

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2021] SCCA 30 13 August 2021  
SCA CL 07/2020  
(Appeal from CP 10/2020)

**Vijay Construction (Proprietary) Limited**

*(rep. by Mr. Bernard Georges)*

**Appellant**

and

**Eastern European Engineering Limited**

*(rep. by Ms. Alexandra Madeleine)*

**1<sup>st</sup> Respondent**

**The Attorney General**

*(rep. by Ms. Lansinglu Rongmei)*

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Limited & Anor* (SCA CL 07/2020) [2021] SCCA 30  
13 August 2021

**Before:** Twomey JA, Tibatemwa-Ekirikubinza JA, Dingake JA

**Summary:** Right to a hearing- a litigant is entitled to be heard on an issue which would have a bearing on his rights.

**Heard:** 2 August 2021

**Delivered:** 13 August 2021

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**ORDER**

The appeal is dismissed with costs.

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**JUDGMENT**

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**DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA**

## **Introduction**

1. The appellant (Vijay Construction (Pty) Ltd) and the 1<sup>st</sup> respondent (Eastern European Engineering Ltd (“EEEL”)) are companies incorporated in Seychelles. The Second Respondent is joined as a party in accordance with the provisions of Rule 3 (3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the constitution) Rules.
2. The appellant company is seeking constitutional redress under Article 19 (7) of the Constitution of the Republic of Seychelles. The article in part provides that any court required or empowered by law to determine the existence or extent of any civil right or obligation shall give the parties a fair hearing within a reasonable time. *The appeal arises from a decision of the Seychelles Constitutional Court in which a petition brought by the appellant was dismissed with costs. The court dismissed the petition on the ground that the matter brought before the court had been adequately dealt with by a court of competent jurisdiction. And furthermore that the petition amounted to an abuse of court process.*

## **Background**

3. The appellant and the 1<sup>st</sup> respondent are companies incorporated in Seychelles. In 2011, Eastern European Engineering Ltd (“EEEL”) and Vijay Construction (Proprietary) Ltd (“Vijay”) entered into six contracts to carry out construction work for a hotel called “Savoy Resort and Spa” in Seychelles.
4. The parties agreed that in the event of any dispute arising under or from the contracts as aforesaid, such dispute or disagreement should be settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”) and that the place for the arbitration should be Paris, France.
5. Disputes arose between the parties resulting in the termination by the 1<sup>st</sup> respondent of all six agreements. The respondent referred the disputes to arbitration in Paris under

the Rules of Arbitration of the ICC on 12<sup>th</sup> September 2012. The appellant submitted to the arbitral tribunal which delivered its final award (“the arbitral award”) on the disputes on 14<sup>th</sup> November 2014. The arbitration determined the dispute largely in favour of the Respondent. The appellant applied for the award to be set aside by the French Courts, namely the *Cour d’Appel* and the *Cour de Cassation*. The *Cour d’Appel* dismissed the application on the merits and the appellant allowed the application before the *Cour de Cassation* to lapse.

6. The 1<sup>st</sup> respondent applied to the Supreme Court of Seychelles for the recognition and enforcement of the award in Seychelles which was granted by Robinson J in **Eastern European Engineering (Proprietary) Ltd v Vijay Construction (Proprietary) Ltd**.<sup>1</sup> She found that although the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”) was not applicable in Seychelles, the arbitral award was enforceable in Seychelles under section 4 of the Courts Act. In **Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd**,<sup>2</sup> the appellant successfully appealed against the decision of Robinson J. The Court of Appeal ruled that the arbitral award was not enforceable in Seychelles because Seychelles was not a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards but did not deal with the merits in matter.
7. The respondent then filed an application before the High Court of England and Wales pursuant to the UK Arbitration Act 1996, seeking leave to enforce the Arbitral Award made in its favour on 14<sup>th</sup> November 2014 and judgment in terms of the Award. Pursuant to that application, Mr. Justice Cooke made an Order dated 18<sup>th</sup> August 2015 (“the Cooke Order”) in terms of which he (i) granted leave to the Respondent to enforce the arbitration award such leave to include leave to enforce-award interest, (ii) entered judgment against the defendant in terms of the Award, (iii) dismissed the appellant’s counterclaim in the arbitration, (iv) awarded Costs of the application including the costs

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<sup>1</sup> C/S 33/2015 [2017]; SCSC (18 April 2017).

