IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 61/2015

(arising in CC 13/2015)

[2015] SCSC 257

EASTERN EUROPEAN ENGINEERING LIMITED
Applicant

versus

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED
Respondent

Heard: 9 July 2015

Counsel: Mr. Pardiwalla for petitioner

Mr. Bernard Georges for respondent

Delivered: 22 July 2015

ORDER ON MOTION

Robinson J

[1] Background facts

[2] The plaintiff, Eastern European Engineering Limited, filed a plaint against the defendant, Vijay Construction (Proprietary) Limited, on the 3rd March, 2015, Civil Side: Commercial Cause 13/2015, seeking a declaration that Vijay Construction (Proprietary)

Limited complies with the determination of the International Chamber of Commerce (the "ICC") International Court of Arbitration, in Paris, France, delivered on the 14th November, 2014.

[3] The defendant filed a defence on the 10th May, 2015, denying the claim of the plaintiff.

[4] The plaintiff, on the 13th March, 2015, applied for provisional attachment and provisional seizure against the defendant under section 280 of the Seychelles Code of Civil Procedure CAP 213. The Seychelles Code of Civil Procedure CAP 213 is hereinafter referred to as *"the Code of Civil Procedure"*. The application for provisional attachment and provisional seizure is supported by an affidavit and documents exhibited thereto sworn by Mr. Yuri Khlebnikov, a director of the petitioner, on the 13th March, 2015.

[5] The respondent filed evidence in the form of an affidavit of Mr. Vishram Jadva Patel, also known as V.J. Patel, the Managing Director of the respondent, opposing the application.

[6] The petitioner and the respondent do not dispute that "*six agreements*" were entered by and between themselves, in 2009, for the construction of the Savoy Resort and Spa Hotel.

[7] The evidence of the petitioner is that disputes arose between the plaintiff and the defendant resulting in the termination of the *´six agreements´*. The plaintiff and the defendant submitted the disputes to the ICC International Court of Arbitration, pursuant to the *´six agreements´*. The ICC International Court of Arbitration delivered its determination on the 14th November, 2014. The ICC International Court of Arbitration awarded the plaintiff a total sum of Euro (€) 14,248,431.89/- and United States Dollars (US$) 126,000/- with interest and costs.

[8] Mr. Yuri Khlebnikov swears and believes that as part of the ICC rules the petitioner and the respondent entered into a contractual agreement to abide by the award of the ICC once it was delivered. The evidence of the petitioner is that to date the respondent has failed to fulfil the arbitral award.

[9] Mr. Yuri Khlebnikov swears and believes that the respondent has no intention to fulfil its contractual obligations.

[10] The respondent denied, among other things, that it is bound to comply with the arbitral award.

[11] The respondent disputed that it is necessary for any of its assets to be provisionally seized or provisionally attached.

[12] Submission and discussion

[13] This court has considered the plaint, the application and the affidavit of facts filed in support thereof and the affidavit of the respondent in light of the submissions of counsel, respectively.

[14] Sections 280 and 281 of the Civil Code of Procedure provide —

> "280 At any time after a suit has been commenced, the plaintiff may apply to the court to seize provisionally any movable property in the possession of the defendant in the suit or to attach provisionally any money or movable property due to or belonging to the defendant in the suit, which is in the hands of any third person. The application shall be by petition supported by an affidavit of the facts and shall be signed by the plaintiff or his attorney, if any, and shall state the title and number of the suit.
>
> 281. If the court is satisfied that the plaintiff has a *bona fide* claim, the court shall direct a warrant to be issued to one of the ushers to seize provisionally such property, or shall make an order prohibiting the third person in whose hands such money or other movable property is from paying such money or delivering such property to any other person pending the further order of the court. The order shall be served on the third party by an usher of the court. The court, before any such warrant or order is issued, may require the applicant to find such security as the court may think fit.".

[15] Firstly, there is no dispute that the petitioner invoked section 280 of the Civil Code of Procedure after a suit has been commenced.

[16] Secondly, the plaintiff must satisfy this court that the plaint discloses a *bona fide* claim that is not frivolous or vexatious and which it had some justification to commence. As I

understand it a consideration of what constitutes a *bona fide* claim should not involve speculation on the ultimate merits of the claim. Similarly, it should not be part of this court's analysis to weigh the merits of the defendant's defences.

