

IN THE SEYCHELLES COURT OF APPEAL

ALLIANCE SECURITY INC

APPELLANT

versus

FIDELITY HOLDINGS S.A

RESPONDENT

Civil Appeal No: 23 of 1998

*[Before: Ayoola, Venchard & Adam, J.J.A]*

For the Appellant: Mr. P. Pardiwalla

For the Respondent: Mr. P. Boule



JUDGMENT OF THE COURT

*(Delivered by Adam J.A)*

The appellant, a registered body corporate in Liberia sought a declaration and injunctive relief before Bwana J against the respondent, a registered body corporate in Luxembourg. In its original Plaint the appellant (plaintiff) proceeded against the respondent (defendant) with J.H. Byramji cited as its representative and relied on an undated written agreement, certified by a Notary Public in Pakistan which was signed by both parties with respective signatories attaching to their signatures the word "Director" with "J.H. Byramji" signing for the respondent. In its Amended Plaint of February 1997 the appellant proceeded against the respondent with Yvette Hamillius cited as its representative and relied on a written agreement of 24 September 1987 which had one signatory for the respondent with "J.H. Byramji" signing in the same way. This was one of a number of agreements provided to the appellant by Yvette Hamillius, being the Liquidator of the respondent appointed in Luxembourg. It should be mentioned that the undated written agreement with 3 paragraphs of preamble showed a blank space in paragraph A for

the amount of the loan and in paragraph B does not before the word subsidiary have "(wholly owned)." The written agreement of 24 September 1987 again with 3 paragraphs of preamble showed in the preamble in paragraph A USD 2.5 million for the amount of the loan and does in paragraph B have "(wholly owned)" before the word subsidiary. Both agreements start with the appellant as the first name and in paragraph 10 are to be governed by English law. Another written agreement of 3 January 1989 starts with the respondent as the first name with 5 paragraphs of preamble and in paragraph A showed that the appellant was 100% shareholder of the respondent; in paragraph B that the appellant has made advances of USD1,568,780 to the respondent as a loan which was secured by a Pledge by it of 714 shares held by the respondent in Central Stores Development Limited of the Seychelles; in paragraph C that Central Stores owed respondent SR3404 929 (USD635 423); in paragraph D that the appellant required the respondent to repay the loan made by it which the respondent was unable to do, in paragraph E the appellant has agreed to accept transfer to it of the shares and the loan made by it to Central Stores in settlement of the loan made to the respondent by the appellant. That agreement was to be governed by the law of Luxembourg and is not as lengthy as the other two written agreements but does have with the respective signatures the word "Director" and "J.H. Byramji" signing for the respondent. This agreement seems to reflect a set off of one loan as against another with 714 shares being transferred

In the Amended Complaint the appellant averred that in a written agreement made on 24 September 1987 a loan of US\$1.5 million was made to the respondent by it for which the respondent gave a Pledge to the appellant of 714 shares owned by the respondent in Central Stores in repayment of the loan. The respondent in its Amended Defence to this averred that there was no agreement in writing or otherwise on 24 September 1987; that if there was, it was null and void in view of the fact



that the person who signed on behalf of the respondent, J.H. Byramji had no authority to sign as he was only appointed Director of the respondent in 1991 and in any event one signature could not have bound the respondent because joint signatures of two directors were required to bind it. The respondent averred that no Pledge of 714 shares was given as a Pledge to the appellant. In its counterclaim the respondent asked that the agreement of 24 September 1987 and the Pledge of 16 September 1992 be declared null and void. In the appellant's Reply to this it averred that there was an agreement in writing on 24 September 1987 which was confirmed by a further agreement of 3 January 1989; that the person who signed it was duly authorised and mandated for that purpose and had ostensible authority of the respondent.

The onus was thus on the appellant to prove that a written agreement was made on 24 September 1987. In the evidence of the witness called by the appellant he testified that to his knowledge Byramji was a Director of the respondent; that he had not seen any special power of attorney issued to Byramji but that he had always dealt with him as a Director in all matters and that Byramji signed all documents as Director.

In the evidence of the expert witness called by the respondent he testified that he was a lawyer in Luxembourg specialising in commercial law especially Luxembourg company law; that he had made certain searches in relation to company matters in Luxembourg concerning the respondent; that the respondent's Memorandum of Association required joint signatures of two directors or one person appointed as a delegate with a special power of attorney by the respondent's Board of Directors to sign on behalf of the respondent; that Byramji had been appointed Director of the respondent with effect from 20 June 1991; that in the case of a person appointed delegate he had to produce the special power of attorney showing his appointment and that the agreement itself had to indicate the date of the resolution of the Board of Directors or the special

power of attorney should be attached to the agreement itself; that in his opinion as an expert that the 24 September 1987 agreement was signed alone by Byramji as Director and 16 September 1992 Pledge was signed alone by Byramji without more does not mean that Byramji was authorised to sign it alone; that irrespective of what was warranted in the body of the agreement by the Director who signed alone the respondent would not be bound to the agreement executed by Byramji alone; that the 16 September 1992 Pledge was not a ratification of the 24 September 1987 agreement and he did not find any ratification in the wording of the Pledge; that ostensible authority was excluded in Luxembourg law, and that if there were creditors of the respondent they would have to file their claims with the Liquidator. This witness produced a Judgment of 29 May 1995 of the Luxembourg Court. Before the Luxembourg Court the Liquidator argued that Byramji who alone signed the 24 September 1987 agreement as Director and alone signed the 16 September 1992 Pledge did not have the power to act alone on behalf of the respondent since joint signatures of two Directors was required so the 24 September 1987 agreement and the 16 September 1992 Pledge were void. The Luxembourg Court in its judgment (accepted by Bwana J) held that both of these instruments should have been signed by joint signatures of two Directors or that the signatory should have been delegated relevant powers by the Board of Directors in order to validly bind the respondent, the sole signature was therefore in effectual and the two instruments were void and without effect.

