

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2023] SCSC  
MC82/2022

In the matter between:

**MUKESH VALABHJI**  
(rep. by France Bonte)

**Applicant**

and

**ANTI-CORRUPTION COMMISSION**  
(rep. by Edmund Vickers)

**Respondent**

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**Neutral Citation:** *Mukesh Valabji v Anti-Corruption Commission Seychelles* (MC 82/2022)  
[2023] SCSC (10 February 2023)

**Before:** Govinden, CJ

**Summary:** Advancement of Loan to Company Director contrary to section 172 of Companies Ordinance, 1972; Confirmation of section 60(1) notice.

**Heard:** 10 February 2023

**Delivered:** 10 February 2023

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**ORDER**

The court confirms the directives of the Respondent in terms of section 60(1) of the Anti-Corruption Act, given in the notices dated 13<sup>th</sup> December 2021 and further extended on the 13<sup>th</sup> September 2022 in respect of the bank accounts of Zil Pasyon Resort Limited No. 2100 2060 800 033 and Intelvision Limited No. 0100 2025 754 010, in so far as the purported resolutions by the directors in the aforesaid companies are illegal by virtue of being contrary to section 172 of the Companies Ordinance.

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**RULING**

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## GOVINDEN CJ

### FACTS/ BACKGROUND

- [1] This is a Ruling on an application was filed on the 2<sup>nd</sup> December 2022 under MC 82 of 2022 by Mr. Mukesh Valabhji (hereafter “the Applicant”), one of the beneficial owners of Zil Pasyon Resort Limited (hereafter “Zil Pasyon”) and the sole beneficial owner of Intelvision Limited (hereafter “Intelvision”), who holds 1% shareholding in both companies (hereafter to be referred to together as “the Companies”). The Respondent is the Anti-Corruption Commission Seychelles (hereafter “the Respondent” or “the ACCS”) established under the Anti-Corruption Act, 2016 (hereafter “the ACA”).
- [2] The Applicant and Mr. Benoiton were arrested by officers of the Respondent on the 18<sup>th</sup> November 2021 on allegations of violating *inter alia*, the Anti-Money Laundering and Countering the Financing of Terrorism Act, 2020 (hereafter “the AML/CFT Act”), the Penal Code and the ACA, and subsequently charged.
- [3] On the 13<sup>th</sup> December 2021, the ACCS issued a number of section 60(1) orders against the account of local entities and companies in which the Applicant and Mr. Benoiton have financial interest, and private individual accounts held in their names. These included the bank accounts of Zyl Pasyon and Intelvision, both of which the Applicant is a director, shareholder and ultimate beneficial owner (UBO). These restrictions were extended on 13<sup>th</sup> September 2022 for a further six months.
- [4] The challenge arose when new invoices were issued and the Applicant sought that same be paid from funds derived from the Companies. The Applicant requires and requests that the Court allow for access to the bank accounts of Zil Pasyon and Intelvision to pay the legal and expert fees, including court fees which are paid through counsel.

- [5] The Respondent queried Applicant’s production of resolutions from Intelvision and Zyl Pasyon when the invoice identified Felicite Island Development Limited as the company from which the legal fees are sought to be drawn.
- [6] The Respondent requested that the Court determine whether Applicant’s decision to defray his legal costs using funds from these Companies is in compliance with the Companies Act, having regard that the latter have a separate and distinct legal personality from the directors, shareholders or owners.
- [7] In its judgment rendered on 10 November 2022, the Court confirmed that a section 60(1) notice can indeed “*be varied by the Supreme Court in respect of the disbursement of any expense including that of legal fees of a person whose account is subject to the restriction*” in terms of subsection (6).
- [8] The Court referred to Article 19(2)(d) of the Constitution, affirming the accused’s right to procure legal representation of their **own choice** and at **own expense**. The Court found that in the event that the ACCS refuses to reverse or vary the directive, that it is still open to the Applicant to approach the Supreme Court in terms of subsection (6).
- [9] The Court further found that Applicant could legally be entitled to pay a legal bill or invoice “*from monies in an account of a legal entity or company in which they hold interest and subject to the limits of those interests and the applicability of the provisions of statutes including the Companies Act.*” The Court said the above was subject to certain conditions.
- [10] Prompted by the 10 November 2022 judgment, Applicant filed his application and prays for the following orders:
- a. An order pursuant to section 60(6) of the Anti-Corruption Act 2016, reversing/varying the directives of the Respondent, given in the notices dated 13<sup>th</sup> December 2021 which were further extended by the Respondent on the 13<sup>th</sup> September 2022 in respect of the following bank accounts to allow the Applicant to pay legal fees of the Applicant as per the resolution of Zil Pasyon Resort Limited and Intelvision Limited;
    - i. Zil Pasyon Resort Limited No. 2100 2060 800 033

- ii. Intelvision Limited No. 0100 2025 754 010;
- b. Such other order as the Court shall deem fit.

