

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 573
MA 119/2020
(Arising in CS23/19)

In the matter between:

EASTERN EUROPEAN ENGINEERING LIMITED
(rep. by Alexandra Madeleine)

Applicant

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED
(rep. by Bernard Georges)

Respondent

Neutral Citation: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd*
(MA119/2020) [2020] SCSC 573 (10 August 2020).

Before: E. Carolus J

Summary: Application for respondent to disclose particulars of applicant.

Heard: 30 July 2020

Delivered: 10 August 2020

ORDER

Application for disclosure is dismissed

RULING

CAROLUS J

Background

[1] Judgment was delivered in the case of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) [2020] SCSC 350 (30 June 2020) (“the principal case”) on 30 June 2020 declaring two Orders of the High Court of England and Wales to enforce an international arbitral award in favour of the applicant (“EEEL”), executory and enforceable in Seychelles. In terms of the judgment the respondent (“Vijay”) was

ordered to pay EEEL various sums of money, amounting in excess of Euro twenty million.

- [2] Various applications were filed by the parties after delivery of the judgment. This included an application filed by EEEL on 1st July 2020, seeking execution of the judgment and an application for stay of execution of the judgment pending appeal filed by Vijay on 3rd July 2020. Both matters were heard together on 21st July 2020, and by a ruling delivered on 24th July 2020, the Court dismissed EEEL's application for execution and granted Vijay's application for stay of execution of the judgment on condition that Vijay provides a bank guarantee in the sum of Euro Twenty Million within 14 days of the ruling. The matter was fixed for today 10th August 2020 for Vijay to inform the Court whether it had fulfilled the conditions of the stay of execution.
- [3] On 23rd July 2020, EEEL filed the present application by way of Notice of Motion supported by an affidavit of Vadim Zaslouov ("the affidavit"), seeking "*an order obliging the Respondent to disclose to the Applicant and to the Court the particulars of all of Respondent's financial transactions for the period 2019 – 2020 including but not limited to complete bank statements and financial statements of the Respondent for the same period;*".
- [4] The grounds for the application as set out at paragraphs 4 to 7 of the affidavit are essentially that Vijay is ceasing its operations as a result of the judgment against it, and that disclosure of particulars of its financial transactions is necessary to ensure that there has been no dissipation of its assets/funds to circumvent the judgment and deny EEEL the fruit of the judgment. EEEL relies on alleged announcements in the local media by Vijay that it is closing down following the judgment, and a similar announcement made in the National Assembly, as well as a statement of Mr. V. Patel in case *CC33/2015 Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd*, that the Respondent (Vijay) would rather wind up than pay damages to EEEL as per the arbitral award. On that basis, it is averred on behalf of EEEL that there is a strong likelihood that Vijay has dissipated most of its assets and/or funds or is about to do so in order to deny EEEL the fruits of its judgment, and that it is in the interests of justice that the order for disclosure be made.

- [5] In support of its averment of Mr. V. Patel's statement in case CC33/2015 that Vijay would rather wind up than pay the arbitral award to EEEL, EEEL has exhibited in the affidavit, proceedings of Wednesday 2nd September 2015, in CS33/2015. No other documents are exhibited.
- [6] When addressing the Court on EEEL's application counsel for EEEL stated that the applicant is basically seeking for the Court exercise its discretion to make the orders sought in the interests of justice, as there is a legitimate fear that Vijay might have dissipated its assets and funds based on its comments on national media and those made in the National Assembly.
- [7] Vijay objected to the application but declined to file an affidavit in reply thereto choosing to respond orally to EEEL's application. It objected to the application on the ground that EEEL has shown no legal basis for the application and stated there is no legal provision empowering a Court to willy-nilly ask a judgment debtor to disclose its bank statement.
- [8] He further pointed out that in any event the parties are engaged in litigation pursuant to which a stay of execution has been granted on condition that security is provided. He argues that, on the returnable date therefore either Vijay will have provided the security as ordered in which case the application will have no relevance, as there will be no justification for Vijay having to provide its financial information, or in the event of its failure to provide such security EEEL will be free to enforce the judgment. It is only in the latter case when seeking to enforce the judgment that EEEL can avail itself of avenues open to it to request information. Counsel expressed the view that at this point in time EEEL cannot make the present application which is totally irrelevant within the confines of the case and for which he can see no reason.
- [9] For the above reasons it is submitted on behalf of Vijay that the application is vexatious, spurious, a waste of the Court's time and an abuse of process, and should be struck out with costs.

