

Misc.app 445/08

2008

B.

NO:1

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

AND

IN THE MATTER OF THE COMPANIES ACT CAP. 249 OF THE LAWS OF
SIERRA LEONE 1960 AND IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW OF THE DECISION OF THE REGISTRAR OF
COMPANIES TO REFUSE THE REGISTRATION OF A COMPANY (ZAIN (SL)
LIMITED) BY THE APPLICANT

BETWEEN:

ALIE BASMA

- APPLICANT

AND

THE REGISTRAR OF COMPANIES

- 1ST RESPONDENT

CELTEL (SL) LIMITED

- 2ND RESPONDENT

Counsels:

C. MACAULEY Esq. for the Applicant

J. FOFANAH Esq. for the 1st RespondentY. H. Williams Esq. for the 2nd Respondent

JUDGMENT DELIVERED THIS 12th DAY OF July 2012 BY
HONOURABLE MRS. JUSTICE V. M. SOLOMON J. A.

JUDGMENT

Background/Proceedings:

The Applicant filed an Originating Notice of Motion dated 28th October 2008 praying for the following orders and reliefs:-

(a). A Declaration that the 1st Respondent was wrong, acted unlawfully, ultra vires and in violation of the provisions of the Companies Act Cap 249 of the Laws of Sierra Leone 1960, (the Act) by -

- i. Refusing to register and issue the Applicant with a certificate of incorporation after the Applicant's Solicitors had submitted for registration all documents necessary for the registration of a

-2-

company under the name Zain (SL) Limited (hereinafter referred to as "the Company").

- ii. Approving an application by the 2nd Respondent for the change of its name to Zain (SL) Limited and issuing a certificate of the said change of name of the 2nd Respondent to Zain (SL) Limited and entering the new name in the register on or about the 16th of September 2008 AFTER the Applicant had submitted all documents necessary for the registration by that name to the 1st Respondent thereby disabling herself from proceeding with the said registration.
 - iii. Giving effect to a purported change of name by the 2nd Respondent by issuing the 2nd Respondent with a Certificate of Change of Name to "**Zain (SL) Limited**" and entering the said new name on the Register of Companies even though the 2nd Respondent had not complied with the provisions of section 20 (1) of the Act by failing to pass a special resolution and obtaining the approval of 1st Respondent signified in writing for the said change of name.
- (b) A further Declaration that as at the 5th September 2008 the Applicant having submitted through his Solicitors all documents necessary for the Company to be registered under the name of "**Zain (SL) Limited**" is entitled to have the same so registered as at all material times the said name was available, the 2nd Respondent had not properly gone through the procedure laid down by section 20 (1) of the Act for the change of its name to that the Applicant sought to use for its new Company.
- © For an Order of Certiorari to quash the decision of the 1st Respondent to approve of the change of name by 2nd Respondent to Zain (SL) Limited and issue them with a Certificate of Change of name to that effect.

-3-

- (d) For an Order Mandamus compelling the 1st Respondent to register the Applicant's company as provided for under the provisions of the Act
- (e) A perpetual injunction restraining the 2nd Respondent by its directors, agents, dealers, servants, employees or howsoever otherwise from using the name Zain as part of its name, adverts, letters, hoarding and or get up of the 2nd Respondent or in any manner whatsoever.
- (f) Any further or other relief as to the Court may seem just.
- (g) That the Costs of the application be provided for.

This application is supported by the affidavits of Alie Basma and Patrick Lambert sworn on the 28th October 2008.

By Motion Paper dated 11th November 2008 the 2nd Respondent prayed inter alia that the action herein be struck out for abuse of process of the Court and/or lack of jurisdiction in that judicial review cannot be granted against the 2nd Respondent-a private Company Limited by Shares. On the 21st January 2009 by Order of the Hon. Mr. Justice N.C. Browne-Marke J.A. all the orders sought by the 2nd Respondent were refused with costs. The 2nd Respondent being dissatisfied with this order filed Motion Paper dated 4th February 2009 seeking inter alia, a stay of proceedings and leave to appeal to the Court of Appeal. The Appeal was dismissed by Order dated 20th May 2010. Thereafter these present proceedings were commenced with oral submissions and written arguments from the parties. All the orders sought on the Originating Notice of Motion concern and affect the 1st Respondent save for order "E" relating to a perpetual injunction which affects the 2nd Respondent herein. The complaint against the 1st Respondent was that she refused to register and issue the Applicant with the Certificate of Incorporation in the name of Zain (SL) Limited, and then proceeded to approve the application by the 2nd Respondent for the change of its name to Zain (SL) Limited even though the Applicant's application for registration was before that of the 2nd Respondent. In such applications this Court may grant the declaration or injunction claimed after

