

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 580

MA131/2020 & MA132/2020

(Arising in CS23/2019)

In the matter between:

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

(rep. by Bernard Georges)

Applicant

and

EASTERN EUROPEAN ENGINEERING LIMITED

(rep. by Alexandra Madeleine)

Respondent

Neutral Citation: *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd*
(MA131/2020 & MA132/2020) [2020] SCSC (14 August 2020).

Before: E. Carolus J

Summary: Application for leave to appeal – Application for variation of condition of order for stay of execution.

Heard: 12 August 2020

Delivered: 14 August 2020

ORDER

The applications for leave to appeal against, and for variation of, the condition imposed in granting a stay of execution on 24 July 2020, of the judgment of the Supreme Court delivered in CS23/2019 on 30 June 2020 are dismissed.

RULING

CAROLUS J

[1] This ruling arises out of two applications filed concurrently on 10th August 2020: The first application (MA 131/2020) is for leave to appeal against a condition imposed by this Court in granting a stay of execution of a judgment of this Court delivered on 30 June 2020, in CS23/2019 (the principal suit). The second application (MA 132/2020) is for a variation of the condition imposed in granting the stay of execution, as an alternative to appealing

- [2] against the said condition, to give this Court the possibility of revisiting the conditions for stay and changing them to conditions which the applicant is able to meet (see paragraph 8 of affidavit in support of application for variation of condition in MA 132/2020).
- [3] The applicant in the present applications is Vijay Construction (Pty) Ltd (“Vijay”) and the respondent is Eastern European Engineering Ltd (“EEEL”). EEEL was the plaintiff and Vijay was the defendant in the principal suit.
- [4] Both applications were made by way of Notice of Motion supported by affidavits of Kaushalkumar Patel, empowered to make the declarations in the affidavit on behalf of the applicant company, in his capacity as a director thereof. Supporting documents are exhibited in the affidavits.
- [5] EEEL filed affidavits sworn to by Vadim Zaslonov in his capacity as a director of EEEL, in reply to both applications, in essence contesting the applications. Supporting documents were also exhibited in the affidavits.
- [6] The circumstances which give rise to these two applications are as follows:
- [7] The Court gave judgment in favour of EEEL in the principal suit (*Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (CS23/2019) [2020] SCSC 350 (30 June 2020)*) on 30 June 2020. It declared two Orders of the High Court of England and Wales rendering enforceable an arbitral award in favour of EEEL, executory and enforceable in Seychelles and ordered Vijay to pay various sums of money amounting in excess of Euro twenty million to EEEL.
- [8] Vijay appealed against the judgment in the principal suit and applied for a stay of execution of the judgment. By ruling dated 24th July 2020 in MA101/2020 the Court granted Vijay a conditional stay of execution of the judgment, the relevant part of which reads as follows:

“I grant the application in MA101/2020 for stay of execution of the said judgment on condition that within 14 days of the date of this Ruling, Vijay Construction (Pty) Ltd provides security in the form of a bank guarantee in the sum of EURO Twenty Million (EUR20,000,000) pending determination of the appeal against judgment dated 30th June 2020 in CC23/2019. Failure to comply with this Order in the time stipulated will result in the stay of execution lapsing.”

[9] In the affidavits in support of both of Vijay's applications (MA 131/2020 and MA132/2020) it is averred that Vijay has appealed to the Court of Appeal against the condition imposed in this Court's order for stay of execution, but that on 7th August 2020 the Seychelles Court of Appeal has ruled orally that it has to first obtain leave to appeal from this Court. Draft copies of the Notice of Appeal are exhibited as **KP5** in both MA131/2020 and MA132/2020. It is not apparent from these copies when the appeal was filed. The relief sought from the Court of Appeal by Vijay in terms of paragraph 3 of **KP5** is "[A]n order allowing the appeal and replacing the condition imposed by the Trial Court for the granting of the Stay of Execution by conditions which will preserve the status without either unduly penalising the Appellant or reducing the current prospects of the Respondent."

[10] The ruling delivered by the Court of Appeal in SCA MA14/2020 (arising in SCA CS23/2019), on 7th August 2020, dismissing the appeal, reads as follows:

1. *The Court is making a Ruling now, but the reasons will be handed over on the 21st of August 2020. We are of the view, that is myself and Justice Twomey, that there has not been compliance with Section 12(2)(b) read with Section 12(2)(a)(i) of the Courts Act and Rule 16 of the Seychelles Court of Appeal Rules and this matter has come before this Court as a direct appeal against the Ruling of Judge Carolus dated 24th July 2020, without seeking leave to appeal from the Supreme Court as required by Section 12(2)(b) of the Courts Act.*
2. *In our view this is an interlocutory matter, as stipulated in Rule 25 of the Seychelles Court of Appeal Rules, relevant to the pending appeal against the Judgment of the Supreme Court in Case Number CS 23/2019 dated 30 June 2020 and the application before this Court is misconceived.*
3. *Therefore, the application is dismissed. Justice Robinson would be having a dissenting opinion on this matter.*

[11] On 10th August 2020, Vijay filed in the Registry of the Supreme Court, the two applications now before this Court and which are the subject matter of this ruling.

