

## ZOOBERT LTD v ZALAZINA

(2011) SLR 205

F Ally for the plaintiffs

F Elizabeth for the defendants

### **Ruling delivered on 10 June 2011 by**

**RENAUD J:** In an application entered on 26 December 2008, by the then applicant Mrs Tatiana Zalazina (electing her legal domicile in the chambers of Mr Frank Elizabeth, attorney-at-law, of Suite 303, Premier Building, Victoria, Mahe) *inter alia* prayed that:

1. the first defendant is the sole owner, sole director and shareholder of the Company;
2. the first defendant incorporated the Company under the International Business Companies Act of Seychelles on 25 November 2005, under certification number 024523;
3. on 25 November 2005, the company passed a resolution appointing the first defendant as director of the Company;
4. on 25 November 2005, it was resolved that the Company issues 5,000 ordinary shares of \$1.00 each in the name of the first defendant; and
5. there have been several fraudulent and/or illegal transactions conducted by persons not authorized, permitted or allowed to do so in respect of the company and without the knowledge, express or implied permission, authority or consent, which has prejudiced and compromised the interest of the first defendant.

The respondent then was only FIFCO (Offshore) Services Ltd (represented by its Director, Mr Paul Chow of Suite 103 Premier Building, Victoria, Mahe, Seychelles) who was duly served and accordingly responded.

The respondent's representative, Mr P Chow also gave his unsworn personal answers in court.

On 28 December 2008 the then Chief Justice AR Perera made an order under section 66(1) of the International Business Companies Act. The order that the Court made was substantially as follows:

On the basis of the oral and documentary evidence adduced, the Court is satisfied on a prima facie basis that -

1. The applicant, Mrs Tatiana Zalazina is the sole beneficial owner of the company "Med Enterprises Ltd".
2. In the circumstances, based on the same evidence, it is declared that all transactions conducted for and on behalf of the said company to date by any person or persons other than the applicant, be null and void for fraud or illegality.
3. Consequently the respondent is hereby ordered not to transfer, give, transmit, dispose of or otherwise deal with the records and documents in possession in a way prejudicial or contrary to the interest of the applicant.
4. The respondent is further ordered to allow the applicant to inspect the

share register of the company, the books, records, minutes and consents kept by the company at its registered office, and to allow the applicant to make copies and extracts therefrom.

On 15 February 2009 the present plaint was entered as an "Opposition by Third Parties under Articles 172-175 of the Seychelles Code of Civil Procedure" and the plaintiffs prayed that in view of their pleadings it is just, fair, necessary and in the best interest of justice that the judgment be set aside.

The plaintiffs plead that the first plaintiff is the current sole shareholder of all the issued shares of MED Enterprises Limited (the "Company"), the second plaintiff is the current beneficial owner of all the issued shares in the Company and the third plaintiff is the current sole director of the Company.

The present plaintiffs by their pleadings alleged that according to documents in possession of the second defendant and certificates of incumbency made by the second defendant, which were not disclosed or produced to the Court by the second defendant during the hearing of the application:

1. on the incorporation of the Company on 25 November 2005, Stephen John Kelly was appointed as the first and sole director of the Company by Company resolution of even date;
2. by resolution of sole director dated 25 November 2005, the Company issued 5000 ordinary shares of USD1.00 each numbered 1 to 5000 in the name of Stephen John Kelly;
3. by resolution of sole director of the Company dated 20 July 2007, the Company approved the transfer by Stephen John Kelly of the 5000 that he held in the Company to Shevchuk Victoria;
4. by resolution of the Company dated 20 July 2007, the Company approved the resignation of Stephen John Kelly as director of the Company tendered on the 20 July 2007, and appointed Shevchuk Victoria in his stead and place;
5. by resolution of sole director of the Company dated 3 April 2008, the Company approved the transfer by Shevchuk Victoria of 5000 that she held in the Company to Olga Perova; and
6. by resolution of the Company dated 3 April 2008, the Company approved the resignation of Shevchuk Victoria as director of the Company tendered on the 3 April 2007, and appointed Olga Perova in her stead and place; and
7. by resolution of the Company dated 15 December 2008, Olga Perova acting as the sole director of the Company appointed the 3rd Plaintiff with immediate effect as the sole director of the Company in her stead and place.

