SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 476
MA100/2020 & MA101/2020
(Arising in CS23/2019)

In the Matter of an Application for Execution between:

EASTERN EUROPEAN ENGINEERING LIMITED **Applicant**
(rep. by Alexandra Madeleine)

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED **Respondent**
(rep. by Bernard Georges)

And in the Matter of an Application for Stay of Execution between:

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED **Applicant**
(rep. by Bernard Georges)

and

EASTERN EUROPEAN ENGINEERING LIMITED **Respondent**
(rep. by Alexandra Madeleine)

Neutral Citation: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (MA100/2020 & MA101/2020) [2020] SCSC 476 (24 July 2020).
Before: E. Carolus J
Summary: Application for execution of judgment – Section 225 Seychelles Code of Civil Procedure – Application for stay of execution – Section 230 Seychelles Code of Civil Procedure – Requirements for stay of execution fulfilled.
Heard: 21 July 2020
Delivered: 24 July 2020

ORDER

1. Execution of the judgment dated 30 June 2020 in CS23/2019 is stayed on condition that within 14 days of the date of this Ruling, Vijay Construction (Pty) Ltd pays into Court security in the form of a bank guarantee in the sum of EURO Twenty Million (EUR20,000,000) pending determination of the appeal against judgment dated 30th June

2020 in CC33/2019. Failure to comply with this Order in the time stipulated will result in the Order for the stay of execution lapsing.

2. The bank accounts of Vijay Construction (Pty) Ltd subject to the attachment Order dated 16th July 2020 amended by Order dated 17th July 2020, are to be released from attachment forthwith.

RULING

CAROLUS J

Background

[1] This Court delivered a judgment ("the judgment") on 30 June 2020 in the case of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (CS23/2019) [2020] SCSC 350 (30 June 2020)* ("the principal case") declaring two Orders of the High Court of England and Wales to enforce an arbitral award, executory and enforceable in Seychelles. In terms of the judgment, the defendant ("Vijay") was ordered to pay the plaintiff ("EEEL") the following:

1. By Order of Mr. Justice Cooke dated 18th August 2015 -

a) In relation to the arbitration proceedings:

i. the sum of Euros 15,963,858.90 (arbitral award in favour of plaintiff against the defendant);
ii. the sum of Euros 640,811.53 (plaintiff's legal and other costs of the arbitration);
iii. the sum of US Dollars 126,000 (plaintiff's costs to the ICC).

b) Costs of the application for leave to enforce the arbitral award and to enter judgment in terms of the award to be summarily assessed if not agreed.

c) In relation to post award interest:

i. Euros 145,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61;
ii. Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01;

iii. Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.

2. By Order of Mrs. Justice Cockerill dated 11th October 2018 –

   a. the Claimant's (plaintiff's) costs of (1) the defendant's application to set aside the Order of Mr. Justice Cooke dated 18th August 2015 and (2) the defendant's application to cross-examine witnesses of the plaintiff, on the indemnity basis, to be assessed if not agreed;

   b. an interim payment on account of the costs referred to in sub-paragraph (a) above in the sum of £245,315.90.

3. Costs of registration of the Orders.

[2] After delivery of the judgment, EEEL, on 1st July 2020, filed an application seeking its execution pursuant to section 225 of the Seychelles Code of Civil Procedure ("SCCP"), prior to taxation of the bill of costs incurred in the principal case (MC100/2020). On 3rd July 2020, EEEL filed its bill of costs and disbursements incurred in the principal case for taxation and on the same day, Vijay filed an application for stay of execution of the judgment pending appeal (MC101/2020). On 8th July 2020, EEEL through its counsel withdrew its application for taxation of the bill of costs and informed the Registrar that it was waiving its right to claim costs and disbursements stated in the bill of costs. On the same day it filed an application with the Registrar under section 247 SCCP for attachment of monies belonging to Vijay in five accounts held with three banks in Seychelles, namely Barclays Bank (now ABSA), Nouvobanq and Bank of Baroda. The Registrar issued an Order on 16th July amended by an Order dated 17th July 2020 attaching all sums of money in the said bank accounts to secure payment of the judgment debt in the principal case ("attachment Order").

[3] The application for execution of judgment in MA100/2020 and the application for stay of execution of judgment in MA101/2020 being intrinsically linked in that an order made in either application would inevitably have an impact on the other, both applications were dealt with together and give rise to this ruling.

[4] Both applications came before the Court for the first time on 20th July 2020. In view of the urgency of the matter because VIJAY claimed that it was unable to operate while its funds were subject to an attachment order, the applications for execution and stay of execution were fixed for hearing on the next day 21st July 2020.

Application for Execution of judgment (MC100/2020)

[5] EEEL's application for execution of the judgment was made by way of Notice of Motion supported by an affidavit sworn by Vadim Zaslonov who avers that he is a director of the applicant company and authorised to swear the affidavit. The grounds on which the applicant seeks execution of the judgment as a matter of urgent necessity as per paragraph 3 of the affidavit are that:

3.1 the arbitral award and post-award interests are unexecuted to-date and have been outstanding since 14th November 2014 and all attempts at amicable settlement have proved futile;

3.2 Applicant has been denied the fruit of the arbitral award and post-award interests for almost six years and has incurred and continues to incur expenses in relation to the recognition and enforcement of the said award in Seychelles, in France and in the United Kingdom;

3.3 there are still a number of pending cases before the Supreme Court of Seychelles between the same parties and surrounding the arbitral proceedings and award which depend upon the outcome of the case CS23/2019;

3.4 there is strong likelihood that now the Respondent will proceed to dispose of and/or dissipate its assets in Seychelles including and not limited to the funds held by the Respondent in the below mentioned accounts so as to avoid execution of the judgment:

(a) Barclays Bank Account (now ABSA) No.------ (EURO)
(b) Nouvobanq Account No.----- (EURO)
(c) Nouvobanq Account No.----- (USD)
(d) Nouvobanq Account No.----- (SCR)
(e) Bank of Baroda Account No.------ (SCR)

3.5 The Respondent's (sic) has stated on court record in CS33/2015 Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd during cross-examination of Mr. V. J. Patel, that its (sic) would rather be (sic) wound up the Respondent than settle the arbitral award.