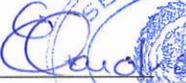
[12] 10th August 2020 was also the date fixed by the Court for Vijay to inform it whether it had complied with the condition of stay namely providing a bank guarantee of EURO Twenty Million (EUR20,000,000). Counsel appeared in Court in the morning and informed the

Court that Vijay was unable to obtain the guarantee from its banks, and also informed the Court of the two applications filed that morning.

- [13] The applications came before the Court in the afternoon of 10th August 2020. As per the Notices of Motion, both applications were sought to be heard as applications of extreme urgency. Vijay also sought the extension of the stay of execution until the hearing of both applications. The Court granted Vijay's motion to hear both matters as a matter of urgency, and extended the stay of execution until determination of the two applications or until further order of this Court. Hearing of both applications took place on 12 August 2020.
- [14] Before dealing with the two application on the merits, this Court has to consider whether it had jurisdiction to entertain these applications.
- [15] The stay of execution granted on 24th August 2020 was subject to the condition that Vijay provides a bank guarantee in the sum of EURO Twenty Million (EUR20,000,000) within 14 days of that date. In his affidavit in support of the application for leave to appeal (MA131/2020) at paragraph 4 thereof, Mr. Patel avers that the last date for compliance with the condition is 10th August 2020. The same averment is made in paragraph 4 of his affidavit in support of the application to vary the condition for stay (MA132/2020). EEEL denies this and contends that the "*the last date for compliance with the condition of the stay order was 7th August 2020 but the matter was set for mention on the 10th of August 2020 to ascertain whether security as ordered had been obtained.*" (See paragraphs 7 of Vadim Zaslouf's affidavits in reply in both MA131/2020 and MA132/2020).
- [16] I find that the position taken by EEEL is the correct one. The period of 14 days for Vijay to provide a bank guarantee expired on Friday 7th August 2020, and on that day the order for stay of execution lapsed as per the Court's Order. Effectively as from that date, the stay of execution ceased to be in existence. This Court therefore at that point no longer had any jurisdiction to entertain an application for leave to appeal against an order for stay or an application to vary such order which no longer existed. In fact, at that point this Court did not even have any jurisdiction to extend the order for stay of execution. It follows that the order for extension of the stay of execution was void ab initio.

- [17] Counsel for Vijay, in giving reasons as to why this Court has jurisdiction to vary the condition it had imposed in the grant of stay and was not *functus officio*, advanced the argument that after delivering its ruling, the Court gave a returnable date for Vijay to inform it whether it had complied with the condition and that therefore the matter was not closed. This argument has no merit. In my view this Court's order is clear and unequivocal, that if Vijay did not provide the bank guarantee within 14 days of the date of the ruling, then the stay of execution would lapse, irrespective of whether a date was fixed for the Court to be informed if the order had been complied with. To my mind, this leaves no room for interpretation.
- [18] In reply to Counsel for EEEL's contention that the applications should have been filed earlier before the 7th August 2020, Counsel for Vijay explained that he proceeded by way of appeal against the condition for stay before the Court of Appeal because he was and still is, of the view that the order for stay was not an interlocutory order, and that therefore no leave was required to appeal. It was only when the Court of Appeal, ruled that leave was required to appeal the condition of stay and dismissed the appeal that he had to come back to this Court. He further stated that Vijay was only granted an audience by the Court of Appeal on Friday 7th August after having sought one for well over a week before that; that the Court of Appeal only delivered its ruling late in the day on Friday 7th August; and that it filed the applications before this Court at the next available opportunity which was in the morning of Monday 10th. That may well be the case, but the fact remains that by the time the applications were filed, the stay of execution had lapsed and this Court has no power to bring back to life an application which no longer exists.
- [19] For the reasons given above, this Court cannot consider the merits of the applications in MA131/2020 and MA132/2020, both of which stand dismissed.

Signed, dated and delivered at Ile du Port on 14 August 2020



E. Carolus

The seal of the Seychelles Supreme Court is circular. It features a central emblem with a bird, possibly a frigatebird, perched on a branch. The emblem is surrounded by a wreath. The text "SEAL OF THE SEYCHELLES" is inscribed along the top inner edge of the circle, and "SUPREME COURT" is inscribed along the bottom inner edge.