

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 823
MC 97/2020

In the matter between

EASTERN EUROPEAN ENGINEERING LIMITED
(rep. by Ms. Alexandra Madeleine)

APPLICANT

and

AARTI INVESTMENTS (PTY) LIMITED
(Mr. Bernard Georges)

RESPONDENT

Neutral Citation: *Eastern European Engineering v Aarti Investments (Proprietary) Limited*
(MC 97/2020) [2021] SCSC 823 (2 December 2021)

Before: G Dodin

Summary: Application for Norwich Pharmacal Order

Heard: By written Submissions

Delivered: 02 December 2021

RULING

DODIN J

[1] The Applicant, Eastern European Engineering Limited (EEEL”) is the Judgment creditor in a Judgment of the Supreme Court of Seychelles, *CS23/2019 Vijay Construction (Pty) Limited v. Eastern European Engineering Limited* (EEEL) dated 30th June 2020 which was upheld by the Seychelles Court of Appeal in its majority Judgment dated 2nd October 2020 in SCA28/2020 *Vijay Construction (Pty) Limited v. Eastern European Engineering Limited*. Vijay Construction (Pty) Ltd (Vijay) is the Judgment Debtor of the said Judgments. The Respondent, Aarti Investments (Pty) Limited (Aarti) is a company incorporated and operating under the laws of Seychelles.

[2] The Applicant is seeking a Norwich Pharmacal Order against the Respondent maintaining that Aarti is related to Vijay in that Mr. Vishram Jadva Patel is the majority

shareholder and director of both companies and produced the annual returns for Vijay and Aarti for the year ending 31st December 2019 in support of this Petition.

[3] The affidavit of Vadim Zaslouov states as follows:

“In terms of the SC Judgment maintained by the SCA Judgment, VIJAY has been ordered to pay EEEL EURO 20Million plus interest.

On the delivery of the SC Judgment, VIJAY has made several announcements in the media including on the social media that it is closing down in view of negative outcome of the SC Judgment.

In fact, Mr. V. J Patel declared in the Supreme Court on the 2nd September 2015 in case CS33/2015 Eastern European Engineering Limited v Vijay Construction (Pty) Ltd that VIJAY would wound up rather than pay damages to EEEL. A copy of extract of transcript of Supreme Court Proceedings is produced in the Applicants Affidavit in support of this petition.

True to his words, immediately after the delivery of the SCA Judgment, VIJAY filed a petition for its winding up on the ground of its inability to pay debts and liabilities. A copy of the Winding Up petition is produced in the Applicants Affidavit in support of this petition.

EEEL opposed to the Winding Up of VIJAY challenging the company’s inability to pay debts and averring bad faith and dissipation of the assets of VIJAY to deny EEEL the fruit of the Judgments. A copy of EEEL’s affidavits in opposition to the Winding Up is produced in the Applicants Affidavit in support of this Petition.

In view of the matters stated and exhibited under paragraphs 6 to 9 of this Affidavit, there is a very strong likelihood based on VIJAY’S and its director’s past and recent statements that the assets and/or funds of VIJAY have been transferred to related companies including Aarti in order to deny EEEL the fruits of the Judgment.

I am advised by EEEL's Attorney-At-Law, Ms Alexandra Madeleine (EEEL's Attorney), and verily believe the same to be true that the matters stated at paragraph 10 above constitute wrongdoing on the part of VIJAY, Aarti in that it is a deliberate attempt by VIJAY and Aarti to prevent and frustrate the execution of the Judgment and further deny EEEL the fruit of the Judgment.

Therefore, it is in the best interests of justice that the origin of all the assets and money of Aarti are disclosed to the Court and to EEEL and for all documentary evidence including bank statements of all bank accounts of Aarti be ordered to be disclosed.[sic].

[4] The Applicant moved the Court for a Norwich Pharmacal Disclosure order against the Respondents including the disclosure of documents, bank statements and any such information pertaining to the origin of assets including all the funds in all the accounts of Aarti Investments (Pty) Ltd.

[5] I note that the Applicant has headed the application as Applicant but in the body of the Application has used Petition and Petitioner. This is not fatal to the Application and has not been contested by the Respondent.

[6] In reply to the Petition, the Respondent advanced two grounds as plea in limine litis:

1. *The Petition does not disclose sufficient, or indeed any, wrongdoing by the principal debtor, and discloses no evidence of any attempt by it to avoid payment of the Judgment debt by utilising the Respondent to hide its assets.*
2. *Insofar as the Applicant seeks information pertaining to the origin of the assets of the Respondent, this petition is an abuse of the process of the Court in that the Respondent company has been in existence for many more years than the litigation between the parties and the information sought is merely a fishing exercise and can in no manner assist the Applicant in its stated aim.*

[7] On the merits the Respondent admitted the relationship between Vijay and Aarti putting forth the following defence:

1. *Paragraphs 1,2,3 and 4 of the Petition are admitted.*
2. *Paragraph 5 of the Petition is admitted to the extent that the inevitable outcome of the adverse judgment against Vijay was that its liabilities exceeded its assets and it was obliged to enter liquidation in order not to risk being accused of fraudulent trading if it continued in business and so as to protect all its creditors, some of whom ran the risk of not being paid if the said judgment in favour of EEEL were enforced against the assets of Vijay.*
3. *Paragraph 6 of the Petition is denied. Mr. V J Patel never uttered the words attributed to him. He merely responded affirmatively to a statement made by counsel for EEEL and explained in his answer to the statement next made by counsel for EEEL why this was so. The words which Mr. Patel is accused of uttering were in fact formulated by EEEL's counsel and not by him.*
4. *Save that it is admitted that Vijay filed a winding up petition immediately after the delivery of the Court of Appeal majority judgment on the ground of its inability to pay its debts, paragraph 7 of the Petition is denied. The Respondent repeats the averment in paragraph 2 hereof.*
5. *Paragraph 8 of the Petition is denied pro forma.*
6. *Paragraph 9 of the Petition is denied. The Respondent avers that no sums have been transferred from Vijay to it since the delivery of the Court of Appeal judgment, and in fact since.*
7. *Paragraph 10 of the Petition is denied as being libellous, devoid of any underpinning factual basis and – if proved to be untrue, which the Respondent will clearly undertake to do – the statements therein amount to perjury.*
8. *Paragraph 11 of the petition is, in the premises, denied.*

[8] Learned counsel for the Respondent moved the Court to dismiss this Application with costs.

