

IN THE SUPREME COURT OF SEYCHELLES

**Civil Side: MA 128/2017
(arising in CC 33/2015)**

[2017] SCSC 380

**VIJAY CONSTRUCTION (PROPRIETARY) LIMITED
Applicant**

versus

**EASTERN EUROPEAN ENGINEERING LIMITED
Respondent**

Heard: 6 May 2017
Counsel Bernard Georges for applicant
:
Basil Hoareau for respondent

Delivered: 9 May 2017

RULING ON MOTION

Robinson J

[1] The court on 18 April, 2017, entered judgment in favour of EEEL as against Vijay in the suit (hereinafter "Judgment"). On 18 April, 2017, the court dismissed the motion (MA220/20 15), f led by Vijay, for the court to take EEEL in contempt of court and decline to entertain EEEL's action in this matter for the reason that the behaviour of

EEEL towards the hearing is both tainted with illegality and is a clear and blatant attempt at perverting the course of justice in this matter, and reserved the reasons for doing so. The court gave reasons on 4 May, 2017.

- [2] This is an application for a stay of execution of the foreign arbitral award in ICC Case No. 18493/MCP/EMT between Vijay and EEEL, and delivered on 14 November, 2014, which arbitral award was declared executory and enforceable by the Judgment, under section 229 of the Seychelles Code of Civil Procedure (hereafter "SCCP"). Section 229 of the SCCP provides -

"229. An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the Court or the Appellate Court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the Appellate Court may direct. "

- [3] In the case of **MacDonald Pool v Despilly William Civil Side No. 224 of 1993**, the Supreme Court identified five grounds which may be considered in granting a stay of execution of judgment pending appeal -

- "1. The appellant would suffer loss which could not be compensated in damages.*
- 2. Where special circumstances of the case so require.*
- 3. There is proof of substantial loss that may otherwise result.*
- 4. There was a substantial question of law to be adjudicated upon the hearing of the appeal.*
- 5. Where if the stay is not granted the appeal if successful, would be rendered nugatory."*

See also the case of **Falcon Enterprise v David Essack The Wine Seller (Ply) Ltd and Eagle Auto parts Ltd Civil Side No. 139 of 2000**

- [4] In the case of **Casino Des Seychelles Ltd v Companie Seychelles (Pty) Ltd S.C.A 2/94** the Court of Appeal of Seychelles added a further consideration that although an appeal does not operate as a stay of execution, save in exceptional circumstances, this court

ought not to make any order which would have the effect of the Court of Appeal being faced with a *fait accompli* in respect of that appeal.

[5] As regards the terms on which a stay is ordered the court reads from O. 59, r. 13 Appeals to the Court of Appeal, 59113/2 -

"Terms on which a stay is ordered. - These are in the discretion of the Court, but in regard to the payment of costs under the judgment or order appealed from they are usually that the costs shall be paid to the solicitor on the other side on his personal undertaking to return them if the appeal is successful (Grant v Banque Franco-Egyptienne (1878), 3 C. P. D. 202; Hood-Barrs v. Crossman, [1897] A.C. 172; Swyny v. Harland, [1894] 1 Q. B., per Lopes, LJ, at p. 709). As regards the debt or damages awarded, there is no general practice: according to the circumstances (for example, and the chances of success in the appeal) the money may be ordered to be paid into Court, or only some part of it. Unless it is quite plain that something must be recovered, a term should not be imposed that part of the money should be paid to the plaintiff and not be repayable in any event (Doyle V White City Stadium, [1935] 1 K. B. at pp. 128, 129; Bloor v. Liverpool Derricking Co., [1936] 3 All E.R. at p. 403). Under a Chancery practice of long standing the defendant may be ordered to pay the money, the plaintiff giving security for repayment if the appeal is successful, or the defendant if the plaintiff prefers that course, to pay the money into court (Merry v Nickalls (1873), L.R. 8 Ch. App., p. 206; Cooper v . Cooper (1876), 2 Ch. D. 293; Morgan v. Elford (1876), 4 Ch. D. 388); and, in an appeal against an order for payment out of a fund in Court, a stay is granted on an undertaking, if the appeal fails, to make good the difference between interest at 4 per cent, and the income actually produced by the fund in Court, and to pay the expenses of the sale of the fund and the reinvestment of the proceeds (Brewer v. Yorke (1882), 20 Ch. D. 669, and see Bradford v. Young (1884), 28 Ch. D., P. 23). Where the Court below has imposed terms, the Court of Appeal will be loath to interfere with its exercise of discretion (Hansard v. Lethbridge (1891), 8 T L. R. 197)."

[6] In exercising its discretion given to it the court will have to carry out a balancing exercise in order to decide what is just in the circumstances of the case.

[7] The court has considered the application, the Affidavit in Reply and the submissions of both counsel with care.

