

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES AT VICTORIA

Civil Suit No. 13 of 2012

Dr Bharti Dhanjee=====Plaintiff

Versus

Javahar Dhanjee=====Defendant No.1

Kiran Dhanjee=====Defendant No 2

Serge Rouillon for the plaintiff

S Rajasundaram for he defendants

RULING

Egonda-Ntende, CJ

- 1 This a ruling arising out of a plea in limine hearing. The plea in limine raised by the defendants was that this action, is wrongly instituted by way of plaint, and ought to have been by way of a petition filed in accordance with the Companies (Supreme Court Proceedings) Rules S I No. 94 of 1972, in light of the subject matter of the action being a claim for remedies in the affairs of a company. In the head suit the plaintiff who is suing as executrix of the estates of Vadilal Dhanjee, Kalambai Vadilal Dhanjee and Malti Dhanjee, contends that the the late Malti Dhanjee was and still is a shareholder in a company, Malti Trading (Proprietary) Limited, holding 99% of the shares. Javahar Dhanjee, defendant no.1, held 1% shares in the said company.
- 2 It is contended by the plaintiff that defendant no.1 as the only surviving signatory to the accounts of Malti Trading Company (Proprietary) Ltd after the demise of Malti Dhanjee has drawn funds of the said company from the Mauritius Commercial Bank and Barclays Bank accounts for which now a sum of R2,464,410.00 stands unaccounted for. The plaintiff contends that by virtue of the laws of transmission the plaintiff in her personal capacity and in her capacity as executrix of the estate of Malti Dhanjee is entitled to inherit and protect the rights of the heirs of Malti Dhanjee by law. The plaintiff further contends that the defendant no.1 has illegally and without

lawful authority, taken funds from the company Malti Trading Company (Proprietary) Ltd for which funds he is personally accountable to the estates represented by the plaintiff. The plaintiff seeks a declaration in those terms and prays for a commissioner to be appointed to assess the sums of the money due to the estates represented by the plaintiff and judgment be entered against the defendants in accordance with the findings of the Commissioner, among other reliefs claimed.

- 3 This action has not been brought under the Companies Act. No right or remedy under the Act is being sought or invoked. There is therefore no reason why the plaintiff should have invoked the provisions of the Companies (Supreme Court Proceedings) Rules as argued by Mr Rajasundaram, learned counsel for the defendants. I would reject the plea in limine. However that is not the end of the matter.
- 4 It appears to me that with regard to the property of Malti Trading Company (Proprietary) Ltd it is only that company that has a right to sue for recovery of its property. [Salmon v Salmon] Where it is shown that the company is not in a position to do so by virtue of those in control of such a company the law has fashioned remedies under the Companies Act for an action to be brought. This is no such action. The plaintiff is not a shareholder in Malti Trading Company (Proprietary) Ltd. She is the executrix of a shareholder. Whether she is entitled to take over the shares of the deceased shareholder is something that must be decided in accordance with the constitution of the company. She may have a beneficial interest in the shares of the company and in ensuring that the assets of the company are preserved but I am far from sure that she has a right to commence an action of this nature purportedly to recover money due to the estates she represents. The estates are separate persons from the company each with its own assets.
- 5 A limited liability company is different from its members. The right to sue or be sued is reposed in the management of the company. If for instance it is true that the defendant no.1 owes the company Malti Trading Company (Proprietary) Ltd any money this money is due to Malti Trading Company Ltd and not to the plaintiff whether as an heir of the estate of a former shareholder or as an executor of the estate of a former shareholder. In a case of a member of the company that is deceased that shareholding is subject to regulation by the constitution of the company. This is what

the plaintiff ought to be after, at least initially, rather than claiming the assets of Malti Trading Company (Proprietary) Ltd as either an heir of a shareholder or an executor of a shareholder.

- 6 If the shares of deceased majority shareholder were inherited directly as moveable property by heirs of Malti Dhanjee, which include the plaintiff, as shareholders there are steps that such members persons ought to take to allow for the transmission of those shares to the new shareholders of the company. The Companies Act has provided companies with how the company and its assets must be managed. It is not clear what steps if any the plaintiff has taken in this regard, consistent with the constitution of the company. Companies that adopt the regulations provided under the Companies Act would have the following provisions in relation to the shareholding of deceased members of the company.

‘13. In case of the death of a shareholder or debenture holder the survivor or survivors where the deceased was a joint holder, and the heir or other person entitled on the death of the deceased where he was a sole holder, shall be the only persons recognised by the company as having any title to the deceased’s shares or debentures; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which has been jointly held by him with other persons.

14. Any person becoming entitled to shares or debentures in consequence of the death or bankruptcy of a shareholder or debenture holder may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the shares or debentures or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the shares or debentures by that shareholder or debenture holder before his death or bankruptcy, as the case may be.

15. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company:

Provided always that the directors may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share, and, if the notice is not complied with within ninety days the directors may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share until the requirements of the notice have been complied with.'

7 I am not aware what the constitution of the company in question provides on this matter. What is clear is that the plaintiff has not averred in the amended plaint that she has taken steps as may be required by the constitution of the company to allow for the transmission of the shareholding of the deceased shareholder to herself and other heirs and then be seized with the right to intervene into the affairs of the company as the law provides.

8 Section 92 of the Seychelles Code of Civil Procedure, hereinafter referred to as the SCCP, allows the court to strike out a pleading that discloses no reasonable cause of action and to dismiss the action. It provides,

'92. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment on such terms as may be just.'

9 Though a cause of action is not defined in the SCCP comparative case law is of persuasive value and may be helpful. In Auto Garage v Motokov [1971] E A 514 the Court of Appeal for East Africa considered the meaning of cause of action. After a review of a number of English decisions on the subject, Spry VP, defined it in the following words at page 519,

'I would summarize the position as I see it by saying that if a plaintiff shows that the plaintiff enjoyed a right, that has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed.'

10 What is in issue in this suit are funds belonging to Malti Trading Company (Proprietary) Ltd and a claim against defendant no.2 for a locket alleged to have belonged to Kalambai Vadilal Dhanjee, now deceased. The plaintiff is not entitled to

the assets of Malti Trading Company (Proprietary) Ltd, neither as an heir of a shareholder nor as an executor of the estate of a shareholder. She is not a shareholder in that company, at least this is not alleged on the plaint. The company is a different person from its members. She may have a beneficial interest in the shares of the company that belonged to a deceased shareholder but such claim has to be processed in accordance with the constitution of the company.

- 11 The Companies Act provides remedies to any members of the company or persons who may have an interest in a company, which the plaintiff has not invoked. In my view the plaint does not disclose a reasonable cause of action with regard to the assets belonging to Malti Trading Company (Proprietary) Ltd. I strike out the claim in relation to the assets of Malti Trading Company (Proprietary) Ltd against defendant no.1 for failure to disclose a reasonable cause of action. The action for a lockout or its value against defendant no.2 may proceed.

Signed, dated and delivered at Victoria this 29th day of October 2012

FMS Egonda-Ntende
Chief Justice