

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 37/2014
(arising in CS 2/2014)

[2014] SCSC

DTA SHIPPING LIMITED

Petitioner

versus

ASIAN ATLAS LIMITED

First Respondent **REGISTRAR OF SHIPPING**

Second Respondent

Heard: 14 February 2014

Counsel: Mr. Frank Elizabeth and Mr. Rene Durup for petitioner

Mrs. Samantha Aglae for first respondent
Second Respondent - absent

Delivered: 19 February 2014

RULING ON MOTION

Robinson J

[1] The petitioner is an international business company. On 24th January 2014, the plaintiff, the petitioner for the purposes of the present Petition, filed a Complaint : CC no. 2 of 2014, against the first and second defendants, the first and second respondents, respectively, for the purposes of the present Petition. The plaintiff is seeking the following orders from this Court —

"8 [...].

(a) to prohibit any dealing with the vessel until such time as the Plaintiff and the 1st Defendant have resolved the issues under the current MOA;

(b) that the Registrar of Shipping under the SMSA places a prohibition on the registration of any dealing with the vessel, in respect of any application made to the Registrar of Shipping for the transfer of change of ownership of the vessel until further notice; and

(c) that the 1st Defendant be prohibited from de-registering the vessel and the Registrar of Shipping be instructed not to delete the register in respect of the vessel until further notice."

[2] On 20th January 2014, DTA Shipping Limited, the petitioner for the purposes of the present Petition, filed an application, supported by an affidavit sworn by one Mr. Richard France, seeking orders under section 40 of the Merchant Shipping Act, 1994 CAP 127A (hereinafter referred to as the "MSACT"). I heard the application, Miscellaneous Application no. 25 of 2014, on 6th February 2014. I noted that the affidavit being used by the applicant in support of the application was a photocopy of an original affidavit. I ruled, on 7th February 2014, that this Court will not allow a photocopy of the original affidavit to be used for the purposes of the application. I dismissed Miscellaneous Application no. 25 of 2014.

[3] On 10th February 2014, a Notice of Motion supported by an affidavit, of even date, sworn by learned counsel, Mr. Rene Durup, was filed. I repeat the affidavit in part —

"[1].

2. On 27th January 2014, I filed a Plaintiff in this matter together with incidental applications.

3. Further to filing the Plaintiff, I have been advised on Friday 7th February 2014 that a prohibitory injunction, as is the application in this matter, is proper by way of Petition and affidavit rather than Plaintiff.

4. Upon advice, I have taken immediate steps to expedite the necessary amendments so that the application would be filed and heard on Monday 10th February 2014 which I have managed to do.

5. [...].

6. There are real issues to be determined and settled and the amendment is necessary to avoid the necessity of another application.

7. The amendment is being made in good faith, would not cause injustice to other parties [...]. Only the form, not the substance of the application, is being changed.

8. There is the possibility that upon hearing of this application the 1st Respondent will request the Registrar to deal with the Register of Shipping thereby defeating the intent of the application and therefore this matter is best dealt with *ex parte* in the interests of justice.

9. The 2nd Respondent, as per Annex B, is an international business company and the application is therefore subject to *ex parte* proceedings in civil matters.

10. The statements above are true to the best of my information, knowledge and belief.”

[4] On 10th February 2014, the petitioner filed the present Petition. I repeat the Petition in part —

“4. The 1st Respondent is the owner of a ship named ASIAN Atlas registered in Port Victoria, Mahe, Seychelles under no. 738812 with official call sign 50169-S7TY (hereinafter referred to as the ‘Vessel’) (see Annex C).

5. By virtue of a Memorandum of Agreement (hereinafter referred to as ‘MOA’) dated 13th November 2013 (see Annex 1 of the Affidavit in Support), the 1st Respondent agreed to sell the vessel to the Petitioner who consequently has an interest in the Vessel.

