

SUPREME COURT OF SEYCHELLES

Not Reportable
[2022] SCSC 230
MA 296/2020
(Arising in CS23/19)

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*
(MA296/2021) [2022] SCSC 230 (15 March 2022).

Before: E. Carolus J

Summary: Application for Judgment Debtor to be allowed to sell vehicles.

Delivered: 15 March 2022

RULING

CAROLUS J

- [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 (“Vijay”), executory and enforceable in Seychelles. In terms of the judgment Vijay was ordered to pay the respondent (“EEEL”) various sums of money, amounting in excess of Euros twenty million.

- [2] Following proceedings before the Court of Appeal the judgment has been stayed by that Court. Various applications were also filed in the Supreme Court by the parties after delivery of the judgment including the present one. The application is for an order that Vijay be allowed to sell seven vehicles (4 cars and 7 pickups) described in a Schedule annexed to the application. It is made by way of Notice of Motion supported by an affidavit of Kaushalkumar Patel who avers that he is a director of the applicant company and empowered to make the declarations in the affidavit.
- [3] In his affidavit Mr. Patel avers that there is currently a pending application by the respondent (MA51/2021) which seeks an injunction preventing Vijay from disposing and/or transferring any of its assets to any person; preventing the use of any of the vehicles, machineries, plant and equipment of Vijay by any person; preventing Vijay from disposing, dissipating and/or diverting any payments due or received from the sale of any of its vehicles or other machineries, plant and equipment or any payment due and payable for the use of any of its machineries, plant and equipment including but not limited on any construction sites from 5th October 2020. I note that MA51/2021 is one of the many applications filed in the Supreme Court after delivery of the judgment in the principal case. Written submissions have been filed by both parties and a date has been fixed for the Court to deliver a ruling in that matter.
- [4] Mr. Patel avers that in the meantime, while awaiting a ruling on the injunction application, Vijay wishes to dispose of some of the vehicles in its possession listed in the Schedule attached to the application, on the ground that the vehicles are not being used and storing them incurs expenses to Vijay and depreciates their condition. He further states that Vijay is agreeable to keeping the proceeds of sale in escrow pending the determination in the main case. For those reasons Vijay seeks the permission of the Court to dispose of the vehicles and seeks directions as to the manner in which the proceeds of sale are to be held.
- [5] Before replying to the motion counsel for EEEL Ms Madeleine filed a request for further and better particulars on 13th December 2021 to which Counsel for Vijay Mr. Georges filed a response on 16th December 2021.

- [6] In regards to Mr. Patel's averment that the vehicles are not being used thereby incurring storage expenses to Vijay and depreciating the said vehicles (para 6 of his affidavit), Ms. Madeleine sought confirmation from Vijay: (a) that the vehicles were all roadworthy; and (b) that EEEL and its own vehicle assessor would be given the opportunity to inspect all the vehicles. Mr. Georges replied in the affirmative to both questions.
- [7] Ms Madeleine also queried whether there were any existing agreements/undertakings for the sale of any of the vehicles to any prospective buyers to which Mr. Georges responded in the negative. Mr. Georges also confirmed that there were no pre-determined prices for any of the vehicles. As to whether the sale price of any of the vehicles would be agreed with the respondent Mr. Georges reply was "Yes, this is what the Applicant offered prior to having to file the application". As to Vijay agreeing to keep the proceeds of sale in escrow pending the determination in the main matter (para 7 of Mr. Patel's affidavit), Mr. Georges also confirmed that it was agreeable to Vijay for the proceeds of sale of the vehicles to be deposited in Court.
- [8] EEEL being of the view that the response provided by Mr. Georges to the request for further and better particulars was insufficient for it to file an adequate affidavit in reply, still filed an affidavit dated 20th December 2021 exhibiting certain documents. The affidavit is sworn by Vadim Zaslonov who avers that he is a director of EEEL and authorised to swear the affidavit on EEEL's behalf. At paragraphs 5 and 6 of his affidavit he states that:
5. ... *Vijay's reply to the request for further and better particulars failed to address the essential preconditions to EEEL's approval...*
 6. ... *in the circumstances, there is a total lack of disclosure of essential information from Vijay on the proposed sale of vehicles such that EEEL has been deprived a fair opportunity to properly consider and approve or object to Vijay's application nor for the Court to take an informed decision on the ... application.*
- [9] For those reasons EEEL sought for a more comprehensive reply to its request for further and better particulars and for the application to be stayed until Vijay provided the information requested. The Court was of the view that Mr. George's response to the request for further and better particulars was sufficient for it to make a determination on the matter

but nonetheless afforded time to EEEL to file a further affidavit which it did - the second affidavit being dated 24th December 2021 also sworn by Mr. Zaslonov (“second affidavit”).