<sup>2</sup> Civil Appeal SCA 15 & 18/2017 [2017]; SCCA 41 (13 December 2017)

of entering judgment to the respondent (v) gave the appellant 14 days after service of the Order to apply to set it aside.

8. On 23<sup>rd</sup> October 2015, the appellant applied under section 103 of the UK Arbitration Act 1996, for the Cooke Order to be set aside. The application was heard by Mrs. Justice Cockerill. After the hearing of submissions of counsel for the parties, the application was dismissed. The application of the appellant to cross-examine two persons who had made statements on behalf of the respondent was also dismissed. Costs of the various applications were awarded to the respondent and the court ordered an interim payment on account of costs which the defendant failed to comply with.
9. Subsequently, the Respondent **successfully** initiated proceedings before the Supreme Court of Seychelles to have the two Orders declared enforceable in Seychelles and registered in terms of section 3 (1) of the Reciprocal Enforcement of the British Judgments Act (REBJA).
10. Aggrieved by the decision of the Supreme Court, Vijay appealed to the Court of Appeal (SCA 28/2020)<sup>3</sup> on a number of grounds. Grounds 6 and 7 are relevant in the constitutional matter before us.

**Ground 6 was as follows:**

11. “The Learned Trial Judge erred in finding that the roundabout route taken by the Respondent in seeking to enforce an unenforceable award through the process of a British judgment could not be faulted because of the change of the Seychelles position through its accession to the New York Convention. In doing so, and in surmising that the

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<sup>3</sup> Vijay Construction (Pty) Ltd v Eastern European Engineering Limited (SCA 28/2020) SCCA 22 (02 October 2020);

respondent could now possibly seek to enforce the award directly, the Learned Trial Judge showed that her whole judgment was predicated, not on the law as it stood at the time of the hearing in 2019 but on the law as she interpreted it while preparing her judgment, without having given the parties an opportunity of disabusing her of her view.”

## **Ground 7**

12. “The Learned Trial Judge erred in failing to provide the defendant with an opportunity to address the issue of ‘back- door-entry’ due to Seychelles ratification of the New York Convention and in concluding that ‘it can no longer be argued that the enforcement of arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are capable of being enforced’. This failure to provide a procedural opportunity is a breach of natural justice, as the Appellant would still argue that, in the unique circumstances of the case, the enforcement of the arbitral award would be unconscionable and contrary to public policy, and in breach of legitimate expectation.”
13. It is to be noted that when the case was brought before the Supreme Court, a Statement of Agreed Facts, signed by both parties and including agreed documents was dated 24 July 2019 and filed shortly thereafter. The written submissions of counsel for the parties were filed during August and September 2019. The court delivered its judgment on 30<sup>th</sup> June 2020. Meanwhile, on 10 December 2019 the National Assembly voted on a motion brought by the Government that Seychelles accede to the New York Convention. The Convention came into force in Seychelles on 3 May 2020, close to 8 months from the date written submissions were filed in court.
14. In resolving Grounds 6 and 7 **Dingake JA** who wrote the lead judgment at the Court of Appeal (SCA 28/2020) was of the view that the essence of the two grounds read together revolved around the question whether the Trial Court was correct to have regard to the New York Convention in the manner it did.