[6] Vijay objected to execution of the judgment but stated through counsel that it would rely on its application for stay of execution to support its objections to the execution.

[7] The procedure to be followed by a judgment creditor for enforcement of a judgment by means of execution is prescribed under section 225 SCCP which provides as follows:

> *225. If the party liable fails to satisfy the judgment or to comply with the order of the court, application may be made to the Registrar by the judgment creditor, forty-eight hours after such default, for the enforcement of the judgment or order by means of execution. Before applying for execution, the judgment creditor must have his bill of costs taxed by the Registrar and where the judgment is for a sum of money exceeding sixty rupees or for the delivery of property exceeding sixty rupees in value, the judgment creditor may also obtain from the Registrar a formal judgment stating the substance of the judgment or order and must cause the same to be registered at the Registration Office:*
>
> *Provided that the court may, on grounds of urgent necessity, direct that a judgment or order be enforced by execution, except in so far as it relates to the costs of the suit, immediately after judgment has been given and before the costs incurred in the suit can be ascertained by taxation, and that the judgment or order, in so far as it relates to the costs, be enforced by execution so soon as the amount of the costs shall have been ascertained by taxation.*

[8] A reading of this section shows that after a judgment has been delivered, if the judgment debtor fails to satisfy the judgment, the judgment creditor has two options. The judgment creditor may forty-eight hours after such default, after having its bill of costs taxed, apply to the Registrar for execution of the judgment. Alternatively it may immediately after judgment is delivered and before forty-eight hours have elapsed, and before taxation of costs, apply to the Court on the grounds of urgent necessity for execution of the judgment. In the latter case, costs of the suit will be taxed and enforced at a later date.

[9] In the present case, EEEL has availed itself of the option under the second limb of section 225 for execution on grounds of urgent necessity. Having waived its right to claim costs and disbursements, the question of enforcement of taxed costs does not arise. If the Court is satisfied that there is urgent necessity to order execution of the judgment it should do so.

[10] This Court is of the view that the ground of urgent necessity for execution of the award has not been made out by EEEL. In that respect, this Court takes note as averred in the affidavit in support of its application for execution, that the arbitral award was made on 14th November 2014 and the award and post-award interest remain outstanding almost six years

later. Further, that EEEL has incurred additional expenses in attempting to enforce the award. However, I also note that EEEL has not produced any evidence to support the averments at paragraphs 3.3, 3.4 and 3.5 of the affidavit in support of its application for execution. In particular there is no evidence before this Court to show that there are cases before the Supreme Court which depend on the outcome of CS23/2019. EEEL has also not shown how this makes execution of the judgment a matter of urgent necessity. Further EEEL has not substantiated its averment that there is strong likelihood that Vijay will proceed to dispose of and/or dissipate its assets in Seychelles including funds in its bank accounts to avoid execution of the judgment. In any event, there is an attachment order in force in respect of most of Vijay's bank accounts, which was made on the application of EEEL.

Application for stay of execution pending appeal (MA101/2020)

[11] Vijay's application for stay of execution is supported by an affidavit signed by Kaushalkumar Patel (KP's 1st affidavit) who avers that he is a Director of the company and consequently empowered to swear the affidavit on behalf of the company. In his Affidavit Kaushalkumar Patel depones *inter alia* as follows:

> 4. *Vijay has filed an appeal against the judgment of this Honourable Court ...*
> 5. *I am informed by Vijay's lawyers, and verily believe, that Vijay has good grounds of succeeding in its appeal, as these appear in the memorandum of appeal, especially on the grounds relating to lack of due process in the matter of the accession by Seychelles by Seychelles to the New York Convention and on the principle of double exequatur.*
> 6. *I am advised by the lawyers of Vijay that EEEL would probably take steps to enforce the judgment and am concerned that it does so before the Court of Appeal has had a chance of hearing the Appeal filed. If this occurs, the appeal will be rendered otiose in that EEEL is a shell company with offshore company shareholders and non-seychellois directors…*
> 7. *From dealing with the Respondent company over many years, I have come to know the company and verily believe that it has no assets whatsoever other that the furniture in its office at Premier Building. I verily believe that it will be unable to refund any sum paid to it by Vijay in satisfaction of the judgment of this Honourable Court should the appeal be adverse to it.*
> 8. *Vijay, on the other hand, is able and willing to put up security to the satisfaction of this Honourable Court to ensure that, if its appeal fails, EEEL will be able to recover its judgment debt, interest and costs.*

9. *Additionally, I verily believe that no injustice will be caused to EEEL by a grant of a stay of execution of the judgment insofar as interest is running on the sums awarded to EEL*
10. *I verily believe that this is a good case for the exercise by the court of its discretion to … grant a stay of the execution of the judgment debt pending disposal of the appeal herein ….*

[12] Vijay has exhibited in its affidavit the judgment appealed against (Doc 1), its intended Notice of Appeal dated 2nd July 2020 containing the grounds of appeal (Doc 2), and a number of documents (collectively Doc 3), including the Memorandum of Association of EEEL showing the particulars of directors and shareholders of the said company. When the applications were called for the first time on 20th July 2020, Vijay's counsel produced to the Court a revised Notice of Appeal to replace the one previously exhibited. The revised Notice of Appeal contained 2 additional grounds of appeal. EEEL did not object to the production of the revised Notice of Appeal.

