

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2021] SCSC ...  
MA 13/2021  
(XP 01/2021)

In the ex parte matter of:

**EASTERN EUROPEAN ENGINEERING LIMITED**  
**Represented by its Director, Mr Vadim Zaslavov**  
**Of Beau-Belle, Mahe**  
*(rep. by C. Andre)*

**Applicant**

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**Neutral Citation:** *Eastern European Engineering Limited*, MA 13/2021 (Arising in XP 01/21) [2021] SCSC 190 (29 April 2021).

**Before:** Govinden CJ

**Summary:** Application under Section 66(1) of the Criminal Procedure Code for leave to proceed with a private prosecution; leave refused; offences are unknown to the law and vexatious

**Heard:** 6<sup>th</sup> and 12<sup>th</sup> April 2021

**Delivered:** 29<sup>th</sup> of April 2021

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**ORDER**

Application for permission to conduct a private prosecution is dismissed on the grounds that it is vexatious and contain offences unknown to law.

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**RULING**

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**R. Govinden, CJ**

[1] This is an ex parte Notice of Motion filed under Section 66 (1) of the Criminal Procedure Code (CAP 59), herein after referred to as “*the Code*”. In this motion the applicant seeks the permission of this court to conduct a private prosecution against the following persons;

[2] Vishram Java Patel of La Misere, Mahe Seychelles

Foram Varsani of La Misere, Mahe , Seychelles

Nilesh Kerai of La Misere, Mahe, Seychelles

Kaushalkumar Patel of La Misere, Mahe, Seychelles

[3] All being Directors of a company registered under the provisions of the Companies Act, the Vijay Construction (Pty) Limited, herein after also referred to as “*Vijay*”.

[4] On an application to the Court for permission to commence a private prosecution, it was held in the locus classicus English case of ***R v. West London Metropolitan Stipendiary Magistrate, ex parte Klahn (1979) WLR 933*** that, in the exercise of its discretion, the duty of the court in considering such an application is to ascertain the following:

1. Whether the allegation is of an offence known to the law; and if so, whether the essential ingredients of the offence are prima facie present;
2. Whether the allegations are vexatious;
3. Whether the alleged offence is not out of time;
4. Whether the court has jurisdiction; and
5. Whether the applicant has the necessary authority to prosecute.

[5] In that case, the court, per Lord Widgery CJ, also held that: “In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant...The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons.”

[6] In accordance with Rule 7.2(2) of the UK Criminal Procedure Rules, information must be laid in writing before the court, and it is important that the information contains all the elements essential to the offence including:

- a. A statement of the offence in ordinary language;
- b. The legislation governing the offence; and
- c. The particulars of the private prosecutor's case together with evidence available to support the prosecution.

[7] From the foregoing, it is clear that the primary test for an application for permission to commence a private prosecution is whether the allegations are of offences known to law, and whether the essential ingredients of the offences are prima facie present. In the absence of specific rules regarding the applicable test in this jurisdiction this court will allow itself to be inspired by the established English law. The latter being a jurisdiction from which we have inherited our law of criminal procedure. I will hence consider the issues raised in the light of the principles laid down in the above stated case of *R v. West London Metropolitan Stipendiary Magistrate, ex parte Klahn*.

**Issue 1 – Whether the offences are known to law; whether the ingredients of the offences prima facie present and whether they are vexatious**

In the applicant's proposed amended formal charge filed on 12/04/21 and annexed to its application, there are 3 counts tendered to the court:

**Count 1** is the offence of disobeying a lawful order of court. Section 124 of the Penal Code clearly makes the disobedience of a lawful order of any court a misdemeanour, punishable by imprisonment for two years. It is pertinent to note that even though this provision is made in the Penal Code, it makes no distinction between orders made by courts in civil or criminal matters.

In this count the applicant in its particulars of offence refers to two different court orders that Vijay has purportedly disobeyed. The 1<sup>st</sup> order is that found in the Supreme Court Civil Side 23 /2019. In this case the applicant avers that the Supreme Court entered judgment in favour of the applicant ordering Vijay to pay to the applicant a sum of more than EURO 20 million with interest and that this decision was upheld by the Court of Appeal in its majority judgment on 2<sup>nd</sup> October 2020. However, it avers that Vishram Jadv Patel, Foram Varsani, Nilesh Kerai, and Kaushallkumar Patel acting in the capacity of directors of Vijay Construction ( Pty) Limited failed and caused Vijay Construction ( Pty) Limited to refuse to comply with the judgments and caused Vijay to file multiple applications to avoid execution of the judgment.