- [10] In response, counsel for EEEL submitted that the application is for an order in the nature of a Norwich Pharmacal Order for disclosure of information by Vijay, which this Court has jurisdiction to grant, and that this is the legal basis for the present application.
- [11] She conceded that the application came before the Court after it had ordered a stay of execution of the judgment in the principal suit, subject to a condition which Vijay has to satisfy the Court has been complied with on 10th August, but pointed out that the application was filed on 23rd July 2020 before delivery of the ruling granting the stay of execution on 24th July 2020.
- [12] She further argues that the basis for the application for disclosure is the statement that Vijay is ceasing operations which was made in the local media, after the hearing of the applications for execution and stay of execution of the judgment, and which continues to be made despite the stay having been granted. This, she states forms a legitimate basis for EEEL to request for disclosure of the information sought because it is a judgment creditor and the statements seriously prejudice EEEL, and although a stay has been granted, at this stage it is not known whether the security ordered will be provided.
- [13] On the basis of the above, Counsel for EEEL submitted that the Court has jurisdiction to make the order applied for and that the application is not vexatious, spurious and an abuse of process.
- [14] Counsel for Vijay raised three further points:
- [15] Firstly that counsel for EEEL only disclosed the basis for EEEL's application in her reply to Vijay's counsel's oral submissions and not when she made the motion. He argues that nowhere in the application is it stated that a Norwich Pharmacal Order is being sought, and that this has to be disclosed at the very least, in addition to the basis upon which the Court is empowered to issue such an Order. Further if the application is for a Norwich Pharmacal Order, then it has no basis because an application for such an Order is not served on the respondent but on third parties from which it is sought to obtain information.

- [16] Secondly, if the application was filed before the stay of execution was granted, EEEL ought to have conceded that the application was now otiose because of the subsequent order for stay.
- [17] Thirdly, notwithstanding that the application for stay of execution had been filed and before it was heard, EEEL applied for attachment of money in Vijay's bank accounts which was done, and this led to the statements being made to the media about Vijay having to close down. However as soon as the bank accounts were released from attachment, Vijay resumed operation. What was stated to the media was an obvious consequence of the attachment order applied for by EEEL and which it cannot now complain about. This Court notes that such matters are factual matters which should properly have been put before this Court in the form of affidavit evidence on behalf of Vijay and constitutes evidence from the bar. This statement is therefore disregarded.
- [18] In reply, Counsel for EEEL reiterated that the present application is for a Norwich Pharmacal Order for disclosure of particulars of Vijay's financial transactions to ensure that there has been no dissipation of assets/funds to circumvent the judgment and deny EEEL the fruit of the judgment.

Decision

- [19] I note that the Notice of Motion simply gives notice of EEEL's motion for "*an Order obliging the Respondent to disclose to the Applicant and to the Court the particulars of all of Respondent's financial transactions for the period 2019 – 2020 including but not limited to complete bank statements and financial statements of the Respondent for the same period*". The affidavit in support of the application in paragraphs 4 to 7 states the grounds for the application as follows:
4. *On 22nd July 2020, VIJAY announced in the local media that it is closing down following the negative outcome of the judgment. The same announcement was simultaneously confirmed in the National Assembly sitting of the 22nd July 2020.*
 5. *I state that this announcement confirms the statement of Mr. V. Patel under cross-examination in case CC33/2015 Eastern European Engineering Ltd v Vijay*

Construction (Pty) Ltd on the 2nd September 2015 that the Respondent would rather wind up than pay damages to EEEL as per the arbitral award.

6. *Based on Vijay's announcement and its director's past statement with respect to the same subject matter – the arbitral award -, there is a very strong likelihood that VIJAY has already dissipated most of its assets and/or funds or is about to do so in order to deny EEEL the fruits of the Judgment.*
7. *Therefore, it is in the interests of justice to order VIJAY to disclose the particulars of VIJAY's financial transactions for the period 2019 – 2020 including but not limited to complete/ full bank statements and financial statements in order to satisfy EEEL and the Court that there has been no dissipation of assets/ funds.*

[20] I also note that in moving the Court to grant its motion, counsel for EEEL gave no indication as to the legal basis of the application or even that it was for a Norwich Pharmacal Order. She essentially limited herself to reiterating what was stated in the Notice of Motion and supporting affidavit, and only stated that the order sought was a Norwich Pharmacal Order in response to counsel for Vijay's objection.

[21] I am of the view that it is desirable in an application of this kind, or indeed any application, to make clear the exact nature of the order being sought, and the legal provisions under which the application is made, or in the absence of such provisions in our law, the legal basis therefor. This is to inform the respondent of the nature of the application so that it may make and defend any objections thereto in an informed manner. However if the nature of the order being sought is clear from the application and supporting evidence although it is not specifically mentioned, in this case a Norwich Pharmacal Order, then this objective would have been met and no prejudice would be caused to the respondent which would be able to adequately defend itself. The question therefore is whether the contents of the Notice of Motion and supporting affidavit sufficiently discloses the nature of the Order sought and the legal basis for such Order. In my view, in the present case, this is arguable as it was not clear, before it was clarified by counsel for EEEL if it was the equitable or other jurisdiction of the Court which was being invoked in the present application.