-4-

consideration of the matter herein. The 1st Respondent is a body established under Section 141 (1) (2) of the Constitution of Sierra Leone 1991 (hereinafter called "The Act"), which performs a judicial or quasi judicial function and it does carry out administrative functions. Order 52 Rule 1 (2) of the High Court Rules 2007 (hereinafter called "The Rules") permits an application for judicial review and Order 52 Rule 5 (1) of the Rules enjoins the Applicant for judicial review to serve all the parties directly affected by it. Sections 19 (2) (3) of the Court's Act, Act No.21 of 1965 gives this Court jurisdiction to determine an issue relating to a writ of mandamus, writ of prohibition or a writ of certiorari, similar to Order 52 of the Rules.

A brief background to the facts will be summarized thus: In respect of the Applicant the name "Zain" was registered since 1977. There was a partnership in the name of Zain which was dissolved in 1989; but the Applicant continued to renew the business licence in the name of ZAIN pursuant to the Business Registration Acts of 1972 and 1983 till 2008. The Court cannot understand the nature of the business that was issued a licence under the name "Zain" after the dissolution of the partnership. To whom was that business licence granted? To the Partnership or sole Proprietorship? If a Sole Proprietorship was it ever registered as such before the licence was granted? On 5th September 2008 the Solicitor for the Applicant submitted the requisite documents to the 1st Respondent for registration. As of that date 2nd Respondent had not taken any steps to effect a change of name from, "Celtel (SL) Limited". By the 15th September 2008 the 1st Respondent made it clear that the Applicant's documents for incorporating a Company will not be processed. Even after Solicitors wrote to the 1st Respondent she did not respond. It was only on 16th September 2008 that 2nd Respondent applied to the 1st Respondent to effect its change of name to "Zain (SL) Limited". The 1st Respondent allowed the change of name despite the 2nd Respondent's non-compliance with Section

20 (3) of the Companies Act Cap 249 of 1960. By Letter dated 24th August 1989 the Applicant had written to the Commissioner of Income Tax stating inter alia that Zain

"Will be closed permanently with effect 30th September 1989 due to unavoidable circumstances. The laid down rules (Regulations) of the partnership in terms of dissolution have been satisfied or carried out by the partner. I would therefore be grateful if you will endorse your records accordingly".

On 16th September 2008 Solicitor for the Applicant wrote to the 1st Respondent informing her of his encounter with members of her staff. On even date 1st Respondent wrote a memorandum to inform Solicitors for Applicant that the name "Zain (SL) Limited" was not available for use as it is being used by another company. On the 16th March 1990 the Applicant informed the 1st Respondent by letter informing her that,

"..... the partnership business Zain has dissolved due to unavoidable circumstances... I have decided to operate a sole proprietorship and to retain the name Zain. I am one of the partners of the said dissolved partnership. I also attach herewith application for Business Registration/licence together with written statement from income Tax Department for renewal of licence for Zain. I would therefore be grateful if you could please issue me with a renewal of licence".

Assuming after the dissolution of the Partnership a sole proprietorship was infact registered under the Business Registration Act the name of that business was subsequently changed to Medo Enterprises. By a certificate of change of name dated 19th August 2004 the 1st Respondent certified that name of Zain in certificate number 528/1984 dated 24th July 1984 was to be changed to Medo Enterprises. This in brief is a summary of the various events leading to the present proceedings.

-6-

Findings:

The Applicant has relied on the various documents/correspondence referred to supra in support of its case. On the other hand, the 1st Respondent's has relied on Section 18 of the Companies Act Cap 249 of the Laws of Sierra Leone 1960 (hereinafter called "The Act") which provides to wit:

"18 (1) No company shall be registered by a name which -

(a) is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires;"

The question is whether, at the time the name of Celtel was changed to Zain there was a Company by that name in existence? My answer is No. She further placed reliance on Section 228 (1) of the Act relating to a default by any company and notice of 14 days to make good all defaults referred to therein and that 2nd Respondent complied with all the provisions of the Act, and have acted within the law. The 2nd Respondent was served with notice of default and it proceeded to remedy that default within 14 days as required by the Companies Act.

