Eastern European Engineering v Vijay Construction

(2013) SLR 25

Egonda-Ntende CJ

25 March 2013 Misc Appl 275/2012

Counsel P Pardiwalla for the petitioner
B Georges for the respondent

EGONDA-NTENDE CJ

[1] The petitioner sought an order for the provisional attachment of money belonging to the respondent in three accounts with two banks in Seychelles. As an interim measure before the hearing of the application inter partes an order for provisional attachment was granted against two banks for the sum claimed in the plaint of R 2,538,329.00. It turned out that the attachment of the respondent's account in Barclays Bank Seychelles Ltd satisfied this amount and the interim provisional attachment was lifted in respect of other accounts. This ruling is in respect of the main application and will determine whether to maintain, vary or discharge the interim order.

[2] Mr Pardiwalla, counsel for the petitioner, submitted that the petitioner had established all the requirements that needed to be established for an order of provisional attachment to issue. It was up to the respondent to come back to court after the issue of this order and satisfy the court that it should be lifted, which the respondent had not done. There is no affidavit in support of the respondent's side of the story. He prayed that the interim measure ought to remain in force. Mr Pardiwalla referred this court to the decisions of *Barker v Beau Vallon Properties* (1975) SLR 115, *Union Estate Management v*

Mittermayer (1979) SLR 140 and *Allied Builders v Denis Island Development Company* CS 330/2003 in support of his submissions.

[3] Mr Georges, counsel for the respondent, submitted that following French jurisprudence the object of an order of provisional attachment is the protection of a defendant's assets from risk of disappearance or diminution in value so as to fail to satisfy a possible judgment that may be entered against the defendant in the head suit. He further referred to the case of *Zaccari v Andre* (2008) SLR 136 in which Karunakaran J had taken into account that there was a clear danger of the defendant avoiding satisfying the judgment that may be entered against him to order that assets of the defendant be seized provisionally.

[4] Mr Georges submitted that in the instant case that had not been shown and the respondent was well within a position to take care of any judgment or decree that may be passed against it. He prayed that this order for provisional attachment ought not to be granted. Mr Georges further submitted that the claim in this case is for damages of over R 12,000,000.00 when all the agreement allowed as a penalty was capped at 10 per cent of the contract value. He submitted that as damages were to be determined by the Court it was not right to attach assets to cover all the damages claimed by the petitioner as it may never be awarded by the Court.

[5] Without departing from the traditional jurisprudence on the grant of provisional orders for attachment of property, as propounded by Mr Pardiwalla, I am satisfied that the applicant is not entitled to the order for provisional attachment in the sum of R 12,538,329.00. The bulk of this claim is an alleged loss of profits for delay caused in opening the hotel and the cost of extra works incurred by the plaintiff. This would be in the form of damages to be awarded by the Court

upon proof of liability, loss and damage including quantum. The Court of Appeal has previously frowned upon granting security before trial for the full claim of damages on the ground that such damages would not at that stage have been determined to be due. See *Village Management v Geers* SCA 3/1995. By analogy this is equally applicable to an order for provisional attachment in relation to a claim for damages.

[6] Similarly in this action the claim for damages will be determined by this Court. It is yet to be determined. It may succeed or it may fail. It is unreasonable in my view, without more, simply on the filing of an action for damages, to order provisional seizure of a defendant's assets to the value of the claim for damages when the plaintiff may well never succeed to prove that the damages claimed are due. Secondly in this particular case the contract between the parties provided a penalty in case of a delay in completing the contractual works. The contract capped the penalty claim to 10 per cent of the contract value which the plaintiff has put at R 712, 329.00.

[7] Paragraph 6 of the petition states:

> The Respondent's breach is [in] not completing the works has caused delays in the opening of the Hotel resulting in loss of profits amounting to SR9,856,000.00 for which the Respondent is liable to the Petitioner.

[8] Neither the plaint nor the petition explains how the petitioner has arrived at this sum of money. I am unable on its face to determine the bona fides of this claim or that it is prima facie due to the plaintiff.

[9] At the same time regard may be had to the provisions of art 1152 of the Civil Code of Seychelles (CCS) which state:

> When the agreement provides that the failure to perform the contract shall make the debtor liable to a certain sum of money by way of damages, no larger or lesser sum may be awarded to the other party. This provision shall not apply if the failure to perform is due to fraud or gross negligence. In any case, the Court may reduce the sum agreed upon if it is manifestly excessive in the particular circumstances of the contract.