[13] At the first sitting of 20th July 2020, counsel for Vijay also sought to have Vijay's bank accounts which were the subject of the attachment Order released from attachment. He 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. I note that only some of these accounts have been attached. The statements pertain to the following accounts:

(a) Nouvobanq bank account No. ----- (SCR), showing transactions on 16th July 2020 and with a closing balance of SCR8,761,119.48 as at 20th July 2020 (attached);

(b) Nouvobanq account No. ------ (USD) showing transactions on 16th July 2020 and with a closing balance of US$ 412,474.82 as at 20th July 2020 (attached);

(c) Nouvobanq Account No. ------- (EURO) showing transactions on 24th, 19th,, 08th and 4th July 2020 and with a closing balance of Euro 259,175.70 as at 20th July 2020 (attached);

(d) Nouvobanq Impersonal Fixed Deposit Account No. --------- (USD) with a balance of USD 1,060,382.39 (SCR equivalent 19,542,847.45) as at 18th July 2020 (not attached);

(e) Bank of Baroda Fixed Deposit Account No ----- (SCR) with a balance of SCR 10, 261,546.00 as at 20th July 2020 (not attached);

(f) Bank of Baroda Advantage Current Account No. ------ (USD), with a balance of US$ 27,024.74 as at 20th July 2020, the status of which was shown to be dormant (not attached);

(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.

[14] On 21st July 2020 Vijay filed a supplementary affidavit signed signed by Kaushalkumar Patel as a supplement to his first affidavit (KP's 2nd Affidavit).The averments in KP's 2nd Affidavit deal principally with the adverse effects of the attachment order on Vijay's business operations and its continued effect if a stay of execution is not granted, as well as the undertakings he is prepared to make if a stay of execution is granted.

[15] It is averred therein that as a result of the attachment Order since 17th July 2020, all the accounts of Vijay have been frozen; cheques issued will not be honoured and sums due to Vijay will not be able to be credited to the accounts; and cash deposits which Vijay wanted to make, even after the freezing of the accounts, were not accepted by the bank.

[16] Twelve cheques dated 14th July 2020 to 16th July 2020 for various sums are listed (paragraph 6) which are averred to have been issued by Vijay and remain uncleared. These include five cheques in favour of the Seychelles Revenue Commission ("SRC") totalling SCR459,404.63 (which with the agreement of EEEL were allowed to be paid by Court Order of 21st July 2020). It is also averred that in addition to the cheques issued, payments totalling several million Rupees are immediately due for ongoing activities of Vijay. Nineteen cheques dated 17th July 2020 for various sums payable to various payees (including two for the SRC totalling to SCR398,305.63) are listed (paragraph 8) which are averred to have been prepared and stopped following the freezing of the accounts. Paragraph 9 contains a list of payees with various sums allocated to them which are averred

to be payment cheques which had been prepared but not despatched. I note that the SRC figures in that list as being owed is SCR128,450.92. 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.

[17] It is further averred that Vijay has numerous projects on foot which the continued freezing of its account will jeopardise, insofar as it will be unable to procure materials and supplies and pay employees as well as settle other obligations. It is averred that if the Court is not minded to grant Vijay a stay of execution and its accounts remain frozen, it will have to cease operations. The main projects which Vijay is currently averred to be undertaking are: Ste Anne Resort, completion date end October 2020; Eden Island, completion date December 2021; Civil Infrastructure at Zone 20, Providence, completion date June 2021; and Asphalt works at New Port, completion date December 2020. It is averred that the immediate effects of Vijay ceasing operations will be the loss of 1520 jobs, of which 71 are Seychellois; the suspension, pending new arrangements by the clients of work on Ste Anne Resort and Eden Island; claims against Vijay for delays; the immediate loss to the country of approximately US$ 3.5 net inflows of foreign exchange into the country per month for the projects on foot; and the consequential loss of revenue to the country from the delayed opening of Ste Anne Resort (scheduled for December 2020) and the relaunching of tourism after the Covid-19 induced downturn. Again the Court has not been given adequate information on Vijay's operations and its financial situation which would enable it to assess the effect of payment of the judgment debt on the company and the potential effect of its ceasing operations.

[18] In KP's 2nd affidavit, Kaushalkumar Patel avers that Vijay has made available to the Court all bank balances of its accounts – three at Nouvobanq and three at the Bank of Baroda. He avers that if the Court is minded to grant a stay of execution, Vijay is able to offer security over all that EEEL would be able to recover in executing judgment, namely a court-ordered charge against all its plant and equipment, valued in 2017 at US$ 8 million (and now perhaps a little more, given that Vijay has since 2017 taken delivery of a dredger), and over its bank accounts through a court supported undertaking that the accounts will not be

depleted otherwise than in the ordinary course of business. In this way, he avers, Vijay will be able to continue to operate pending the determination of the appeal against the judgment and EEEL's position as judgment creditor will be secured, or at any rate will not fall below the value it could realise in an immediate execution over these assets.

[19] He further avers that Vijay is the beneficiary of two arbitral awards (one against Beau Vallon Properties, a company allied to EEEL) and a Supreme Court judgment, which together amount to approximately US$ 6 million, but these are contingent upon appeals against these awards and the judgment failing. Vijay is therefore unable to offer those as security, but is willing to undertake not to enforce any of them, occasion arising, without first informing this Court and taking directions as to the fate of any receipts thereunder.

[20] He claims that the offer of EEEL to hold any sums by Vijay in satisfaction of the judgment in a separate bank account pending the hearing of the appeal while it appears to be reasonable, ignores the fact that refusal of a stay of execution and the enforcement of the judgment pending determination of the appeal filed by Vijay, will have immediate and irreversible consequences as stated at paragraph 17 hereof. He avers that Vijay will have to cease operation immediately and money repaid to it in a year or two when the appeal is disposed of will not compensate it for any losses incurred in the interim by reason of it having to cease operation over the enforcement of judgment which was subsequently reversed. On the other hand, he avers that if Vijay is allowed to continue operating and is successful in its appeal, neither it nor the country will be adversely affected in the interim.

