

SUPREME COURT OF SEYCHELLES

Not Reportable
[2022] SCSC 1069
MA 04/2021
(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)

1st Respondent

Neutral Citation: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd*
(MA04/2021) [2022] SCSC 1069 (02 December 2022).

Before: E. Carolus J

Summary: Summons to show cause - contempt

Delivered: 02 December 2022

ORDER

The Notice of Motion is dismissed with costs

RULING

CAROLUS J

Notice of Motion

[1] This Ruling arises out of a Notice of Motion made by Eastern European Engineering Ltd (“EEEL”) seeking orders from this Court in the exercise of its inherent jurisdiction, against the 1st respondent Vijay Construction (Pty) Ltd (“VIJAY”) and the 2nd to 5th respondents who are directors of the 1st respondent company. The orders sought are as follows:

- (a) *An order for summons to issue on the Respondents above-named to show cause as to why they should not be held in contempt of this Court for having misled and/or given misleading information and evidence to the Court;*
- (b) *An order that the Respondents above-named have acted in contempt of this Court and punishing the said Respondents for contempt;*
- (c) *Any other or further orders the Court deems fit in the circumstances.*

- [2] The Notice of Motion is supported by an affidavit sworn by Vadim Zaslouov (“VZ”), who avers therein that he is authorised to swear the affidavit as a director of EEEL.
- [3] By way of background, the applicant Eastern European Engineering Ltd (“EEEL”) and the 1st respondent Vijay Construction (Pty) Ltd (“VIJAY”) entered into various contracts for the construction of the Savoy Resort and Spa Hotel. Disputes arose between the parties which were referred to arbitration in Paris, France, pursuant to arbitration clauses in the contracts which provided that such disputes should be finally settled by arbitration under the Rules of Arbitration of the ICC. These Rules provide, *inter alia*, that by submitting a dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. The arbitral tribunal delivered an award in EEEL’s favour ordering Vijay to pay certain sums of money to EEEL in damages with interests and costs.
- [4] In his affidavit VZ avers that the 2nd to 5th respondents who are VIJAY’s directors and are and were responsible for the control and management of the affairs of the company (1) *“failed and refused VIJAY to comply with the award but to resist all attempts at registration and enforcement of the Award in Seychelles”*; and (2) *“caused VIJAY to engage in multiple and costly litigation in France, England and Seychelles to avoid enforcement of the Award instead of settling the sums involved in the Award”*.
- [5] On 30th June 2020 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 2020)* on 30 June 2020 declaring two Orders of the High Court of England and Wales rendering the arbitral award in favour of the applicant (“EEEL”) enforceable in

Great Britain, executory and enforceable in Seychelles (“the Supreme Court Judgment”). In terms of the Supreme Court Judgment the respondent (“Vijay”) was ordered to pay EEEL various sums of money, amounting in excess of Euro twenty million. This judgment was upheld by the Court of Appeal in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (SCA 28/2020) [2020] (2nd October 2020)*. The Court of Appeal judgment was subsequently set aside (See (MA24/2020 arising in SCA28/2020) [2022] SCCA 8 (21 March 2022)) and the appeal re-heard, pursuant to which another panel of three Justices of Appeal dismissed the appeal and upheld the Supreme Court Judgment in its entirety in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (SCA 28 of 2020) [2022] SCCA 58 (21 October 2022)*.

[6] It is to be noted that at the time that pleadings and submissions in relation to this Notice of Motion were filed, the Court of Appeal had rendered its first decision of 2nd October 2020. However, a challenge by Vijay as to the procedure followed on appeal, which ultimately led to the decision of 2nd October 2020 being set aside, was still pending before the Court of Appeal. Hence when reference is made to the judgments in VZ’s affidavit, he is referring to the Supreme Court Judgment of 30th June 2020 and the Court of Appeal judgment of 2nd October 2020.

