SUPREME COURT OF SEYCHELLES

Reportable
[2024]
MC69 of 2021

In the matter between:

SERGE DE CHARMOY LABLACHE **Plaintiff**
(rep. by Guy Ferley)

and

ANEM PALLAGAMES LIMITED **1st Respondent**
Represented by its director
Mr Freddy Paul Moutou
(rep. by Shantasha Barbe)

SEYMAU INVESTMENTS LIMITED **2nd Respondent**
Represented by its director
Mr. Freddy Paul Moutou
(rep. by Shantasha Barbe)

Neutral Citation: *Lablache v ANEM Pallagames Limited and Anor (MC 69/2021) (15th July 2024).*
Before: Pillay J
Summary: Minority Shareholders
Heard: 14th August 2023 and Affidavit of the Petitioner
Delivered: 15th July 2024

ORDER

[1] The Petition is dismissed.

[2] Costs are ordered in favour of the Respondents.

JUDGMENT

PILLAY J:

[3] By way of a Petition filed on 30th August 2021, pursuant to section 201 of the Companies Act of 1972, the Petitioner seeks the following orders:

a) to appoint a person to investigate into the affairs of the 2nd Respondent and the conduct of the 1st Respondent and to report this Honourable Court;

b) to prevent the disposal of or dealing with any assets including but not limited to any bank accounts or rights in land belonging to the 2nd Respondent until after the report of investigation has been made;

c) that any person found to have acted contrary to law with regards to the conduct of the affairs of the 2nd Respondent be dealt with as the law prescribes and for any person who has suffered in consequence of the conduct of the abovementioned person to be paid compensation by the said person;

d) that the 1st Respondent shall be liable for the costs of this petition; and

e) for any order as the court may deem fit in the circumstances.

[4] The Petitioner avers that he is a minority shareholder of 25 shares in the company SeyMau Investments Limited. ANEM Pallagames Limited is majority shareholder with 75 shares in SeyMau Investments Limited. SeyMau Investments Limited is a limited liability company incorporated in Seychelles.

[5] The Petitioner avers that ANEM Pallagames Limited being in control of SeyMau Investments Limited has conducted the affairs of SeyMau Investments Limited in a manner which is oppressive and/or unfairly prejudicial to the interests of the Petitioner. The particulars of the conduct of the ANEM Pallagames Limited are as follows:

a) the first Respondent has, unilaterally and without proper authority of a resolution of the company, through its director Mr Freddy Paul Moutou surrendered the gaming licence of the company.

b) the first Respondent has since the commencement of operation failed to initiate and conduct shareholders meeting.

c) the first Respondent has never caused the second Respondent to declare a dividend.

[6] The Petitioner avers that the first Respondent has treated the assets of the second Respondent as its own and has acted negligently and recklessly in the management of the second Respondent.

[7] The Petitioner further avers that under the direction of the first Respondent, the second Respondent is currently in default of the following:

a) the second Respondent is in default of paying its dues owed to its employees;

b) the second Respondent is in default of paying its taxes owed to the Seychelles Revenue Commission.

[8] The Petitioner avers that the first Respondent has decided, without proper authority of a company resolution, to "disinvest" in Seychelles. The first Respondent has closed the business of the second Respondent and is in the process of shipping the slot machines and other equipment belonging to the company to Mauritius.

[9] Mr Freddy Paul Moutou in answer raised three points in limine.

1. the application is bad in law as it raised several points that are outside the scope of section 201 of the Companies Act 1972 such as the salary of works and tax payments that are in arrears.

2. The Petitioner, in his status as a majority shareholder, does not:

a) have any rights to the properties such as the slot machines as well as other equipment mentioned in his application.

b) have locus standi to raise regarding the slot machines and other equipment.

3. The Application raised no cause of action as it fails to state how the actions of the Respondents have caused prejudice or oppressed the Petitioner personally, as the minority shareholder.