The plaintiffs also alleged that by agreement and transfer of shares dated 15 December 2008, Olga Perova sold and transferred 5000 shares in the Company representing all the issued shares in the Company to the first plaintiff.

The plaintiffs opposed the judgment in issue, for the following reasons:

1. the first plaintiff is the sole current shareholder of all of the issued shares in the Company having purchased them from Olga Perova by agreement and transfer of 15 December 2008;
2. the second plaintiff is the beneficial owner of all the shares of the Company;
3. the third plaintiff is the sole director of the Company;
4. the plaintiffs have an interest in the matter and as a result of the judgment their interests have been seriously affected and prejudiced;
5. the plaintiffs were not made a party to the matter and this matter should have been heard with the plaintiffs or at least the third plaintiff as a party for the Court to competently and effectively adjudicate on the matter specially as it alleges fraud and illegal practice.

The plaintiffs also pleaded that the second defendant who had knowledge of the third plaintiff's appointment as a director of the Company failed:

1. to notify the third plaintiff, who is the current director of the Company, of this matter in order that he could have intervened in Civil Side No 380/2008; or
2. to apply to the Supreme Court to join the third plaintiff as a party to Civil Side No 380/2008.

The plaintiffs further pleaded that:

- Failure to notify and/or make the plaintiffs or the third plaintiff a party to Civil Side No 380/2008, amounts to a denial of justice;
- This matter should have commenced by plaint and not by application and therefore, should have been struck off or dismissed;
- The first defendant was not the first shareholder or first Director of the Company or a shareholder or sole director of the Company as averred by the second defendant in its testimony in Civil Side No 380/2008 before the Supreme Court based on documents in its possession;
- The second defendant failed to give material evidence in court as regards to the first shareholder, first director, shareholders and directors of the Company based on documentary evidence in its possession or made by it;
- The first defendant did not establish on the required standard of proof in civil cases that she was the beneficial owner of all the shares of the Company and that all the transactions conducted for and on behalf of the said Company to date by any person or persons other than the first defendant should be declared null and void for fraud and illegality in that she has failed to adduce sufficient evidence to prove a fraud.

The plaintiffs also pleaded that the Court was wrong to hold that it was satisfied *prima facie* and not on the required standard of proof in civil matters or that required to establish fraud that:

1. the first defendant, Mrs Tatiana Zalazina is the sole beneficial owner of the Company;
2. that all transactions conducted for and on behalf of the Company to date by any person or persons other than the first defendant, be null and void

- for fraud or illegality; and
3. the second defendant is hereby ordered not to transfer, give, transmit, dispose of or otherwise deal with the records and documents in possession in a way prejudiced or contrary to the interest of the first defendant.

The plaintiffs further pleaded that the Judge was wrong in making such declaration, findings and orders on such tenuous evidence was adduced in this matter. The application was made under section 66(1) of the International Business Companies Act and the Court exceeded its powers in making declarations 1 and 2 and order 3 in its judgment, and, it is necessary for the ends of justice that the judgment should be set aside and if the matter should be tried all relevant parties thereto should be made a party to it.

The parties either by themselves or through their respective representatives swore comprehensive and detailed affidavits which I have taken time to carefully peruse. The averments in the supporting affidavit of the plaintiffs deposed by their representative Victoria Valkovskaya are materially similar to the contents of the pleadings in the plaint as set out above.

The defendants in answer to the plaint raised pleas in *limine litisas* follows:

1. The action is frivolous and vexatious and ought to be struck off.
2. The action is an appeal disguised into an opposition and ought to be struck off.
3. The plaintiffs have no *locus standi* to bring this action in law as they have no interest in this matter.
4. The affidavit is not properly drafted and deposed to by the first and second plaintiffs and Victoria Valkovskaya and therefore the Court cannot act on the facts contained therein in law.
5. That the said Victoria Valkovskaya has no *locus standi* to bring this action on behalf of the first and second plaintiff in law.
6. The application is defective and incompetent in law and ought to be struck off.

The second defendant filed an affidavit in opposition and admitted certain averments, denied others and yet called on the plaintiffs for strict proof of their allegations. The statement of defence on the merits is materially similar to the contents of the supporting affidavit of the representative of the second defendant Mr Paul Chow.