[10] In his second affidavit Mr. Zaslonov states that the application for injunction is intended to preserve the assets of Vijay from any acts intended to dissipate the said assets and frustrate the judgment debt in the principal case. He avers that EEEL objects to the sale of the vehicles without the essential terms and conditions of the sale being clearly identified in advance in order to avert the risks of Vijay’s assets being hidden or dissipated which will ultimately frustrate the execution of the judgment debt; that there is also the risk of concealment of the identity of the ultimate beneficial owners of the listed vehicles with a view to dissipate Vijay’s assets; and that EEEL’s fear that Vijay will dissipate its assets are justified in that subsequent to the delivery of the judgment in the principal case Vijay sold several vehicles. In support a letter from the Seychelles licensing Authority dated 13th January 2021 was exhibited certifying that ten vehicles which were previously registered to Vijay Construction (Seychelles) Limited were transferred to other owners (individuals and businesses) on various dates, namely on 16th July 2020, 4th May 2020, 23rd March 2020, 8th June 2020, 16th July 2020 (4 vehicles were transferred on that date), 6th May 2020 and 26th June 2020.

[11] Mr. Zaslonov states that EEEL is advised by counsel that the reasons stated by Mr. Patel at paragraph 6 of his affidavit for Vijay wishing to sell the vehicles i.e. that the vehicles are not being used and storing them incurs expenses on Vijay and depreciates their condition, does not establish the need for sale of the vehicles. He states that this could have been established at least by a vehicle assessor’s report. He states that as a result the application should be stayed and no decision taken until Vijay provides all essential information, including but not limited to a vehicle assessor’s report to EEEL and the Court, or dismissed if such information is not provided, as there is no basis on which the Court can consider and grant the application.

[12] He also avers that at least prior to the approval of the sale, Vijay should allow EEEL to have the conditions of the vehicles assessed to determine whether the need to sell

outweighs the cost of storing them until pending issues before the Court of appeal are resolved.

- [13] Mr. Zaslonov further avers that the consideration for the sale of the vehicles can only be determined after Vijay discloses the essential terms and conditions of the sale which the application fails to disclose. He reiterates that consequently the matter should be stayed until such information is provided or dismissed in the case where it is not.
- [14] He states that in the event that the Court grants the application EEEL being the judgment creditor should be allowed to have the said vehicles assessed by its own assessor, to agree to any proposed or ultimate buyers of the vehicles and the prices to be paid for such vehicles. He objects to Vijay keeping the proceeds of sale in escrow pending the determination of the main case and states that they should be deposited in the Supreme Court's account.
- [15] Finally Mr. Zaslonov prays for the present application to be stayed and no decision taken until Vijay provides all essential information to the Court and EEEL or dismissed if such information is not provided. However should the Court decide to allow the sale this should be subject to the conditions stated at paragraph [14] hereof.
- [16] EEEL objects to the application mainly on the grounds that certain information which it considers essential for it to give its approval to the sale of the vehicles have not been disclosed by Vijay. This is information regarding the terms and conditions of the sale of the vehicles i.e. the sale price, as well as the identity of the buyers and ultimate beneficial owners of the vehicles once they are sold, without which EEEL claims that there is a risk that Vijay conceals or dissipates its assets which would ultimately result in EEEL being unable to recover the judgment debt in the main case. EEEL also considers that an assessors report is essential.
- [17] EEEL has produced the letter from SLA showing that certain vehicles were disposed by Vijay after delivery of the judgment in the main case in EEEL'S favour, as justification for its fear that Vijay will dissipate its assets thereby affecting its ability to satisfy the judgment debt in the principal case. I take note that at the time of the transfer of these vehicles there

was no injunction prohibiting Vijay from disposing of the same and that he was therefore at liberty to do so. In fact the application for injunction in MA 51/2021 was only filed on 12th December 2021 whereas the vehicles were sold between March and July 2020. I further note that five of them were sold before judgment in the principal case was delivered, and only the other five sold shortly after the judgment. To my mind the sale of five vehicles after the delivery of the judgment without more, is not evidence that Vijay was seeking to dissipate its assets with a view to evade satisfying the judgment debt, especially in the absence of any Court Order restraining it from disposing of those assets. The correspondence between the parties which commenced on 26th September 2021 also show that after the injunction application was filed counsel for Vijay consulted EEEL's counsel regarding disposal of the vehicles subject matter of the application.