[7] The contempt of Court alleged by EEEL on the part of VIJAY’s directors as stated in VZ’s affidavit are that the 2nd to 5th respondents in their capacity as VIJAY’s directors, not only “[u]pon the delivery of judgments ... failed and, caused VIJAY to refuse to comply with the Judgments” but also caused “caused VIJAY to file multiple applications to avoid execution of the Judgment”. These applications as set out at paragraphs 14 to 16 of the affidavit are as follows:

(a) *application filed in the Constitutional Court in CP10/2020 VIJAY v EEEL alleging violation of VIJAY’s right to fair hearing in the Supreme Court, which was dismissed as, inter alia, an abuse of the Courts process. Exhibited are copies of the Constitutional Court Petition and the Judgment of the Constitutional Court dated 24th November 2020.*

(b) application filed in the Seychelles Court of Appeal in SCAMA21/2020 to set aside the Court of Appeal Judgment^{2nd} October 2020 on the ground that the appeal had not been heard by 3 Justices of Appeal, in that one of the judges hearing the appeal was not a Justice of Appeal which was dismissed. Exhibited are copies of the Application and Ruling of the Court of Appeal dated 13th November 2020.

(c) two applications filed in the Seychelles Court of Appeal in SCAMA23/2020 and SCAMA24/2020 alleging denial of right to fair hearing in the appeal. It is to be noted that at the time of filing of the present application, SCAMA23/2020 and SCAMA24/2020 were pending before the Court of Appeal. The judgment of the Court of Appeal dated 2nd October 2020 was set aside by judgment of the Court of Appeal dated 21st March 2022 in SCA MA24/2020.

[8] VZ further avers that on 9th October 2020, the 2nd Respondent Vishram Jadva Patel being a director and shareholder of VIJAY filed an affidavit dated 8th October 2020, in the registry of the Supreme Court verifying a petition for winding up VIJAY (“Winding-Up Petition”), stating that VIJAY is unable to pay its debts. A copy of the Affidavit is exhibited.

[9] He avers that he is aware that a new company named Vijay Construction (Seychelles) Pty Ltd. (“VIJAY2”) was incorporated on 1st September 2017, three months before the Court of Appeal delivered its Judgment dated 12th December 2017 in favour of VIJAY in SCA18/2017 *Vijay Construction (Pty) Ltd V Eastern European Engineering Limited* (SCA 15 of 2017) [2017] SCCA 41 (12 December 2017) in which it held that the arbitral award was not enforceable in Seychelles. The appeal was against a judgment of the Supreme Court in CC33/2015 dated 21st April 2017 allowing registration of the arbitral award in Seychelles. On that basis, he states that the unavoidable conclusion is that the 2nd - 5th respondents being directors and shareholders of VIJAY, even then, had the intention to defraud EEEL and deny it the fruits of the Supreme Court judgment of 21st April 2017 if the Court of Appeal judgment dated 12 December 2017 had been in favor of EEEL. He further states that the 2nd - 5th respondents are now putting their plan to defraud

EEEL into effect after the Court of Appeal Judgment of 2nd October 2020 in favour of the EEEL.

[10] He avers that despite the fact that VIJAY2 was registered 3 years ago for the same type of business activity as VIJAY, it only started to operate after the Supreme Court judgment of 30th June 2020 and the Court of Appeal judgment dated 2nd October 2020 were delivered in favor of EEEL. He states that VIJAY2 only received its license for carrying out construction works on 15th October 2020 i.e. two weeks after delivery of the Court of Appeal Judgment dated 2nd October 2020.

[11] VZ avers that VIJAY2 is directly affiliated to VIJAY as well as the 2nd-5th respondents since the composition of the shareholders and directors of both companies are the same. Furthermore, the legal name of VIJAY 2 (Vijay Construction (Seychelles) Pty Ltd) is almost identical to VIJAY's legal name (Vijay Construction (Pty) Ltd.) which he avers is misleading, creates confusion and gives the impression to construction market participants that they are dealing with the main company i.e. VIJAY.