The second defendant avers that the appointment of John Kelly as the first director of the Company was fraudulent *ab initio* as it was a criminal attempt by the said John Kelly to defraud the first defendant of her company by forging documents to purport that he was the duly first director of the Company MED Enterprises when in actual fact he was not.

The second defendant also avers that as subscriber acting through one of his companies namely, Saks and Associates, they appointed the first defendant as the first director of the MED Enterprises Ltd on 25 November 2005 and issued 5000 shares to her by first resolution on the said date and not Stephen John Kelly.

The second defendant further avers that on 23 January 2006, Mrs Tatiana Zalazina swore on behalf of MED Enterprises Ltd an "Authentication of Signature of Person Signing on behalf of A Body Corporate Or in the Name of Another Person" before a notary in Israel namely, Mr Daniel Mirkin and for the purpose of the said document produced her passport, minutes of the Company's Board of Directors meeting and a certification that the signer is the sole director in the Company.

The second defendant went on to make several more averments that —

- On 23 August 2007 he was informed by the intermediary in Cyprus, namely Company Express that Mr Stephen John Kelly is the first Director of the Company and they submitted minutes of the first meeting of the Subscribers of MED Enterprises Ltd showing that Mr Stephen John Kelly as first Director of the Company.
- The document mentioned above is a forged document as it's a scanned document with its (second defendant) stamp, namely Saks and Associates, stamped underneath the letters Saks and Associates Ltd.
- Second defendant always put its stamp on top of the letterings and not underneath the stamp and the document has clearly been tempered with to make it appear authentic.
- Second defendant had never been provided with the original of the said document despite several requests.
- Although the document is alleged to have been signed on 25 November 2005 the second defendant only received it in August 2007 and that from November 2005 to August 2007 when second defendant received the said document, Mrs Tatiana Zalazina was registered in its (second defendant) company register as the sole beneficial owner of the company, MED Enterprises Ltd.
- On 26 December 2008 when Mrs Tatiana Zalazina came to Seychelles she showed him (second defendant) an original of minutes of the first meeting of the subscribers of MED Enterprises Ltd which clearly showed that she was indeed the first Director and sole beneficial owner of the Company.
- On 2 December 2008, the deponent's office received a mail from their Cyprus intermediary, Company Express informing that one of their clients was seeking a lawyer in Seychelles to file suit against a company for breach of contract.
- On the same day its office sent a mail to the Company Express and recommended the services of Mr Frank Elizabeth and sought the name of the company on whose behalf Mr Elizabeth was going to act.
- On the same date Company Express advised that the company is MED Enterprises Ltd and that a lawyer, Mr Boris Lemper would be making contact.
- Mr Lemper later sent instructions on behalf of Mrs Tatiana Zalazina as the sole beneficial owner of MED Enterprises.
- Any document which purports to show that the said John Kelly was appointed first Director of MED Enterprises is a mistake, fraudulent, illegal, null and void as it was forged with the intention to deceive.
- The plaintiffs' *locus* is void *ab initio* since their claim stems from that of John Kelly and since the said John Kelly did not have any interest in the said Company from the start the plaintiffs' interest, if any, is flawed and defective from the start. The plaintiffs have no interest in the said Company and therefore cannot oppose the said judgment in law.
- All the share transfers and appointments of directors from John Kelly

onwards are fraudulent, illegal, null and void ab in ti and therefore cannot be relied upon by the Court to create an interest for the plaintiffs in this matter in law.

In his submission, Mr Elizabeth, counsel for the respondents submitted that there is only one issue in this matter that needs to be adjudicated. He stated that the order made by the Supreme Court on 26 December 2008, the then Chief Justice AR Perera, declared Tasiana Zalazina (respondent) as the sole beneficial owner of a company known as MED Enterprises Ltd. The applicants have now come with this present application claiming that they had an interest in that company and as such they should have been given notice of that proceeding in order that they could have had their right heard. Basically the applicants are now asking this Court to set the said judgment aside so that the case can be heard again and that the applicants can also participate.

On the other side, Mr F Ally counsel for the applicants submitted that the matter before the Court is an action by plaint opposing the judgment in issue. He clarified that it is not an application for a new trial and the only order that he is asking this Court to make, if the Court finds that the opposing party had an interest in the case and had been affected by the result, is for this Court to simply set aside that judgment.