[22] Norwich Pharmacal Orders are grounded in equity and emanate from the case of *Norwich Pharmacal v Commissioners of Customs and Excise (1974) AC 133*. The Supreme Court of Seychelles has jurisdiction to make such an Order in the exercise its equitable jurisdiction, by virtue of sections 5, 6 and 17 of the Courts Act which vests it with all the powers, privileges, authority and jurisdiction capable of being exercised by the High Court of Justice (*Danone, Asia Pte Limited and Ors v Offshore Incorporations (Seychelles) Ltd CS310 Of 2008*).

[23] Pillay J, in *Brickhill Capital (NZ) Limited v Vistra (Seychelles) Limited (MA40/2017) [2017] SCSC (27 July 2017)* correctly sets out the applicable principles for applications for Norwich Pharmacal Orders, and their development, including such applications made post judgment in aid of enforcement, as follows:

(5) *The basis of a Norwich Pharmacal Order originates from the case of Norwich Pharmacal v Commissioners of Customs and Excise (1974) A.C. 133, that is that the Court on application by the Applicant, may order an innocent third party to disclose any information relevant to the case, when there has been wrongdoing and the Plaintiff is unable to find out the wrongdoers.*

(6) *The conditions which must be satisfied before a ‘Norwich Pharmacal Order’ may be granted were summarised in Mitsui & CO Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511 at 21, as follows:*

(i) “A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) There must be the need for an order to enable action to be brought against the ultimate wrongdoer;

(iii) The person against whom the order is sought must:

(a) be mixed up in so as to have facilitated the wrongdoing;

(b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.”

(7) *Per Lord Reid in Norwich Pharmacal v Customs & Excise, “Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a person in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage.”*

(8) *“...if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. [It does not] matter whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”*

(9) *An essential pre-condition to the grant of a “Norwich Pharmacal Order” is that the Plaintiff requires the information for a pending suit or prospective suit. However it must not be a mere fishing expedition.*

(10) *In the present case the suit has already been completed. A judgment has already been given and the Applicant wishes to execute the judgment. In spite of the initial restrictive approach taken to the granting of such orders the Courts have extended the ambit and recently the Commercial Court of the British Virgin Islands in the case of UVW and XYZ (A Registered Agent) (Claim No. BVI HC (COM) 108 of 2016 [19th September 2016] extended such orders, allowing discovery post-judgment. However the test remains that the Court must be satisfied that there is wrong-doing by the third party or the debtor. The test laid in the above case is that the Applicant must show that “there is a reasonable suspicion that a disclosure defendant is mixed up in the wilful evasion of another’s judgment debt.” Mere failure to satisfy the debt does not amount to wilful evasion.*

[24] In the *Brickhill Capital* case Pillay J, in dismissing the appeal found that there was no allegation of wrong-doing, innocently or not, by either the respondent or the judgment debtor other than the applicant wishing to execute a judgment against the debtor.

- [25] In the Territory of the Virgin Islands (TVI) case of *UVW and XYZ* relied upon by Pillay J, the judgment creditor applied to the Court for a Norwich Pharmacal disclosure order against a corporate registered agency provider in the TVI for the purpose of *inter alia* aiding enforcement of a number of overseas judgments. The judgment creditor identified a corporate vehicle registered in the TVI which appeared to belong ultimately to the judgment debtor containing at least one substantial asset. The judgment creditor had identified a pattern of conduct on the part of the judgment debtor which, when taken in the round, carried the unmistakable hallmark of efforts to make himself judgment proof by way of deliberate concealment of assets. It required disclosure to discover assets the judgment debtor might have concealed through the TVI corporate vehicle or other vehicles registered with the same corporate service provider and to discover possible leads for asset tracing and/or execution efforts. In granting the Order, the Court held that Norwich Pharmacal relief is in principle available post-judgment in aid of enforcement, where there is reasonable suspicion for believing that a disclosure defendant is mixed up in the wilful evasion of another's judgment debt.
- [26] The present application seeks disclosure of particulars of Vijay's financial transactions for the period 2019 – 2020 including bank statements and financial statements. The purpose of such disclosure is to satisfy EEEL and the Court that there has been no dissipation of Vijay's assets/ funds to circumvent the judgment and deny EEEL the fruit of the judgment. According to EEEL there is a very strong likelihood that Vijay has already dissipated most of its assets and/or funds or is about to do so, such likelihood being shown by Vijay's alleged announcement on the media, and the announcement in the National Assembly that it was ceasing operations and V. Patel's statement that it would rather wind up Vijay than settle the arbitral award.
- [27] In the *UVW and XYZ* case at paragraph 14, the Court quoted Tomlinson LJ's concluding remarks in *NML Capital Ltd v Chapman Freeborn Holdings Ltd [2013] EWCA Civ. 589* as follows: "... *Norwich Pharmacal type relief in aid of execution should ... be available only in respect of involvement in conduct which necessarily amounts to willful evasion of execution.*". The Court then proceeded to explain that "*Tomlinson LJ was saying that mere non-payment of a judgment debt would not be enough to trigger the Norwich*

