THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES AT VICTORIA

Civil Suit No. 12 of 2012

Dr Bharti Dhanjee==========Plaintiff

Versus

Estate of Late Rajnikant Dhanjee represented by Zarine Dhanjee==========Defendant No1

Javahar Dhanjee==========Defendant No.2
Tradelink (PTY) Limited==========Defendant No 3

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. She contends that the the late Malti Dhanjee was a shareholder in a company, Malti Trading (Proprietary) Limited, holding 99% of the shares. Javahar Dhanjee, defendant no.2, held 1% shares in the said company. Defendant No 1 is a shareholder and director of defendant no.3.

2 It is contended by the plaintiff that defendant no.2 as only surviving signatory to the accounts of Malti Trading Company (Proprietary) Ltd after the demise of Malti Dhanjee transferred to the defendant no.3 a sum of 1,120,876.35 as a loan from Malti Trading Company (Pty) Ltd. The defendant no.1 has paid back only R470,000.00 leaving the balance unpaid. That this outstanding money is accountable to the estates represented by the plaintiff. The plaintiff 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] 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 a 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 company, and in which she contends, she may be an heir to or an executrix of the estate of a deceased shareholder.

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.3 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 executrix 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 executrix of the estate 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 or other 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 SCCP, allows the court to strike out a pleading that discloses no reasonable cause of action. I shall set it out below for ease of reference.

> '92. The court may order any pleading to be struck out, on the ground that it does not disclose a reasonable cause of action or answer, and in such a 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 will 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 plaint 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. The plaintiff is not entitled to those assets, neither as an heir of a shareholder nor as an executrix 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. And so are its assets.

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 plaintiff has failed to show that she enjoyed a right or an actionable right in the sums claimed in the plaint. The plaint does not disclose a reasonable cause of action with regard to the assets belonging to Malti Trading Company (Proprietary) Ltd. As the amended plaint revolves around this claim of money belonging to Malti Trading Company (Proprietary) Ltd only I strike out the plaint for failure to disclose a reasonable cause of action.

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

FMS Egonda-Ntende
Chief Justice