For ease of reference sections 172 to 175 of the Seychelles Code of Civil Procedure are reproduced hereunder:

172. Any person whose interests are affected by a judgment rendered in a suit in which neither her nor persons represented by him were made parties, may file an opposition to such judgment.
173. 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.
174. Such opposition by a third party shall not delay the execution of the judgment sought to be set aside unless the court orders a stay of execution.
175. Execution of judgments ordering a party to give up possession of an immovable property shall not be stayed by an opposition to such judgment made by third parties whenever such judgments are res judicata between the parties to the original suit.

Counsel Mr F Elizabeth informed the Court that he was only holding brief for the first defendant because he had been served with the plaint at his chambers and he denied that the first defendant had elected domicile at his chambers. He added that the first defendant was not even aware of this suit. She has to be first served with plaint and summons and then he will be instructed to act for her. Mr Elizabeth also submitted that the address of the second plaintiff is simply Moscow, Russia, which is insufficient.

Counsel Mr F Ally countered that this suit is in the nature of “an opposition to judgment” and the first defendant was a party thereto who had elected her domicile

to be at the chambers of Mr Elizabeth. It is normal that any opposition to that judgment be served on her as per her legal domicile in relation to this suit which in effect is an extension of the previous suit. Mr Ally, using the same argument of Mr Elizabeth submitted that Tatiana Zalazina had also not given her full address.

The point raised did not culminate as a contentious issue and the parties proceeded with the plaint.

The case, in a nutshell, is that Zalazina claimed that she is the sole beneficial owner of the shares of MED Enterprises. She brought a case against FIFCO and used FIFCO to establish that she is the sole beneficial owner of the shares. The first plaintiff is now saying that she is the beneficial owner of those shares having purchased them from the persons who were shareholders of the Company. FIFCO Offshores has given under its hand documents called Certificates of Incumbencies. When Zalazina brought the case against FIFCO, the plaintiff, although they allegedly held shares in MED Enterprises Ltd, were not made party to the case. For that reason the plaintiffs have now entered this suit.

In French legal parlance this sort of process is called "tierce opposition" — that is, opposition by third parties. The following notes quoted from the *Encyclopedie Dalloz, Repertoire de Procedure Civile et Commerciale, Tome II - Tierce Opposition*, are apposite:

Notes 1. La tierce opposition est une voie de recours extraordinaire, ouverte contre tout jugement, à une personne que n'y a point été partie, par elle-même ou par ses auteurs, et aux droits de laquelle ce jugement préjudicie. Elle constitue un moyen réparateur, à côté de la fin de non-recevoir tirée de l'autorité relative du jugement auquel on n'a pas été partie — moyen défensive -, et de l'intervention, moyen préventif.

Notes 6. En principe, la tierce opposition est admise contre toute espèce de jugement. Peu importe que le jugement rendu l'ait été en premier ou en dernier resort; qu'il émane d'une juridiction d'exception ou d'une juridiction de droit commun, à l'exception toutefois des arrêts rendus par la Cour de cassation, car ces derniers ne menacent jamais les tiers, qui peuvent attaquer par la tierce opposition, soit, au cas de rejet, la décision maintenue, soit, au cas de cassation, la décision qui remplacera celle des premiers juges.

Notes 66 Trois conditions sont exigées par l'article 474 du code de procédure civile pour qu'on puisse former tierce opposition. Il faut:

1° que le jugement soit de nature à porter préjudice au tiers opposant ;

2° que celui-ci n'ait pas été partie dans l'instance;

3° qu'il n'y ait pas été représenté. Il n'est pas nécessaire qu'il ait dû y être appelé.