[10] On the merits he admits in answer that the first Respondent is the majority shareholder of SeyMau Investments Limited. He avers that SeyMau Investments Limited is a company incorporated in Seychelles under the Companies Act 1972. He avers that the first Respondent has conducted the affairs of the second Respondent in a fair and just manner. He avers that no resolution was necessary to surrender the gaming licence of the company. He avers that given the economic situation at the time and based on the performance of the business of the second Respondent it was fair and in the best interests of the company and its shareholders to surrender the licence. He avers that the actions of the Respondents did not cause any oppression or prejudice to the Petitioner as a minority shareholder; that meetings were held occasionally; that the company had many expenses to settle including rent of machines and building; that the company was not making profit and as such could not declare dividends.

[11] He avers that the first Respondent has acted fairly, appropriately and in the best interest of the second Respondent and that the Petitioner was very much aware of the affairs of the second Respondent. All decisions made in relation to the management of the second Respondent were in accordance with best practices and the performance of business of the second Respondent and the economic situation of the time.

[12] He admits that there are payments due but avers further that the arrears in the payment of dues owed to the employees of the second Respondent does not prejudice or oppress the Petitioner in any way. He further avers that the alleged default in payment of tax by the second Respondent does not in any way oppress of prejudice the Petitioner in his capacity as a minority shareholder.

[13] He avers that the decision to disinvest was rightly taken and was made in the best interest of the company and all its shareholders. He prayed for dismissal of the Petitioner's application and the order of 1st September 2021 in MA 212 of 2021 be set aside.

[14] On 2nd May 2023 Learned counsel for the Petitioner after considering the affidavit filed by the Respondent verbally moved that the matter be heard in order for the Court to decide if an inspector should be appointed to give a report to the Court as to the management of the affairs of the second Respondent per the first prayer in the Petition. He indicated that all the other prayers in the Petition was "somewhat redundant now because the machine were sold. The licence was revoked." He moved to rely on the affidavit of the Petitioner as his client had very little knowledge of what actually happened.

[15] Thereafter, Learned counsel for the Respondents moved for the evidence of the representative of the Respondents, Mr. Moutou, to give evidence by video link. After some technical issues we managed to take the evidence of Mr. Moutou.

[16] Mr Paul Moutou deponed that he is Mauritian and lives in Rosille. He is the director of Anem Pallagames. SeyMau Investments Limited is a company for himself and the Petitioner. Initially it existed with the Petitioner and one Marlene Lablache as Directors before 2015. Now the current shareholders are the Petitioner and the witness. The company has two licences; one for slot machines and one for casino. It was his evidence that the company would have closed down a long time before it did but each time he said he was closing down the Petitioner would say he had a new purchaser coming to buy the business. He ended up losing 10 million rupees on the deal as he had to bring money into Seychelles to pay the bills. Though profits were made initially he couldn't send money to Mauritius as he had to build up the funds and pay 25% rental on the machines.

[17] One year before the licence was surrendered he informed the Petitioner that they had to close down the casino business. The Petitioner in spite of the witnesses' disagreement went to FSA and paid the one year renewal fees. The Petitioner also went to the FSA and reported that machines belonging to SeyMau were being sold which was untrue as Mr. Ferley was the one who drafted the agreement with Mauritius.

[18] It was his evidence that all the time he was on Mahe he was with the Petitioner. They had meetings though they were not written down. The Petitioner was a director, an active one and he was paid SCR 30, 000.00 with his pension fund also paid. The Petitioner was told that the witness was debating surrendering the licence for the businesses. The Petitioner did not invest any money in the company.

[19] In cross examination he stated that he was earning SCR 40, 000 to SCR 50, 000 as salary from the business. He accepted that when the Petitioner and his wife were shareholders of the second Respondent the company already had a casino licence. The Petitioner had told him that the President of Seychelles at the time was married to his niece and they would be able to get all types of favours. He accepted that official meetings were not held but the Petitioner was aware of everything that was going on.

[20] Mr. Frank of Mauritian nationality, currently resident of Au Cap testified on behalf of the Respondents. He is a consultant with SeyMau Investments Limited. He was sent to Seychelles in August 2015 by Mr. Paul Moutou to enquire into the possibilities of

investing in Seychelles. He went to the relevant authorities to enquire and then returned to Mauritius to report back to Mr. Moutou who then decided to invest in Seychelles. At the time Mr. Moutou was the director of Anem Pallagames in Mauritius. Pallagames Limited is incorporated in Mauritius and is made up of 4 companies. He has been working with SeyMay Investments Limited since December 2015.