[12] He states that he believes that the 2nd-5th respondents' statement regarding the inability to pay VIJAY's debts and having to cease operations on all project sites where VIJAY was undertaking projects prior to the judgments of the 30th June 2020 and 2nd October 2020, and the plight of its workers in losing their jobs have been exaggerated in the Winding-Up Petition. This is because VIJAY resumed construction works on all project sites soon after the filing of the Winding-Up Petition and the filing of the 2nd respondent' affidavit. Photographs and video footage showing ongoing works on some of VIJAY's construction sites, plants/machinery and equipment of Vijay in operation and/or in use on those sites and showing VIJAY workers are exhibited (on a pen drive). He avers that since VIJAY's construction sites are not closed, and its workers and its plant/machinery and equipment are at work and in operation and use, the declarations of the 2nd Respondent as to cessation of work are incorrect.

[13] He expresses the belief that there is a strong likelihood that if VIJAY is not the one carrying out the construction works on its project sites, then the 2nd-5th respondents would have initiated transfer of VIJAY's plants/machineries and equipment and its workers to

another company that is related to the VIJAY or transferred its said plants/machineries and equipment and the gainful employment permit in respect of its foreign workers to another company under an agreement between VIJAY and that other company.

[14] VZ goes on to aver that he is advised by EEEL's lawyer and believes that the 2nd - 5th respondents repeatedly shows bad faith based on the following as stated at paragraph 25 of his affidavit:

- a. *The Directors of VIJAY have continuously declared that they would rather wind up VIJAY than to settle the above Judgment debt to the Applicant, and I refer in that respect to the paragraph 14 of the Affidavit of 2nd Respondent – Vishram Jadva Patel in response to a motion for a prohibitory injunction dated 9th December 2015 in MA315/2015 arising out of CS33/2015, page 28 of the transcript of Supreme Court Proceedings in CS 33/2015 of Wednesday 2nd September 2015 at 9. 30 on the cross examination of the 2nd Respondent, paragraph 8 of the Affidavit of 5th Respondent's (Kaushalkumar Patel) dated 1st July 2020 and paragraph 20 of his affidavit dated 21st July 2020 in support of an application for stay of execution of Judgment in MA101/2020 arising out of Civil Side 23/2019 are now produced.*
- b. *Acting in a capacity of the Directors of VIJAY the Respondents 2nd – 5th transferred VIJAY's shares in Q Glazing LTD (UK company) to Ms. Versani. I state that this was not a bona fide transfer for value, and that it was effected in an attempt to conceal the actual ownership of VIJAY's shareholding in Q Glazing Ltd. A copy of the annual term returns and confirmation statement for Q Glazing Ltd are now produced.*
- c. *On the 22nd December 2015 the Respondents 2nd - 5th acting in capacity of the Directors of VIJAY transferred USD One Million from its Nouvobanq USD Account No 3200240475006 to the personal account in India of the 1st Respondent. This was discovered on 7th January 2016 during cross examination of the operations Manager of Nouvobanq in the Seychellois recognition proceedings. In his affidavit dated 30 November 2016, the 2nd Respondent stated that several more remittances made from the Nouvobanq account to his personal account in India and insisted that this was also a long standing practice dating back several years. A copy of the Affidavit of 30th November 2016 and transcript of proceeding dated 7th January 2016 are now produced.*

- d. *Subsequently, on 7 August 2017, the 5th Respondent admitted in Court that there were “several” payments. When pressed on the point he admitted that 9 payments were made in 2015 and 8 payments in 2016. The 4th Respondent confirmed that each payment totaled US\$1,000,000 save for the one payment of US\$700,00. This postdated the relevant protective orders. There is a reason to believe that substantial sums have been and continue to be transferred to personal account (s) of the 1st Respondent on a regular basis. Estimate the total amount of funds of the injunction order to be US\$17,000,000 as of 7 August 2017 (when 5th Respondent gave evidence on these matters). A copy of the transcript of proceedings of 7th August 2017 and order on motion dated 12 November 2015 are now produced.*
- e. *The respondents 2nd – 5th authorized the disbursement of funds for the purchase of a Mercedes 5400 Hybrid Vehicle Registration No S26318 in circumstances where there was no business rationale of such vehicle.*

[15] It is averred that the multiple applications caused to be filed by the 2nd-5th respondents in their capacity as directors of VIJAY in the Constitutional Court and the Court of Appeal were and are frivolous, vexations and spurious. Furthermore, that the same applications to mislead the Court were designed purely and simply to harass the Applicant and delay execution of the judgments, denying the Applicant the fruit of the said judgments. Finally, it is averred that the applications were filed for wrongful motives and constitute an abuse of right to sue for valid and probable cause.