[21] Kaushalkumar Patel, also addresses EEEL's response to Vijay's claim that EEEL is a shell company with offshore company shareholders and non-Seychellois directors and that any money paid to it in execution of the judgment will not be recovered by Vijay if it is successful in its appeal. He avers that all that EEEL has shown is that one of its directors is a Russian naturalised Seychellois and notes that the particulars purporting to show the person's appointment as a director in 2013 was only registered on Friday 17th July 2020, the date set for hearing of the application for stay of execution. In addition, his naturalisation was only made in 2014, the year following his alleged appointment as a director of EEEL as a 'Seychellois'. He further avers that in any event his statement that

EEEL is effectively a shell company with no assets to speak of and with 100% shareholding by foreign companies registered in offshore jurisdictions has not been traversed indicating that his statement is true. However in my view, this falls short of proving that EEEL would not be able to refund any sums paid to it.

[22] Finally regarding EEEL's claim that it is unable to trust in Vijay's proposal to provide security in view of Vijay's past behaviour in relation to security, Kaushalkumar Patel explains two matters which he claims have been dealt with several times and explained to the Court, which has acted on them, and which have been brought up by EEEL in a bid to influence the Court against Vijay. These are firstly regular transfers from Vijay's Seychelles accounts to Mr. V J Patel's accounts in India which he avers are paid to its Indian workers. He states that this is a long-standing practice reflected in the payroll and audited annual accounts of Vijay and that the money is not for Mr. Patel's benefit. Secondly, with respect to Mr. V J. Patels's statement on Court record in CS33/2015 that that winding up is preferable to paying damages to EEEL as per the arbitral award, he explains that V J Patel has always maintained that the award made against Vijay is unfair and wrong and that it will fight it – as it is the company's right to do – until the very end. He states the following: *"If the last battle is lost, then the inevitable outcome will be that the company will cease to operate and will be wound up. That will be the logical end to this matter. But until then, Vijay will continue to fight with every legal argument available to it with a view to reversing the award and, in the meantime, using legal means to prevent attempts to enforce it."*

[23] EEEL set out its objections to the application for a stay of execution in an affidavit in reply sworn by Vadim Zaslonov on 20th July 2020 (VZ's 1st affidavit), exhibiting supporting documents. EEEL objects to the application for stay of execution on the ground that it is purely and simply calculated to further unjustly deny it of the fruit of the Judgment which includes an arbitral award made in its favour since November 2014 and confirmed in proceedings in France and United Kingdom. It further claims that the grounds of appeal raised by Vijay in its Notice of Appeal do not justify a grant of a stay of execution of the Judgment and do not have good grounds of succeeding on appeal as they do not raise any serious questions of law to be adjudicated upon at the hearing of the appeal and are devoid

of any merit. It is also averred that the affidavit in support of the application for stay of execution does not make out good reasons to justify such stay and to further deny EEEL the fruit of the judgment.

[24] EEEL denies that Vijay's appeal will be rendered otiose if EEEL takes steps to execute the judgment before determination of the appeal on the ground that EEEL is a shell company. It is averred that documents submitted by Vijay in that respect's affidavit are out-dated and revised particulars of EEEL's directors dated 17th July 2020 showing Mr. Yuri Khlebnikov as one of the directors of Seychellois nationality and a copy of the Seychellois passport of Mr. Yuri Khlebnikov were exhibited. EEEL also denies that it has no assets and will not be able to refund any money paid to it by Vijay. It avers that it is a company organized and existing under the laws of Seychelles and was carrying out the promotion/ project management of the construction of the hotel project known as the Savoy Resort and Spa when disputes arose in the course of the construction contracts with Vijay.

[25] It is further averred that if the stay is refused and the appeal is successfully determined in favour of Vijay, there are no risks that Vijay will not be able to recover whatever sums paid to EEEL in that EEEL undertakes to refund to Vijay any sum paid to it by way of the judgment debt. EEEL is prepared to operate a separate bank account into which all sums paid by Vijay are to be deposited and provide periodic statements to the Court in satisfaction of this undertaking until the appeal is determined.

[26] EEEL also objects to Vijay's offer of security so that it can recover the judgment debt, interests and costs if Vijay's appeal fails, on the ground that it is unable to trust in neither Vijay's undertaking nor its proposal to provide security in view its past behaviour in relation to the same subject matter. This behaviour relates to breaches of Court Orders of the English and French Courts, breach of protective orders of the Seychelles Supreme Court alleged to be aimed at the dissipation of companies assets, and the statement by V. Patel on the 2nd September 2015 under cross-examination in case 33/2015, that Vijay would rather wind up than pay damages to EEEL as per the arbitral award. Court proceedings for that date was exhibited. EEEL further alleges that if the stay is granted and the appeal is unsuccessful, EEEL will suffer irreparable harm that cannot be compensated by damages

and costs in that there is a very strong likelihood based on Vijay's past conduct that it will dissipate its assets and/or funds to deny EEEL the fruit of the judgment. It avers that EEEL has been unfairly and without any justification denied the fruits of the Judgment since 14 November 2014 and that on a balance, more injustice will be caused to EEEL than to Vijay such that the application should be refused. It states that to avoid further injustice to EEEL the judgment sum should be paid to it to be kept in a separate bank account or into Court.

[27] In reply to KP's 2nd affidavit in support of Vijays's application for stay of execution, Vadim Zaslonov has filed a further affidavit ("VZ''s 2nd affidavit) dated and filed on 21st July 2020. In the affidavit he reiterates that KP's 2nd affidavit is bad in law and fails to prove any good reasons for the Court to grant a stay of execution of the judgment. He also points out that the declarations made at paragraphs 5, 6, 7, 8, 9, 10, 11, and 12 of KP's 2nd affidavit which are set out in paragraphs 15, 16, and 17 above are not substantiated. He further avers that the period for which the alleged tax liability referred to under paragraph 10 (that SRC is expected to be paid SCR 9,044,302.02 BY 21st July 2020 in VAT and other taxes) is due has not been specified such that the accuracy and legitimacy of the declaration made in paragraph 10 of KP's 2nd affidavit cannot be established.