The 2<sup>nd</sup> order which is alleged to have been disobeyed is that given by the same court in SCSC 931/20, MA 227/20, dated the 7<sup>th</sup> of December, 2020, in which Vijay was ordered to disclose financial information by the 29<sup>th</sup> of January 2021. According to the averments in this charge this was never done and hence, according to the applicant Vishram Jadva Patel, Foram Varsani, Nilesh Kerai, and Kaushallkumar Patel acting in the capacity of directors of Vijay failed and caused Vijay to refuse to comply with the above-named Disclosure Order.

**Count 2** is the offence of Vijay’s directors filing a petition for winding up under false pretences with intent to defraud creditors, transferring and purchasing the company’s property in order to represent that the company is insolvent. This contrary to Section 288(b) of the Companies Act.

**Count 3** is the offence of concealing or removing the assets of Vijay by the directors with the intent of defrauding its creditors. It is similarly brought under Section 288(c) of the Companies Act. In paragraphs 7, 14 and 15 of his affidavit, the applicant’ representative has deposed to the facts making up the particulars of the offence in counts 2 and 3.

Section 114(a) of the Seychelles Criminal Procedure Code provides for the rules to be observed for the framing of charges and information, and it states that –

*“The following provisions shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code-*

*(a) (i) A count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence;*

*(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;*

*(iii) after the statement of the offence, particulars of such offences shall be set out in ordinary language, in which the use of technical terms shall not be necessary;*

*Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required; ...”*

[8] From the above provisions of the CPC, section 114(a) sets out certain rules regarding the framing of charges and information. In particular, section 114(a) (ii) states that if the offence charged is one created by an enactment, the charge shall contain a reference to

the section of the enactment creating the offence. Note the use of the word “shall” in the provision.

- [9] It is trite law that charges which are defective in form can be cured – see ***Vidot v. R (1981) SLR 79; Rene v. R SCA 3/1999, LC 158; Beeharry v. R (2010) SLR 470***. It is also trite that charges brought under a wrong section of a law may not render a count bad in law – see ***Hibonne v. R (1976) SLR 44*** where it was held that a charge sheet which quotes the wrong section of the Penal Code and does not mention all the elements of a felony may not render the count bad in law or occasion a failure of justice.
- [10] A perusal of the Companies Act will show that sections 203 – 304 of the Act have been repealed by the provisions of the Insolvency Act 2013. This repeal is inclusive of section 288(b) & (c) under which the applicant has brought counts 2 and 3 in the formal charge filed on April 12, 2021. So, while it is good law that defective charges can be cured and charges brought under the wrong section of a law do not render the charges bad in law, it is also trite that a person cannot be charged and convicted for what is not an offence – see ***Air Seychelles v. R SSC (1995), LSC 201 (42)***.
- [11] In the present application, the applicant has brought counts 2 and 3 in his formal charge under a section of the Companies Act that is no longer on the statute book. In other words, those sections of the Companies Act is no longer known to law. It therefore follows that any offences not on the statute books are not known to law. This application has therefore failed this primary test for the grant of permission to commence a private prosecution in respect of count 2 and 3 on this basis.
- [12] Having failed this primary test, permission to commence a private prosecution must be refused.
- [13] Moreover, in count 1, though the proposed statement of offence avers one offence and this relates to “ *Disobeying a lawful order of the court...* ”, the particulars of offence that

follows, however, relates to two different lawful court orders of the Supreme Court , that is the one arising in CS 23/19 and the one arising in CS 931/20. This clearly amounts to duplicity. Duplicity is the error committed when the charge (known as a “count”) on an indictment describes two different offences.

[14] An information such as the intended information relied upon by the applicant in this case may contain more than one count, but each count must allege only one offence, so that the defendant and the court can know precisely of what offences he or she is accused of. If a count is poorly drafted so that it alleges two offences, it is said to be "duplicitous". A duplicitous count is defective and must be quashed by the judge, unless the judge permits the count to be amended so that it only alleges one offence, or is split into two counts. If a duplicitous count is not noticed until after the defendant has been convicted on it, the verdict may be void.

[15] The English Court of Appeal held in **R. v. Greenfield [1973] 1 W.L.R. 1151** that “*duplicity is an error in form, that is, it must be apparent in the wording of the count itself and not appear from a consideration of the evidence*”.