[16] It is further averred that based on the matters stated in the affidavit, the 2nd - 5th respondents have misled and/or given misleading information and evidence to the Court and acted in contempt of this Court. Therefore it is necessary in the interest of justice that summons are issued on the 2nd - 5th to show cause as to why they should not be held personally liable in contempt of this Court for having misled and/or given misleading information and evidence to the Court.

[17] Finally it is averred that based on the aforementioned, this Court should make an order that the respondents have acted in contempt of Court, punish them for the said contempt, and make such further or other orders as this Court deems fit in the circumstances.

Answer to motion

[18] The respondents oppose the motion. They have filed the following pleas in limine litis:

1. *The motion is frivolous, and vexatious and amounts to an abuse of the process of this Honorable Court.*
2. *The motion is bad in law in that it does not identify the order of the Court of which the Respondents or any of them are alleged to be in contempt.*
3. *The motion does not make out any contempt by any of the Respondents and it is simply a vexatious attempt at rehearsing a litany of grievances that singly or in combination fall short of contempt.*
4. *Any redress which the Applicant may have against the Respondents or any of them lies elsewhere than in contempt proceedings.*

[19] The answer of the respondents on the merits of the motion is contained in the affidavit of Vishram Jadva Patel (“VJP”) in which he makes declarations both on his own personal behalf and as a director of VIJAY and of Vijay Construction (Seychelles) (Proprietary) Limited (“VIJAY2”). Except for what is stated below, the averments in the affidavit of VZ are admitted.

[20] He avers that while he agrees that the Rules of Arbitration of the ICC provide that by submitting a dispute to arbitration under such rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. He believes that the rules in that respect are exhortative only and do not, and cannot deny any party to an arbitration the right to avail itself of remedies provided by law for challenging an award.

[21] He also denies that disputes arose between the parties in the course of the performance of the agreements between them, resulting in the termination of all the agreements by EEEL and avers that it was only VIJAY which raised a dispute.

[22] He denies that the directors or VIJAY refused to comply with the arbitral award and avers that they all availed themselves of the procedures permitted by law to challenge the

award, which he believes had been obtained through unacceptable practices by EEEL, was procedurally and substantively flawed and delivered an unfair, unjust, and abusive result. The same is repeated in regards to the 2nd – 5th respondents' failure and refusal to cause VIJAY to comply with the Supreme Court and Court of Appeal Judgments of 30th June 2020 and 2nd October 2020 respectively and the filing of the applications by VIJAY to avoid execution of the judgments.

[23] As for the Ruling of the Constitutional Court in CP10/2020, dated 24th November 2020, VJP expresses the belief that the ruling was wrong and states that VIJAY has appealed to the Court of Appeal against it. Exhibited is the Notice of Appeal. I note that the appeal was dismissed by the Court of Appeal in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Limited & Anor* (SCA CL 07/2020) [2021] SCCA 30 (13 August 2021).

[24] In regards to his statement in his affidavit verifying VIJAY's winding-up Petition that VIJAY is unable to pay its debts, he states that he believes that the statement is correct and that due to the Court of Appeal Judgment, the debts of VIJAY were greater than its assets, rendering the company insolvent.

[25] He accepts VZ's averments regarding the incorporation of VIJAY2 and the timing thereof in relation to the Court of Appeal judgment in SCA18/2017 dated 12 December 2017, and avers that VIJAY2 was incorporated in case VIJAY was forced to go into liquidation in order to allow the directors to continue to carry out their calling as construction contractors.