[28] Vadim Zaslonov also avers in his 2nd affidavit that the prolonged non-payment of the judgment debt to EEEL continues to prejudice EEEL. He reiterates that EEEL incurred and continues to incur substantial legal expenses in France, United Kingdom and Seychelles to enforce its right to the arbitral award.

[29] He claims that in providing the bank balances of Vijay's accounts to the Court, Vijay failed to make a full and frank disclosure in that all the bank balances (except for the bank statement from the Bank of Baroda) do not reveal whether there have been any debit transaction from the said accounts on, before or reasonably close to the making of the judgment or the attachment order.

[30] As to Vijay's offer of security in the form of a Court- ordered charge against Vijay's plant and equipment, valued in 2017 at US$ 8 million and a court supported undertaking that all the bank accounts will not be depleted otherwise than in the ordinary course of business, it is averred that such offer is vague as the assets are unidentified, their actual value as at

2020 are not ascertained and valuation will take time. Further, the said proposal is insufficient to guarantee payment of the judgment debt should the appeal fail given Vijay's annual turnover of Euro 50 million, in 2015, and that such offer represents approximately 1/3rd of the judgment debt. Over and above Vijay's proposal or in lieu thereof as the Court may order, it is proposed that Mr. Vishram Patel should act as personal security for Vijay for payment of the judgment debt/ such part thereof and make payment of a percentage of the judgment debt into the Court's registry.

[31] At the hearing of the application for execution and stay of execution, counsels for the parties made oral submissions, essentially elaborating on the affidavit and documentary evidence presented by the parties. This will be referred to as occasion arises in respect of the points discussed below.

Analysis

Applicable law

[32] As regards the applicable law for applications for stay of execution, Counsel for Vijay relied upon a judgment of this Court in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (MA310/2018) [2019] SCSC (11 February 2019)* which he submitted sets out a proper statement of the law and the conditions for the granting of a stay of execution. The Court in that case relied on principles stated in *International Investment Trading SRL (IIT) v Piazolla & Ors (2005) SLR 57* and *Choppy v NSJ Construction (2011) SLR 215*. Counsel for EEEL on her part endorsed the latter two cases and relied on the case of *Macdonald Pool v Despilly Williams (1996)*.

[33] It was held in the case of *International Investment Trading SRL (IIT) v Piazolla & Ors (2005) SLR 57* that the power of the Court to grant or deny a stay is a discretionary one. In the same case the Court stated as follows:

> *There does not seem to be any specific and explicit provision of any statute which directly and expressly grant this Court power to stay execution of judgment pending appeal. It is only by inference from section 230 of the Seychelles Code of Civil Procedure, that this Court may draw such power."*

[34] Section 230 of the SCCP provides as follows:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the appellate court may direct."

[35] The Seychelles Court of Appeal Rules, 2005, contain a similar provision in its Rule 20 which provides as follows:

20. (1) An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from:

Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or non-performance or any act or the suffering of any punishment ordered by or in such judgment, order, conviction, or sentence, as the Supreme Court or the Court may deem reasonable.

(2) No intermediate act or proceeding shall be invalidated except in so far as the Supreme Court or the Court may direct.

[36] The Courts have, in addition, established principles that a Court may have regard to in considering whether or not to grant a stay of execution. The case of *Choppy v NSJ Construction (2011) SLR 215* sets out the following such principles, which was approved in the International Investment Trading case (supra):

a) The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all Parties.
b) The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.
c) The Court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of Parties.
d) Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted Courts will normally exercise their discretion in favor of granting a stay.
e) The Court will not speculate on the appellant's prospect of success but may make some preliminary assessment about whether the Appellant has an arguable case in order to exclude an appeal lodged without any real prospect of success simply to grant time.

f) As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security.

[37] The essence of these principles is encapsulated in what was held, in the recent case of *Elmasry & Anor v Sun (Civil Appeal MA37/2019) [2020] SCCA (30 June 2020)*, following earlier Seychelles authorities, to be the circumstances a court would consider in granting a stay of execution. These circumstances are as follows:

i. Where there is a substantial question of law to be adjudicated upon at the hearing of the appeal,
ii. Where special circumstances so require,
iii. Where there is proof of substantial loss that may otherwise result,
iv. Where if the stay is not granted the appeal if successful, would be rendered nugatory,
v. If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment,
vi. If a stay is refused, and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover the subject matter of execution (in a money judgment that has been paid to the respondent)?

[38] In addition, the Court in that case also set out the following guidelines for a decision on a stay of execution on a money judgment taking into consideration the provisions of section 230 of the Seychelles Code of Civil Procedure and Rule 20(1) of the Seychelles Court of Appeal Rules at paragraph 25 of its judgment:

C has obtained a money judgment against D who appeals and applies for a stay of execution. C objects. The Court must ask the following questions:

Q1 Has D satisfied me that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and that his appeal has a good prospect of success?-

If yes, proceed to Q2. - If no, a stay should not be granted.

Q2 Has D satisfied me that he will be ruined, or his appeal otherwise be stifled if forced to pay C immediately instead of after the (unsuccessful) appeal? –

If yes, a stay can be granted subject to considering the answers to Q4. - If no, a stay should not be granted unless a positive answer is given to Q3.

Q3 Has D satisfied me that there is no reasonable probability that C will be able to repay the monies paid to C by D? –
If yes, a stay should be granted, subject to considering the answers to Q4. - If no, a stay should not be granted.

Q4 What are the risks that C will be unable to enforce the judgment if the stay is granted and D's appeal fails? Depending on the extent of that risk and other relevant circumstances can there be a compromise solution: payment of all or part of the relevant sum into court to await determination of the appeal; a stay only of part of the judgment sum; provision of security for part of C's payment to D? A compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard.

