

Zalazina v Zoobert Ltd

(2013) SLR 189

MacGregor PCA, Fernando, Twomey JJA

3 May 2013

SCA 28/2011

Counsel F Elizabeth for the appellants
 F Ally for the respondents

**The judgment was delivered by
TWOMEY JA**

[1] Who owns the shares in Med Enterprises Limited? That is the million dollar question lurking in the murky depths of this case, where alleged shareholders of a Seychellois international business company who initially took advantage of the benefits of such companies, namely minimum record keeping and comprehensive confidentiality, now want the Court to publicly ascertain the identity of the beneficial owners of the company by examining those very records and breaching the coveted confidentiality.

[2] Med Enterprises Limited was incorporated in Seychelles as an International Business Company on 25 November 2005 under the International Business Companies Act 1994. The services for its offshore business were provided by FIFCO (Offshore) Services Limited, the second appellant. These included the provision of an agent and a registered office at Premier Building, Victoria. A Seychellois International Business Company is not required to disclose the identity of its shareholders without a court order; the directors may be elected at the first company board meeting; there is

no minimum capital stipulation; only one director or shareholder is required and there is no need to file accounts with the Registrar of International Business Companies.

[3] The first appellant, Tatiana Zalazina, brought an application before the Supreme Court in December 2008 asking the Court to declare her the sole beneficial owner of Med Enterprises Limited. She supported her application by affidavit and several documents: inter alia, the resolution by the company appointing her as sole director and the issuing of 5,000 ordinary shares of \$1.00 in her name. At the hearing, the registered agent of the company, the second appellant, appeared through its manager Paul Chow and confirmed that according to the share register held by FIFCO, the first appellant was the sole beneficial owner of the company, Med Enterprises Limited.

[4] He also gave evidence that his agent in Cyprus had informed him that several fraudulent and/or illegal share transactions had been conducted by a person or persons not authorised by the company and also without the knowledge, permission, authority or consent of the first appellant. The trial Judge, Justice Perera, hearing the application held that the Court was satisfied on a prima facie basis that the first appellant was the sole beneficial owner of the company and ordered that all transactions conducted for and on behalf of the company to date by any person other than the first appellant be null and void and that the second respondent not transfer, give, transmit, dispose of or otherwise deal with the records and documents in his possession in a way prejudicial or contrary to the interest of the first appellant.

[5] Less than two months later, on 18 February 2009, the respondents filed a third party opposition under ss 172–175 of the Seychelles Code of Civil Procedure praying that the Court set aside the judgment of the Supreme Court. They alleged that they were the

legitimate shareholders and directors of the company. The documents they attached to their application reveal what can only be described as an elaborate pass the parcel exercise involving the shares and directorship of Med Enterprises Limited. They averred that the first and sole director of the Company was one Stephen John Kelly who had by resolution of the company, dated 20 July 2007, resigned and appointed one Victoria Shevchuk as the sole director and that he had transferred all his shares to her. Victoria Shevchuk in turn had by resolution of the company on 3 April 2008 resigned and appointed Olga Perova as the sole director and transferred her shares onto her. In addition on 15 December 2008, by agreement of the company, Olga Perova had transferred her shares to Zoobert Limited, now the first respondent in the present appeal. The second respondent of this appeal, one Dimitry Podkilzin is the beneficial owner of Zoobert, the sole shareholder of Zoobert Limited and the third respondent, Roy Delcy the sole director of Zoobert Limited having been appointed after the resignation of Olga Perova.

[6] Both parties claimed that their derivation of title to the shares was made out by the documents they produced and each side alleged the other of fraud or illegality. It is certainly not possible that Med Enterprises Limited was incorporated on 25 November by two different persons and that its total shares issued to two different persons who both claim to be the sole director and shareholder. Somebody is not telling the truth.

[7] None of the parties led evidence at the trial of the third party opposition, relying instead on their affidavits and attached documents. The trial Judge found that the case for a third party opposition had been made out and he went to order “a retraction” of the original judgment. The appellants have now appealed this decision on seven

grounds but only the following grounds as summarised and reworded by this Court were substantially proceeded with:

- 1) That the trial Judge erred in law by finding that the respondents had satisfied the conditions under s 174 of the Code of Civil Procedure and had an interest in bringing a third party opposition to the original judgment.
- 2) That the trial Judge erred in law when he failed to consider whether the share transfer from Stephen John Kelly was valid as it was not properly registered.
- 3) That the trial Judge erred by failing to give proper consideration to the documentary evidence, namely to consider the effects of the trust document (I5) in favour of the first appellant.
- 4) That the trial Judge erred when he failed to consider the appellants' plea in limine litis namely that the respondents had locus standi to bring this case and that their supporting affidavits were proper under the provisions of the Civil Procedure Code.
- 5) That the trial Judge erred when he concluded that the respondents had discharged their burden of proof to justify the setting aside of the judgment of the original case.

