SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 222
MC 89/2022

In the matter between:

EASTERN EUROPEAN ENGINEERING LIMITED **Applicant**
(rep. by Serge Rouillon)

and

AARTI INVESTMENTS LIMITED **Respondent**
(rep. by unrepresented)

Neutral Citation: *Eastern European Engineering Limited v Aarti Investments Limited* (MC 89/2022) [2023] SCSC 222 (28th March 2023).
Before: Pillay J
Summary: Application for a Norwich Pharmacal Order
Heard: 7th February 2023
Delivered: 28th March 2023

ORDER

Application is dismissed

RULING

PILLAY J:

[1] The Applicant seek by way of a motion filed on 27th December 2022 for an urgent order of disclosure against the Respondent.

[2] The motion is supported by the affidavit of Vadim Zaslonov who avers that he is a director of the Applicant and authorised to swear the affidavit. He averred as follows:

> 3. *That the Directors of the Respondent are directly related to Vijay Construction (Proprietary) Limited ("VIJAY") by virtue that:*
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> - *Mr Vishram Jadva Patel is the majority shareholder and director of both AARTI and VIJAY; and*
> - *Mr Vishram Jadva Patel's daughter, Ms Aarti Kerai, has been, or continues tobe, a minority shareholder and director of AARTI; and*
> - *Mr Vishram Jadva Patel's daughter-in-law, Ms Foram Varsani, has been, or continues to be, a minority shareholder of VIJAY; and*
> - *Mr Vishram Jadva Patel's daughter-in-law, Ms Foram Varsani, has been, or continues to be, a director of both AARTI and VIJAY.*
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> 4. *That EEEL is the judgment creditor in a Judgment of the Supreme Court in CS 23/2019 Vijay Construction (Pty) Limited v Eastern European Engineering Limited dated 30th June 2020 ("SC Judgment") which was upheld by the Seychelles Court of Appeal in Judgment dated 2nd October 2020 in SCA 28/2020 Vijay Construction (Pty) Limited v Eastern European Engineering Limited ("SCA Judgment") (collectively the "Judgments").*
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> 5. *That VIJAY is the judgment debtor from the Judgments'*
>
> 6. *That on 17th August 2020, EEEL filed an application in CS No. 23/2019 for an order under section 247 of the Seychelles Code of Civil Procedure Act by the Registrar of the Supreme Court, which would prohibit a number of banks from paying monies belonging to VIJAY until further court order. Especially the sums of EUR 16, 604, 670.43 and USD 126, 000, EUR 8, 872, 845.14 and GBP 245, 315.90.*
>
> 7. *That the said banks included: Seychelles Commercial Bank, Bank of Baroda, Bank of Ceylon, Barclays Bank (now ABSA), Nouvobanq, Mauritius Commercial Bank (Seychelles) Limited, Seychelles Credit Union, and Bank of Al Habib Ltd.*
>
> 8. *That in the hearing on 2nd December 2022, it transpired that VIJAY has bank accounts with Bank of Baroda and Nouvobanq. The representatives of*

ABSA and Seychelles Commercial Bank did not appear before court though duly notified.

9. *That in the hearing on 9th December 2022, a representative of Bank of Baroda confirmed that VIJAY holds a bank account in SCR and the current amount held in this account is SCR 637, 454.15. In the same hearing, a representative of Nouvobanq confirmed that VIJAY holds three bank accounts with the bank in three different currencies: EUR, USD and SCR. According to the bank representative the amounts held in each account are EUR 207, 576.19, USD 152, 691.85 and SCR 956, 905.04. The bank representative was not able to confirm the occurrence of the last transaction in this account.*

10. *That in a previous validation application and ruling delivered by Carolus J in Eastern European Engineering Limited v Vijay Construction (Pty) Limited (MA100/2020 & MA101/202 [2020] (24 July 2020) on 20th July 2020, counsel for VIJAY produced printouts of part statements of what he claimed were all of VIJAY's bank accounts in Seychelles, showing the closing balances of the accounts. The statements pertain to the following accounts:*

    a) *Nouvobanq bank account No. 0100204075006 (SCR), showing transactions on 16 July 2020 and with a closing balance of SCR 8, 761, 119.48 as at 20 July 2020;*
    b) *Nouvobanq Account No. 32002040475006 (USD) showing transactions on 16 July 2020 and with a closing balance of USD 412, 474.82 as at 20 July 2020;*
    c) *Nouvobanq Account No. 21002040475006 (EURO) showing transactions on 24, 19, 08 and 4 July 2020 and with a closing balance of EUR 259, 175.70 as at 20 July 2020;*
    d) *Nouvobanq Impersonal Fixed Deposit Account No. 32302040475061 (USD) with a balance of USD 1, 060, 382.39 (SCR equivalent 19, 542, 847.45) as at 18 July 2020;*
    e) *Bank of Baroda Fixed Deposit Account No. 90210300003302 (SCR) with a balance of SCR 10, 261, 546.00 as at 20 July 2020;*
    f) *Bank of Baroda Advantage Current Account No. 90210200000109 (USD), with a balance of USD 27, 024.74 as at July 2020, the status of which was shown to be dormant;*
    g) *What appears to be a Bank of Baroda Account from the stamp thereon, the account number and type not being shown as the first page of the statement is missing. The balance is 2, 725, 958.17 but*

it is also not possible to ascertain the currency or whether the account has been attached as the account number is not shown.

