

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
MC 87/2021

In the matter between:

**EASTERN EUROPEAN ENGINEERING
LIMITED**

(rep. by Basil Hoareau)

Applicant

and

**VIJAY CONSTRUCTION (SEYCHELLES)
PROPRIETARY) LIMITED**

(rep. by Bernard Georges)

Respondent

Neutral Citation: *Eastern European Engineering Limited v Vijay Construction (Seychelles) Proprietary) Limited (MC87/2021) SCSC* (24 March 2023)

Before: Burhan J

Summary: Norwich Pharmacal Disclosure Order

Heard: Written Submissions

Delivered: 24 March 2023

ORDER

The Application is dismissed

RULING

BURHAN J

[1] The Applicant in this application Eastern European Engineering Limited ("EEEL") sought a Norwich Pharmacal Disclosure Order ("NPO") against the Respondent Vijay Construction (Seychelles Proprietary) Limited ("Vijay Seychelles"). At the time of filing the application, the de novo appeal in CS 23/2019 was pending. This Court by Order dated 13th September 2022 ordered that this Application be laid by pending final determination of the appeal in CS 23/2019. The background facts of the case are

indicated in the said Order. The Court of Appeal delivered its decision on the 21 October 2022 where the judgment of Carolus J in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (CS23/2019)* was upheld in its entirety (*Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited (SCA 28 of 2020) [2022] SCCA 58 (21 October 2022)*). The present application was revived. The Respondent filed Additional Submissions and the Applicant filed its Additional Submissions in reply to those of the Respondent.

Additional Submissions

- [2] The Respondent states that as a post-judgment application for Norwich Pharmacal Order, that is an application to assist a party with enforcement of the judgment, the present Application does not meet the standard of test required for such application. The Respondent submits that the requirement is ‘wilful evasion’. The Respondent further submits that the Application has filed a plaint against both the Respondent and Vijay Construction (Pty) Ltd alleging that the former is the alter ego of the latter and seeking an order that the two companies are liable for each other’s debts. The Respondent submits that there is substantial overlap between the application for Norwich Pharmacal Order and the plaint in that similar allegations that the Respondent and Vijay are intertwined and that the Respondent be made liable for the debts of Vijay. It is submitted that the Norwich Pharmacal Order seeks documents to prove exactly that. The Respondent further submits that the Applicant must have been in possession of sufficient information concerning the alleged link between the two companies to file the Plaint. Otherwise the action would be an abuse of process. The Respondent submits that if, on the other hand, the Applicant did not have the information to make out a case, if the present application is granted, the Applicant will have conducted a fishing exercise and gathered the information it requires to support the plaint and that this is unfair and contrary to the whole basis of a Norwich Pharmacal Order which does not permit fishing exercises. The Respondent further submits that the application for Norwich Pharmacal Order has been overtaken by the filing of the plaint.

- [3] The Applicant submits that the standard of proof that the Applicant needs to satisfy is that of “reasonable suspicion of willful evasion” (reference made to “*ALFA-Bank*” *Joint Stock Company Limited (Seychelles) v Crystal (Seychelles) Limited* (MA 106/2021) [2021] SCSC 670 (19 October 2021)); *NML Capital Ltd v Chapman Freeborn Holdings Ltd* [2013] EWCA; *UVW and XYZ (A Registered Agent)* (Claim No. BVI HC (COM) 108 of 2016 [19th September 2016]). The Applicant submits that it has satisfied the standard of proof by producing evidence it refers to in paragraphs 2.4 and 2.5 of the Additional Submissions.
- [4] With regard to the alleged abuse of process and a plaint, the Applicant submits that the Court ought to disregard the issue concerning the plaint in considering the present application as the evidence adduced in respect of the present application is based on the affidavits of Mr Zaslonov and Mr Patel and that the Respondent cannot adduce further evidence in its written submissions. It is submitted that this is tantamount to giving evidence from the bar and cannot be condoned nor allowed by the Court. In the alternative it is submitted that if this Court does consider the plaint, the present application should not be dismissed as it is seeking a post-judgment NPO, the assistance of the Court to enforce the SCA Judgment. Hence the present application is different from a plaint where a judgment is being prayed for as opposed to an enforcement of a judgment. It is submitted that since the Respondent admits that the present Application was instituted before the alleged plaint, the Application cannot be an abuse of process and if there is any abuse of process it must be in respect of the suit but not in relation to the present Application which has been filed since November 2021.