[26] He denies that even at the time of the Court of Appeal judgment in SCA18/2017 dated 12 December 2017, the 2nd - 5th respondents had the intention to defraud EEEL and deny it the fruits of the Supreme Court judgment of 21st April 2017 in the event that on appeal the Court of Appeal found in favour of EEEL. He also denies that the 2nd - 5th respondents are now putting their plan to defraud EEEL into effect after the Court of Appeal Judgment of 2nd October 2020 in favour of the EEEL. He avers that there was never any intention to defraud any creditors of VIJAY by setting up VIJAY2; that the affairs of both companies are separate and have been so kept; that the assets of VIJAY have not

changed negatively since the 2017 or the 2020 Court of Appeal judgments; and that if anything, they have appreciated through the purchase of new equipment.

- [27] He also accepts that VIJAY2 only started to operate after the Supreme Court judgment of 30th June 2020 and the Court of Appeal judgment dated 2nd October 2020 were delivered in favour of EEEL, and only received its license for carrying out construction works on 15th October 2020 - two weeks after the delivery of the Court of Appeal Judgment of 2nd October 2020.
- [28] He denies that the fact that VIJAY and VIJAY2 have the same shareholders and directors and that the names of the companies are almost identical is misleading, creates confusion and gives the impression to construction market participants when dealing with VIJAY2 that they are dealing with the VIJAY, and reiterates that VIJAY2 was incorporated to allow its directors to continue to carry out their calling as construction contractors in the event that VIJAY was forced to go into liquidation.
- [29] VJP also denies that his statement in the Winding-Up Petition regarding the inability to pay VIJAY's debts and having to cease operations on all project sites where VIJAY was undertaking projects prior to 30th June 2020 and 2nd October 2020 judgments, and that its workers have lost their jobs have been exaggerated. He avers all the averments in the Winding-Up Petition were and are correct and true. He further denies that VIJAY resumed construction works on any project sites after the filing of the Winding-Up Petition. He also denies that his declarations as to cessation of work are incorrect and that VIJAY's construction sites are not closed, and its workers and its plant/machinery and equipment are at work and in operation and use. It avers that all its ongoing contracts were terminated by the clients; that the workers were legally employed by a new company which has nothing to do with VIJAY; and that the equipment on sites were retained by the clients in accordance with the provisions of the construction contracts in order to complete the works. He states that only one of the ongoing contracts which had been terminated were awarded to VIJAY2 for completion. In regards to that contract, VIJAY2 applied to the Government to employ some of VIJAY's workers and took over

about 200 of the complement of approximately 1600 workers previously employed by VIJAY.

[30] VJP further avers that there has been no transfer of any assets, plant or equipment of VIJAY to VIJAY2. He states that to the extent that any equipment of VIJAY is used by VIJAY2, this is in order to keep it operational and is accounted for to VIJAY

[31] VZ's averments at paragraph 25 of his affidavit regarding matters which he claims are evidence of the bad faith of the 2nd - 5th respondents are also denied. In that regard VJP avers that none of these statements and allegations amounts to contempt and each has been the subjects of prior cases which have dealt with them. He states that he is advised that proceedings for contempt should have been brought in the several cases dealing with each of these matters and not in a generic application such as the present one.

[32] He avers that the filing of cases before the Constitutional Court and the Court of Appeal by VIJAY even if they are called frivolous, does not amount to a contempt of Court. Further that they were all filed with a single motive - to avail of the procedures permitted by law to set aside proceedings on an award and judgments delivered thereon which the Respondents felt, and were advised, were wrong, unfair and unjust. He denies that they were filed for wrongful motives and constitute an abuse of right to sue for valid and probable cause.

[33] He further denies that the 2nd - 5th respondents have misled and/or given misleading information and evidence to the Court and acted in contempt of this Court, or that that they should not be held personally liable therefor, and that this Court should make a finding to that effect and punish them contempt.

Submissions

[34] Both parties filed submissions both on the points of law raised by Vijay and on the merits of the motion. I have carefully considered both submissions and will refer to them as appropriate in the analysis below.

Analysis

[35] Counsels for both parties have cited the case of *Ramkalawan v Anor v Nibourette* MA178/2017 [2018] SCSC618 (28 June 2018) regarding the jurisdiction of this Court and the applicable law in contempt proceedings. In that case Twomey, the CJ stated -

31. *There are no statutory provisions with respect to contempt in the laws of Seychelles. Contempt procedures and remedies are received from England. Section 4 of the Courts Act (Cap 52) with regard to the jurisdiction and powers of the Supreme Court provides that*

“The Supreme Court shall be a Superior Court of Record and, in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England”.