[17] In short, the affidavit evidence of the petitioner is that the ICC International Court of Arbitration delivered its determination on the 14th November, 2014. The ICC International Court of Arbitration awarded the petitioner a total sum of € 14,248,431.89/- and US$ 126, 000/- with interest and costs. The petitioner claims that the respondent has failed to fulfil the arbitral award. The position of the petitioner is that by submitting to arbitration, under the rules of the ICC International Court of Arbitration, the parties have contractually bound themselves to comply with the Arbitral Award. The defendant has denied the claim of the plaintiff and contended that it has availed itself of its legal rights to challenge the arbitral award and, to that end, has filed an appeal against the arbitral award before the Cour d'Appel in Paris and, through Civil Side: Commercial Cause 06/2015, has filed an application before this court to have the arbitral award set aside. In light of the above, this court is satisfied, on the materials filed, that the plaintiff has a *bona fide* claim that is not frivolous or vexatious and which it had some justification to commence.

[18] Should this court refuse the provisional attachment and provisional seizure orders even after the petitioner has satisfied the pre-requisites for the said orders under sections 280 and 281 of the Civil Code of Procedure?

[19] Mr. Pardiwalla submitted that the *bona fide* test is the only test: See Union Estate Management (Proprietary) Limited v Herbert Mittermayer (1979) SLR 140.

[20] Mr. Georges urged this court to remind itself of the object of an order of provisional attachment or provisional seizure, which is the protection of a defendant's assets from risks 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 relied on authorities to substantiate his position. He referred this court to the case of Alfonso Zaccari v Leslie Andre Civil Side No. 16 of 2008 delivered on the 2nd October, 2008, in which Judge D. Karunakaran, after being satisfied that the petitioner had a *bona fide* claim, turned to

consideration of the materials placed before him, establishing that the respondent was disposing of his assets in a manner that would be likely to seriously prevent the plaintiff in the enforcement of a judgment. Mr. Georges also looked to the ruling of Eastern European Engineering Limited v Vijay Construction (Proprietary) Ltd Miscellaneous Cause No. 275 of 2012 arising from Commercial Cause No. 28 of 2012, delivered on the 25th March, 2013. I will refer to the Eastern European Engineering Limited ruling later.

[21] This court states that the submissions of Mr. Pardiwalla and Mr. Georges are valid submissions. This court agrees with Mr. Pardiwalla that the only test to be met to satisfy the requirement for a provisional attachment or provisional seizure order, under section 281 of the Civil Code of Procedure, is the *bona fide* test. However, this court respectfully opines that the approach taken by Mr. Pardiwalla falls short of considering the object of those conservatory measures.

[22] In the Union Estate Management (Proprietary) Limited case the court held, among other things, that the plaint should disclose a *prima facie* case against the defendant. As I understand it, the effect of the Union Estate Management (Proprietary) Limited case is to impose a higher hurdle on a plaintiff/petitioner seeking those conservatory measures.

[23] In the Alfonso Zaccari case, Judge D. Karunakaran has turned to consideration of the object of those conservatory measures and seems to indicate that the petitioner has to meet the requirement of urgency. Judge D. Karunakaran appreciated the condition of urgency as follows —

> "[…] there is a clear danger that the defendant may avoid satisfaction of judgment, if given for the plaintiff. I reasonably believe that unless an order of provisional attachment is granted, the plaintiff would not be able to realise the fruits of the judgment, if given in his favour in the original suit.".

[24] I turn to the Eastern European Engineering Limited ruling in which the then Chief Justice Egonda Ntende expressed opinions on the condition of urgency, at para [15], of the ruling —

"[15] [t]he order for provisional attachment ought to be invoked only in cases where its raison d'être 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 the judgment that may be passed against him or he plans to relocate himself or his assets outside the jurisdiction again with the object of not satisfying a possible judgment being passed against him.".

[25] This court has considered fully the Alfonso Zaccari and the Eastern European Engineering Limited cases, and has no difficulty to endorse the approach taken in those cases. This court notes that the common thread to the jurisprudence of the Supreme Court is that those conservatory remedies are extraordinary remedies. I read the following from para [13], of the Eastern European Engineering Limited ruling —

"[…] The time has come for a review of this approach and to restrict such orders to a defendant acting in such a way as to defeat the possibility of a successful plaintiff from recovering the fruits of his judgment should he or she succeed in the head suit.".