[21] It was his evidence that he is familiar with the affairs of SeyMau Investments Limited. The directors are Mr. Paul Moutou and Mr. Serge Lablache. Mr. Moutou bought some shares in the company when he invested. The company ran a casino business. First it had a slot machine licence and then a casino licence. It was based at Grand Anse Praslin. The casino started business in December 2017. The slot machines business started in December 2015.

[22] It was his testimony that the casino business has not been profitable. The licence at the time they did their study before investment, was at SCR 250, 000.00. when they went to renew their licence the next year, in 2018, the licence fee had gone up to SCR 1 million. The profit went down.

[23] On 5th July 2021 Mr. Moutou wrote to the Financial Services Authority explaining why he is disinvesting in Seychelles which was dues to the licence fee increase and lack of new spenders. In December 2017, the Casino revenue was SCR 134, 000. For 2018 it was SCR 5 million, for the year 2019 it was SCR 3 million and the year 2020 it was SCR 1.5 million. Profitability went down. It was difficult to continue because of the losses on the casino tables.

[24] In 2017 they were making SCR 13.5 million on the slot machines. Then when the casino opened in 2018 they were making SCR 5 million in the casino The slot revenue went down from SCR 13.5 million to SCR 9.7 million which confirmed according to him that the vendors who were playing slots were now playing casino. 2019 it was still SCR 9.7 million and in the year 2020 it was only SCR 7 million because of covid.

[25] He testified that the pandemic had a huge impact on the first Respondent's operations. They had to close for 3 months in 2020 and again in 2021. The licence fee was not reimbursed for the time that they were closed. In 2021 the casino was closed for 6 months and even upon re-opening they could only operate for a limited number of hours because of the curfew. The flow of client was considerably reduced. They had about 20 to 25 employees and even while they were not working during the pandemic they were still paid.

[26] Expenses had to be paid. Rent for the premises from House 2000 Pty Ltd was SCR 200, 000.00 then there were the utilities. The owner of the rental premises was the Petitioner. The rental agreement dated 28th September 2015 was for the sum of SCR 200, 000.00. in 2020 the rent was still the same other than a reduction of 25% for three months. They tried to talk to the Petitioner to reduce the rent but he refused.

[27] There were no official shareholders' meetings but very often the Petitioner came to Praslin especially during the weekends when he would meet with Mr. Moutou when he was in Seychelles and they would discuss. The Petitioner knew everything that was going as every night he would get a copy of the report by mail from the managers as did Mr. Moutou. He also had cameras inside and outside the casino so he saw everything that was going on.

[28] The final decision regarding finance of the company was taken by Mr. Moutou. When he was in Seychelles he signed the cheques but when he was away two managers signed the cheques or one manager and the witness or the witness and the Petitioner. Mr. Moutou was also the one who took the decision to surrender the licence. At the time the witness was the financial controller. On 30th June 2021 a letter was sent to the Ministry of Employment informing that the second Defendant was surrendering the casino licence and was requesting for the staff to be made redundant. All salaries were paid other than their redundancy payment. Out of an initial sum of SCR 500, 000.00 there is outstanding SCR 90, 000.00 to be paid to the employees which Mr. Moutou is personally paying.

[29] It was his testimony that the Petitioner was well aware of the situation. He added that when they decided to open a location on Mahe it was the Petitioner who made all the arrangements from which the Respondents lost SCR 1 million in rent and refurbishment.

[30] It was further his testimony that when they opened on 2017, the Petitioner insisted that they apply for a casino licence. It was worth the risk as the licence was only SCR 250, 000.00 but the investment on Mahe was a waste of money. However, he accepted that his initial thought was that it would be a good idea to invest on Mahe if they could get a good location.

[31] The Petitioner was the one who organised for the food, catering and for the bands to play.

[32] Seymau Investments Limited did not own any slot machines. All machines belonged to Pallagames Limited, Pallagame Games Limited and Good Lance Games Limited and were rented from those companies.