32. *It is settled law that this provision has imported into the laws of Seychelles the common law of England. In this respect the courts of Seychelles recognise and maintain the common law concept of contempt of court. As a court of record, it has an inherent power to punish for contempt, whether criminal or civil and as it has been said: “A court without contempt power is not a court” (Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN’S L. REV. 337, 342 (1998) and the power of contempt “is inherent in courts, and automatically exists by its very nature” (Ronald Goldfarb, *The History of the Contempt Power*, 1 WASH. U. L. Q. 1, 2 (1961).*

[36] She goes on to explain the purpose of contempt proceedings in light of the term “contempt of court” as follows -

33. *Indeed, the term contempt of court is a misnomer (see *Attorney General v BBC* (1981) AC 303, 362) and poorly explains the purpose of such proceedings. In *Morris v Crown Office* [1970]1 All ER 1079 at 1087, [1970]2 QB 114 at 129, Salmon J explained the objects of contempt proceedings thus:*

“The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.”

34. *In *Mancienne v Government of Seychelles* (2004-2005) SCAR 161, the Court of Appeal citing Lord Ackner in *Attorney General v Times Newspapers Ltd* and*

another [1991]2 All ER 398 (HL) and Bowen LJ in *Re Johnson* (1888) 20 QBD 68 explained that the term was “inaccurate and misleading, suggesting in some contexts that it exists to protect the dignity of the judges.” It also cited Bowen LJ in *Johnson v Grant* 1923 SC 789, 790 who stated that :

“The phrase “Contempt of Court” does not in the least describe the true nature of the class of offence with which we are here concerned ... The offence consists in interfering with the administration of the law; in impeding and preventing the course of justice ... It is not the dignity of the Court which is offended – a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged.’

[37] Twomey then CJ, then proceeds to make a distinction between civil and criminal contempt as follows –

35. *In general terms, civil contempts consist in disobedience to judgments and court orders; and criminal contempts consist in conduct impeding or interfering with the administration of justice or creating a risk of such impediment or interference (see The Green Book-The Civil Court Practice Contempt of Court 2018 Volume 2, Part III).*

36. *In Linyon Demokratik Seselwa v Gappy & Ors (MA 266/2016 arising in MC 86/2016 and MC 87/2016) [2016] SCSC 615 (24 August 2016), Karunakaran J in making a distinction between civil and criminal contempt stated:*

“The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised including the nature of the relief and the purpose for which the sentence is imposed.

The purpose of civil contempt is to compel the defendant to do thing (sic) required by the order of the court for the benefit of the complainant. The primary purpose of criminal contempt are (sic) to preserve the Court’s authority, and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial or compensatory and for the benefit of the complainant but if it is for criminal contempt the sentence is punitive to vindicate the authority of the Court ...”

[38] Having made that distinction between civil and criminal contempt, Twomey then CJ then goes on to say that -

37. *It must be stated, however, that although contempts have followed this classic distinction, the two classes have converged (see in this respect Daltel Europe Ltd v Makki [2006] EWCA Civ 94). The basis for contempt orders is the strong public*

interest in ensuring obedience to court orders generally. As was held by the UK Court of Appeal in JSC BTA Bank v Solodchenko & Others [2011] EWCA Civ 1241, [2012] 1 WLR 350, committal for contempt is first and foremost a sentence which is in the public interest to uphold the authority of the court and to serve as a deterrent.