11. *That by the evidence the learned judge found that VIJAY has enough funds in the accounts to satisfy at least the amount of the arbitral award and costs associated with the arbitration proceedings, as well as post award interest, the judge ordered VIJAY to provide security in the form of a bank guarantee in the sum of EURO 20 million pending determination of the appeal against SC Judgment dated 30th June 2020 in CC23/2019.*

12. *That to the best of my knowledge, such a security has never been provided by VIJAY, which means, as I have been advised by the EEEL's legal advisor, Mr. Serge Rouillon, that VIJAY never complied with the court order dated 24th July 2020.*

13. *That it is clear from the figures produced in respect if that bank account for 2020 and 2022 that there has been a gross dissipation of those supposed frozen accounts, with a complete emptying of these respective accounts and possibly others during the whole court process by VIJAY. The conclusion is that VIJAY has orchestrated the funds to invariably dissipate from the said bank accounts, thereby depriving EEEL of the fruits of the judgment.*

14. *That in view of the matters stated ad exhibited herein, there is a very strong likelihood based on VIJAY's and its director' past and recent statements that the assets and/or funds of VIJAY have been transferred to third parties, including AARTI, in order to deny EEEL the fruits of the Judgment.*

15. *That I have been advised by the EEEL's legal advisor, Mr Serge Rouillon, and verily believe that the matters stated above constitute wrongdoing on the part of VIJAY and possibly AARTI and others connected to the latter in that it is a deliberate attempt by VIJAY and possibly AARTI and others connected to the latter to prevent and frustrate the execution of the judgment and further deny EEEL the fruit if the judgment.*

16. *Therefore, it is in the best interests of justice that the origin of all the assets and money of AARTI and any other transaction involving the participation or connivance of AARTI is disclosed to the Court and to EEEL and for the documentary evidence including bank statement of all bank accounts of AARTI be ordered to be disclosed to this honourable court.*

[3] A draft order is attached to the application as is a bundle of documents comprised of the judgments referred to above as well as the court proceedings in the referenced applications along with the copies of annual returns for AARTI for the year ending 31st December 2019, annual returns for VIJAY for the year ending 31st December 2020 and AARTI's particulars of directors.

[4] In terms of the law governing applications of this nature, the Supreme Court of Seychelles has jurisdiction to make an Order of disclosure by virtue of sections 5, 6 and 17 of the Courts Act in that the Supreme Court being vested with all the powers, privileges, authority and jurisdiction capable of being exercised by the High Court of Justice may exercise its equitable jurisdiction to grant such relief. See ***Danone, Asia Pte Limited and Ors v Offshore Incorporations (Seychelles) Ltd CS310 0f 2008***; ***Wavel Ramkalawan v The Agency of Social Protection MC8 of 2016***.

[5] The basis of a disclosure order, technically known as a Norwich Pharmacal Order, originates from the case of ***Norwich Pharmacal v Commissioners of Customs and Excise (1974) A.C. 133***, wherein the principle was established that on application by the Applicant, the Court may order an innocent third party to disclose any information relevant to the case, when there has been wrongdoing and the Plaintiff is unable to find out the wrongdoers.

[6] Per Lord Reid in ***Norwich Pharmacal v Customs & Excise***, "Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a person in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage."

[7] The conditions which must be satisfied before a 'Norwich Pharmacal Order' may be granted were summarised in ***Mitsui & CO Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511 at 21***, as follows:

> *(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;

(iii) The person against whom the order is sought must:

(a) be mixed up in so as to have facilitated the wrongdoing;

(b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."

[8] An essential pre-condition to the grant of a "Norwich Pharmacal Order" is that the Plaintiff requires the information for a pending suit or prospective suit. However it must not be a mere fishing expedition.

[9] In ***Ramkalawan v The Agency of Social Protection (MC 8/2016) [2016] SCSC 88 (15 February 2016)*** the Court stated the following:

> *"One of basic tenets of a Norwich Pharmacal Order is that full and frank disclosure of all facts pertaining to the applicant's case must be made. This is one of the traditional safe guards the courts have put in place for the protection of respondents. The applicant also has to show an extremely strong case given the draconian nature of the remedy."*

[10] In the case of ***Otkritie Securities Ltd v Barclays Bank (seychelles) Ltd (CS 15 of 2012) [2012] SCSC 12 (30 March 2012)*** an order of discovery compelling the Respondent to disclose certain information was sought. There was no allegation of wrongdoing on the part of the Respondent. The Applicant's contention was that the Respondent had become "a conduit for the fraudulent holding and transfers of money that was fraudulently obtained from the applicants by a group of individuals".