The case against the 2nd Respondent as referred to supra is in respect of the prayer "E" which is for a perpetual injunction against its servants, agents, privies, directors, employees from using name of Zain as part of its name, adverts, letters, hoarding or use in any manner whatsoever. The Applicant is one of the biggest dealers in regard to top-up cards and M vouchers and other merchandise of the 2nd Respondent as seen in exhibits "J, K & L". Mr. Y.H. Williams Esq. on behalf of the 2nd Respondent submitted that the name "Zain" was registered as a Trade Mark on 19th January 2011 marked "Q". Counsel further submitted that the Applicant

-7-

has no proprietary interest in the use of the name Zain as it had ceased operating under the said name and had applied for a change of name to "Medo Enterprises", and so had no rights at law. To be entitled to an injunction a party ought to establish his right at law which will be violated, and that damages will not be adequate. Counsel submitted that the Applicant had relinquished whatever rights he had as at 19th August 2004 and had no proprietary, legal or equitable interest. On the other hand, the 2nd Respondent possess rights to the use of the name Zain as a Trade Mark by an Application dated 23rd August 2007 which was gazetted and certificate issued on 19th January 2011. By so doing the 2nd Respondent has obtained exclusive right to the use of such trade mark. Counsel further argued that the Applicant had not applied for the use of the name Zain as a trade mark and so action against 2nd Respondent is not sustainable. He argued that the 2nd Respondent has not suffered any damages but alternatively benefitted by business dealings with the 2nd Respondent as seen in "H, J, K & L" respectively; and that even after commencement of these proceedings on 28th October 2008 the Applicant continued to conduct business transactions with the 2nd Respondent as seen in exhibit "K" dated 8th January 2009. He urged this Court to refuse order against the 2nd Respondent.

I shall first of all consider the case against 1st Respondent before proceeding to case against the 2nd Respondent. Judicial Review under Order 52 of the Rules has a statutory basis and this Court is empowered to exercise its supervisory jurisdiction in the granting of prerogative orders. By Section 134 of the Constitution 1991 it provides that:

"the High Court of justice shall have supervisory jurisdiction over all inferior and traditional Courts in Sierra Leone and any adjudicating authority, and in the exercise of its supervisory jurisdiction, shall have power to issue such directions, Writs

-8-

and orders, including writs of *habeus corpus*, and orders of *certiorari*, *mandamus* and *prohibition* as it may consider appropriate for the purpose of enforcing or securing the enforcement of its supervisory powers."

The procedure is concerned with the review of the lawfulness of decisions and actions rather than an appeal. A decision can be questioned on two alternative grounds;

(1) that it is not within the powers conferred by the statute;

OR

(2) That any of the requirements of the statute have not been complied with.

The complaint is about the 1st Respondent refusing to register and issue a certificate of incorporation under name of Zain (SL) Limited". By failing to approve the aforesaid name, the Applicant is hereby seeking orders of *certiorari* and *mandamus*. The Court of Appeal in Ash-bridge Investments Ltd V Minister of Housing and Local Government (1965) 1 WLR page 1320 Lord Denning M.R. said that the Court could interfere if the minister:

".... has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if has taken into consideration matters which he ought not to have taken into account or vice versa. It is identical with the position where the Court has power to interfere with the decision of a lower tribunal which has erred in point of law".

This formula was adopted in de Rothschild V Secretary of State for Transport (1989) J.P.L. page 173. Normally under judicial review, for an Applicant to succeed in quashing the decision he must have been "substantially prejudiced" by the failure to comply with the statute's

procedural conditions. Under both substantive and procedural grounds of judicial review, the Court possesses a residual discretion not to quash a decision where there has been no prejudice or detriment to the Applicant and to refuse relief in exceptional circumstances see – De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5th Edition page 681 – 684. I refer to case of Richmond – upon – Thames LBC V Secretary of State for the Environment (1984) J.P.L. 24.

The primary issue for my consideration is whether the 1st Respondent has acted outside of the powers conferred by statute, that is, the Companies Act 1960 Cap 249 or that provisions of the said Act have not been complied with. It is important to note that in paragraph 11 of her affidavit of 26th January 2011 the 1st Respondent avers as follows:

“That where certain documents are required to be filed by Companies and there is a default I am empowered to give notice to the Company in default to comply within a specific period of time after service of the notice.”

An affidavit in opposition on behalf of the 2nd Respondent was sworn to by Gerald Cole. Perusing this affidavit, it mentions the same averments in the affidavit of the 1st Respondent except the following points:

- (a) That between 8th November and 26th June 2008 there was a change in the personnel in the 1st Respondent's office.
- (b) That by Notice and Resolution dated 13th September 2008 the 2nd Respondent requested the 1st Respondent to change its name from Celtel (SL) Limited to “ZAIN (SL) LIMITED” (relevant exhibits attached).
- (c) That on 16th September 2008 the 1st Respondent effected the change of name.

A very significant point raised in paragraph 14 of the affidavit reads as follows:

"That the Applicant was in the know of the 2nd Respondent's use of the name "ZAIN" as it is one of the biggest dealers in regard top-up cards, M vouchers and other merchandise of the 2nd Respondent. Copies of documents showing that the Applicant knew about the 2nd Respondent's use of the name "ZAIN" and his acquiescence thereto are now exhibited and marked EX "H" EX "J" EX "K" and EX "L" respectively."