15. I am of the view that resolution of the constitutional matter before us will depend on how the Court of Appeal resolved the question and therefore I will quote the Justice of Appeal extensively:

*I have the greatest sympathy for the arguments of the Appellant with respect to the approach of the Trial Court to the New York Convention, more particularly its applicability and relevance, given that it was ratified after the matter had been argued in the Supreme Court and judgment awaited and also on the aspect of a fair hearing.*

*However, I consider that it is not necessary to decide the grounds bearing on the New York Convention on account of the view I take that the remarks of the learned judge with respect to the New York Convention were obiter.*

*I have perused the record and found that the New York Convention although it came for discussion and debate in the Trial Court was not part of the pleaded case of the parties and there was no way it could have been a live issue that determined the matter. It is trite learning that pleadings drive the evidence and ultimately dictate the material issues that fall for determination.*

*In my view, reading the judgement as a whole, not just few paragraphs of the judgment that deal with the New York Convention, it seems that the remarks of the learned Trial judge were obiter, and were not the basis of the conclusions she reached. The basis or ratio of the judgement as I understand it is that the UK Orders were capable of enforcement in Seychelles as they satisfied the conditions of section 3 (2)(a) to (f) of REBJA and those stated in the case of *Privatbanken Aktieselskar v Bantele* (1978) SLR 226.”*

16. The appellant subsequently filed a petition before the Constitutional Court (CP 10/20).<sup>4</sup> The petitioner prayed that the court declares that the provisions of Article 19 (7) of the Constitution were contravened by the Supreme Court as evidenced in the judgment of that court delivered on 30<sup>th</sup> June 2020.
  
17. At the Constitutional Court, it was the contention of the appellant that neither in the statement of agreed facts filed by the parties, nor in the submissions of counsel was the accession by Seychelles to the New York Convention an issue. The accession of Seychelles to the Convention occurred six months after the court had retired to prepare its judgment and was thus not a live issue. That in addressing the defences of the appellant and in order to reject the submissions of the appellant on the defences, the Supreme Court in its judgement of 30 June 2020, utilised the fact that Seychelles had, in the interim between the filing of submissions in the matter in September 2019 and delivery of judgment in June 2020 acceded to the Convention. That by departing from the statement of agreed facts and from the submissions made by the parties in which the accession by the Seychelles to the New York Convention was not an issue, the appellant’s right to a fair hearing had been violated. To support the averment, the appellant referred to 5 paragraphs of the court judgment where the Supreme Court dealt with the Seychelles becoming a party to the New York Convention. That the parties were not called upon to address the court on the issue, despite the court being “greatly influenced in arriving at its decision by the subsequent accession to the New York Convention.’
  
18. The Constitutional Court referred to the resolution of grounds 6 and & 7 by the Court of Appeal (**Dingake JA**) above and came to the conclusion that the COA considered the issue whether the right of the Petitioner was violated when the Supreme Court dealt with the applicability of the New York Convention outside the Agreed Statement of Facts by the parties. The court also referred to Article 46 of the Constitution which deals with remedies for infringement of fundamental rights and in particular Article 46 (3) of the Constitution which provides in part that:

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<sup>4</sup> Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd [2020] SCSC 881

The Constitutional Court may decline to entertain an application for remedies for infringement of rights where the Court is satisfied that the applicant has obtained redress for the contravention under any law.

19. The court held that since the finding of the apex Court was that the discussion of the Convention did not in any way affect the rights of the petitioner (appellant before this Court) it follows that the question raised in the constitutional petition were dealt with by the apex court.
20. The appellant came to this Court on the following grounds:
  1. *The Constitutional Court erred in dismissing the Appellant's petition on the basis that the relief being sought had been 'dealt with by the Court of Appeal and 'adequately dealt with by a competent court' in that the standard is not the one contemplated by the Constitution which requires that a petitioner must have 'obtained redress for the contravention under any law' which standard is higher than the one applied by the Constitutional Court.*
  2. *The Constitutional Court erred in finding that the petition constituted an abuse of process in that the same relief as had been sought before the Court of Appeal was being sought before the Constitutional Court. The Constitutional Court failed to appreciate that the Court of Appeal had not ruled on the relief being sought there, and in the Constitutional Court, namely that the decision of the Supreme Court to address the fact that Seychelles had acceded to the New York Convention without hearing the appellant had amounted to a contravention of the right of the appellant to a fair hearing, irrespective of the use to which the accession to the New York Convention was made in the determination of the case before the Supreme Court.*
  3. *The Constitutional Court erred in failing to appreciate that the issue to be decided was not whether the Court of Appeal had made a ruling on the grounds of appeal which were filed, but whether, in that ruling, it had addressed the issue of fair trial,*



*such that it could be submitted that the appellant had already ‘obtained’ redress for the contravention.*

### Relief Sought from the Seychelles Court of Appeal

21. The appellant prayed for an order allowing the appeal, quashing the ruling of the Constitutional Court and remitting the petition to that court to be heard on the merits.