[33] There were no issues between the witness and the Petitioner as the witness used to stay at the Petitioner's place when he was working on Praslin. Throughout the time they were on good terms. A decision had to be made as the company was making losses and it was in the best interest of the company to disinvest.

[34] In cross examination he insisted that it was in the best interest of the company to surrender the licence because it was difficult to find the money every month to pay salaries and SRC. He agreed that all casinos in Seychelles took a hit during the pandemic and then bounced back. He also agreed that in business there are good times and bad times. He was not aware if discussions were had with the Petitioner before closing down the business but he stated that the Petitioner was asked to reduce the rent. They had to sell a van to pay the rent one month. He agreed that it was possible that during May 2020 to June 2021 there was no rent being paid at all. There was pressure from the Lessor for rent but they were unable to pay. He agreed that in August 2021 the Lessor filed proceedings before the Rent Board after the decision was made to surrender the lease.

[35] He agreed that companies are governed by resolutions. He had no documents to show with regard to the procedures followed before the decision was taken to surrender the licence. He agreed that resolutions are written and not verbal. It was his evidence that the slot machines were transferred to Aux Cap, Mahe on a lease sale agreement with Robert Louis Investment. He agreed that the machines when they entered Seychelles was under the name of the second Respondent.

[36] It was his testimony that the Petitioner received no dividends but received a salary of SCR 30, 000.00. The Petitioner was given the chance to buy out the majority shareholder but what he said never came true.

[37] In re-examination he clarified that all the profits were deposited in the bank and was then used to pay the bills and expenses during covid. He also clarified that the Petitioner was aware of the discussion and decision to disinvest in Seychelles.

[38] Both counsels opted not to file any submissions.

[39] With regard to the plea in limine raised by the Respondents the case of ***Lesperance v Ernestine & Anor (SCA 15 of 2020) [2023] SCCA 14 (26 April 2023)*** is authority for the proposition that the Court cannot decide a plea in limine in the absence of the parties having been heard on the issues.

> *Suffice to state that it was not permissible for the learned Judge to proceed to determine the pleas in limine litis since "nobody filed submissions" to address the issues raised by the said pleas. It was also irregular in the present case for the learned Judge to deliver a ruling based on her "own research". The Appellant was correct to complain that he had not been heard on matters decided by the trial court. We find that the learned Judge had failed in her duty to do justice between the parties when she determined the pleas in limine litis in the absence of a hearing.*

[40] Neither side addressed the pleas raised so I make no finding on any of the pleas.

[41] In terms of the merits, per paragraph 1 above, the only issue for the Court to decide is if an inspector should be appointed to give a report to the Court as to the management of the affairs of the second Respondent.

[42] Section 201 of the Companies Act 1972 reads as follows:

Protection of minority shareholders

> *(1) Any shareholder of a company who complains that the affairs of the company are being conducted in a manner which is oppressive or unfairly prejudicial to some part of the share holders (including himself) or, in a case falling within section 190(3), the Registrar, may make an application by way of petition to the court for an order under this section.*
>
> *(2) If on the hearing of the application the court is satisfied either:*

(a) *that the applicant, either alone or together with other shareholders, has been treated oppressively in one or more respects over a period of time, or that action has been taken by the persons who are or were in control of the affairs of the company, being action which was known by them to be likely to prejudice unfairly the interests of the applicant, either alone or together with other shareholders; or*

(b) *the persons who are or were in control of the affairs of the company have been guilty of serious misconduct or breaches of duty which has or have prejudicially affected the interests of the applicant, either alone or together with other shareholders;*

the court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any shareholders of the company by other shareholders of the company or for the acquisition of any such shares by the company and, in the case of such an acquisition by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) *Without prejudice to the generality of its powers under the last foregoing subsection, the court may order that:*

(a) *an action or other proceeding shall be brought in the company's name and conducted by any person (including the Registrar) appointed by the court;*

(b) *a director, managing director or other officer or an auditor of the company shall be removed from any office, appointment or employment held by him under the company or its holding company or subsidiary, and that some other person nominated or approved by the court shall be appointed to any such office, appointment or employment in his place;*

(c) *any person shall be appointed to be a director or managing director of the company or of its holding company or subsidiary on such terms and condition as the court thinks fit;*

(d) *a dividend shall be paid by the company to shareholders or any class of shareholders of the company or by a subsidiary of the company to the company;*

(e) any person shall pay damages or compensation to the company or to the applicant for any loss suffered in consequence of that person's misconduct or breach of duty.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Ordinance, but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in, or addition to, the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company, and the provisions of this Ordinance shall apply to the memorandum or articles as so altered or added to accordingly.

