

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 774
MA 191/2020
(Arising XP 130/20)

In the ex parte matter of:

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

(rep. by S Rajasundaram)

Applicant

And

IN THE MATTER OF THE COMPANIES ACT 1972 AND THE INSOLVENCY ACT 2013

Neutral Citation: *Ex Parte Vijay Construction Pty Ltd* MA 191/2020 (Arising in XP 130/20)
[2020] SCSC 774 (19 October 2020).

Before: Govinden J

Summary: Application under Section 112 of the Insolvency Act for the appointment of a provisional liquidator is dismissed.

Heard: 15 October 2020

Delivered: 19 October 2020

ORDER

The ground for the main winding up petition and that of this application is one and the same, namely the inability of the company to pay its debt. However, that in this application I have to decide whether there are reasonable ground to believe that this is so, whilst in the main case, I would have to do so on a balance of probabilities. I find that to make this crucial finding of fact at this stage of the proceedings would be too premature. Any determination in that regards would result in prejudging this issue. The prejudicial nature would be exacerbated by the fact that the court is invited to make this determination here on an affidavit that contains no averments as to the applicant's inability to pay its debts.

RULING

- [1] This is an application filed under the provisions of Section 112 of the Insolvency Act, herein after also referred to as “the Act” and Regulation 27 of the Companies (Winding up) Regulations 1975. It prays that the Official Receiver and if the Official Receiver is unable to accept the appointment, for Mr Duraikannu Karunakaran be appointed as a suitable provisional liquidator. The application is made following the filing by the Applicant company of a winding up petition in case EXP 130/20 seeking an order that it be wound up for the reasons that it is unable to pay its debt.
- [2] The application is supported by the affidavit of Mr V. J. Patel, a director of the company. According to this deponent the appointment of a liquidator is imperative in this matter as the applicant is engaged in a number of construction contracts. The two main contracts are for the construction of the Club Med Resort of Ste Anne Island and ongoing construction work on Eden Island and the Eden View at Roche Caiman. Both contracts being time sensitive and that work has had to stop on both as a result of the filing of the winding up petition. He further avers that its clients are eager to press on with the work and are threatening to terminate the contracts with the applicant and that notice of termination has already been received in respect of the Ste Anne Resort contract.
- [3] The court has thoroughly considered the averments found in the application and its supporting affidavit and the submissions of the Learned counsel of the applicant. It has also in the process scrutinized the legal provisions dealing with such kinds of applications.
- [4] It appears that the application seeks the appointment of a provisional liquidator. This is evident on the face of the Motion. However, at paragraph 5 of the affidavit the deponent prays for “a liquidator” to be appointed in order to manage the affair of the company. Whether this is deliberate or not, this inconsistency needs to be reconcile as there is a difference between those the two, these relates to both the functions and the conditions of appointment of a liquidator and a provisional liquidator. Having considered the submission of counsel on this issue, who clarified that paragraph 5 is a mistake and should

have been read as provisional liquidator, I will read the application as one calling for the appointment of a provisional liquidator instead of a liquidator. This is more so given that this court has not made a winding up order following the presentation of the winding up Petition.

- [5] The provisions of the Act governing appointment of a provisional liquidator are found in Section 112 (1) of the Act, which reads as follows ;

*“112.(1) The Court may appoint the Official Receiver or any other qualified person as provisional liquidator at any time after the presentation of a winding up petition, if
(a) there are reasonable grounds to believe that the company is unable to pay its debts; or
(b) any of the property of the company available to meet its debts is at risk of being removed from Seychelles.*

(2) Where a provisional liquidator is appointed by the Court under subsection (1), the Court may restrict his or her powers in such manner as it thinks fit by the order appointing him or her or by a subsequent order, subject to any restriction so imposed, the provisional liquidator shall have the same powers and be subject to the same liabilities as a liquidator appointed after the making of a winding up order”.

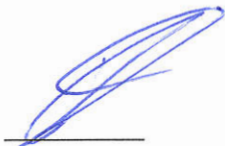
- [6] In its supporting affidavit the representative of the company has not grounded his prayers in any of the two sub limbs of Section 112 (1) of the Act. He only refers a number of contractual difficulties that the company is facing as a result of the presentation of the winding up petition. The same applies to the Motion, which only makes reference to Section 112 (1). The court had to refer to the content of the winding up petition to find out under what limbs that this application is founded. Having done so, it has revealed that the applicant is seeking the order on the ground that the company has no ability to pay a judgment debt awarded by the court.

- [7] Accordingly, it is clear that this application is being made on the first limb of the provision, namely that there are reasonable ground to believe that the company is unable to pay its debt.

[8] It is therefore patently clear that the ground for the main winding up petition and that of this application is one and the same, namely the inability of the company to pay its debt, albeit that in this application I have to decide whether there are reasonable ground to believe that this is so, whilst in the main case I would have to do so on a balance of probabilities. This as it may, I find that to make this crucial finding of fact at this stage of the proceedings would be premature. Any determination in that regards would lead me to prejudge the core issue of fact found in the petition. This prejudicial nature is exacerbated by the fact that the court is here invited to make this determination based on an affidavit that contains no averments as to the applicant's inability to pay its debts.

[9] This application is accordingly dismissed.

Signed, dated and delivered at Ile du Port on 19th October 2020

A handwritten signature in blue ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

R Govinden J

Judge of the Supreme Court