[11] In ***Otkritie*** above, His Lordship CJ N'tende considered the case of ***Ex parte: Danone Asia Pte Limited & Ors v Offshore Incorporations (Seychelles) Ltd*** **Civil Side No 310 of 2008** before Perera CJ in which "the Supreme Court came to the conclusion that it had the jurisdiction to issue an order to respondents who may not be parties to an action and who are not involved in the alleged wrongdoing but who have information that is relevant to

establish the identity of the wrongdoers against the applicant, relying on sections 5 and 17 of the Courts Act."

[12] In the matter at hand the suit has already been completed. A judgment has already been given and the Applicant wishes to execute the judgment. In spite of the initial restrictive approach taken to the granting of such orders the Courts have extended the ambit to allow discovery post judgment as was done by the Commercial Court of the British Virgin Islands in the case of ***UVW and XYZ (A Registered Agent) 19th |September 2016***. However the test remains that the Court must be satisfied that there is wrong-doing by the third party or the debtor. The test laid in the above case is that the Applicant must show that "there is a reasonable suspicion that a disclosure defendant is mixed up in the wilful evasion of another's judgment debt." Mere failure to satisfy the debt does not amount to wilful evasion.

[13] In the instant application there is no allegation of wrong-doing, innocently or not, by the Respondent. The only assertion is that the Directors of the Respondent are directly related to Vijay Construction (Proprietary) Limited and a very strong likelihood based on VIJAY's and its directors' past and recent statements that assets and/or funds of VIJAY have been transferred to third parties.

[14] As I understand the facts of this case, on 24th July 2020 Her Ladyship Carolus J ordered VIJAY to provide security in the form of a bank guarantee in the sum of EURO 20 million as Her Ladyship found that on the evidence presented to her Ladyship, VIJAY had enough funds in the accounts to satisfy at least the arbitral award and costs associated with the arbitral proceedings. It is noted that the bank guarantee was never provided. On that same day her Ladyship also ordered the release of the bank accounts of the Judgment Debtor VIJAY) that were subject to the attachment Order dated 16th July 2020 and amended by Order dated 17th July 2020.

[15] As a result of the security not being provided and dismissal of applications for variation to the 24th July 2020 order and for leave to appeal the order of 24th July 2020, with the debt still owing, on 17th August 2020 the Judgment Creditor (the Applicant in the current matter)

filed a second application for attachment which was granted by Order dated 20th August 2020.

[16] According to the Applicant when the Order was made on 20th August 2020 for the attachment of the Judgment Debtor's accounts there was a marked difference in the amounts available on those accounts.

[17] From the documents provided, between 24th July 2020, when the Order was made to release the bank accounts from attachment, and 20th August 2020, when the second Order was made for attachment, the Nouvobanq accounts specifically had been depleted substantially:

> *SCR Account No. 01002040475006 from 8, 761, 119.48 to 956, 905.04*
> *USD Account No. 32002040475006 from 412, 474.82 to 152, 691.85*
> *EURO Account No. 21002040475006 from 259, 175.70 to 207, 576.19*

[18] It is further noted that in her Judgment dated 24th July 2020, Her Ladyship Carolus J noted certain discrepancies in the averments of the Judgment Debtor, specifically that "It is averred that on its own, the SRC is expected to be paid SCR 9, 044, 302.02 by 21st July 2020 in respect of VAT and other taxes. There is no evidence to substantiate that such cheques have been issued or that the payments are due."

[19] What the Applicant seeks to do is find out to whom the funds, in those accounts that had been frozen then released before being subsequently frozen again, were dissipated and when. In my humble opinion that cannot be done by chasing each and every entity that the Respondent has a familial affiliation with or that the Applicant suspect may have assisted in the evasion of execution.

[20] On the basis of the third condition in ***Mitsui*** above it is the finding of this Court that the Applicant has not shown that the Respondent is *"mixed up in so as to have facilitated the wrongdoing or be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."*

[21] That said, the Judgment Creditor had started the execution process and Her Ladyship Carolus J had made a finding that the Judgment Debtor had enough funds to satisfy "at least the arbitral award and costs associated with the arbitral proceedings". The Applicant

having shown that the Judgment Debtor has depleted the accounts named, between 24th July 2020 to 20th August 2020, in the absence of a bank guarantee being provided, it is my view that the logical conclusion is that the Judgment Debtor is evading execution.

[22] Going back to the ***Norwich Pharmacal v Customs & Excise*** case:

> *"...if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing 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. [It does not] matter whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong it he unwittingly facilitated its perpetration."*

[23] With that in mind on the basis of the averments and documents attached, the person mixed up in the wrong doing is the bank. It may be that the Respondent is involved in the wrong-doing by receiving money from the Judgment Debtor however on the basis of the documents at hand it has not been shown that the Respondent facilitated the wrong-doing. The proper Respondent to be cited would be the banks who "willingly assisted in the wrong-doing" or believed they were doing what was their duty to do in effecting the transfers from the bank accounts.

[24] Accordingly the application is dismissed.

Signed, dated and delivered at Ile du Port on 28th March 2023

Justice Laura. G. Pillay SUPREME COURT SEYCHELLES Supreme Court Judge

Pillay J