[16] Accordingly, this count is also vexatious on the ground of duplicity and leave to proceed will not be given on this basis

**Issue 2 – Is the present application before the Court premature and vexatious in view of the pending appeal before the Court of Appeal and the dismissal of the applicant’s petition for liquidation of Vijay?**

Following the decision in CS23 /19 Vijay has brought 2 matters before the Court of Appeal. The first is Civil Appeal No: *SCA MA 23 of 2020* arising from SCA 28 of 2020. This is a Motion to suspend/stay the execution of its October 2, 2020 judgment in SCA 28/2020 and CS23/2019 of 30 June 2020, and calling upon that court to consider rehearing matter as it did not consider key submissions/arguments that were before it in 2017. The issue raised in this application is:

Whether the Court of Appeal has inherent jurisdiction to re-hear an appeal in a matter previously decided where it made a mistake and did not consider key submissions/arguments that were before it in 2017.

[17] The second is *SCA MA 24 of 2020* arising in *SCA 28 of 2020* which is a Motion filed pursuant to Court of Appeal judgment on October 2, 2020, in *SCA 28/2020* seeking a revisit of the judgment on the basis that the court did not give Vijay an opportunity to be heard on matters raised by the PCA, and in which two Court of Appeal judges refused to participate. On the basis of this, Vijay states that it was denied the right to a fair trial.

[18] In the same case Vijay requested that the Supreme Court judgment of June 30, 2020, in *CS 23/2019* be suspended/stayed pending the hearing of the motion. The issue raised in this application is:

Whether the Court of Appeal has jurisdiction to hear an application to reconsider its own judgment in an instance where there was a lack of procedural regularity.

[19] The dates for ruling on both applications is June 1, 2021.

[20] The doctrine of *lis pendens* is based on the Latin maxim “*pendent lite nihil innovature*” which means that during the pendency of litigation, nothing new should be introduced. Though the doctrine originally applied to property cases, it has later been adopted by equity to provide for a better administration of justice. The doctrine of *lis pendens* has been held to be based on notice, wherein a pending suit constitutes constructive notice to keep matters in status quo.

[21] This Court takes judicial notice of the above stated matters pending before the Court of Appeal, which is the court of last jurisdiction. This court having taken cognizance of those pending matters before the apex court is concerned that by granting this application for permission to commence a private prosecution, this Court would be unduly interfering with the appellants Constitutional Right of Appeal, especially when there is a motion for a stay of execution of both the Supreme Court judgment of June 30, 2020, in *CS 23/2019*, and the Court of Appeal judgment of October 2, 2020, in *SCA 28/2020*.

[22] This Court therefore finds in the same vein that this application is too premature and would offend against the doctrine of *pendete litis*. This makes count 1 vexatious. It would make a mockery of justice for me to grant the applicant the right to proceed with a private prosecution on the basis of refusal to comply with a judicial decision for us to find that

tomorrow the apex court had overturned the said decision and accepts the propositions of Vijay that it was in the right to appeal and not to accept the said determination in the first place. I am especially concerned of the fact that by then irreparable harm would have been caused to the appellant and its representative given the severe negative implications and connotations of a criminal prosecution.

[23] In paragraph 7 of his affidavit the representative of the applicant has deposed to the fact that the Disclosure Order of this court in CSCS931/2020 MA227/2020 had compelled Vijay to disclose financial information to the court by January 29, 2021, which order was not obeyed. This is a direct reference to the 2<sup>nd</sup> limb of the particulars of offence of count 1. Ostensibly, this court did make the order in a miscellaneous application in the winding up proceedings brought by Vijay, and the order was for Vijay to disclose to the applicant a number of documents upon which its petition for winding up was founded prior to the hearing of the petition.

[24] It transpired however that due to non-compliance by the applicant to the mandatory procedural requirements of the Insolvency Act 2013 and the Winding Up Regulations, the winding up petition was dismissed on the date fixed for hearing of the petition. As a result of this dismissal all miscellaneous applications pending in the winding up proceedings, including the disclosure order lapsed and was rendered nugatory.

[25] Accordingly, failure of Vijay to comply with this court ruling in MA 227/20 cannot be faulted, put aside of it constituting a criminal offence as underlined above. To that extent I find that this count is also vexatious on this basis.

[26] In my final determination therefore, I dismiss this application for permission to conduct a private prosecution on the grounds that it is vexatious and contain offences unknown to law.

Signed, dated and delivered at Ile du Port on 29<sup>th</sup> April, 2021

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**R Govinden CJ**