[39] This Court will now proceed to consider individually the grounds on which a stay of execution is sought.

Is a substantial question of law to be adjudicated upon at the hearing of the appeal with good prospects of success.

[40] At paragraph 5 of KP's 1st affidavit in support of the application for stay of execution the following is averred:

> *I am informed by Vijay's lawyers, and verily believe, that Vijay has good grounds of succeeding in its appeal, as these appear in the memorandum of appeal, especially on the grounds relating to lack of due process in the matter of the accession by Seychelles by Seychelles to the New York Convention and on the principle of double exequatur.*

[41] In the affidavit, in support of its contention that it has good prospects of success on appeal Vijay, relies principally on the grounds of appeal relating to breach of natural justice in not allowing Vijay the opportunity to address the Court on the effect of Seychelles accession to the New York Convention and the principle of double exequatur, which are found in paragraphs 6 and 7 and paragraph 8 of the Grounds of Appeal respectively. In his submissions counsel for Vijay further states that in addition to these two grounds, ground 1 of the Grounds of Appeal that the application in the principal case was brought under the

wrong legal provision also has good prospects of success. The aforementioned grounds of appeal are reproduced below.

1. *The application of the Respondent, then Plaintiff , was brought under the wrong legal provision (section 3 of the Reciprocal Enforcement of British Judgments Act) which had been replaced by section 9 of the Foreign Judgments (Reciprocal Enforcement) Act and, as a consequence, (i) was bad in law and (ii) should have been summarily dismissed by the Trial Court.*

[…]

6. *The Learned Trial Judge erred in finding … that the roundabout route taken by the Respondent in seeking to enforce an unenforceable award through the process of a British judgment could not be faulted because of the 'change of the Seychelles position' through its accession to the New York Convention. In doing so, and in surmising … that the Respondent could now possibly seek to enforce the award directly, the Learned Trial Judge showed that her whole judgment was predicated, not on the law as it stood at the hearing in 2019 but on the law as she interpreted it while preparing her judgment, without having given the parties an opportunity to disabuse her of her view.*

7. *The Learned Judge erred in failing to provide the Defendant with an opportunity to address the issue of 'back-door-entry due to Seychelles' ratification of the New York Convention and in concluding that 'it can no longer be argued that the enforcement of the arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitral awards are capable of being enforced' … This failure to provide a procedural opportunity is a breach of natural justice, as the Appellant would still argue that, in the unique circumstances of the case, the enforcement of the arbitral award would be unconscionable and contrary to public policy, and in breach of legitimate expectation.*

8. *The Learned Trial Judge erred, having accepted that the British Orders were in the form of executory orders, in dismissing the submission exequatur sur exequatur ne vaut or similar arguments regarding double exequatur.*

[42] Counsel for Vijay submitted that the Court, in deciding whether to grant a stay, should not speculate on the chances of success of the appeal but will only make a preliminary assessment of the merits of the appeal so that if the appeal is spurious or destined to fail, the Court will refuse such stay of execution. On the other hand, he submits that if the grounds of appeal disclose an arguable case or a very likely prospect of success then the

Court will be minded to grant a stay. This accords with the Court's view in the *Choppy v NSJ Construction case (supra)* in which it was held that *"The Court will generally not speculate on the prospects of success on Appeal but may make some preliminary assessment of whether the applicant has an arguable case in order to exclude appeals lodged without real prospect of success simply to gain time."*

[43] Counsel for Vijay argues the ground that the application was not made under the correct legal provision and the ground alleging a breach of natural justice in not allowing Vijay the opportunity to address the Court on the effect of Seychelles accession to the New York Convention are "difficult to resist" and are "so manifestly obvious that the chances of Vijay successfully appealing are greater than average".

[44] In respect of the first ground of appeal he submits that on a simple reading of the judgment which is predicated on section 3 of the Reciprocal Enforcement of British Judgments Act and a reading of section 9 of the Foreign Judgments Reciprocal Enforcement Act, there is clear and distinct possibility that EEEL came to court on a wrong legal footing which, if accepted will not entail going into any further grounds of appeal but would dispose of the appeal without any need to do so.

[45] With regards to what he terms the "New York Convention ground", counsel for Vijay states that simply put, this ground of appeal is that the trial Court made the accession of Seychelles to the New York Convention at a time between the hearing of the case and delivery of the judgment a live issue without it having been a live issue at the hearing, and the Court proceeded to come to certain conclusions based on the fact that Seychelles had acceded to the said convention without having given Vijay an opportunity of addressing the Court on the issue. He stated that the issue raised in this ground of appeal, is not whether if Vijay had addressed the Court on the issue, it would have come to the same conclusion, but that Vijay was denied an opportunity to address the Court on the accession of Seychelles to the Convention which had not been a live issue at the hearing but which the court made into a live issue. He submits that it is a denial of an opportunity to a party to address the Court on an issue that the Court uses to find against that party.

[46] Counsel for Vijay submitted that the ground challenging the finding of the non-applicability of the *exequatur sur exequatur ne vaut* principle in the principal case may be said to be arguable, he states that the finding does pose a challenge in terms of jurisprudence because it sets down a rule which is different from what we have been accustomed to.

[47] He submits that the remaining grounds although less compelling than the aforementioned ones, are also arguable.

