PAN ELECTRONICS LIMITED AND SAVVAS PANAYIOTIDES AND OTHERS v ANDREAS MILTIADOUS AND OTHERS (1988 - 1989) Z.R. 19 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG .J.S.
24TH MARCH AND 9TH MAY, 1988
(S.C.Z. JUDGMENT NO. 4 OF 1988)

Flynote

Company - Beneficial ownership of shares - Allotment of shares in Registrar's Register of Companies - Whether evidence of transfer of shares.
Company - Beneficial ownership of shares in dispute - Petition for winding up pending - Question of ownership to be decided as preliminary point before petition heard.

Headnote

The first appellant entered into a deed of partnership with his employees whereby the employees held shares in trust for the first appellant. Subsequently, the respondents became the registered owners of half the issued shares and the appellant's sister held the remaining shares. Because the respondents were the owners of the shares they argued they could present a petition to wind-up the company. The appellants contended that the respondents held the shares as nominees of the appellants. The first respondent claimed that at a later stage the first appellant tore up the trust deed and thereby transferred the ownership of the shares to the respondents. After this incident the respondents' remuneration from the profits of the company was increased.

The trial, in deciding the question of the ownership of the shares, examined the Register of Companies wherein it was recorded that the shares were purchased by the second appellant. The return of allotments did not show the shares were owned by the first appellant. On that evidence the Court found the registered shareholders were nominees and that the first appellant was precluded from owning shares under Exchange Control Regulations because he was not resident in the country.

Held:

(i) An examination of the return of allotments filed with the Registrar was not a relevant method of deciding a question of fact which could only be received on the basis of the evidence tendered by the parties.

(ii) It is inappropriate to raise questions of beneficial ownership in shares in a winding-up petition and the better approach may be to stand over the petition while the ownership question is determined in proceedings constituted in the ordinary way.

Cases referred to:

(1) Re Bambi Restaurants Ltd [1965] 2 All E.R. 79
(2) Re Craig, Meneces v Middleton [1979] 2 All E.R. 390

For the appellants: A..M. Hamir, Solly Patel Hamir and Lawrence.
For the respondents: C.H.J. Chileshe, Lloyd Jones and Collins.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the Court.

This was an appeal against the decision of a High Court Judge who

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determined that the respondents were beneficial owners of the shares they hold in Pan Electronics Limited and that their petition for the winding-up of the company should be upheld on the ground that it was just and equitable to do so. A major issue at the trial was whether or not the respondents were the beneficial owners of the shares registered in their names or if in fact, as was contended by the appellants, they were simply nominees and held the shares in trust for the first appellant Savvas Panayiotides. Thus the question of the true and beneficial ownership of the shares was critical since it seems obvious that it can hardly be just and equitable to wind-up a company at the instance of a nominee against the specific wishes of the true owner and when the nominee has the simple option of withdrawing from the trust.

The learned trial Judge heard evidence from one of the respondents- the holder of a 10% shareholding- testifying on his own behalf and on behalf of the other respondents who were the holders of the other 40% of the shareholding. The appellants, notably the alleged true owner and others, also gave evidence. It was common cause that the first appellant was running a successful business as a sole trader under the style of Sam Amusement, a firm dealing in amusement machines of various types. The respondents were his employees. The first appellant ran into a problem with the government and decided to return to Cyprus. The question arose what he should do with his business. On advice from the late Richard Christopher, an eminent advocate, the first appellant entered into a deed of partnership with his employees and subsequently formed Pan Electronics Limited in which he and his employees were shareholders. It was not in dispute that the employees then held their shares in trust for the first appellant and for this purpose a trust deed was executed and the nominees also executed share transfers in blank. All these documents were kept by the first appellant in Cyprus. The government confiscated the shares registered in the first appellant's name under the Exchange Control Regulations and these shares were later bought back by one of his sisters, the second appellant in these proceedings. In the course of time, the respondents came to be the registered shareholders of 50% of the issued shares while the first appellant's sisters held the other 50%.

The appellants claimed that the respondents continued to hold the shares as trustees and nominees of the first appellant. Thus, from the inception of the company, the respondents received salaries and other fringe benefits, together with a bonus of 5% of the profits. The first respondent, while expressly admitting that in the beginning he and his fellow respondents were nominees, claimed that as from sometime in 1977 they became the beneficial owners of the shares. The first respondent explained that on a visit to the first appellant in Cyprus when the first respondent indicated that he was emigrating to Canada because he was not earning enough from the company in Zambia, the first appellant tore up the trust deed and transferred the beneficial ownership to the respondents. The first respondent explained further that it was the first appellant's wife who explained that such was the meaning of the tearing up which the first appellant attached thereto. The first appellant himself expressly denied such transfer and explained the tearing up as a

demonstration of the trust which he placed in the first respondent. The second

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appellant witnessed this incident and departed in a fit of temper while complaining about the lack of trust on the part of the first respondent. What was not in dispute was that after this incident the respondents' remuneration was increased to the extent that the bonus became 10% of the profits as against 5% previously. There was evidence that the respondents and all the other registered shareholders continued to consult the first appellant and to take his instructions in the running of the company and the shareholdings. There was also unchallenged evidence from the first appellant that one of the respondents - who did not himself give any evidence - had even offered to return his 30% shareholding to the alleged true owner.

