

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 952

MA 247/2022

(Arising in XP 241/2022)

In the matter:

IN THE MATTER OF VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

(rep. by Bernard Georges)

and

**IN THE MATTER OF THE COMPANIES ACT 1972 AND THE INSOLVENCY ACT
2013**

Neutral Citation: *In the matter of Vijay Construction & In the matter of Companies Act 1972*
(MA 247/2022) [2022] SCSC 952 (04th November 2022)

Before: Burhan J

Summary Application for stay of any proceedings on foot or pending against the
Petitioner/Applicant under Section 102 of the Insolvency Act

Heard: 31st October 2022

Delivered: 04th November 2022

ORDER

Considering the background and circumstances of the present case set out herein and as the procedure under Rule 7 (1) of the Winding up Regulations was not followed, the application for an order that any proceedings on foot or pending against the Petitioner/Applicant be stayed or restrained pending the determination of the Petition is dismissed.

ORDER

BURHAN J

[1] The Applicant, Vijay Construction (Proprietary) Limited (“Vijay”), a company incorporated in Seychelles has filed an ex-parte Petition for winding up XP 241/2022 (the “winding up Petition”) and ex-parte Notice of Motion, MA 247/2022, under Section 102

of the Insolvency Act 2013 moving the Court that the Motion be heard as one of extreme urgency and that the Court orders that any “proceedings on foot or pending” against the Petitioner/Applicant be stayed or restrained pending the determination of the Petition.

- [2] On the 26 October 2022, when the matter was taken up, learned Counsel Mr. Georges moved for time to amend the affidavit filed in the MA application (247 of 2022) dealing with the application for stay of proceedings. A date was granted and an amended affidavit was filed on the 31 October 2022. On the said date Mr. Georges supported his application for a stay based on the said amended affidavit. He stated the application was brought under Section 102 of the Insolvency Act by the Applicant Company to restrain further proceedings in any action or proceeding before any Court pending against the said Applicant Company. He moved for a holding application which is a temporary stay which would continue depending on the outcome of the winding up application. Learned Counsel further submits that the reason he seeks a stay is set out in his amended affidavit, the main reason being that apart from Eastern European Engineering Limited (“EEEL”) the major judgment creditor to the company there are several other creditors as set out in the affidavit including the Seychelles Revenue Commission which is a preferred creditor in a sum of “seven odd million rupees”. He further submitted that there are other unsecured creditors and they rank *pari passu inter se* (equally amongst themselves). He further submits that if EEEL moves to execute their judgment there would be nothing left for the creditors. It is for the protection of all these that the stay is sought.

- [3] I must say that the sudden consideration for all the creditors by the Applicant Company who themselves have created this situation is somewhat questionable when one considers the background facts of the case as set out in the amended affidavit. It is admitted that EEEL has obtained an arbitration award against Vijay in a sum of Euro 16 million which was resisted by the Applicant until on the 21st October 2022, when the Seychelles Court of Appeal dismissed the appeal against Supreme Court judgment recognizing and enforcing an English Judgment on the award. Mr. Georges submits that now as the said appeal has been dismissed the sum mentioned in the arbitration award has now become due and payable. He further tendered the judgment in *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited [2022] SCCA 56 (21st October 2022)* to assist

the court in determining the law in respect of stay application. I observe that all these facts are supported in the affidavit of Mr Kaushal Patel, director of Vijay. Mr. Georges admits and it is also mentioned in the said affidavit that EEEL has started enforcement proceedings against Vijay following the Court of Appeal decision.

- [4] Having set down the background facts relied on by learned Counsel Mr. Georges I will set out the law in relation to this application for stay. Section 102 (1) of the Insolvency Act provides:

(1) At any time after the presentation of a winding up petition, and before a winding up order is made, the company, or the petitioner or any of the petitioners, or any creditor, shareholder, contributory, liquidator, administrator or debenture holder, may, if any action or proceeding is pending against the company, apply to the Court to restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings on such terms as it thinks fit.

- [5] It would be pertinent to set out at this stage Part VI of the Companies Ordinance 1972 dealing with 'Winding up' of the Companies which states that the Insolvency Act 2013 applies to winding up of the companies registered under this Act and as per Section 202 (3) it states that, "*Any regulations made under part VI of the Companies Act 1972 shall continue to have effect until they are repealed or amended under the provisions of the Insolvency Act 2013*".

- [6] The Regulations have not been repealed and therefore, the Companies (Winding Up) Regulations, 1975 (the "Regulations") still apply to winding up of the Companies registered under the Companies Ordinance (see also *Lincoln v EODC* (XP 27/2008) [2019] SCSC 908 (16 October 2019)).

- [7] It would be pertinent at this stage to set out Rule 7 of the Regulations which state:

7. (1) Every application in Court other than a petition shall be made by motion, notice of which shall be served on every person against whom an order is sought not less than two clear days before the day named in the notice for hearing the motion, which day must be one of the days appointed for the sittings of the Court.

(2) Every application in Chambers shall be made by summons which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.