This court respectfully opines that in addition to the requirement that the claim should be *bona fide*, the jurisprudence of the Supreme Court requires the court to be satisfied, first, that there is a clear danger that the respondent may avoid satisfying an eventual judgment against it, and, second, that unless the provisional attachment or seizure is granted the petitioner would be unable to enjoy the fruits of the judgment.

[26] The issue for the determination of this court is whether or not the petitioner has satisfied the condition of urgency?

[27] Mr. Yuri Khlebnikov stated the following in support of the provisional attachment and provisional seizure orders —

"6. I verily believe that the Respondent has no intention to fulfil his contractual obligations. This is obvious from —

a. The manner in which the Respondent has organised his assets between a group of companies so as to ensure that the Respondent Company owns no immovable property. This is a method of ensuring that should any high value

claim be made against the Respondent company it can quickly become insolvent. (List of Companies Attached)

b. The filing of several applications that have no real chance of success in an attempt to stall the enforcement of the arbitral award and gain time in a likely attempt to further dissipate his assets or render them worthless.

7. I verily believe that the few moveable assets and funds in Bank Accounts that still belong to the Respondent Company will be moved to other companies where Mr. Vijay Patel is a shareholder, deliberately out of the reach of the Petitioner and the Court.".

[28] The Managing Director of the respondent disputed that it is necessary for any assets of the respondent to be provisionally seized or provisionally attached. He declared in paragraphs 4 and 5 of his affidavit that —

"4. The Respondent is a well established company which has been in existence in Seychelles since 1979. The Respondent is the employer of some 1,300 employees and for the last seven years has had a turnover in excess of US$50 million per annum. It is currently engaged in several large projects in Seychelles, including the construction of residential and commercial units at Eden Island, a resort hotel at Bel Ombre, a resort on Felicite Island and a multi-storey commercial building in Victoria. Its credit is excellent and it is debt-free. All the assets of the respondent are in Seychelles.

5. The Respondent will consequently be able to honour any award in this matter made against it after exhaustion of all necessary and available challenges thereto.".

[29] This court observes that para 6 (a), of the affidavit of the petitioner, alleges a threat of insolvency *"should any high value claim be made against the respondent"*. This court has considered the affidavit evidence of the respondent and noted that the said allegation has been contradicted by the respondent. This court should be slow to infer from a "List of Companies" attached to the affidavit of the petitioner, in the absence of evidence, that the respondent would, following a judgment against it, quickly dispose of its assets in a manner that would be likely to seriously prevent the plaintiff in the enforcement of a judgment. This court notes that the respondent has been in existence in Seychelles since 1979 and there is no evidence that its assets are being disposed of or moved out of the

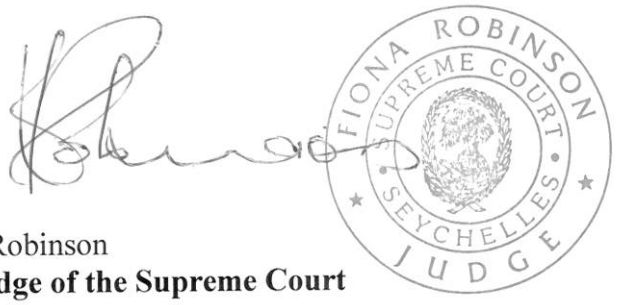
country or put beyond the reach of this court. It is possible to infer from paragraph 5 of the affidavit of the respondent that it will be in a position to meet any judgment that would be given against it. This court observes that the said fact has not been contradicted by the petitioner. Having considered the evidence of the petitioner and the respondent, this court is not satisfied that there is a clear danger that the respondent may avoid satisfying an eventual judgment against it, and unless the provisional attachment and provisional seizure orders are granted the petitioner would be unable to enjoy the fruits of the judgment.

[30] On the question of provisional seizure of cars and vehicles, this court respectfully opines that cars and vehicles are not subject to provisional seizure : see the opinions of this court in the matter of Benoiton Construction (Pty) Ltd MA: XP 51/2014 arising in CC29/2013 delivered on 7th March, 2014.

[31] Decision

[32] In light of the above this court refuses to order provisional attachment and provisional seizure against the respondent.

Signed, dated and delivered at Ile du Port on 22 July 2015



F Robinson
Judge of the Supreme Court