[10] The contract in question contained a provision for penalty in case of default which capped the amount to about R 712,329.00. It would appear to me that the above provision bars the plaintiff from claiming any further sums beyond what is provided in the contract unless the failure to perform was due to fraud or gross negligence. The plaint alleges neither fraud nor gross negligence. On its face and in light of the said provisions of art 1152 of the CCS, the plaint may well then fail to disclose a cause of action with regard to the claims for damages beyond the sum of R 712,329.00. This would be sufficient to defeat this application.

[11] At this stage I am unable to establish the bona fides for the claim by the plaintiff beyond the penalty provided for by the agreement between the parties which if the plaintiff is believed is capped at R 712,329.00. For the reasons set out herein above I decline to grant the provisional order for attachment for the sum of R 12,538,329.00. I set aside the interim order for provisional attachment dated 14 January 2013. I dismiss this petition with costs.

[12] Before I take leave of this matter I wish to study this matter a little further in light of the arguments put forth by Mr Georges. It is not in dispute that traditional jurisprudence in this jurisdiction tends to support the approach in law taken by Mr Pardiwalla rather than that urged upon this Court by Mr George. Nevertheless I do not think that that position is cast in stone in the light of the mischief it is now creating in the business ranks of this country. No doubt it can be very disruptive of many a company's operations. It is not unusual that an applicant will seek the attachment of a respondent's accounts virtually in all banks in Seychelles. In this case attachment was sought in respect of three accounts with two banks. The effect of such orders is to freeze a respondent's financial operations or place its financial affairs under great strain. This would be so without any blameworthy action on a defendant's side. All that is essentially required is the institution of a suit, and a claim that it is bona fide.

[13] In my view this is an unsatisfactory state of affairs. It disrupts the business operations of companies, who at this stage have no obligations adjudicated upon toward the applicant. And much as it is possible for a party to come to court and seek some relief from that order injury will have been done or suffered. The time has come for a review of this approach and to restrict such orders to defendants acting in such way as to defeat the possibility of a successful plaintiff from recovering the fruits of his or her judgment. A plaintiff or a party ought to show that the defendant has acted in a manner that is putting at risk the possibility of recovering the fruits of his judgment should he or she succeed in the head suit.

[14] The raison d'etre for provisional attachment of a defendant's moveable properties is to ensure that should the plaintiff succeed in the main suit the plaintiff would be able to enjoy the fruits of its

judgment. However at this stage no trial has taken place. No 'judgment' as such has been ordered against a defendant. Judgment may well be two or more years away. In this Court it is not uncommon to have cases last for five years without completion. It appears to me quite wasteful in economic terms, both to the owner and the nation that an order of the Court can sequester assets of the defendant for such a period, locking such assets out of economic or commercial activity to the benefit of the owner when the owner has done nothing wrong at that stage. All there is, is a suit filed against him. In my view there must be more.

[15] The order for provisional attachment ought to be invoked only in cases where its raison d'etre is at stake and not otherwise. The defendant should be acting in such a manner that puts at risk the plaintiff's ability to recover the fruits of his judgment. For instance if he is disposing of his assets with a view to avoiding satisfying any judgment that may be passed against him or he plans to relocate himself or his assets outside this jurisdiction again with the object of not satisfying a possible judgment being passed against him.

[16] In the instant case the impugned behaviour of the defendant company is set out in paragraph 5 of the supporting affidavit. I shall set it out:

> The Respondent is a building contractor carrying on its trade in Seychelles and engaged in several building projects at any one time. I feel that if his funds, to the limit claimed by the Petitioner, is not conserved through a provisional attachment order, he may use up the funds on other projects and not be able to satisfy any judgment given this case.

[17] The petitioner is aware that the respondent is engaged in business in Seychelles. The petitioner's director 'feels' that the respondent would not be able to meet a judgment against it because it may be working on other projects. Apart from the fact that the logic informing that 'feeling' appears to be warped, in my view, this Court should act on facts and not 'feelings' of parties. What is wrong with the respondent carrying on with its business while the litigation goes through its paces? It would appear to me that this is likely to create more wealth and ability to meet any judgment that may be obtained against the respondent rather than the reverse in ordinary circumstances. There are no extra ordinary circumstances alleged here.

[18] It is possible in my view to infer from paragraph 5 of the affidavit of the petitioner, and I do infer, that the respondent is in a position to meet any judgment that would be passed against it given that it is known that it is a building contractor that is engaged in several building projects at any one time. I conclude that it is unnecessary in the circumstances of this case to order provisional attachment against the respondent.