Pharmaceutical jurisdiction ... A deliberate effort to obstruct or frustrate enforcement is required. That undoubtedly constitutes wrongdoing. Inability to pay a judgment debt although unfortunate, can occur in good faith. Justice still demands however that the judgment debtor satisfy the judgment debt. Tomlinson LJ described non-payment of a judgment debt as a wrong – and correctly so – but the fact of non-payment alone is not sufficient to trigger the Norwich Pharmaceutical jurisdiction. There has to be something sufficiently unconscionable in the alleged wrongdoer’s conduct to trigger what is ultimately a jurisdiction which seeks to do equity. Strategies to obstruct and delay enforcement, on the other hand, are wrong because they frustrate justice. They work against the very purpose of the courts and legal system. Tomlinson LJ’s observations ought not be taken to imply that the court should be slow to see in a judgment debtor’s acts an attempt to obstruct or evade settlement of the judgment debt. To the contrary, the court should be astute and robust to see through a judgment debtor’s acts for what they are. A reasonable suspicion of willful evasion suffices.”

[28] In the present case EEEL has brought no evidence of the alleged statements made to the media and in the National Assembly that Vijay is going to be wound up because of the judgment against it in the principal case. The only document exhibited in the affidavit of Vadim Zaslouk on behalf of EEEL, are the proceedings of Wednesday 2nd September 2015, in CS33/2015 in support of the averment that Mr. V. Patel stated in case CC33/2015 that Vijay would rather wind up than pay damages to EEEL as per the arbitral award. This Court does not have before it any evidence that Vijay is indeed going to be wound up. It may very well be that the alleged statements in the media and in the National Assembly, if substantiated, together with the statement of Mr. V. Patel that he would rather wind up Vijay than settle the arbitral award, in the particular circumstances of this case, could suffice to show reasonable suspicion for believing that Vijay is attempting to evade the judgement debt which might justify the granting of an order for disclosure. However I am of the view that the sole statement of Mr. V. Patel does not suffice to show such reasonable suspicion of willful evasion. Consequently, on the evidence before this Court, I do not find proven any wrongdoing on the part of Vijay which would justify the granting of a Norwich Pharmaceutical Order.

- [29] As to the objection that a Norwich Pharmacal Order may only be made against a third party and not the judgment debtor itself, I note that in the cases reviewed, orders allowing disclosure in aid of post-judgement enforcement through a Norwich Pharmacal Order are orders against third parties and not the judgement debtor. Where Courts make disclosure orders against a judgement debtor in order to aid in the execution of a judgment, it would appear that this is usually not in terms of their Norwich Pharmacal jurisdiction but under statutory provisions or as in the case of *Gridrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos LDA* [1994] 1 WLR 299) which was cited with approval in the Jersey case of *Jomair-v-Hourigan* [2011] JRC042, “where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and independently of the injunction as a power in support of the execution of the judgment ...” In the latter case disclosure is allowed if it is in the interests of justice for the judgment debtor to obtain it. In any event, having found that a Norwich Pharmacal Order is not justified on the evidence before it, this Court is not required to a definitive determination on this issue. Which in my view could have benefitted from further argument of the parties.
- [30] With regards to counsel for Vijay’s claim that the application is rendered otiose by the granting of a stay of execution, I note that this Court’s ruling granting a stay of execution of the judgment pending appeal, subject to Vijay providing a bank guarantee of Euro 20,000,000 within 14 days of the ruling, as security for the judgment debt in the event that the appeal is dismissed was delivered on 24th July 2020. Vijay has to inform this Court whether this condition has been fulfilled on 10th August 2020. If Vijay provides the security, then the disclosure of information will not be necessary, as the bank guarantee will ensure execution of a substantial part of the judgement debt. It is only if the bank guarantee is not provided and the stay of execution lapses that an application for disclosure will become relevant for purposes of enforcement of the judgment. The present application was filed on 23rd July 2020, after the application for stay of execution of the judgement had already been heard and one day prior to the date fixed for delivery of the ruling on the application for stay of execution of the judgment. In my view it was made prematurely.

[31] For the above reasons the application must fail. I therefore dismiss the application. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 10th August 2020

E. Carolus J