[18] As regards the terms and conditions of the sale including the sale price and ultimate beneficial owners of the vehicles, according to the response to the request for further and better particulars, Mr. Georges has confirmed that there are no existing agreements/undertakings for the sale of any of the vehicles to any potential buyers and that there were no predetermined prices for any of the vehicles. Furthermore Vijay has agreed that the sale price of the vehicles will be agreed with EEEL and any buyers would be also be approved by it. In the same vein in the correspondence between counsels for the parties, Mr. Georges had stated that the ultimate buyers and the price for each vehicle was *"for both sides to decide"* and that *"[y]ou and I will decide how to sell, to whom, and for how much"*. However although the potential buyers are subject to the approval of EEEL, there must be a starting point which in my view should start with a proposal of such buyers from Vijay which will then be considered by EEEL. If the buyer(s) proposed do not meet the approval of EEEL, then either party can propose others. It goes without saying that any refusal of either party to approve buyers proposed by the other party will have to be for good cause. Once both parties have reached agreement as to the buyers, provided the price has been agreed upon, then the sale can proceed.

[19] In regards to the price at which the vehicles will be sold, I also find EEEL's request for Vijay to provide a vehicle assessor's report justified, if only as a starting point to ascertain the condition and value of the vehicles and consequently the price at which they may be

sold. However I disagree with EEEL's contention that the fact that the vehicles are not being used and consequently are depreciating in value while Vijay is incurring expenses in terms of storage fees does not establish the need to sell them, and that this should be established by an assessor's report. I consider it sufficient reason for selling the vehicles.

[20] EEEL has also requested that its own assessor be allowed to examine and assess the vehicles which Vijay has agreed to. I find this request justified in order for EEEL to make an informed decision as to whether the price in Vijay's vehicle assessor's report correctly reflects the true value of the vehicles. In that regard I note that it is in EEEL's interest as a judgment debtor to ensure that the best price possible is paid for the vehicles. However I do not understand EEEL's contention that such assessment is necessary to determine whether the need to sell the vehicles outweighs the costs of storing them pending resolution of the issues before the Court of Appeal. The reason given for selling the vehicles are that they are not being used resulting in their deterioration and in costly storage fees to Vijay which can only be detrimental to EEEL as it will put Vijay in a worse position to satisfy its judgment debt. On the other hand there will be no risk of EEEL not receiving the money in part satisfaction of the judgment debt if the vehicles are sold and paid into Court.

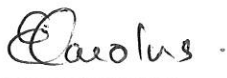
[21] Mr Georges has also indicated in his response to the request for further and better particulars that Vijay agrees to transfer the proceeds of sale of the vehicles into the account of the Supreme Court to be held in escrow pending determination of proceedings before the Court of Appeal. In the correspondence between counsels he further stated in regards to how the proceeds of sale would be dealt with that *"[a]ll Vijay wants to do is sell the vehicles and put the money in a safe escrow account, which can be the court"*.

[22] Accordingly I allow the application subject to the following conditions:

- (a) Vijay shall, not later than two weeks after the date of this ruling provide EEEL with a comprehensive vehicle assessor's report containing details of the vehicles subject matter of this application including their current condition and market value.

- (b) Vijay shall, not later than two weeks after the date of this ruling provide EEEL with a list of potential buyers and ultimate beneficial owners (as far as it is known to Vijay) to whom/which it intends to sell the vehicles.
- (c) Once Vijay has complied with paragraphs (a) and (b) above, it shall allow assessment of the vehicles by an assessor provided by EEEL which must be completed not later than four weeks after the date of this ruling. Upon completion of the assessment, EEEL shall provide Vijay with a copy of the assessment report not later than 6 weeks after the date of this ruling.
- (d) The parties have a period of not more than 8 weeks after the date of this judgment to come to an agreement as to the potential buyers to which, and the price at which, the vehicles are to be sold providing that neither party shall withhold their agreement to potential buyers or price proposed by the other party without good cause.
- (e) Once agreement has been reached in accordance with paragraph (d) above, the sale of the vehicles shall be effected forthwith and the proceeds thereof paid into the Supreme Court's account.
- (f) Each party shall bear its own costs.

Signed, dated and delivered at Ile du Port on 15th March 2022



E. Carolus J