Ground 1 – third party oppositions

[8] The trial Judge correctly identified the provenance of the law pertaining to the unusual procedure invoked in this case. He found that ss 172–175 of the Seychelles Code of Civil Procedure have their origins in French law and referred to the *Encyclopédie Dalloz* for

guidance. He held, based on the French jurisprudence, that three conditions must exist in order to sustain an opposition by a third party namely:

- 1) That the judgment is of such nature that it causes prejudice to a third party.
- 2) That the third party was not party to the case when it was heard.
- 3) That the third party was not represented at the hearing.

He found that these conditions were satisfied and set aside the original judgment in the case. We are of the view that the Judge was correct in his consideration of the law in respect of the conditions to be met in order that third party oppositions to judgments be permitted. Where he erred was in his assumption that he was only seized with the duty of setting aside the judgment.

[9] As this is the first time that the ss 172–175 procedures have effectively been used in Seychelles we have taken some time to examine the rules relating to the provisions. The Seychelles Code of Civil Procedure, since 1920, is based almost entirely on provisions of English civil procedure. However, certain sections which derive from the French Civil Procedure Code, of which ss 172–175 form part, continued to have the force of law and were incorporated in the 1920 Code which to this date remains largely unchanged. Section 327 of the Seychelles Code of Civil Procedure states that:

Articles of the French Code of Civil Procedure repealed by any law which is repealed by this Code shall remain repealed.

Section 21(1) of the Interpretation and General Provisions Act, Cap 103 of the Laws of Seychelles stipulates:

Where in an Act terms or expressions of French Law are used, they shall be interpreted in accordance with French Law.

The fact that ss 172–175 were not repealed and the effect of s 21(1) above is to guide us back to French law, currently arts 582–592 of the French Civil Procedure Code. The equivalent rules are contained in the Mauritian Code of Civil Procedure at art 474 et seq.

[10] It is useful to bring to light the French provisions. Article 582 of the Code de Procedure Civile states:

La tierce opposition tend à faire rétracter ou réformer un jugement au profit du tiers qui l'attaque. Elle remet en question relativement à son auteur les points jugés qu'elle critique, pour qu'il soit à nouveau statué en fait et en droit.

(Third-party proceedings aim at retracting or varying a judgment in favour of the third party who impugns it. Third party proceedings bring back into issue, with regard to its originator, the points decided which he challenges so that a new ruling may be given on the factual and legal grounds).

(As translated by the official French government site *legifrance*).

And art 587:

La tierce opposition formée à titre principal est portée devant la juridiction dont émane le jugement attaqué.

La decision peut être rendue par les mêmes magistrats.

Lorsque la tierce opposition est dirigée contre un jugement rendu en matière gracieuse, elle est formée, instruite et jugée selon les règles de la procédure contentieuse.

(Third party proceedings made as the main issue will be brought before the court from which the impugned judgment emanated.

The same judges may render the decision.

Where third party proceedings are directed against a judgment rendered in a non-contentious matter, it will be brought, examined and determined in accordance with the rules governing contentious procedures.)

[11] Our provisions relating to a third party opposition are truncated but the gist of the French law is preserved in ss 172–173 of the Seychelles Code of Civil Procedure which state:

Any person whose interests are affected by a judgment rendered in a suit in which neither he nor persons represented by him were made parties, may file an opposition to such judgment.

Such opposition shall be *formed by means of a principal action* to which the parties to the suit, in which the judgment sought to be set aside was obtained, shall be made defendants.

[Emphasis added]

Although the articles of the French Civil Procedure Code cited have no direct application, our provisions relating to third party oppositions originate from them and we are therefore guided by them in interpreting s 173. The use of the term “principal action” is similar to the French terminology *titre principal* and is indicative of the fact that

third party opposition hearings are like ordinary suits. Hence, while we agree with the trial Judge insofar as his analysis of the *tierce opposition* is concerned and his finding that the respondents satisfied the conditions necessary to show that they had an interest in this case, we are of the view that his decision fell short of what is then required in proceedings for a *tierce opposition*.