In November 2007 the 2nd Respondent was informed that the name "Zain (SL) Limited" was not available for registration but by exhibit "D" dated 1st July 2008 the 1st Respondent informed 2nd Respondent that the said name was now available. By 23rd August 2007 the name was registered as a Trade Mark and Certificate issued marked "Q". They relied on Section 44 of the Trade Mark Act Cap 244 which provides as follows:

"..... Person shall be entitled to institute any proceeding to prevent or to recover damages for, the infringement of an unregistered trade Mark, unless such trade mark has been in use for not less than three years prior to the commencement of such proceedings and has been refused registration under this Act. The Register may, in request grant a certificate that such registration has been refused".

On the 13th September 2008 a Board meeting was held and minutes of such meeting held is marked "E". The Applicant has complained that the 2nd Respondent is in default of provisions of the Companies Act 1960. Notice was served on 2nd Respondent who complied pursuant to Section 228 of the Act. The Applicant on the other hand had traded under name "Zain" since 1977 under a partnership which was dissolved in 1989 and no steps taken by him to register it as a sole proprietorship. The name "Zain" was changed to "Medo Enterprises" on 19th August 2004 and that it was on

-11-

16th September 2008 the 1st Respondent effected the change of name from Celtel (SL) Ltd to ZAIN (SL) Ltd on Certificate No. 18488. Yet still the Applicant continued to renew its business licence up to December 2008, when in fact he was no longer trading under said name and there is no evidence of a change of name from Medo Enterprises to Zain or a new application submitted in the name of Zain. There can be no doubt that all the renewals of business licenses carried out after 1989 were therefore void and of no effect.

Another issue for my consideration is whether the Applicant has been prejudiced by the use of the name "Zain" by the 2nd Respondent, or there is a detriment caused to him by use of the said name. From the evidence before this Court the Applicant and 2nd Respondent entered a Dealership Agreement on 23rd October 2008 in which the Applicant is to serve as authorized dealer for the 2nd Respondent on the sale of its products. The Applicant has not disputed being a dealer for the 2nd Respondent or the validity of the agreement. This document was duly executed by the Applicant. A question I pose is at the time of signing this agreement, the Applicant had presented papers for incorporation of the name "Zain S.L Limited" and by letter dated 17th September 2008 being informed that the name was not available as it is being used by another company; then why did he sign said agreement? To my mind, at this time, the Applicant must have been aggrieved by the decision of the 1st Respondent. As can be seen from the documents filed herein it was five days after he became a dealer in the sale of Zair products that the Applicant instituted this action. Why then did he execute exhibit "Q" dated 23rd October 2008. Why did he want to be a dealer for the 2nd Respondent? My answer to that would be as stated in submission for the 2nd Respondent that he will derive a benefit as a Dealer and hence executed said agreement and is not prejudiced by use of the name or said name has not caused him any detriment. The front page of the said agreement reads thus to wit:

ZAIN SIERRA LEONE LIMITED
DEALER AGREEMENT

Between

ZAIN

And

.....ZAIN.....

("The Dealer")

I refer to page 16 of the said agreement under rubric "Commission". I am strengthened in my view by his conduct of carrying on business with the 2nd Respondent as evidenced by exhibit "K" an invoice dated 8th January 2009. The Applicant continued to act as dealer for the 2nd Respondent even after commencement of this action. I agree with Counsel's submissions for the 2nd Respondent that the Applicant has no proprietary interest to protect. And he knew that the 2nd Respondent operated business under name of "Zain" and continued to deal with it as its dealer. As regards Mr. Macaulay's submission and arguments I find them to be without merit. I have no hesitation in rejecting as untenable any argument which seeks to suggest that the Applicant has a proprietary right to protect. As at the date of institution of this action I hold firmly to the view that the Applicant did not have a proprietary right to the name Zain. Needless to say that the position of the 2nd Respondent is guaranteed by Section 17 of Cap 244 of 1960. The Applicant had notice and/or knowledge of the use of the name 'ZAIN' by the 2nd Respondent and there can be no danger of doing injustice to him. The law is settled that where a Plaintiff or an applicant has no legal right recognisable by the court there is no power to grant him injunction Gouriet V Union of Post Office Workers (1977) 3 All ER 70 (H L).

-13-

In all the circumstances of the case and in the light of the evidence adduced I have come to the conclusion that the Applicant's case has no merit at all. In the premises the application is dismissed and each party is to bear its own costs.

V. M. Solomon

HON. JUSTICE V. M. SOLOMON J. A.