

IN THE SUPREME COURT OF SEYCHELLES

CIVIL SIDE: MA16/2018

(arising in CC13/2015)

[2018]SCSC 660

EASTERN EUROPEAN ENGINEERING LIMITED

Applicant

Versus

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

Respondent

Heard:

Counsel: Miss Alexandra Madeleine for Applicant

Mr. Bernard Georges for Respondent

Delivered: 11 July 2018

Reasons for Ruling on Motion

F. ROBINSON, J

1. The Applicant is Eastern European Engineering Limited hereafter "*EEEL*". The Respondent is Vijay Construction (Proprietary) Limited hereafter "*Vijay*".
2. On 14 April, 2018, this court dismissed the application for leave to amend before trial, save for the proposed amendment to paragraph (b) of the prayer to the plaint, on the stipulation that it will give its reasons for doing so on another date. This court now gives reasons.

Reasons

3. The affidavit in support of the application alleged in part –

"I, VADIM ZASLONOV being a Director of Eastern European Engineering Limited of Premier Building Office No. 406, Victoria, Mahe, Seychelles solemnly and conscientiously make OATH and swear as follows:-

1. That I am the deponent above-named, and I am duly authorised to swear this affidavit.
2. That Eastern European Engineering Limited ("EEEL") is the Plaintiff in Supreme Court case CC13/2015 Eastern European Engineering Limited v/s Vijay Construction (Pty) Ltd (hereafter "CC13/2015) filed for breach of Agreements.
3. In the Plaint filed in CC13/2015 Plaintiff, inter alia, sought an order that the Defendant complies with the final Award of the arbitrator.
4. Now Plaintiff seeks to amend the plaint in CC13/2015 by inserting a new paragraph 13 and amending the prayer to –
 - i. state the full amount of Award with which Defendant is required to comply;
 - ii. add a further prayer that the directors of the Defendant are declared liable to the Plaintiff for the Defendant's breach of the Agreements notably to pay the sums awarded in the Award to the Plaintiff,

as shown in bold on the attached Amended Plaint shown to me , produced and exhibited herewith as **A1**.

5. I have received legal advice and verily believe that the proposed amendments are necessary for the purpose of determining the real questions in controversy between the parties.

6. I have received legal advice and verily believe that the proposed amendments do not convert the cause of action, and will not cause any prejudice to the Defendant its defence.

7. Case CC13/2015 is yet to be heard by the Court.

[...]"

4. The proposed amendments are specified in a *PLAINT (AMENDED)* exhibited with the affidavit as "A1".

5. Vijay filed its response supported by an affidavit declared by Vishram Jadva Patel, of La Misere, a director of Vijay. The affidavit alleged as follows –

"3. On the basis of advice I have been given, I have no objections to the proposed amendments to paragraph (b) of the prayer to the Plaint. I am informed by the company's lawyers and verily believe that the amendments may require filing fees to be paid as there will now be liquidated sums claimed and prayed for if the amendments are allowed. These filing fees should be paid by the Plaintiff for good order.

4. On the basis of the advice I have received, I object to the proposed prayer (c). I am informed by the company's lawyers, and verily believe, that the addition of this prayer will effectively change the nature of the present action, from one where a sum is claimed from the company to one which seeks to make directors of the Defendant company liable for the debt of the company. This is a completely different action from the one filed, which is based on an award given and unpaid. The proposed new prayer will require a consideration of the liability of directors for debts of their company, a matter of company law very remote from suing on an

alleged debt. This will, I am informed by the company's attorneys, and verily believe, an investigation of the behaviour of the directors and the solvency of the Defendant, matters not required to be proved in the Plaintiff in its current form.

[...].

6. Section 146 of the Seychelles Code of Civil Procedure provides –

"Amendment of pleadings

146 The court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties ... provided that a plaintiff shall not be amended so as to convert a suit of one character into a suit of another and substantially different character."

7. Sauzier J. in *Petit Car Hire v Mandelson* [1977] SLR 68 formulated the following principles –

"An amendment should be granted to enable the real questions in controversy between the parties to be settled and to avoid the necessity of another suit if –

- (a) The amendment is made in good faith;
- (b) The amendment would cause no injustice to the other party (there is no injustice if the other party can be compensated by costs); and
- (c) The nature of the suit is not altered."

8. Vijay did not object to the proposed amendment to paragraph (b) of the prayer to the plaint. This court allowed the amendment to paragraph (b) of the prayer to the plaint.

9. Vijay opposed the new prayer (c) on the ground that it is contrary to the proviso to section 146 of the Seychelles Code of Civil Procedure. The new prayer (c) averred –

"an order that the directors of the Defendant are liable to the Plaintiff for Defendant's breach of the Agreements notably they are liable to pay to the plaintiff the sums referred to in paragraphs (b) (i), (ii), (iii) and (v) above."

The new prayer (c) is linked to the proposed paragraph 13, which averred –

"13. The Defendant, and in default, the directors of the Defendant are liable to make good the breach of the Agreements by complying with the Award."

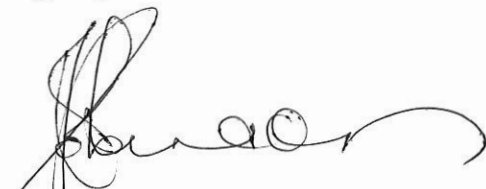
10. This court had to determine whether the proposed amendments would alter the nature of the case. Having considered the proviso to section 146 of the Seychelles Code of Civil Procedure, the materials on file and the submissions of both Counsel, this court was satisfied that the amendment if allowed would entirely alter the nature of the case.

11. The plaint is brought against *"Vijay Construction (Proprietary) Limited of Providence, Mahe, Seychelles"* styled as *"Defendant"*. Paragraphs 11 and 12 of the plaint aver *"11. The Defendant is bound under the Agreements to comply with the Award. 12. In breach of the Agreements, the Defendant has failed to comply with the Award or pay any amount of the sums aforesaid."* EEEL's claim is based on an award delivered by the arbitrator and unpaid by Vijay. The proposed amendments seek to make the directors of Vijay liable for the debt of Vijay. It is noteworthy that the directors of Vijay are not parties to the suit. Moreover, paragraph 13 is not particularised. As rightly pointed out by Mr. Georges how on the face of the pleading, as sought to be amended, is EEEL going to prove that the directors are liable? And how does the liability of the directors arise? In the final analysis, this court accepts the evidence of Vijay that the new prayer (c) would have required a consideration of the liability of the directors for debts of their company, a matter of company law very

remote from suing on an alleged debt. For these reasons this court did not grant leave to amend as prayed for by EEEL, save for the new prayer (b).

12. This court directs that the plaint shall be amended in terms of the *PLAINT (AMENDED)* (*new prayer (b)*) and a summons with a copy of the amended plaint attached to be served on Vijay.
13. This court also makes order for costs in favour of Vijay.

Signed, dated and delivered at Ile du Port on 11 July 2018

A handwritten signature in black ink, appearing to read 'F Robinson', with a large, stylized flourish extending to the right.

F Robinson

Sitting as a Judge of the Supreme Court