[39] The Notice of Motion at paragraph (a) seeks an order “for summons to issue on the Respondents ... to show cause as to why they should not be held in contempt of this Court **for having misled and/or given misleading information and evidence to the Court**”. At paragraph (b) the order sought is “that the Respondents ... have acted in contempt of this Court and punishing the said Respondents for contempt”. According to the Notice of Motion, the contempt which is alleged on the part of the respondents appears to be “having misled and/or given misleading information and evidence to the Court”. Furthermore at paragraphs 29, 30 and 31 of VZ’s affidavit he states:

29. *Based on the matters stated in this Affidavit, I state that the Respondents 2nd- 5th have **misled and/or given misleading information and evidence to the Court and acted in contempt of this Court.***

30. *Therefore, it is necessary in the interests of justice that summons are issued on the Respondents' 2nd - 5th to show cause as to why they should not be held personally liable **in contempt of this Court for having misled and /or given misleading information and evidence to the Court** and for this Court to find that on the basis of the matters stated in this Affidavit, the Respondents 2nd – 5th have acted in Contempt of the Court.*

31. *I further state based on the aforementioned, this Court should make an order that the Respondents have acted in contempt of Court and to punish the said Respondents for the said contempt and to make such further or other orders as this Court deems fit in the circumstances.*

[40] However at paragraph 13 of VZ’s affidavit which contains particulars of the alleged contempt, the contempt also seems to consist of the 1st – 5th respondents in their capacity as directors of VIJAY, firstly failing and causing Vijay to refuse to comply with the judgments of the Supreme Court dated 20th June 2020 and the Court of Appeal dated 2nd October 2020, and secondly causing VIJAY to file several applications to avoid

execution of the judgments, which applications are specified at 14, 15 and 16 of the affidavit.

[41] It is trite that the evidence must follow the pleadings, and the contempt alleged in the pleadings in the instant case being the Notice of Motion, is “*having misled and/or given misleading information and evidence to the Court*” and not non-compliance with the two aforementioned judgments or filing of applications before the Supreme Court, Constitutional Court and Court of Appeal to allegedly avoid execution of the said judgments. This Court will therefore not consider those aspects of the alleged contempt which are not pleaded.

[42] In his affidavit VZ alleges other acts of contempt. At paragraph 17 of his affidavit he states that in the affidavit dated 8th October 2020 verifying the Winding-Up Petition filed by VIJAY after the delivery of the judgment of the Supreme Court dated 20th June 2020 and the Court of Appeal dated 2nd October 2020, VJP as a director and shareholder of VIJAY, stated that Vijay is unable to pay its debts. This may fall within the ambit of the Notice of Motion in that it may be considered as “*having misled and/or given misleading information and evidence to the Court*” provided of course that there is evidence of the same. The only evidence in that regard is a copy of VJP’s affidavit of 8th October 2020 in which he declares the following:

7. *I verily believe that the company has no ability to pay the sums awarded in the award in that its assets are valued at substantially less than the total of the award, including interest, which now stands in total at over EURO 20 million. I exhibit as DOC4 a recent US Dollar estimate of the plant and equipment of the Company in support. Additionally, the Company has sums standing to its credit with banks, sums due to it by its clients and judgment awards in its favour, but, insofar as cash and monies due to it are concerned, these must be set off against sums which the Company owes, and insofar as awards in its favour are concerned, these are all subject to appeals and are contingent on the Company successfully resisting these appeals.*
8. *The Company has numerous other creditors and, for the foregoing reasons, I verily believe that it is consequently unable to pay its debts. I exhibit as DOC5 a provisional statement of the other creditors of the Company.*

[43] Neither a copy of the Winding-Up Petition nor the documents exhibited in VJP's affidavit were provided to this Court. The Winding-Up Petition was dismissed by order dated 12 March 2021 as an abuse of process with costs, for the reason that VIJAY had contrary to its undertaking to Court intentionally failed to comply with provisions of the Winding up Regulations 1975 so that the interested parties could not be present and exercise their right to be heard at the hearing. There was no finding of the Court that EEEL was able to pay its debts.

