

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable/ Not Reportable / Redact**

[2020] SCCA 18 December 2020

SCA 10/2018

(Appeal from MC 03/2017)

**PATRICK JOHN WALTER**

*(rep. by Mr. Frank Elizabeth)*

**Appellant**

and

**TANIA HOAREAU**

*(rep. by Ms. Kelly Louise)*

**Respondent**

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**Neutral Citation:** *Walter v Hoareau* (SCA 10/2018) [2020] SCCA - (18 December 2020).

**Before:** Fernando, President, Tibatemwa-Ekirikubinza JA, Dingake JA

**Summary:** Company Law- expulsion of a director from a proprietary company under Section 28 of the Companies Act.

**Heard:** 7 December 2020

**Delivered:** 18 December 2020

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**ORDER**

The Court upholds the learned trial Judge's finding that Patrick John Walter be expelled from Prince Car Hire (Proprietary) Ltd. The shares held by Patrick John Walter be acquired by the continuing member. The costs of this appeal as well as those in the court below to be paid by the appellant.

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**JUDGMENT**

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**TIBATEMWA-EKIRIKUBINZA JA**

[1] Patrick John Walter- the appellant and Tania Hoareau- the respondent were shareholders and directors in a company known as Prince Car Hire (Proprietary) Limited incorporated

in Seychelles. Tania Hoareau held 51% of the shares in the said company and Patrick John Walter held 49%.

- [2] It was on record that on 12<sup>th</sup> April 2016, Patrick John Walter unlawfully withdrew SR 22,200/= from the company account for his personal use. Tania considered the conduct of Patrick Walter as detrimental and petitioned the Supreme Court under Section 28 of the Companies Act to have him expelled from the company.
- [3] It is also a fact on record that the company was not doing well financially which prompted Tania Hoareau as the Managing Director to take out a loan in the sum of SR 1,652,000.00/= in order to raise the share capital of the company.
- [4] In defence, Patrick John Walter submitted that Tania Hoareau was equally guilty of conduct which was detrimental to the company. This allegation was however not supported by evidence.
- [5] In exercise of the powers granted to Court under Section 28 of the Companies Act, the Supreme Court found Patrick John Walter guilty of conduct detrimental to the interests of the Company as well as its members and ordered his expulsion. The court also ordered him to pay costs of the petition.
- [6] Dissatisfied with the decision, Patrick John Walter appealed to this Court on the following grounds:
- 1. The presiding Judge erred when she gave judgment in favour of the respondent on the basis that the appellant's allegation that the respondent is equally guilty of conduct detrimental to the interests of the company is unsupported.**
  - 2. The presiding Judge erred when she failed to expand on the legal consequences of the word "expulsion" as defined in the Companies Act.**

**3. The Presiding Judge erred when she failed to consider the appellant's defence at all.**

**Prayers**

[7] The appellant prays that this Court:

- (i) allows the appeal.
- (ii) sets aside the judgment of the Supreme Court.
- (iii) Orders a trial *de novo* before a different Judge.

**Appellant's submissions**

**Ground 1**

[8] The appellant faults the learned Judge for finding that his allegation of Tania being equally guilty of conduct detrimental to the company was not supported by evidence. And yet in the affidavit deponed by Tania she admitted that she was authorized to withdraw the various sums of money by virtue of her being a Managing Director. That in face of this admission, the learned Judge erred in reaching such a finding.

**Grounds 2 and 3**

[9] The appellant's counsel argued these grounds together. Under these grounds, counsel submitted that the learned Judge erred when she failed to explain the legal consequences of the word 'expelled' used in Section 28 of the Companies Act. The legal consequences envisaged were that the court could order the expulsion of a person from the company and yet remain a director. That it was therefore vital for the court to interpret the word "expulsion".

[10] Furthermore, the counsel submitted that the learned Judge erred when she failed to consider all the defences raised by the appellant which were in fact admitted by the respondent. That Tania Hoareau admitted to making several large withdrawals from the company's bank account without making any accountability. It is on this premise that counsel argued that

both directors ought to have been expelled from the Company under Section 28 since they were both guilty of the same conduct. That in such circumstances, the Court should have declined to grant the application, ordered the expulsion of both directors and appointed an accountant to take over the day to day running of the company.

## **Respondent's submissions**

### **Ground 1**

[11] The respondent's counsel on the other hand refuted the claims made by the appellant that she was equally guilty of detrimental conduct. That whereas the appellant illegally withdrew money from the company's account for personal use, the respondent had lawful authority to withdraw money by virtue of her position as a Managing Director. Thus, the learned Judge was right to find the appellant guilty of conduct detrimental to the company.

### **Ground 2**

[12] Under this ground, counsel argued that the failure by the learned Judge to define the word "expulsion" did not prejudice the appellant and does not per se constitute a valid ground of appeal to make this Court to overturn the decision of the Judge. That Section 28 of the Companies Act clearly explains what expulsion means.

### **Ground 3**

[13] The respondent submitted that the learned Judge was bound by the pleadings and submissions presented before her. That the appellant elected not to substantiate any averments with documentary evidence for the Judge to consider and therefore the Judge should not be faulted.

In conclusion, the respondent prayed that this Court dismisses the appeal with costs and upholds the findings of the learned Judge.