### **Consideration by the Court.**

22. The contention that the Trial Judge violated the appellant’s right to a fair hearing was based on the fact that a rather considerable part of the judgment made reference to a legal regime (the New York Convention and its implications) which was not relevant and applicable to the cause of action at the time the matter was filed and heard by the court.
23. A reading of the Court of Appeal judgment clearly shows that the Court addressed its mind to the appellant’s right to a fair hearing. Dingake JA stated in his judgment:

*I have the greatest sympathy for the arguments of the Appellant with respect to the approach of the Trial Court to the New York Convention, more particularly its applicability and relevance, given that it was ratified after the matter had been argued in the Supreme Court and judgment awaited and also on the aspect of a fair hearing. (My emphasis)*

24. The finding of the court however was that the remarks of the learned Trial judge were obiter, and were not the basis of the conclusions she reached. The basis or ratio of the judgement as I understand it is that the UK Orders were capable of enforcement in Seychelles as they satisfied the conditions of section 3 (2)(a) to (f) of REBJA and those stated in the case of Privatbanken Aktieselskar v Bantele (1978) SLR 226.” (My emphasis)

25. In resolving the issue raised in this constitutional appeal, I must answer the question: What is the relevance of obiter dictum in a judgment?
26. *Obiter dictum* (plural: dicta) are legal principles or remarks made by judges that do not affect the outcome of the case. It is a judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision. Specifically, in law, it refers to a passage in a judicial opinion which is not necessary for the decision of the case before the court. It is an incidental remark. On the other hand, the *ratio decidendi* (plural: rationes) is the reason for a judge's decision in a case. The ratio is the judge's ruling on a point of law, and not just a statement of the law.
27. To distinguish *obiter dicta* from *ratio decidendi*, one must **ask whether the judge's remarks support or relate to the holding of the case**. It is this that Dingake JA engaged in and then came to the conclusion that the basis for the decision of the Trial Judge that the UK Orders were capable of enforcement in Seychelles was that they satisfied the conditions of section 3 (2)(a) to (f) of REBJA.
28. I find that since the trial Judge's decision was not based on the applicability and relevance of the New York Convention in the Seychelles, the fact that the appellant had not been given a chance to address the court on the accession by Seychelles to the convention cannot be said to have contravened the appellant's *right to a fair hearing*. A litigant is entitled to be heard by court only in regard to issues which have a bearing on his rights.
29. Although the appellant presented three grounds of appeal, they all culminate into one issue: whether the relief sought by the appellant in his petition at the Constitutional Court had been adequately dealt with by a competent court. Article 46 of the Constitution empowers the Constitutional Court to grant remedies to persons whose rights under the Charter have been violated. However under clause 46 (3) the Constitutional Court may decline to entertain an application where the Court is satisfied that the applicant has obtained redress for the contravention under any law.

30. Having analysed the decision of the Court of Appeal in **Vijay Construction (Pty) Ltd vs Eastern European Engineering Limited (SCA 28/2020)**, I am in agreement with the Constitutional Court that the petition by the appellant filed before that court (CP 10/20) was seeking for a resolution of an issue which had already been adequately dealt with by a competent court – the Court of Appeal. The *essence* of what the appellant was seeking for at the Constitutional Court and now before this Court is that a competent court ensures that its right to be heard is not violated. That right is a right to be heard on an issue which would have impact on the party’s rights. The Court of Appeal addressed its mind to the complaint and came to the conclusion that there was no contravention.
31. Arising from the above analysis, this appeal is dismissed with costs.

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Dr. Lillian Tibatemwa-Ekirikubinza,, JA.

I concur

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Dr. Mathilda Twomey, JA

I concur

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Dr. O. Dingake, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.