## LEGAL ARGUMENTS

### Varying a section 60(1) restriction order

[11] In terms of **section 60(8) of the ACA**, the Supreme Court may, on hearing of an application under subsection (5) issue one of the following decisions, either:

- (a) confirm the directive; or
- (b) reverse the directive and consent to the disposal of, or otherwise dealing with, any property specified in the notice, subject to such terms and conditions as it thinks fit; or
- (c) vary the directive as it thinks fit.

[12] The ACA does not specify what determines whether or not the Court confirms or reverses the directive. The facts of this particular case and other cases in other jurisdictions with similar provisions should provide guidance.

### Company as a separate legal entity

[13] It is indisputable in law, that a company is a legal entity distinct from its members. It was so laid down by the House of Lords in the leading case of *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22. In the case of *Umbricht v Golden Flow Pty Ltd (CS 57 of 2020)* [2022] SCSC 41, the court re-affirmed that a company is vested with a separate legal personality and is therefore separate and distinct from its members and directors. This is true unless the director breaches his duties, and in those circumstances, there might arise the possibility of personal liability. The assumption is that since directors are not liable for the debts of the company, it follows therefore that the company should not be liable for the personal debts of its directors.

[14] Applicant has produced documents termed as “resolutions” from Intelvision and Zyl Pasyon, where the Applicant serves as director, shareholder and ultimate beneficial owner, and argues that these confer the authority for the Companies to advance certain sums to pay for his legal fees. While the resolutions on the face of it appear to have been properly executed in so far as they are “*in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors...*” as per the provisions of **section 73 of the Companies Act**, the question is whether these resolutions qualify the Applicant to access the Companies’ funds. The Applicant avers that he is entitled “*not as director, but as a shareholder and ultimate Beneficiary Owner (UBO)*” to have funds “advanced” not “loaned” to him. Authorisation thereto will be determinable as each of the hats worn by the Applicant are examined.

### **Directors Duties and Responsibilities**

[15] The Applicant is, among others things, a director in the Companies in question. It is a long established principle of the law that “*directors represent the mind and will of the company and control what they do. The state of the mind of these managers is the state of the mind of the company and is treated by the law as such.*” [Per Lord Denning, in the UK case of ***HL Bolton Co Vs TJ Graham and Sons [1956] 3 All ER 624***, page 630.

[16] A company director stands in a special relationship to the company of which they are an officer. This special position is known as a ‘fiduciary position’ and the director is known as a ‘fiduciary’ (**Section 52(3) of the Companies Act**). A fiduciary is required to act in a manner which is legally becoming of their office and which places the interests of the company ahead of their own. **Section 171(1)(c)** makes it clear that directors are to exercise their powers “*in good faith in what they reasonably consider to be the interests of the shareholders of the company as a whole.*” [Emphasis added]

[17] In this case the Applicant argues that he has 1% shareholding in both companies. The question, therefore is, given the pre-eminence of **shareholder interests** in section 171(1)(c), whether or not the other shareholders representing 99% of the company shareholding in the companies will not be prejudiced were the funds from these companies repatriated

to pay Applicant's fees. Of significance, on page 5 of his submissions dated 17 January 2023, Mr. Bonte states:

*“It is submitted that both ZPRL and Intelvision have only 2 shareholders each, each, a corporate one represented by Mr. Kishore Buxani in respect of ZPRL and Mr. Reza Jaro in respect of Intelvision and the other shareholder in the other company being the shareholder himself”*

[18] Mr. Bonte goes on to explain that both Mr. Buxani and Mr. Jaro are also directors of the two companies, and both have acceded to, and signed the requisite resolutions in favour of the Applicant. The fact that Mr. Buxani and Mr. Jaro each hold 99% of the shares in each company, and the attitude of the co-shareholders in both companies mean that there would not be an inequitable situation for the shareholders of both companies. In the circumstances, section 171(1)(c) would be fulfilled.

