supreme Court could, occasion arising, grant an injunction outside the bounds of section 304 SCCP. He states that in the United Kingdom, an injunction can be sought and obtained

continuing with the act or breach or injury, then this Court would have had the jurisdiction under section 304 to act, even after judgment. He states that however in this instance this Court has already dealt with the matter and has not made any order on a wrongful act, breach of contract or injury and therefore it is functus and must decline jurisdiction to entertain the application.

- [41] I take into account that the Court of Appeal has now heard the appeal against the Supreme Court judgment de novo and dismissed the appeal. Mr. Georges' argument that it is the only court that can deal with the present injunction application because the matter is live before that court is therefore no longer applicable. I find no necessity to deal with the question of whether this Court has jurisdiction to entertain an injunction application arising in a matter which is on appeal.
- [42] As to his argument that the Supreme Court Judgment contained no order restraining the defendant from doing something which the defendant failed to comply with and continued doing, thereby excluding the jurisdiction of this Court from dealing with the present application, this Court has found that it has the jurisdiction to entertain the present application under section 6 of the Courts Act as EEEL would otherwise have no sufficient legal remedy.
- [43] Further section 304 allows for the making of applications for writs of injunction after judgment. The relevant part of that provision reads "*[i]t shall be lawful for any plaintiff, after the commencement of his action and before or after judgment, to apply to court for a writ of injunction ...*". Although I have found that section 304 is not applicable, I find no good reason why an injunction granted pursuant to section 6 of the Courts Act cannot, by analogy, be applied for and granted post judgment.
- [44] Ms Madeleine also makes the point that notwithstanding the completion of CS23/2019 by the Supreme Court Judgment of 30th June 2020, the Supreme Court still has the power to grant certain applications such as for attachment and validation of attachment under section 248 of the SCCP, and the Registrar to execute judgment under section 239 of the SCCP. She submits that while the Court would be functus to amend or vary its judgment, the Court