6. Pursuant to the MOA, the Petitioner deposited 15% of the sale price on 27th November, 2013 but later the representatives of the Petitioner discovered that the Vessel was not safely afloat thus rendering the ‘Notice of Readiness’ pursuant to clause 5(b) of the MOA to be invalid.

7. At all times thereafter the Petitioner has indicated to the 1st Respondent that it is still willing to purchase the Vessel though the matter ought to be resolved as per the Arbitration Clause – i.e. clause 16 of the MOA.

8. In breach of the MOA and acting in bad faith, the Respondent is attempting to sell the Vessel and despite several requests to the 1st Respondent from the Petitioner not to go attempt selling the Vessel to any 3rd party the 1st Respondent has ignored all such requests.

9. It is urgent and necessary for an Order to be made prohibiting any dealing with the vessel since doing so would defeat the obligations of the 1st Respondent under the MOA and cause great prejudice to the Petitioner.”

[5] I heard the Motion and Petition together on 14th February 2014. Learned Counsel for the petitioner, Mr. Frank Elizabeth, in his submissions, informed this Court that the “*main*

application in this cause should not be amended with the Petition". According to him, this Court should consider *"the petition as filed as an originating Petition"*. Learned Counsel then made application to this Court to withdraw the Plaint against the first and second defendants. I granted the plaintiff leave to withdraw the Plaint, and ordered that the plaintiff pays the defendant's costs of the suit. He then invited this Court to hear the Petition ex parte, and in Chambers under section 116 (1) of the International Business Companies Act, 1994, as amended, (hereinafter referred to as the "IBC Act"). In light of the clear provisions of section 116 (1) of the IBC Act, I heard this matter in Chambers, and the proceeding proceeded inter partes.

[6] This Court, having dealt with the above issues, considered the Petition. Learned counsel for the petitioner submitted that the application is based on section 280 of the Seychelles Code of Civil Procedure CAP 213 (hereinafter referred to as the "SCCP"). He then abandoned section 280 of the SCCP, and stated that the application is grounded on section 40 of the MSACT. At this point I was doing my best to understand the approach of learned counsel for the petitioner in view of the fact that the main suit had been withdrawn.

[7] Learned counsel for the first respondent contended in reply that this Court should dismiss the Petition on the ground that the application was defective. A petition, according to learned counsel for the first respondent, under section 280 of the SCCP, must be supported by an affidavit. Because the petitioner had dropped this ground, I chose not to make a finding on it.

[8] Section 40 of the MSACT provides —

"40. (1) The Court may, if it thinks fit, and without prejudice to any other of its powers, on the application of a person claiming an interest in a ship registered under this Part, make an order prohibiting for the time specified in the order, any dealing with that ship.

(2) The Court may make an order under subsection (1), on any terms or conditions it thinks just, or may refuse to make the order, and generally may act in the case as the justice of the case requires.

(3) The Registrar, after being served with a copy of an order made under this section, shall not register any dealing prohibited by the order.”.

[9] Section 40 of the MSACT is clear. A person claiming an interest in a ship registered in Seychelles may make application under the said section. I note that counsel for the petitioner has filed a petition in this case in what to my mind is a contentious matter. It stands to reason that a confirmatory affidavit ought to have been filed by the petitioner. The same reasoning applies to the Motion filed by learned counsel. Rule 17 (2) (a) of the Legal Practitioner’s (Professional Conduct) Rules provides —

”17 (2) A legal practitioner shall not devise facts which will assist in advancing a client’s case or file or serve any document containing (a) any statement of fact which is not supported by the client’s instructions.”.

The law generally is that counsel must not enter the litigation arena as a witness for his client.

[10] On this point I dismiss Miscellaneous Application no. 37/14. I also dismiss it because the main suit has been withdrawn. The petitioner shall bear the costs of this proceeding.

Signed, dated and delivered at Ile du Port on 19 February 2014

F Robinson
Judge of the Supreme Court