[19] Worthy of note, English law has long recognised that a director's duties are usually owed in the first instance to the company, and not to the members/shareholders, creditors or employees of the company. In such situations, directors have a duty to ensure the well-being, profitability and continued existence of the company. What constitutes directors' duties when a company is foremost, was well summed up on a guidance document on directors' duties<sup>1</sup> based on UK law as follows:

*“For all directors, your job is not to balance the interests of the company and those of other stakeholders. Instead, after weighing up all the relevant factors, ask yourself which course of action you consider best leads to the success of the company, having regard to the long term. This can sometimes mean that certain stakeholders are adversely affected, but this does not call into question decisions made.”*

[20] However, in the UK case of ***BTI 2014 LLC v. Sequana SA and others*** [2022] UKSC 25, the Supreme Court held that directors (particularly in cases of insolvency or when there is a real risk of insolvency) should treat creditors' interests as paramount (that is, in

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<sup>1</sup> Guidance on Directors' Duties: Section 172 and Stakeholder Considerations, GC100, October 2018, 5.

priority to shareholders' interests). Despite these different positions, it is clear that prior to making decisions, directors need to consider all the company's stakeholders and the impact of their decision on them.

### **Compliance with Companies Act and other statutes**

- [21] The Applicant argues that the Court is only concerned with compliance with the Companies Act. However, the Court has a duty to ensure compliance with all laws, not just the Companies Act. In the aforementioned 10 November 2022 judgment the Court said in part, that Applicant could be entitled to pay a legal bill or invoice “*from monies in an account of a legal entity or company in which they hold interest and subject to the limits of those interests and the applicability of the provisions of statutes including the Companies Act.*”
- [22] Undeniably, the Companies Act is the main piece of legislation governing company law in Seychelles. However, there are other legislation, regulations, guidelines, policies, etcetera, all of which constitute the regulatory framework, which a company as a legal person should adhere to and comply with. All these are laws and violations of which often result in legal punishment, including fines. This explains the increasingly mandatory requirement that financial institutions must have a compliance officer (CO) today.<sup>2</sup> The CO is indispensable in today's companies as they are responsible for assuring that the company can fulfil all its duties under whatever laws and regulations apply to the business. Consequently, proper compliance refers to compliance to all laws and regulations, and should not be viewed narrowly as Applicant's attorney suggests.
- [23] Indisputably, Respondent makes a compelling argument for citing the Companies' directors for breach of section 3(1) of the **Financial Institutions Act, 2004 (hereafter “the FIA”)** which proscribes a person engaging in ‘banking business’ without the requisite licence under section 6. As will be apparent below, both companies' objects do not include lending out money, save in those exceptions provided.

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<sup>2</sup> Eg, Section 34 of Anti-Money Laundering and Countering the Financing of Terrorism Act, 2020 provides that every reporting entity should appoint a CO.; Section 23 of the Financial Services Authority Act, 2013 calls for the licensee to have a compliance function/CO within its organization;

[24] Seeing that the Applicant wears different hats in both Intelvision and Zyl Payon, the question is the effect of these designations in his ability to claim title to the companies' funds to pay his legal fees.

### **Loan to Applicant as a Director**

[25] In paragraph 6 of his 11 January 2023 affidavit, the Applicant argues that the monies advanced to him and Mr. Benoiton are “*not loans but advances against monies that will become due to us as we together with others, are Ultimate Beneficial Owners of Zil Pasyon Resort Limited.*” Mr. Shah’s justification of advancing the loan under section 172 contradicts Applicant’s statement here.

[26] **Section 172 of the Companies Act** states as follows

*“It shall **not** be lawful for a company to make a loan to any person who is a director of it ...:*

*Provided that nothing in this section shall apply either:*

*(c) subject to the next following subsection, to anything done to provide a director of the company with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company; or....*

*2) Paragraphs (b) and (c) of the proviso to subsection (1) **shall not authorise the making of any loan, or the entering into any guarantee, or the provision of any security, except either (a) with the prior authorisation of the company given at a general meeting at which the purposes of the expenditure and the amount of the loan ..., as the case may be, are disclosed in the notice calling the meeting and in any advertisement published under section 127(4); or...**”*

[27] Applicant is at pains to argue that the moneys will be “advanced” not “loaned” to him, and demonstrated how the two were not the same. Conceivably, the reason for taking this position is because section 172 clearly prohibits advancing loans to directors, subject to certain exceptions. Respondent correctly addresses the real risk of conflict arising in their



exercise of their duty as directors. It would be unreasonable to expect a director (who is also a shareholder) in Applicant's circumstances being objective in the exercise of their duty, when his liberty is at stake- hence the need for management of conflict between duty and interest. This justifies the decision of the court in ***Gundelfinger v African Textile Manufacturers Ltd 1939 AD 314***. The court held:

*“It is an elementary principle of company law, that (apart from explicit power in the articles of association) a director cannot vote for the adoption of a contract or on a matter in which he is an interested party”*. [Emphasis added]

- [28] In Seychelles, the above principle is codified in section 52 which requires that not only should directors declare their interest but that, in terms of subsection (2) the director “*shall not vote in respect of any contract or arrangement in which he is interested...*”
- [29] While vehemently rejecting the notion that the desired funds are “loans”, in a “*LEGAL OPINION ON LOANS TO DIRECTORS*” prepared by Mr. Kieran Shah dated 11 January 2023, Mr Shah on behalf of the Applicant cites the very section 172(c), and argues that the funds sought in the present circumstances are “*to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him to properly perform his duties as an officer of the company*”. In effect, the Applicant once again agrees that these moneys constitute a loan but are allowable because they fall under this category.
- [30] The question is whether these funds sought to be advanced/loaned to Applicant are really “*for the purposes of the company... enabling him properly to perform his duties.*” Clearly, payment of director's legal fees charged on him on a personal matter does not advance the interests of the company, and therefore, such costs should be borne by him personally. A distinction should be made where a director enters into an agreement on behalf of a company, and when he acts for his own benefit. If it is the former, then the company would be bound to pay the costs of such venture (see ***Swiss Reinsurance v General Insurance (1999) SLR 117***)

- [31] Subsection (2) further provides that such funds shall not be advanced save there is prior authorisation given at a general meeting. Subsection (3) provides that if no such prior authorisation is given the loan should be repaid within six months of the next AGM, and that same should be repaid within 2 years of the loan being extended. Applicant's attorney submitted that Applicant, with support from the shareholders of both companies will be able to repay said amounts within a year of accessing same.
- [32] The challenge for Applicant is that, whether or not he has obtained the support or authorisation of shareholders at a general meeting under subsection (c), or under subsection 3, it is immaterial given that the proviso for extending loans to directors has not been met. The fact is what Applicant needs is a loan but there is no legal basis for attaining that loan as he needs the funds for his own personal benefit, not the companies.
- [33] The facts demonstrate that Applicant seeking advancement of funds or a loan, as it rightly is, would be a breach of **section 172 of the Companies Act**. Further, it is a breach of the Financial Institutions Act in so far as both of the companies are not in the money lending business. The Court in its judgment made reference to other legislation apart from the Companies Act when it held: "subject to the limits of those interests and the applicability of the provisions of statutes including the Companies Act." While Applicant professes that the money will not be a loan, he justifies the request on the authority of the very section dealing with loans, fashioned to fit one of the allowable exceptions. Nevertheless, it is clear that the intended transaction is a loan, and in terms of **section 181** of the Companies Act transactions that violate the loan prohibition are void.

### **Person Aggrieved by the resolution**

- [34] On the same 17 January 2023 submissions, Applicant's attorney called into question Respondent's challenge of the validity of the resolutions, averring that "*the Respondent ... is acting ultra virus of its powers under the Anti-Corruption Act and not in accordance with the Companies Act.*" Mr. Bonte cited section 136(1) of the Companies Act which in effect states that "*within one month after a resolution has been declared to have been passed...any person aggrieved may apply to court for a declaration that the declaration has not been passed...*" Mr. Bonte rightly points out to the fact that in terms of

subsection (2), that the Respondent is not an “aggrieved person”, as it is neither a shareholder nor debenture holder as per subsections (a) and (b) respectively.

[35] Notwithstanding that the Applicant does not have *locus standi* in terms of section 136(2) by virtue of not being an “aggrieved person”, the Court has a right to intervene. In the case of **Zee Entertainment Enterprises Ltd v Invesco Developing Markets Fund & Others 26th October 2021**,<sup>3</sup> G.S. Patel, J on paragraph 70, held, on the question of challenging company officers who are determined to bring into effect an illegal resolution,:

“Sometimes, it happens that a company must be saved from its own shareholders, however well-intentioned. If a shareholder resolution is bound to cause a corporate enterprise to run aground on the always treacherous shoals of statutory compliance, there is no conceivable or logical reason to allow such a resolution even to be considered. Shareholder primacy or dominion does not extend to permitting shareholder-driven illegality. A perfectly legal resolution, if carried, may well result in the diminution of the company's profits or business. That is not a court's concern. But the resolution must be legal. The interpretative question is therefore not over the word 'valid' at all but about the matters proposed to be considered at a requisitioned EGM. And the Court is never foreclosed from considering this.”