[9] Norwich Pharmacal Orders emanate from the English case of *Norwich Pharmacal v Commissioners of Customs and Excise (1974) AC 133*. By virtue of its powers to exercise equitable jurisdiction given by sections 5, 6 and 17 of the Courts Act this Court is also vested with all the powers, privileges, authority and jurisdiction capable of being exercised by the High Court of Justice of England.

[10] The principle governing the granting of the Norwich Pharmacal Order is that parties which believe they have been wronged can apply for the order to the court against third parties who can identify the wrongdoer, because they unwittingly facilitate the wrongdoing. As per Lord Reid in the *Norwich Pharmacal* case:

...that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing 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.

The House of Lords established threshold requirements for obtaining a Norwich Pharmacal Order. These are that “*the applicants must have a bona fide claim against the alleged wrongdoers; it may not be issued against a mere witness or disinterested bystander to the alleged misconduct and the person from whom discovery is sought must be the only practical source of information available.*”

[11] The Canadian case of *Alberta Treasury Branches v. Leahy, 2000 ABQB 575* [Can LII] provides further detailed analysis of the availability of a Norwich Pharmacal Order as developed through a succession of cases in paragraph 106 of the judgment:

“[106] *The foregoing review demonstrates that:*

- a. *Norwich-type relief has been granted in varied situations:*
 - (i) *where the information sought is necessary to identify wrongdoers;*
 - (ii) *to find and preserve evidence that may substantiate or support an action against either known or unknown wrongdoers, or even determine whether an action exists; and*

- (iii) *to trace and preserve assets.*
- b. *The court will consider the following factors on an application for Norwich relief:*
 - (i) *Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;*
 - (ii) *Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;*
 - (iii) *Whether the third party is the only practicable source of the information available;*
 - (iv) *Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some refer to the associated expenses of complying with the orders, while others speak of damages; and*
 - (v) *Whether the interests of justice favour the obtaining of the disclosure.*

[12] The Supreme Court of Seychelles cases of *Brickhill Capital (NZ) Limited v Vistra (Seychelles) Limited (MA40/2017) [2017] SCSC (27 July 2017)* and *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (MA119/2020) [2020] SCSC 573 (10 August 2020)* referred to the above principles with appreciation in determining whether to grant the prayed for disclosure or Norwich Pharmacal Order.

[13] In the case of *Collier v Bennett [2020] EWHC 1884 (QB)* the Court set out the hurdles that must be overcome by an applicant if the application for a Norwich Pharmacal Order is to succeed. These can be summarized as follows:

- (i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person;
- (ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing;

- (iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued; and
- (iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction.

The first three hurdles must be met before the court will consider the (iv) condition. The Court will also not allow the equitable doctrine to be used as a “fishing expedition”, nor will the Court allow the information sought to be used for an improper purpose.

[14] I now consider the first plea in limine litis raised by the Respondent which is “*the Petition does not disclose sufficient, or indeed any, wrongdoing by the principal debtor, and discloses no evidence of any attempt by it to avoid payment of the Judgment debt by utilising the Respondent to hide its assets.*”

[15] The question of whether the averments by Vijay or its counsel that the company would be wound up rather than meet the judgment debt was considered by Carolus J. in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* who found as follows:

“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 Pharmacal Order”.

This determination was however made against Vijay, the judgment debtor, and before Vijay had filed a winding up petition. The current Petition is against Aarti, a third party associated with Vijay.

[16] The fact that the third party is associated with the judgment debtor does not automatically makes the third party a participant in any wrongdoing by the judgment debtor. However even if the third party is an innocent bystander, it still may be unwittingly or innocently involved in the wrongful act of the judgment debtor. The onus is on the Application to prove that to the satisfaction of the Court, that is, on balance of probabilities.

[17] From the pleadings and evidence before this Court, I am satisfied that there is a bona fide fear or suspicion that there is a possibility that Vijay could use the Respondent to dissipate and hide its assets in order to deprive the Applicant the fruits of its judgment. However this cannot be translated into a valid, bona fide or reasonable claim without more evidence. It is correct that subsequent to the statements attributed to Vijay above by Carolus J. Vijay has filed for winding up but that is not an illegal or wrongful act and in any event, the Applicant opposing the winding up could make the necessary application to the Court hearing the winding up Application to protect its interests at the appropriate juncture in that proceeding.

[18] Without sufficient evidence establishing that Vijay is engaged in some illegal acts and that the Respondent is somehow involved in the acts complained of, I find that it would not be in the interest of justice to grant a Norwich Pharmacal Order in favour of the Applicant. The first ground of the plea therefore succeeds. It is therefore not necessary to address the second ground of plea in limine litis. The Application is dismissed.

[19] Each party shall bear its own costs.

Signed, dated and delivered at Ile du Port on 2 December 2021.

C G Dodin

Judge