[12] Having found that the respondents had an interest in the case it was incumbent on him to then weigh the evidence adduced to decide whether the respondents had satisfied the burden and standard of proof in order that the original judgment could be set aside. This ground therefore has merit.

[13] Given our finding in respect of Ground 1 we have considered whether under the Court of Appeal Rules we should remit the matter back to the trial Judge for the consideration of the evidence. In view of the fact that we are permitted by the Rules to exercise any power that the trial Court itself had and in further view of the fact that this matter was decided purely on affidavit and documentary evidence we have decided to weigh the evidence adduced on record ourselves. We do this as we find according to the Rules that the interest of justice may be best served in this way.

Grounds 2 and 3 – the share transfer from Stephen John Kelly and the trust document

[14] We therefore have to consider the next two grounds of appeal raised in respect of the validity of the share transfer by Stephen John Kelly and the trust document. With regard to the documentary evidence produced by the respondents, we begin by examining the issue of shares to Stephen John Kelly on 25 November 2005. Mr Elizabeth has drawn our attention in particular to the following

provisions of the International Business Companies Act 1994 as amended:

Section 28(1)

A company incorporated under this Act shall cause to be kept one or more registers to be known as Share Registers containing–

- (a) the names and addresses of the persons who hold registered shares in the company...

Section 28(3)

A copy of the Share Register, commencing from the date of the registration of the company, shall be kept at the office of the company referred to in section 38 or such other place as the Directors determine and the company shall inform the Registrar of the address of the other place.

Section 38(1)

A company incorporated under this Act shall at all times have a registered office in Seychelles.

Section 39(1)

A company incorporated under this Act shall at all times have a registered agent in Seychelles who is licensed to provide international corporate services under the International Corporate Services Providers Act 2003.

It is clear that the Act provides for the disclosure of legal and beneficial ownership of issued and transferred shares to the registered

agent. Since the authenticity of the resolution passed on the date of incorporation of Med Enterprise Limited issuing the shares to Stephen John Kelly and the share certificate in his name are challenged as are the shares in the name of Tatiana Zalazina, we have to consider the official share register kept by the agent of the company.

[15] Mr Paul Chow, the director of FIFCO who was the registered agent of Med Enterprises and the second appellant in this case testified in the original case and deponed by affidavit in the present case. He stated that the share register reveals the first appellant, Tatiana Zalazina, as the sole beneficial owner of the company. He also stated that the issue of shares or appointment of Stephen John Kelly is not matched by the entries in the register. Moreover, he raises a doubt as to the authenticity of the resolution and minutes of Med Enterprises appointing Stephen John Kelly as director as forwarded to him by an intermediary in Cyprus. These were only received by him by fax from Cyprus on 27 November 2007 two years after the incorporation of the company. He also deponed that the document is a scanned document and that despite his repeated requests he has never received the original. He also deponed that the stamp of one of his companies, Saks and Associates is used irregularly on the document in that the company normally inserts its stamp on top of the letterings and not underneath them. We have no reason to disbelieve him. He has nothing to gain by these proceedings.

[16] We are strengthened in this view by another document produced in this case. This is a declaration of trust sent to Mr Chow which we partly reproduce below:

Declaration of Trust

Med Enterprises Limited

I/We Stephen John Kelly

Hereby Acknowledge and Declare that We hold Five Thousand Ordinary Shares (hereinafter called the Share) registered in our name as Nominee of and Trustee for

Mrs. Tatiana Zalazina

(hereinafter called the Owner) and

We UNDERTAKE AND AGREE not to transfer deal with or dispose of the Share save as the owner may from time to time direct ...

Dated this 25th November 2005.

Its content is baffling. Why may we ask was it necessary for Stephen John Kelly to execute such a document when he claims he was both the legal and beneficial owner of the shares? Why was the trust document not lodged with the agent of the company as was required by law? In any case, the document contradicts the statements contained in the respondents' pleadings, their affidavits and other documentary evidence they have produced. Stephen John Kelly cannot assert on the one hand that he is the beneficial owner of the shares and then on the other hand that he is only the bare trustee or nominee of those shares. If he was only the bare trustee how did he transfer the shares without the knowledge and authorisation of Tatiana Zalazina, the beneficial owner of these shares contrary to the terms of the trust? In any case there is no evidence that he was ever appointed trustee or nominee by Tatiana Zalazina apart from the trust document which is nothing but a self-serving document as it is neither acknowledged nor signed by the nominator or beneficial owner. Moreover, as we have already pointed out, anonymity of the owner of bearer shares is not permissible under the 2003 Act as they have to be registered with the agent.