[44] VZ states at paragraph 22 of his affidavit that the 1st – 5th respondents' statement regarding inability to pay VIJAY's debts and having to cease operations on all projects which it had been undertaking prior to the Supreme Court and Court of Appeal judgments of 30 June 2020 and 2nd October 2020 and the loss of jobs by its workers were exaggerated in the Winding-Up Petition - a copy of which was not exhibited in this motion. He avers that Vijay resumed construction works on all project sites soon after the filing of the Winding - Up Petition. In support he produced a pen-drive containing photographs and video footage purportedly showing on-going works on some Vijay Construction sites, plant/machinery and equipment of VIJAY in operation/use on those sites and also VIJAY workers. Suffice it to say that, in the absence of any evidence as to who took the pictures and videos and testimony from that person as to the dates on and places at which they were taken and explaining the contents thereof, this Court cannot place any reliance on such evidence to show that in making the statement that Vijay was unable to pay its debts, VJP "*misled and/or [gave] misleading information and evidence to the Court*". For that reason the Court cannot find, as stated in VZ's affidavit (para 23) that "*... the Construction sites of VIJAY are not closed, VIJAY's workers and its plant/machinery and equipment are at work and in operation and use*" and that therefore the declarations of the 2nd Respondent as to cessation of work are incorrect.

[45] In his affidavit VZ also speaks about the incorporation of the new company VIJAY2 just before delivery of the judgment of the Court of Appeal on 13th December 2017 – arising from an appeal against the Supreme Court Judgment in favour of EEEL given in its first attempt at enforcement of the arbitral award in Seychelles. He states at paragraph 10 that the unavoidable conclusion that can be inferred is an intent on the part of VIJAY's

directors to defraud EEEL and deny it the fruits of its judgment if the Court of Appeal Judgment of 13th December 2017 had been in EEEL's favour.

[46] The timing of the incorporation of VIJAY2 certainly appears suspicious especially given the similarity in the names of the two companies, that VIJAY2 has the same directors as VIJAY and that both companies are registered for the same type of business activity. The fact that VIJAY2, despite being incorporated in 2017, only started operating and was given a license to carry out construction works after the delivery of the Court of Appeal judgment of 2nd October 2020 could lead to the inference that it was incorporated to defraud EEEL of the fruits of its judgment but I would not go as far as to say that this is an unavoidable conclusion. More is required in order for this Court to come to such a conclusion.

[47] At paragraph 24 of his affidavit VZ states that “*there is a **strong likelihood** that **if** VIJAY is not the one carrying out the construction works on its project sites, then the Respondents 2nd – 5th **would have** initiated transfer of VIJAY plants/machineries and equipment and its workers to another company that is related to the VIJAY or transferred its said plants/machineries and equipment and the gainful employment permit in respect of its foreign workers to another company under an agreement between VIJAY and that other company*”. The wording of this paragraph shows that VZ is not sure that it is Vijay carrying out works on the sites as previously stated. VZ has also not supported by any evidence his averment of the transfer of VIJAY plants/machineries and equipment and its workers to another company either related to VIJAY (presumably VIJAY2) or to another company under an agreement between Vijay and such company.

[48] In VIJAYS' defence, VJP states at paragraph 19 of his affidavit that all ongoing contracts were terminated by the clients, VIJAY's workers were legally employed by a new company which has nothing to do with VIJAY, and equipment on sites were retained by the clients in accordance with the provisions of the construction contracts in order to complete the works. He avers that only one of the ongoing contracts with the Government which had been terminated, was awarded to VIJAY2 for completion. Moreover, VIJAY2 had applied to the Government to employ some of the workers of

VIJAY and in fact took over about 200 of the complement of approximately 1600 workers previously employed by the latter. No documentary evidence was produced in support of these averments but I note that it is up to the applicant to prove its case and in this present matter show that such acts amounts to contempt as alleged in the Notice of Motion.

[49] At paragraph 25 (a) to (e) of his affidavit VZ sets out several instances which he alleges shows repeated bad faith on the part of the 2nd – 5th respondents. Although bad faith is evident in some of these acts, they do not in my view amount to contempt in the sense of having **“misled and/or given misleading information and evidence to the Court and acted in contempt of this Court”**. They are more in the nature of acts tending to avoid satisfying the judgment debt.

[50] In the circumstances, I do not find that the applicant has proved contempt on the part of VIJAY as pleaded in the Notice of Motion. Accordingly the Notice of Motion is dismissed with costs.

Signed, dated and delivered at Ile du Port on 2nd December 2022

E. Carolus J