[48] EEEL, on the other hand, is of the view that Vijay's grounds of appeal do not justify the grant of a stay of execution, and do not have good prospects of succeeding on appeal. In that respect at paragraph 7 of VZ's 1st affidavit it is averred that :

> *7.1 the said grounds of appeal do not raise any serious questions of law to be adjudicated upon at the hearing of the appeal and especially not the two grounds referred to in paragraph 5 of KP's affidavit;*
>
> *7.4 the ground relating to the lack of due process in the matter of accession of Seychelles to the New York Convention is devoid of any merit and cannot legally form the basis of any challenge in VIJAY's appeal from the Judgment nor before the Courts;*
>
> *7.5 Further to paragraph 7.4 above, according to verbatim proceedings to the National Assembly of 10th December 2019, the adoption of the New York Convention was actively debated upon in the National Assembly and included the participation of VIJAY's lawyer. Translation of verbatim proceeding is shown to me, produced and exhibited herewith as **E2.***
>
> *7.3 the ground of appeal challenging the prohibition of the principle of double exequatur is equally devoid of any merit in our legal system.*

[49] In the Elmasry case, the Court stated at paragraph 16 that:

> 16. *The sine qua non or the most important element that needs to be satisfied in seeking a Stay is to aver in the application and satisfy the Court prima facie that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal. Merely stating that the applicants have an arguable case and the appeal filed has some prospect of success, is not sufficient. The affidavit filed in this case does not state why the Applicants believe that they have an arguable case or has some prospect of success.* Emphasis added.

[50] At paragraph 6, of the same case the Court stated: *"According to the Application for Stay of Execution the grounds upon which the application is based are contained in the affidavit to the Application … In my view the affidavit should develop the substantial issues raised in the application for stay and the grounds of appeal set out in the Notice of Appeal.*

[51] The Court then went on in the same paragraph to say that the Court hearing an application for a stay of execution must prima facie be satisfied that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal, that the applicant has an arguable case and the appeal filed has some prospect of success, before considering matters such as prejudice to parties and the balance of convenience. This, the Court stated, *"necessitates that the Notice of Appeal filed should in stating the grounds of appeal, at its bare minimum disclose the questions of law and facts upon which the Trial Judge erred and thus has to be adjudicated upon at the hearing of the appeal".* The Court went on to explain that *"[T]his does not mean that there needs to be an elaborate discussion of the law or facts"*. In that respect it referred to the Sri Lankan case of *Karunasekera v Rev. Chandananda (2004] 2 Sri L.R* in which it was stated: **"***The court is not expected to go into the intricacies of the question of law to be decided in the appeal: it is sufficient if the court is satisfied that it prima facie appears that there is a substantial question of law to be decided in the appeal.***"**

[52] KP's 1st affidavit in support of Vijay's application for stay does not specifically state that *"there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal".* Further it fails to *"develop the substantial issues raised in the application for stay and the grounds of appeal set out in the Notice of Appeal"* and in that respect falls short of the requirements set out in the Elmasry case. However, the grounds of appeal as set out in the Notice of Appeal satisfy the requirement of adequately disclosing the questions of law and facts which have to be adjudicated upon at the hearing of the appeal. In the circumstances this Court considers that Mr. Patel's averment at paragraph 4 of KP's 1st affidavit that *"Vijay has good grounds of succeeding in its appeal, as these appear in the memorandum of appeal, especially on the grounds relating to lack of due process in the matter of the accession by Seychelles by Seychelles to the New York Convention and on the principle of double exequatur"* coupled with the detailed grounds of appeal

reproduced at paragraph 41 of this Ruling sufficiently shows the existence of such "*substantial questions of law and facts to be adjudicated upon at the hearing of the appeal."*

[53] Further the Elmasry case differs from the present one in that, not only did the affidavit filed in that case not state why the Applicants believe that they have an arguable case or had some prospect of success, but in addition the grounds of appeal were also found to be *"not only vague and general in terms but do not even state whether the learned Trial Judge erred in law or facts or that the decision is unreasonable or cannot be supported by the evidence. They do not show or indicate that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal."* In my view this cannot be said to be the case in the matter in hand.

[54] On the issue of whether the applicant has an arguable case, the Court at paragraph 18 of the Elmasry case referred to the Australian case of *Vaughan v Dawson [2008] NSWCA 169* in which it was held that it is appropriate to consider first whether the appeal raises a serious question to be tried, in the sense of arguable grounds. In the same paragraph the Court also referred to the case of Lawrence v Gunner *[2015] NSWCA 322* in which it was held that it is appropriate to first consider whether the appellant has arguable grounds of appeal and that a detailed examination of the merits of the appeal is neither necessary nor appropriate. At paragraph 19, the Court referred to the Kenyan cases of *Regnoil Kenya Limited vs Winfred Njeri Karanja, Nai of 329 2018 (UR 266 0f 2018); Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012; and Housing Finance Company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another [2015], eKLR* which dealt with applications for stay of execution in civil proceedings under section 6 (2) (b) of the Judicature Act, and which held the first issue for consideration is whether the intended appeal is arguable and that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous.

[55] On the basis of the above cases, I find that at least some of the grounds of appeal raised in Vijay's Notice of Appeal disclose an arguable case in that they are not frivolous.

[56] However as I stated in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (MA310/2018) [2019] SCSC (11 February 2019)*, *"That is not to say that this Court is bound to grant a stay of execution on the finding alone that the Applicant has an arguable case. In exercising its discretion whether or not to grant a stay of execution, the Court also has to weigh all relevant considerations on the particular facts and in the particular circumstances of the case before it. Whether the Applicant has an arguable case is but one such matter to be taken into consideration."*

Will Vijay be ruined, or its appeal otherwise be stifled if forced to pay EEEL immediately instead of after the (unsuccessful) appeal?

[57] According to the guidelines in Elmasry, if Vijay does not satisfy the Court that it will be ruined, or its appeal otherwise be stifled if forced to pay EEEL immediately, instead of after the (unsuccessful) appeal, then a stay should not be granted, unless Vijay satisfies the Court that there is no reasonable possibility that EEEL will be able to repay the moneys paid by it to EEEL in execution of the judgment debt.

[58] If on the other hand, Vijay satisfies the Court that that it will be ruined, or its appeal otherwise be stifled if forced to pay EEEL immediately instead of after the (unsuccessful) appeal, then a stay should be granted. However, this is subject to the risk that EEEL will be unable to enforce the judgment if the stay is granted and Vijay's appeal subsequently fails. Depending on the extent of that risk and other relevant circumstances the Court may consider a compromise solution such as: payment of all or part of the relevant sum into court to await determination of the appeal; a stay only of part of the judgment sum; provision of security.