[17] Other aspects of the trust document are disturbing. Section 3 of the International Trusts Act 1995 states:

This Act applies to international trusts arising voluntarily or resulting by operation of law or by a decision of the court.

Seychelles is a civil law country in terms of its private law. This sets its Civil Code on a collision course with not only the International Trusts Act but also the International Business Companies Act and the International Corporate Services Providers Act 2003 as the civil law regime does not recognise anonymity in terms of ownership of property. Hence international trusts in Seychelles are only statutory creations of the 1995 Act and not common law trusts. Despite the wording of s 3 of the 1995 Act the only trusts permitted under the law are statutory. The Act lays down strict conditions for the creation of such statutory international trusts possibly to avoid their incompatibility with our civil law regime. The trust document in this case runs foul of numerous mandatory provisions of the Act: only one trustee is appointed (despite the provisions of s 22(1) which provides for limited circumstances in which one trustee is permitted), no settlor is identifiable and the only trustee is not a resident of Seychelles (see s 4(1)(b)).

[18] Mr Ally has urged us to rely on the certificates of incumbency and incorporation of the company produced by the respondents which according to him are evidence that Stephen John Kelly was the original director and shareholder of the company. These are two incumbency certificates allegedly signed by Jane Etienne and Lucy Chow on 29 August 2007 and 27 May 2008 respectively. The certificates are on FIFCO letter heads. Also attached to the respondents' affidavits are certificates issued by Lucy Pool and Alexia Amesbury acting as notaries certifying the certificates of incumbency as originals. The entries on these certificates of

incumbency do not match the entries on the share register also held by FIFCO. They certainly fit the account of the respondents who derive ownership of the shares from Stephen John Kelly but it is clear to us that this is an attempt to retrospectively give legitimacy to an original share issue that is highly suspect. Getting notaries to certify possible forgeries as originals does not make these documents authentic. We are in any case bound by the International Business Act to accept only the entries of the share register. The lacunae in the Act are certainly obvious in this case. What are laid bare are the shortcomings of its provisions in permitting such a high level of secrecy in the formation of international business companies. By contrast companies incorporated locally under the Companies Act 1972 must file their Memorandum and Articles of Association at the Companies Registry. No tampering with shares can take place in this context. Further, it is certainly questionable whether the regime under the 1995 International Business Act as it stands serves Seychelles well especially in terms of its associate membership of the Financial Action Task Force (FATF) and the FATF 40 + 9 Recommendations. These concerns should certainly be borne in mind given proposed legislation to unify and replace the existing dual company law system operating under the two Acts.

[19] For the reasons we have already outlined and for the fact that the trust document raises more doubts than provides answers, we have no hesitation in finding that the trust document and the certificates of incumbency are invalid documents and incapable of producing legal effects. We do not accept that Stephen John Kelly was either the legal or beneficial owner of the shares. As the transfers of his shares to subsequent transferees were fruit of the poisonous tree, these are also invalid, null and void.

Grounds 4 and 5 – pleadings, locus standi and burden of proof

[20] There are also serious shortcomings in relation to the plaintiff's affidavits of the respondents. One Victoria Valkovskaya, having produced a special power of attorney has sworn an affidavit in which she states that she is authorised to represent the first and second respondents. It would appear that this is the only statement she could truthfully and validly make under the laws of Seychelles in the affidavit. She is precluded from swearing an oath and making other statements regarding matters of which she has no personal knowledge and cannot prove. The Seychelles Code of Civil Procedure in no uncertain terms stipulates that:

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove....

On those grounds alone the pleadings of the first and second defendant should be struck out as they are not maintainable. The same applies to Roy Delcy, the third defendant. He also has no personal knowledge of what he deposes in his affidavit.

[21] The issues of locus standi and whether the respondents have succeeded in meeting the burden of proof in this case, therefore also have merit but in view of our decision in relation to the more important grounds canvassed in this appeal which has found favour with this Court it would be purely academic to consider them. Accordingly, this appeal is allowed with costs.

[22] We wish to make a final observation. We are of the view that this case reveals serious issues involving a financial and possibly criminal scam to which our financial sector may become vulnerable unless properly checked. We therefore further order that copies of this judgment be served on both the Seychelles International Business

Authority and the Financial Investigation Unit for whatever further action they may deem fit to discharge of their statutory duties in the light of our findings.