(5) A copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fifteen days after the making thereof, be delivered by the company to the Registrar for registration; and if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(6) This section shall not come into operation until a date appointed by the Governor in Council by notice in the Gazette.

[43] In the case of ***Bargellini and Others v Valentino and Another (331 of 2003) [2011] SCSC 7 (15 February 2011)*** his Lordship Karunakaran J found that:

section 201, … provides a remedy only to the minority shareholders.

[44] A remedy for what? It is a remedy for circumstances when the affairs of the company are being conducted in a manner which is oppressive or unfairly prejudicial to some part of the shareholders (including himself).

[45] Shareholder oppression occurs when minority shareholders are denied their rights as shareholders or when majority shareholders act in a way that favors the majority or unfairly prejudices the minority.

[46] In the case of ***Smith v Smith [2022] EWHC 1035 (Ch)*** at paragraph 81 – 82 the Court held that:

> *… in order to qualify for relief, a petitioner must show that the act or omissions which he complains of consist of the management of the affairs of the company, that the conduct of those affairs has caused prejudice to his interests as a member of the company, and that the prejudice is unfair.*
>
> *The test of unfairness is an objective one (see e.g., Re RA Noble & Sons (Clothing) Ltd [1983] BCLC 273 at 290-291), the question being whether a reasonable bystander observing the consequences of the conduct of those who have control of a company regard that conduct as having unfairly prejudiced the petitioner's interests as a shareholder.*

[47] What is the oppression or unfairly prejudicial conduct that the Petitioner complains of?

[48] The particulars of the oppressive or unfairly prejudicial conduct of the Respondents are pleaded as follows:

> *a) the first Respondent has, unilaterally and without proper authority of a resolution of the company, through its director Mr Freddy Paul Moutou surrendered the gaming licence of the company.*
>
> *b) the first Respondent has since the commencement of operation failed to initiate and conduct shareholders meeting.*
>
> *c) the first Respondent has never caused the second Respondent to declare a dividend.*

[49] In the case of ***Didon v Albert & Ors (CS 475/1999) [2001] SCSC 17 (29 August 2001)*** His Lordship Juddoo J held that:

> *Pennington's Company Law, 5th Edition, Chapter 17, p 743 and Minority Shareholder's Rights, Sweet & Maxwell 1990 Edition, R. Hollington, p45.*
>
> *in Pennington, supra, p651, the author states that:-*

> *... But if all the directors agree informally on a certain matter without a board resolution being held, their unanimity is equivalent to a resolution passed at a board meeting and is binding on the company: Re: Bonelli's Telegraph Co. Collie's Claim (1871) LR 12 Eq 246.*

In the instant case, one has to take into account that the company had **only** *three shareholders. All three shareholders were directors and were also engaged in the day to day running of the company. There is evidence that sometime in January 1999, the petitioner's employment in the company, presumably as a salesperson, was brought to an end. Both the First and Second Respondents had agreed and acquiesced to the calling of the extraordinary meeting with the proposed resolutions.*

Accordingly, I find, in the circumstances of the present case, that the petitioner had informally agreed and acquiesced to the holding of the extraordinary meeting in his conduct and capacity as a director and was duly informed of the holding of the said meeting and its proposed agenda in his capacity as a member.

Under Section 171(f) of the Act:

> *it shall be the duty of a director not to compete with the company or become a director or officer of a competing company, unless a general meeting by ordinary resolution authorises the director concerned to do so in any specific case.*

And under Section 171 (g) of the Act;

> *If directors have any interest, whether direct or indirect, immediate or prospective, in any contract or transaction or proposed contract or transaction with the company, to disclose each of their respective interests to the meeting of the directors...*

In addition, under Regulation 52(1) and (2) of Part II, Schedule 1 of the Act, a director shall declare his interest in a contract or proposed contract and shall not vote in respect of such in the director's meeting.