[8] EEEL conceded that there is "*potentially*" a substantial question of law to be adjudicated upon with respect to the finding of the court that section 4 of the Courts Act applied in Seychelles to enable the powers, authorities and jurisdiction of the High Court in England to be exercised by the Supreme Court of Seychelles in addition to (but not in the absence of) the jurisdiction of the Supreme Court).

[9] Paragraphs 4,5,6, 7,8 and 9 of the Affidavit in Reply aver-

"4. *I further aver that if a stay of execution is granted by this Honourable Court grave injustice would be caused to the EEEL as Vijay would deplete its assets especially the funds in its bank accounts.*

5. *During his testimony before the Supreme Court in the said suit, Mr. Vishram Jadvu Patel, a Director of Vijay stated under cross-examination that Vijay would rather wound up than pay damages to EEEL as per the Arbitral Award. It is now shown to me produced and exhibited herewith as A1 the proceedings containing the testimony of Mr. Vishram Jadvu pale I. I wish to refer to Court to pp 10 to 11 and 27 to 28 of A1.*

6. *It is evident therefore that Vijay has every intention to frustrate the enforcement of the judgment.*

7. *Furthermore Mr. Vishram Jadvu Patel has proven himself to be unworthy of belief in that he has sworn inconsistent affidavits in order to suit the convenience of Vijay. It is now shown to me produced and exhibited herewith as A2 a copy of an affidavit which Mr. Vishram Jadvu Patel sworn on the 15th of April 2015. I invite this Honourable Court to compare the averments made at paragraphs 5 and 6 of A2 as opposed to the averments made at paragraphs 7 and 8 of the affidavit sworn in support of the present application.*

8. *I further aver that EEEL would be willing to concede to a stay of execution provided -*

(i) either Vijay deposits at the Registry of the Supreme court;

(ii) or provide a banker's cheque or acceptable guarantee,

in the entire sum due and payable in terms of the judgment;

9. *In the alternative if Vijay pays the entire sum due and payable under the said judgment EEEL is prepared to provide a banker's cheque or other guarantee acceptable to the Court in the value of the sum paid by Vijay as security to Vijay pending the determination of any appeal instituted by Vijay. "*

[10] It is to be noted that in A2, with respect to provisional attachment and seizure proceedings, Mr. Vishram Jadv Patel declared -

"6 ... Its [Vijay's] credit is excellent and it is debt-free. All the assets of the Respondent are in Seychelles.

7. 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."

The position of Vijay is the following -

" Court: Mr. George anything to add or to reply.

Mr. George That Mr. Patel is saying in view all the fact that we are well-established company with a huge turnover we do not need to put up any security, that is what he is saying, we are able to honor any award and that is perfectly correct, it is not an incorrect statement, the question is how will that honoring occur, it also follows that in the event that Vijay is asked to pay tomorrow morning or yesterday morning at 9 o'clock, seventeen million euro in one go, it is not going to be able to do that and will have to face strenuous consequences including liquidation, but one does not exclude the other. It does not mean that it will not honor the award, the award might be honored to the detriment of the company and this is precisely the point that we are making now

and we have made all along, there has been no liquidation of assets, there was no need to have put any security over the assets as it was saying then. Security has been put over the assets and as at today there has been no depletion, so there has been no inconsistency or whatsoever, but clearly, to pay seventeen million euro from one day to the next is going to have serious and adverse consequences for the company. It does not mean that given time and iran arrangement is entered into that the company will not be able to pay the award, that is all that it says-".

(Proceedings of Saturday 6 May, 2017, 10 a.m., pp 24 & 25 of 32)

Underlining is mine

[11] For the reason stated above the court is of the opinion that it ought to stay the execution of the award declared executory and enforceable by the Judgment.

[12] The court has to decide the terms on which the stay is to be granted. In A2 Vijay states that it will be able to honour any award. In A I Vijay avers that it will not honour any award. Vijay is now saying that it will not be able "*to pay seventeen million euro from one day to the next*". The court is guided by the principle that it will not permit any party to deprive a successful litigant of the fruits of its litigation.

[13] In light of the **evidence the court grants Vijay's prayer for a stay of execution of the arbitral award and of the Judgment maintaining the arbitral award, subject to the following conditions.**

[14] The court directs that within 21 days from the date of the Order on Motion Vijay enters into good and sufficient security to the satisfaction of the court in the sum of Euro Eight Million only in the form of money or properties including the charging of any properties to the satisfaction of the court. The security shall be deposited with the Registrar of the Supreme Court.

[15] This matter is made returnable on 31 May, 2017 at 1:45 p.m ..

Signed, dated and delivered at lie du Port on 9 May 2017

F Robinson

Judge of the Supreme Court

F Robinson
Judge of the Sup