Bwana J found that the 16 September 1992 Pledge was signed when Byramji was Director; that the respondent was put under liquidation on 28 January 1993; that there were conflicting figures of the loan extended by the appellant to the respondent with Plaintiff reading US\$1.5 million of 24 September 1987 agreement but 16 September 1992 Pledge reflected sums not exceeding US\$2 million whereas there was no clear and definite amount claimed by the appellant; that 3 January 1989



agreement could not be a material agreement; that 16 September 1992 Pledge although reciting "we" was only signed by Byramji on behalf of the respondent so Byramji alone could not bind the respondent and even after his appointment as Director on 20 June 1991 he had to act in accordance with the Memorandum of Association as required by Article 47(4) of the Commercial Code of Seychelles and that 21 September 1992 Pledge had been registered on 21 December 1993 after the respondent had been put in liquidation on 28 January 1993. Bwana J rejected the Amended Plaint and dismissed it in its entirety. He entered judgment on the counterclaim in favour of the respondent.

In his Memorandum of Appeal the appellant had a number of grounds but Mr. Pardiwalla on behalf of the appellant submitted that Bwana J, having concluded that three documents had been tendered by the appellant to establish proof of the agreement, was wrong in that there would be only one which was relevant to the issue and for rejecting 3 January 1989 agreement as not being material. He argued that 3 January 1989 agreement was confirmation or corroboration of the 24 September 1987 agreement. He conceded that under Luxembourg law joint signatures of two Directors in terms of the Memorandum of Association was a requirement but it also permitted one person to sign who was delegated by the respondent with a special power of attorney. He submitted that when Byramji signed there was a presumption that he had special power of attorney. But such presumption can only arise on the basis that Byramji had ostensible authority to sign. However, Mr. Pardiwalla forgot to point out that according to the expert witness ostensible authority did not apply under Luxembourg law, further in any event the expert witness stressed that the agreement itself had to indicate the date of the resolution when the Board of Directors delegated the authority in the special power of attorney had to be attached to the agreement. As for 3 January 1989 agreement being confirmation or corroboration of 24 September 1987 agreement it again was signed by

Byramji as Director so it was also void and of no effect. Besides there are a number of differences between the two agreements. The 3 January 1989 agreement reflected the amount of the loan as US\$1,568,790, 70% shareholding, in Central Stores, Central Stores was shown to have received a loan of SR3,404,979 (US\$635,423.24) from the respondent and that the "agreement shall be subject to Luxembourg law". It would in light of the foregoing be most difficult for the appellant to insist that the 3 January 1989 agreement corroborated or confirmed the 24 September 1987 agreement.

Mr. Pardiwalla also criticised Bwana J's ruling concerning the calling of Byramji on his personal after having allowed him previously to be called. It was conceded by him that a subpoena or summons could not be issued from Seychelles compelling a person out of jurisdiction to attend in a court in the Seychelles. In light of this a court will not issue orders which it knows cannot be enforced.

Mr. Pardiwalla also submitted that Bwana J should not have admitted the Judgment of 29 May 1995 of the Luxembourg Court as jurisprudential authority since it was irrelevant to the determination of the issues in the case and that it likely prejudiced Bwana J in his determination of the issues of the case. Mr. Boulle on behalf of the respondent submitted that the Judgment of the Luxembourg Court was accepted since it provided authority for the proposition of the law in Luxembourg testified to by the expert witness and that Judgment had in terms of Article 47(4) of the Commercial Code of Seychelles given effect to the issue of powers of an overseas corporation and thus conclusive on that issue. Article 47(4) provides as follows:-

"The powers of an overseas corporation shall be governed by its constitution as given effect by the law of the country of its incorporation to do any act

or enter any transaction and the validity of such act or transaction shall be subject to the law of the country where the act is done or the transaction occurs."

Since Article 47(4) requires that the powers of overseas corporations like the respondent must be governed by its Memorandum of Association as given effect by the law of Luxembourg where it was incorporated to do any act or enter any transaction, Bwana J was correct to accept the Judgment of the Luxembourg Court only as a jurisprudential authority. As Mr. Boulle correctly pointed out that Judgment of the Luxembourg Court confirmed the opinion of the expert witness called by it. His expert evidence provided proof that Byramji did not have capacity as a Director signing alone to bind the respondent in the various agreements and Pledge signed by him which were tendered in this case.

We are satisfied that the appellant had not established that the respondent entered into an agreement with it on 24 September 1987 so Bwana J came to the correct decision. Accordingly the appeal is dismissed with costs to be paid by the appellant.

Dated this 4<sup>th</sup> day of **December** 1998.

  
E. O. AYoola

**JUSTICE OF APPEAL**

  
L. E. VENCHARD

**JUSTICE OF APPEAL**

  
M. A. ADAM

**JUSTICE OF APPEAL**