As stated in Minority Shareholder's Rights, Sweet & Maxwell, 1990 Edition, R Hollington, supra, at p 65:

> *… It is clear that the deliberate diversion of the company's business by those in control of the company to another business owned by them is capable of amounting to unfair prejudice of the shareholders who have no interest in the new business...*

[50] Per the Articles of Association of the second Defendant:

> *1. The regulations set out in Part II of the First Schedule of the Companies Act 1972 with the exceptions of Regulations 73 and proviso to Regulations 49 shall be deemed to be the regulations of this Company.*
>
> *2. A resolution in writing signed by all the Directors for the time being entitled to receive notice of a meeting of the directors, or separate copies of any resolution in writing, signed individually by such directors shall be valid and effectual as if such resolution had been passed at a meeting of directors duly convened and held.*

The second Respondent was supposed to be run formally according to the above. However, the evidence shows that there was no formality to the management of the company.

[51] The Petitioner opted to rely on his affidavit which is scant to say the least. Paul Moutou the director of both the first and second Respondent opted to testify and subject himself to cross examination.

[52] It is clear on the record that the Petitioner and Paul Moutou had a close personal relationship. It was as a result of this close friendship that Paul Moutou placed his trust in the assessment of the Petitioner with regard to the business potential on Praslin and invested in the second Respondent. As such the second Respondent can be described as a quasi-partnership. The evidence is that the Petitioner was aware of the decisions taken by Paul Moutou. Furthermore, when Paul Moutou was out of the country the Petitioner was the one who oversaw the day to day running of the business. It is also in evidence that he was the one who was in charge of the catering and entertainment for the business. Since 2015 it is evident that the second Respondent was run in an informal manner on the basis

of this good partnership between the two shareholders. Is it fair and just now for the Petitioner to allege that there was no resolution for the second Respondent to surrender the casino licence when there is no evidence that he had taken any issue with the informal governance of the company previously?

[53] I found the evidence of the witness Paul Moutou compelling even in the face of cross examination. More than anything he came across as a man who had been tricked into entering into a business under false pretences.

[54] His evidence that the Petitioner injected no cash into the business yet was drawing a hefty rental payment from the second Respondent for lease of premises was a very sweet deal indeed while the first Respondent incurred the risk and expense. The Memorandum of Association of the second Respondent provides that its object, amongst others, at (d), is to open casino and operate gaming machines supports his testimony. It is noted that there is no evidence from the Petitioner that he brought any assets into the second Respondent's business other than the company itself which himself and his wife had incorporated in August 2015.

[55] It was further his evidence, which is accepted, that the Petitioner was given every opportunity to find a new investor to inject cash into the failing business but he could not do so.

[56] The Petitioner averred in his affidavit dated 30th August 2021, at paragraph 8, that the first Respondent has closed down the business of the second Respondent and is in the process of shipping the slot machines and other equipment belonging to the second Respondent to Mauritius. On the other hand, Paul Moutou deponed that the gaming machines did not belong to the second Respondent but was being rented from a Mauritian company, evidence which he supported with copies of the lease agreements. Simply put I believe him and disbelieve the Petitioner.

[57] To my mind the Petitioner is an opportunist who saw an opportunity to make some easy money off of the desire of a well-heeled business man who wanted to invest in the country.

[58] In my humble opinion it would be unjust and inequitable in the circumstances to ignore the informal nature in which the second Respondent was run from day one, something for which there is no evidence the Petitioner complained of, during which time he was recouping handsome benefits, and require a more formal approach when the Petitioner loses the benefits he was gaining. In the circumstances it is proper for the Court to take into account the informal manner in which decisions were taken by the second Respondent and be more flexible in its approach in determining if there is a breach of the rules of governance of the second Respondent.

[59] On the above I find no basis for the claims of the Petitioner. I hereby dismiss the Petition.

[60] Costs are ordered in favour of the Respondents.

Signed, dated and delivered at Ile du Port on ……

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Pillay J