(Emphasis added)

- [8] The current Notice of Motion is ex-parte and therefore on the face of it, there is no person against whom the order is sought, however, it is clear from the affidavit paragraphs 4- 6, 8-11 that the order if granted will affect EEEL and their enforcement proceedings before another Court. On this basis, this Court is of the view that notice of the current Motion should have been served upon EEEL in accordance to Rule 7 (1) of the Regulations, which is specific legislation that applies to winding up of the Companies registered under the Companies Ordinance and is mandatory in nature. By failing to do so as mandated by the said regulation the Applicant has deprived the principal Judgment Creditor EEEL of an opportunity of being heard.
- [9] Furthermore, while the Applicant states in the affidavit that there are “*other creditors whose rights must be protected pending the hearing of the winding up petition*”, he also refers to the Revenue Commissioner as a preferred Creditor. Yes the Revenue Commissioner is a creditor and that was recognised by this Court in *XP Isle Security Agency Limited* [2018] SCSC 776 (17 August 2018). However, it is the view of this Court a claim by a Judgment Creditor supersedes in priority the claim of all other creditors.
- [10] In *Ex Parte Vijay Construction Pty Ltd* (MA 191/2020 (Arising in XP 130/20)) [2020] SCSC 774 (19 October 2020) Govinden J (as he was then) stated the following in the Ruling:

“[4] I have heard the submissions of the Learned Counsel of for the Petitioner on the affidavit, not to proceed with the prayers or winding up and instead to Rule on the application for stay. Having so heard him, and after considering the law, and the whole circumstances of the case, this Court sees that to grant the prayers sought for would imposed certain difficulties;

- (i) It will be granting the prayers, which have not been properly grounded and founded on clear Legal provisions. The Learned Counsel, have been unable to cite the provision of the law, upon which the application to “hold on” is made.*
- (ii) If the prayers in the affidavit were to be granted. It would prove unfair and prejudicial to some to some creditors of the Petitioner, who whilst they will see themselves unable to prosecute their Legal claims or actions, in pending Court cases, against the Petitioner, would also at the same time see themselves unable to lodge their claims in the liquidation of the Petitioner, which by Virtue of filing*

this Petition, is purportedly, unable to pay its debt. As a result of this of this stalemate, they will be somewhat potentially denied justice.

(iii) Fulfilling the prayers in this affidavit would be wholly advantageous and self-serving to the Petitioner, who will see itself sheltered from Civil Suits and claims and executions of valid judgment. This protection would be on an ad infinitum basis and at the behest of the Petitioner. Who would have the final say, as to when the petition would be further prosecuted or the stay, Order would be lifted.

[5] The above findings has led this Court to the irresistible conclusion that granting the prayers, as averred and sought for in the said affidavit would amount to an abuse of the process of this Court. Section 102 (1) of the Act was meant to be an interim order pending a Winding up Order under Section 163 of the Act. It was not meant to be an open ended right of a Judgment debtor to stay Judicial process or claims against it."

(Emphasis added)

[11] It is clear to this Court on a reading of the aforementioned judgment that Vijay has already brought a similar case "Winding up" application soon after the Judgment of the Supreme Court recognising the award of Euro 16 million was given. Similar to this case there was also a separate stay application under Section 102 of the Insolvency Act done in respect of the identical award. Both the hold on application and winding up application was dismissed by Govinden J (*Ex Parte Vijay Construction Pty Ltd (MA 191/2020 (Arising in XP 130/20)) [2020] SCSC 774 (19 October 2020)*). No disclosure was made of this application in seeking the present stay.

[12] In *State Assurance Corporation of Seychelles v First International Financial Company Ltd* (409 of 1998) [2006] SCSC 1 (13 June 2006) it was further observed:

"The judgment debtor has thus, misled the court and obtained sneakily an order for winding up of the company without the knowledge of the judgment-creditor, when the execution proceedings were simultaneously pending before the Court. The court did not appoint a liquidator provisional or otherwise nor has granted a stay of execution of the judgment. Incidentally, the mere filing of a petition for winding-up in the Supreme Court by the judgment-debtor or obtaining an order misleading the court can in no way confer any right or protection nor change the legal status of the debtor."

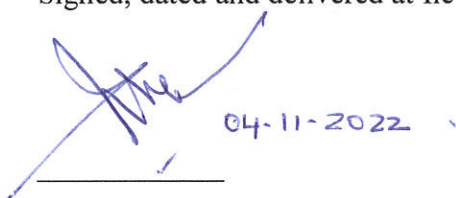
[13] In the present motion, it cannot be said that an attempt was made to mislead Court and obtain an order sneakily as learned Counsel Mr. Georges in his opening submission stated that EEEL was aware of the application which is supported by the letter dated 25 October 2022 sent by Attorney at law Mr. Rajasundaram to the Registrar which has been copied to the Attorney at Law for EEEL. In fact EEEL was present at the ex-parte hearing even

though the Applicant did not make them a party or serve notice of the motion formally on them under Rule 7 of the Winding up Regulations.

[14] The present Notice of Motion and Petition to wind up are both filed ex-parte, while the Applicant/Petitioner is aware as per affidavit that the Judgement Creditor, EEEL, has started enforcement proceedings. Mr. Rouillon who was seated in court on behalf of EEEL during the ex-parte hearing of the application at the end of submissions mentioned to court the importance of his client being heard. This Court is of the view that by failing to notify Judgement Creditor of the current proceedings as per the mandatory provision as set out in Rule 7, it appears to this Court that the Applicant/Petitioner is attempting to obtain the stay of enforcement proceedings without following the mandatory provisions set out in Rule 7 of the Winding up Regulations, thereby depriving the Judgment Creditor EEEL, Mr. Rouillon's client, the opportunity to be heard.

[15] Considering the aforementioned background and circumstances of the present case and as the procedure under Rule 7 (1) of the Regulations was not followed, the application for an order that any proceedings on foot or pending against the Petitioner/Applicant be stayed or restrained pending the determination of the Petition is dismissed.

Signed, dated and delivered at Ile du Port on 04th November 2022.



M Burhan J