## **Court's consideration**

### **Grounds 1 and 3**

- [14] The essence of the appeal is centred on two issues. The first is the argument that sufficient evidence had been adduced in the trial court to warrant expulsion the petitioner from the company as was done to the respondent. In my opinion this issue covers arguments in Grounds 1 and 3.
- [15] It note that at the Supreme Court the case was based on affidavit evidence. No application was made to cross examine witnesses.
- [16] In support of the application under Section 28, the petitioner by way of affidavit averred that the present appellant, Patrick Walter, had withdrawn money from the company account for his personal use. On the other hand she averred that any and all disbursements of company money made by her were effected in her capacity as the Managing Director of the company with company authorization and in furtherance of the company's endeavours. She also admitted withdrawing a specific sum of money as a loan to her in her capacity as a director in line with the expectations under Section 172 of the Act. That the funds were for medical treatment and was recorded as a loan repayable by her.
- [17] In the oral submissions, Tania's lawyer stated that the sum was reflected in the Company's accounts as a Director's loan which was to be paid back to the company. Tania's lawyer argued that this was perfectly in line with Section 172 (A) and (C) of the Companies Act. This submission was not rebutted by Patrick Walter.
- [18] It is only at the hearing in this Court that Patrick Walter's lawyer in the oral submissions challenged Tania's act of taking out a loan and stated that it was without a company resolution.
- [19] I note that the Supreme Court Judge adjourned the matter several times to give an opportunity to Patrick Walter (the defendant) to file documentary evidence to support his averments made in the affidavit in reply. However, no evidence was filed. When the court took issue with the defendant's counsel regarding his failure to file documentary evidence in spite of numerous adjournments, the appellant's counsel responded that the case would rely on the defendant's affidavit already filed. It is clear that the matter proceeded without Patrick Walter ever filing documents in support of the averments made in his affidavit in

reply. The matter therefore was determined on the affidavits as well as the submissions by each party's counsel.

[20] Tania's lawyers submitted that the respondent failed to prove his allegations that Tania withdrew various sums of money from the company account for her personal use.

[21] In this court, counsel for the appellant argued for the first time that that the money withdrawn by the respondent as a loan had not been supported by a company resolution as is required under Section 172 of the Act. The argument regarding absence of a company resolution was raised for the first time on appeal. The Supreme Court Judge cannot therefore be faulted for not having considered a defence which was not presented before her.

[22] It is a trite principle of law that parties are bound by their pleadings and the Court in turn is bound to adjudicate the matter premised on the parties' pleadings. This Court in the case of **Marie-Claire Lesperance vs. Jeffrey Larue SCA No.15/2015** cited Sir Jack Jacob's book The Present Importance of Pleadings by Current Legal Problems, (1960) at page 176 in which he stated that:

*"The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties ... for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice."*

[23] Arising from the above analysis, grounds 1 and 3 are dismissed.

## **Ground 2**

[24] The appellant faulted the trial judge for "failure" to expound the legal consequences of the word "expulsion" in Section 28 of the Companies Act.

- [25] The need to expand the legal consequences of expulsion was not raised in the lower court. Consequently I cannot fault the Trial judge for not expounding the consequences of her order. And indeed the said ground would not in itself constitute a valid ground for overturning the decision of the Supreme Court Judge.
- [26] Nevertheless, I note that Section 28 specifically guides a reader to Section 27 as the provision which deals with the consequences of expulsion of a member from a proprietary company.
- [27] Under Section 28 any member of a proprietary company may apply to the court for an order that another member be expelled from membership of the company. One of the grounds on which the application can be made would be that the member whose expulsion is being sought has been guilty of conduct seriously detrimental to the interests of the company or its members as a whole. Where the member whose expulsion is sought is a director of the company, the application may be brought on the ground that the director has been guilty of serious breaches of duty as such a director.
- [28] If the court in its discretion accedes to the application, the member whose expulsion is sought shall forthwith cease to be a member, and section 27 of this Ordinance shall thereupon apply as though he had become an outgoing member.
- [29] The essence of Section 27 is that continuing members of a proprietary company shall be entitled to purchase the shares of an outgoing member. The offer to purchase the shares must be communicated to the secretary of the company within 4 months of the outgoing member being expelled from the company. The offer specifies the price at which the shares will be purchased.
- [30] The secretary is obliged to notify the outgoing member (in this case the expelled member) of the offers received from the highest bidder. The outgoing member may within fifteen days thereafter notify the secretary and auditor of the company of their unwillingness to transfer their shares to the highest bidder. In that event the auditor of the company shall within one month after receiving such notification make an estimate of the fair value of the

said shares. If the estimate of the value of shares exceeds the price offered by the highest bidder, the estimate by the auditor is substituted. If the auditor's estimate of the value of the shares does not exceed the price offered by the highest bidders, the continuing member will purchase the shares at the price they have offered and on paying such price to the secretary may execute a transfer of the shares into his name.

[31] Under Section 28 (4) if offers to acquire all the shares of an expelled member are not made within the time limited by section 27(4), the continuing members of the company shall be deemed to have offered to take the shares not bid for at a price equal to their fair value as estimated by the company's auditor under section 27.

### **Conclusion**

- [32]
1. For the above reasons, I uphold the decision of the Supreme Court Judge that Patrick John Walter be expelled from Prince Car Hire (Proprietary) Ltd.
  2. I order that the appellant pay to the respondent costs in the lower court and in this Court
  3. The shares of the appellant, hereafter an outgoing member of the company be acquired by the continuing member in accordance with Sections 27 of the Companies Act as expounded in this judgment.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020



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Tibatemwa-Ekirikibinza JA

I concur

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Fernando, President

I concur

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Dingake JA