[36] The picture drawn by G.S. Patel, J is similar to the present case, as the shareholders are all in support of this illegal resolution, being contrary to section 172. The above expressions of the court make it clear that the “*court is never foreclosed from considering this*” and will in the present circumstances.

### **Compliance with the Companies’ Constitutions**

[37] In effecting their duty, directors are to act within the powers prescribed in the company’s articles and memorandum of association, sometimes referred to as the company’s constitution. To this end, section 171(1)(a) of the Companies Act states that directors are

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<sup>3</sup> ial22525-2021 in sl22522-2021-J-F.doc.

*“(a) to exercise their powers in accordance with this Ordinance and within the limits and subject to the conditions and restrictions established by the company's memorandum and articles;....”* [Emphasis added]

[38] Once again, reference may be made to the aforementioned section 171(1)(a) which forbids acting outside the confines of the Companies Act and companies’ constitutions. Consequently, companies can only do those things set out in their articles of association. More so, by virtue of being public companies, Intelvision and Zyl Pasyon, are subject to more onerous accountability and transparency rules than private companies.<sup>4</sup> This serves to ensure shareholders’ (and all stakeholder) interests protection.

[39] In the case of Zyl Pasyon and Intelvision, the objects of the company are stated in Article 3(a) to (i) and Article 3(a) to (f) of the companies’ Articles of Associations respectively. Respondent rightly points out that none of these articles and their sub-articles state can be interpreted to mean that the companies can provide loans or “advance” sums of money, as objects of the companies. According to section 172(d) an exception is:

*“(d) in the case of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to anything done by the company in the ordinary course of that business.”*

[40] Both companies are not in the business of lending money. Applicant has not submitted any part of the companies’ Articles that point to the contrary, which would justify advancing funds to the Applicant as a “director” in the two companies in terms of **section 172(2)(d)**. If the Articles of Association did make such a provision, they would be invalid under section 172, given that money lending does not constitute the business activities of the companies.

### **Money advanced to Applicant as “shareholder”?**

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<sup>4</sup> Van de Walt, Shareholders' Rights in Private and Public Companies in South Africa: An Overview, Weber Wenzel, 01-Dec-2022 accessed online at [https://uk.practicallaw.thomsonreuters.com/w-012-0427?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-012-0427?transitionType=Default&contextData=(sc.Default)&firstPage=true) on 26 January 2023.

[41] In his 21<sup>st</sup> November 2022 letters to the Company Secretaries of Intelvision and Zil Pasyon, Mr. Shah alluded to the Companies Act (Cap 40), arguing to the lack of legal prohibition to lend money both to the UBO or shareholder, but that “*the prohibition is against lending money to a director or a person to assist that person (not being an employee or officer of the company) to acquire shares in the company.*” Mr. Shah’s assertions raise the question of the Applicant’s entitlements by virtue of being a shareholder.

[42] In the case of *Farm Ag Export v Larue (1994) SLR 69* it was confirmed that a company has a separate legal personality from that of the directors *and* shareholders, meaning that company funds belong to the company and do not automatically accrue to the shareholder. **Section 2** contains the definition section of different classes of shareholders and states that a shareholder has “*a right to payment of a dividend.*” **Section 25** prescribes the manner in which dividends are dispensed as follows:

“*Ordinary business at an annual general meeting shall consist of the declaration of dividend and the approval or rejection of the annual accounts and the directors' and auditors' reports.*” [Emphasis added]

[43] Also relevant is **Section 77** provides for payment of company **profits** thus:

“*A general meeting may by ordinary resolution dispose of the profits of the company by declaring dividends, ... to shareholders in the same proportions as a dividend would be paid to them.*” [Emphasis added]

[44] On the other hand, the directors may by the power vested on them by **section 78** pay dividends to shareholders in this manner:

“*The directors may from time to time pay to the shareholders such interim dividends as appear to the directors to be justified by the profits of the company.*”

[45] Section 78 requires directors to make certain enquiries and considerations prior to paying the dividend. “*Justified by the profits of the company*” gives insight into the kind of

analysis that needs to be made prior to the directors exercising this responsibility. The Court cannot go into the question of solvency of the companies. It is obvious however that this is an exercise done with prudence and foresight. More so in a situation like the present one where the directors and shareholders are one and the same people, and where the law in terms of **section 82** makes it clear that the directors have a wide discretion on the timing and manner in which dividends are declared and paid:

*“Any general meeting declaring a dividend or bonus may direct payment of such dividend or ... , and the directors shall give effect to such resolution, ... as may seem expedient to the directors.”*

[46] A New Zealand case of *Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722* concerned a transaction entered into by a company with the approval of the shareholders at a time when it was balance sheet insolvent, and in anticipation of its imminent collapse, for the purpose and with the effect of placing its assets beyond the immediate reach of its creditors. Street CJ distinguished authorities to the effect that shareholder authorisation or ratification validated any *intra vires* act by the directors on the basis that they “*were not intended to, and do not, apply in a situation in which the interests of the company as a whole involve the rights of creditors as distinct from the rights of shareholders.*” (p 730) Hence the significance of the UK position that in cases of insolvency or where the company is likely to become solvent in the near future, consideration should be given to creditors’ rights.

[47] The fact that the companies made a profit is a matter of considerations by the Companies themselves, and subject to the provisions of the Companies Act. The Court will not find it necessary to enquire into this subject given its finding on other issue in this case.

[48] The Companies are to determine the dividends due to their shareholders, using the same considerations as they have in the past. These amounts to be paid to the companies’ shareholders and the shareholders will use these dividends as they please. Such amounts are to be limited to the dividend, not more. Amounts beyond these would be a contravention of the Companies Act. Both Applicant and the other shareholders will employ such amounts as they see fit.

## Advancement of funds to Applicant as Ultimate Beneficial Owner (UBO)

[49] Applicant also claimed the advance payments as an ultimate beneficial owner. He stated that the advance shall be subject to the condition that they will be repaid within 1 year at a fee of 1%.

[50] Seychelles enacted the Beneficial Ownership Act, 2020, (hereafter “the BOA”) whose main aim is to detect and prevent tax evasion, corruption, money laundering, terrorist financing, and other illicit behaviour involving one or more companies, by seeking disclosure of the identity of the natural person who ultimately benefits in companies. A “beneficial owner” is defined in section 3 of the BOA as:

*“one or more natural persons who ultimately own or control a customer or the natural person or persons on whose behalf a transaction is being conducted and includes those natural persons who exercise ultimate effective control over a legal person or a legal arrangement.”*

[51] The OECD commentary considers a ‘beneficial owner’ to be the person ‘*who has the right to use and enjoy that income.*’ The said right is unfettered of any contractual or legal obligation to pass on the income to another person. In the Tax Court of Canada in ***Prevost Car Inc. v. Her Majesty the Queen, 2008 TCC 231***, which was affirmed by the Federal Court of Appeal, the court herein interpreted the meaning of ‘beneficial owner’ of dividends under the Canada–Netherlands treaty.

*“As per the court, ‘beneficial owner’ is the true owner who receives the dividends for his/her own use and enjoyment, assumes all attributes of the ownership including the risk and control of the dividend and is not accountable to anyone for how the dividend is used.”*

[52] The above definition makes it clear that a beneficial owner’s entitlement is, just like in the case of the shareholder, a dividend. The Companies Act is very clear about the requirements and procedures for attainment of the dividend and it is no different here. The dividend, as illustrated above, is acquired through a process and certain procedure is followed. The directors will not out of the blue decide to “reap” or to declare a dividend.

[53]

[54] I therefore finds that the directors' resolutions in Intevision Limited and Zyl Pasyon Resort Limited are unlawful in so far as they purport to grant loans to the directors, which is prohibited by section 172 of the Companies Act.

[55] The companies' intended conduct would also violate section 3 of the Financial Institutions Act as the companies do not have the authority to engage in banking business which a "loan" to the director would constitute.

[56] Applicant is only entitled to a dividend obtained using the usual mechanisms applicable in the Companies Act when a dividend is declared and thereafter paid to the shareholder and/or beneficial owner.

[57] No other funds are to be extended to the Applicant without derogating on the law.

**[58]** THEREFORE, from the foregoing I make the following orders;

1. The restriction notice is confirmed subject to payment of Applicant's dividends as well as the other shareholders as per the Companies Act and the Articles of Association of Intevision Limited and Zyl Pasyon Resort Limited as per normal company practice.
2. Intevision Limited and Zyl Pasyon Resort Limited may not pay out any other funds outside the provisions of the law.
3. All dividends paid to the shareholders and/or ultimate beneficiary owners may be used by the recipients as they deem fit.



Signed, dated and delivered at Ile du Port on 10<sup>th</sup> February 2023.

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R Govinden CJ