[59] In terms of PK's 1st Affidavit, there is no averment of any adverse effects on Vijay by the payment of the judgment debt to EEEL immediately rather than after determination of the appeal, other than that that EEEL will be unable to refund any money paid to it by Vijay in satisfaction of the judgment in the event that its appeal is successful rendering the appeal otiose. It is averred that this is because EEEL is a shell company with offshore company shareholders and non-Seychellois directors and has no assets. Vijay has not proved to the satisfaction of this Court that EEEL will not be able to return any money paid to it

[60] In terms of KP's 1st Affidavit Mr. Patel further claims that Vijay is able and willing to put up security to the satisfaction of the Court to ensure that, if its appeal fails, EEEL will be able to recover its judgment debt, interest and costs. He further expresses the belief that no injustice will be caused to EEEL by a grant of a stay of execution of the judgment insofar as interest is running on the sums awarded to EEL. The inference here is that if Vijay's appeal is unsuccessful EEEL will be able to recover the whole of the judgment debt plus interests and costs. It is to be noted that at the time of filing of application for stay and its supporting affidavit KP's 1st Affidavit the attachment Order had not been made.

[61] However in terms of KP's 2nd Affidavit, Vijay complains about the attachment of money in its bank accounts and the adverse effect it has on its business operations. It states that if a stay of execution is not granted, and the attachment Order is maintained, it will have to cease operations. In the same affidavit, an offer of security is made in the event that the Court decides to grant a stay of execution. However this time the security proposed is *"over all that EEEL would be able to recover in executing judgment, namely a court-ordered charge against all its plant and equipment, valued in 2017 at US$ 8 million (and now perhaps a little more, given that Vijay has since 2017 taken delivery of a dredger), and over its bank accounts through a court supported undertaking that the accounts will not be depleted otherwise than in the ordinary course of business*." It is averred that if this is done Vijay will be able to continue to operate pending determination of the appeal and EEEL's position as judgment creditor will be secured, or *"at any rate will not fall below the value it could realise in an immediate execution over these assets"*. Contrary to what was stated in KP's 1st Affidavit, it would appear from the above that if Vijay's appeal fails, EEEL will not be able to recover the full judgment debt, interests and costs.

[62] In that respect I take note that the alleged valuation of the plant and equipment dates back to 2017. No evidence of any such valuation was produced to the Court. As rightly stated by EEEL the assets are unidentified, their value as at 2020 have not been ascertained and valuation will take time. I also take note of the balances in Vijay's bank accounts as per the bank statements. The evidence before the Court is inadequate to paint a true picture of Vijay's financial situation and it has not shown how much of the of the judgment debt it is able to provide security for. The indication is that the resources available to Vijay may well

fall short of covering the judgment debt, interest and costs. I am also mindful of the difficulty to the Court in ensuring compliance with an undertaking that Vijay's bank accounts will not be depleted otherwise than in the ordinary course of business. As to the two arbitral awards and judgment in favour of Vijay, as rightly stated, these are contingent to appeals against them failing. No reliance can therefore be placed on them.

[63] In PK's 2nd Affidavit Mr. Patel also objects to EEEL's offer to hold any sums paid in satisfaction of the judgment debt in a separate account pending the hearing of the appeal as payment of the judgment debt will cause it to cease operation immediately. It is averred that if the judgment is subsequently reversed on appeal, the refund of the money will not compensate it for losses incurred by it ceasing its operations. Again, this Court not having a clear picture of Vijay's financial situation is not able rely on this assertion.

[64] From the above, it appears that if Vijay pays EEEL the judgment debt now and is ultimately successful in its appeal, its appeal will be rendered nugatory as it will have gone out of business from having to pay out such a large sum. The balance of convenience therefore lies in granting a stay of execution of the judgment.

[65] On the other hand I am mindful of the prejudice caused to EEEL by the prolonged non-payment of the arbitral award since 2014, which I note has been confirmed by the French, and British Courts and rendered executory by this Court and I am also concerned by Mr. Vijay Patel's statement on Court record in CS33/2015 to the effect that winding up Vijay is preferable to settling the arbitral award. I am also of the view that there is a very real risk that if a stay of execution is granted and Vijay subsequently loses the appeal EEEL will not be able to enforce the whole of the judgment debt on which interest continues to accrue, to the detriment of EEEL. To mitigate that risk, I am of the view that a compromise solution is the best option. In so saying, I am mindful that execution of a judgment is the rule and a stay is the exception as a judgment debtor should not be deprived of the fruits of a judgment without good reason. As stated in the Elmasry case *"[A] compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard"*.

[66] Taking into consideration the circumstances of this case and after balancing the competing rights and interests of the parties, I am of the view that EEEL should be able to secure at least the amount of the arbitral award and costs associated with the arbitration proceedings as well as post award interest.

Decision

[67] On the basis of the above:

(a) I dismiss the application in MA100/2020 for enforcement of the judgment dated 30 June 2020 in CS23/2019 by way of execution.

(b) I grant the application in MA101/2020 for stay of execution of the said judgment on condition that within 14 days of the date of this Ruling, Vijay Construction (Pty) Ltd provides security in the form of a bank guarantee in the sum of EURO Twenty Million (EUR20,000,000) pending determination of the appeal against judgment dated 30th June 2020 in CC33/2019. Failure to comply with this Order in the time stipulated will result in the stay of execution lapsing.

(c) The bank accounts of Vijay Construction (Pty) Ltd subject to the attachment Order dated 16th July 2020 amended by Order dated 17th July 2020, are to be released from attachment forthwith.

Signed, dated and delivered at Ile du Port on 24 July 2020



E. Carolus J