Determination

- [5] It is the view of the Court that the Respondent is not adducing further evidence by bringing to the attention of the Court that the Applicant has filed a plaint against the Respondent and Vijay Construction (Pty) Ltd and the Court can take notice of the said plaint (copy attached) The authenticity of the copy filed has not been challenged.

[6] The law with regard to NPO has been stated by this Court in its previous Order dated 13 September 2022. To reiterate, the orders are grounded in equity and the conditions which must be satisfied before NPO may be granted are:

*"(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
(ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
(iii) the person against whom the order is sought must:
(a) be mixed up in so as to have facilitated the wrongdoing; and
(b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."*

[7] The Court further needs to be satisfied that NPO is not sought as a fishing expedition and will not grant the order during pre-trial stage where there are alternative ways of obtaining the information (*Bib Limited v Odra (Seychelles) Ltd & Anor* (MC 34/2019) [2019] SCSC 462 (05 June 2019); *Ramkalawan v The Agency of Social Protection* (MC 8/ 2016) [2016] SCSC 88 (15 February 2016)).

[8] In relation to post-trial NPO, which can be granted to assist a party in enforcement and/or asset tracing where a party evades the judgment debt, it has been held that, “A *reasonable suspicion of willful evasion suffices*” (see *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (MA 119/2020) [2020] SCSC 573 (10 August 2020); *Ex-parte: “ALFA-Bank” Joint Stock Company Limited (Seychelles) v Crystal (Seychelles) Limited* (MA 106/2021) [2021] SCSC 670 (19 October 2021) *NML Capital Ltd v Chapman Freeborn Holdings Ltd* [2013] EWCA and *UVW and XYZ (A Registered Agent)* (Claim No. BVI HC (COM) 108 of 2016 [19th September 2016]). The Court in *UVW and XYZ* further explained the meaning of reasonable suspicion:

*“[32] I also do not agree that an Applicant has to show a particular transaction where assets have been transferred to the corporate vehicle for no reason other than to avoid execution. A general pattern of willfully evasive conduct suffices. ‘Reasonable suspicion’ that the third party has been mixed up in the wrongdoing was the evidential threshold applied by the Jersey Court of Appeal in *Macdoel Investments Limited et al. v Federal Republic of Brazil et al.*30 The Court there explained that ‘reasonable suspicion’ is ‘something less than prima facie evidence’.”*

[9] At the time when this application was laid by pending determination of the appeal by the Order of this Court dated 13 September 2022, the application appeared to be post-

judgment NPO in aid of enforcement, which was not yet due as the appeal was pending. At this moment, however, since the plaint has been filed against the Respondent in different proceedings but with similar allegations, the application can be viewed now as also having attributes of the standard pre-trial NPO in relation to the Respondent. One of the main conditions for the pre-trial NPO is that *“there must be the need for an order to enable action to be brought against the ultimate wrongdoer”*. At present, the action has been brought against the Respondent and judgment debtor jointly with similar allegations as in the present application. It should also be borne in mind that NPO is grounded in equity. Filing a plaint against the Respondent shows that at least according to the Applicant, they are of the view that they have cause of action against the Respondent. Therefore, the need of the equitable NPO becomes questionable. Furthermore, in the context of pre-trial NPO, this Court is not satisfied that this application now is not a fishing expedition and that there are no alternative ways of obtaining the information sought. For these reasons the application is dismissed.

Signed, dated and delivered at Ile du Port on 24 March 2023.

M Burhan J