- Notes 67 Suivant une opinion, le tiers opposant n'aurait rien de plus à prouvé que sa qualité de tiers, en établissant qu'il n'a été ni partie, ni représenté au procès. Mais, d'après le système consacré par la Cour de cassation, le tiers opposant doit, en outre prouver que le jugement attaqué n'est pas bien rendu au fond, et démontrer les erreurs qui seraient de nature à le faire rétracter en ce qui le concerne.
- Notes 71 Il appartient au juge du fond d'apprécier si un jugement préjudice ou non aux droits d'une autre personne. Cette appréciation doit se faire, conformément aux principes généraux, au jour où les juges statuent.
- Notes 86 Il a été jugé qu'il suffit, pour ouvrir la voie à la tierce opposition, que le jugement reconnaisse un droit incompatible avec celui auquel prétend le tiers opposant, ou même que le jugement forme un préjugé défavorable à ses prétentions.
- Notes 110 Le but de la tierce opposition est de permettre à une personne, non présente dans une instance et qui, par conséquent, n'a pu y défendre ses intérêts, de faire rétracter le jugement intervenu en tant qu'il lui porte préjudice. Il suffit qu'au cours de la procédure une personne ait été mise en mesure de faire valoir ses droits, par elle ou par son représentant pour qu'elle ne puisse exercer cette voie de recours.
- Notes 346 Les juges sont, en principe, investis d'un pouvoir discrétionnaire pour accorder ou refuser la suspension de l'exécution du jugement qui leur est déféré; ils suspendent l'exécution s'il y a lieu de craindre que les effets n'en soient irréparables. Cette suspension n'existe pas de plein droit. Le sursis à l'exécution ne peut être ordonné que par le juge saisi de la tierce opposition ; il ne pourrait pas l'être par le juge des référés.

From the notes stated above, it can be seen that such application is an extraordinary course of action open against all judgments, to a person who was not a party to a judgment which caused him/her any prejudice. In principle an opposition by a third party is admissible against all types of judgment except the judgment of the Court of Appeal.

Three conditions must however exist in order to sustain an opposition by a third party, namely:

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

The third party in the circumstances will have nothing to prove more than his/her status as a third party by establishing that he/she was neither a party nor was he/she represented in the process. The third party is however expected to prove that the impugned judgment is not proper and has also further to demonstrate the errors



which by its nature will cause judgments to be retracted as far as he/she is concerned.

It is for the Judge to determine if the judgment is prejudicial or not to the rights of the third party.

In order to open the way for a third party, it has been judged that it is sufficient if the judgment recognizes a right which is incompatible with that of the third party, or even if the effects of that judgment caused an unfavourable prejudice to him/her.

The object of a third party opposition is to permit a person who was not present at the hearing and who consequently could not defend his/her interests, to retract the intervened judgment in so far that it is prejudicial to him/her. It is sufficient that if during the course of the procedure a person was put in a situation that he/she could not seek his/her rights by himself/herself or by his/her representative in order to obtain such recourse.

In principle, judges are invested with a discretionary power to grant or to refuse the suspension of the execution of the judgment in issue; they suspend the execution if there is a fear that the effects will be irreparable. That suspension does not exist as a right. It is only the judge who hears the application for an opposition by third party who can sanction the suspension of the execution of that judgment.

In the present case, I find that the course of action is properly open to the plaintiffs who were not party to the judgment which is not a judgment of the Court of Appeal. I find that the judgment in the circumstances caused prejudice to the plaintiffs. The three conditions that must exist in order to sustain an opposition by a third party exist in this matter as I find that the judgment is of such a nature that causes prejudice to the plaintiffs, the plaintiffs were not party to the case when it was heard, and the plaintiffs were not represented at that hearing.

The plaintiffs have established to my satisfaction that they were neither party nor were they represented in the process. I am also satisfied that the impugned judgment is not proper and the plaintiffs have sufficiently demonstrated the errors which by its nature will necessitate in my retraction of that judgment as far as the plaintiffs are concerned, as I have determined that the judgment is indeed prejudicial to the rights of the plaintiffs. I find that the judgment recognizes a right which is incompatible with that of the plaintiffs; the effects of that judgment caused an unfavourable prejudice to them. The plaintiffs who were not present at the hearing and who consequently could not defend their interests, in my judgment, ought to be permitted to retract the intervened judgment in so far that it is prejudicial to them. The plaintiffs were indeed in a situation that they could not seek their rights either by themselves or by their representative in order to obtain such recourse.

For the reasons set out above, I find it just, fair, necessary and in the interest of justice to exercise my discretionary power in favour of the plaintiffs and hereby sanction the setting side of the order made by this Court (AR Perera CJ) on 28 December 2008 as I am satisfied that there is a reasonable fear that the effects of that order will be irreparable.

I order accordingly.

I award costs to the plaintiffs.