We have taken the trouble to recite this evidence at some length because a major issue in this appeal concerns the beneficial ownership of the shares. The learned trial Judge was specifically requested to resolve this issue and one ground of appeal alleges error in the way the Court below determined the question. The learned trial Judge correctly stated that the first question he had to resolve was whether or not the shares in the company were held in trust for the first appellant. The learned trial Judge examined the return of allotments filed with the Registrar of Companies on 30th October 1973, and observed that the shares then recorded in the name of the first appellant were later confiscated by the State and subsequently purchased by the second appellant's. He then examined the return of allotments filed on 9th November 1983, and observed the first appellant's name did not appear thereon. He concluded that in the absence of the trust deed, the registered shareholders were not nominees. He argued further that even had the trust deed been produced, the first appellant was precluded from holding shares under the Exchange Control Regulations for not being resident in this country. Accordingly, the respondents held the shares in their own right and had the *locus standi* to present the petition for winding-up.

Mr *Hamir* argued that the learned trial Judge erred in resolving the question of beneficial ownership on the basis which we have outlined and without any regard to the evidence which, he submitted, was overwhelmingly in favour of the first appellant. Mr *Chileshe* did not seek to support the decision on the basis of the documents filed with the Registrar or Regulation 11 of the Exchange Control Regulations. He argued his clients' case on the basis of the incident of 1977 when the trust deed was torn up, and to this we shall return in a moment. We have considered the reasons advanced by the learned trial Judge and the submissions by Mr *Hamir*. We have no doubt in our minds that the determination of ownership reached on the reasons given by the learned trial Judge cannot be allowed to stand. An examination of the return of allotments filed with the Registrar was manifestly neither a useful nor a relevant method of deciding a question of fact which could only be resolved on the basis of the evidence tendered by the parties. Having regard to the provisions s. 52 of the Companies Act, Cap. 686 which prohibits the entry of trusts on the register of members or in the documents receivable by the Registrar it was a *non sequitur* to find that those same documents did not support the existence of the trust claimed. Similarly, the argument based on the Exchange Control Regulations was patently immaterial. There was no

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evidence either way whether there was consent by the Minister and, in any case that was a matter between first appellant and the Minister. What is more, even the respondents could not, under the regulations, validly hold shares as nominees which they admitted was the case at the beginning without complying with the regulations. It is obvious that the learned trial Judge did not attempt to answer the issues raised by the parties with the result that he did not decide on the evidence and on the merits, whether the respondents were nominees or whether there was a transfer of the beneficial ownership in the shares by the tearing up of the trust deed. It is therefore now up to this Court to consider this point and to examine the evidence with a view either to resolve the issue or to consider a retrial if we are of the opinion that the material on record is inadequate to permit this Court to reach a decision.

We are at large. We should perhaps mention, in passing, that it is generally inappropriate to raise questions of beneficial ownership in shares in a winding-up petition and that the better approach may be to stand over the petition while the ownership question is determined in proceedings constituted in the ordinary way between the claimant and the registered owner: see *Re Bambi Restaurants Limited* (1). However, we accept also that it is permissible, under the general jurisdiction contemplated by s.13 of the High Court Act, Cap. 50, for the High Court to entertain any combination of issues between the same parties, particularly where they stem from a single subject or related transactions and the parties would best be served by resolving all relevant issues between them - thus obviating a multiplicity of legal proceedings between them. We should also mention that we do not propose to dwell upon the submissions which Mr *Hamir* made concerning the pleadings when it was alleged that the respondents were given to shifting their positions from time to time. It was argued that by their petition and their affidavits they claimed original beneficial ownership but now sought to claim ownership from 1977 after the tearing up of the trust deed. The short answer which may be valid was given by Mr *Chileshe* when he pointed out that the first respondent was referring to ownership as at the time of the presentation of the petition.

The sole question at this stage is whether there was a transfer of beneficial ownership by the destruction of the trust deed so that the respondents there held the shares in their own right. It has been argued on behalf of the respondents that the first appellant, in order to induce the respondents to remain in Zambia and to work for the company - probably for the benefit of his sisters - transferred beneficial ownership and the respondents received such ownership for valuable consideration in the form of past and future services. It was suggested that the act of tearing up the trust deed was sufficient evidence of the transfer. The first appellant specifically denied any such transfer and stated that he tore up the deed to show that there was trust. Regardless of any question of credibility - to which we shall return later - there was, in our considered opinion, nothing in the tearing up of the deed by itself which could lead to an inference that there was a cancellation of the trust and a transfer of the beneficial ownership by gift or in consideration of past or future services. The transfer cannot be implied or accepted when there were

disputed explanations for the tearing up. The answer to the question where the truth lies must, therefore, necessarily be sought beyond the act of tearing up.

As against the bold word of the first respondent, there was opposing evidence from the appellants

which was corroborated by the fact that the first appellant continued to exercise authority and control and the respondents continued to take instructions from him. What is more, there was no dispute that the incident of 1977 resulted in the respondents getting an increased bonus of 10%, apart from their other emoluments and prerequisites. That the first respondent's claim stands unsupported is very significant. The claim that the respondents gave valuable consideration for the shares must fail of its own inanition. The services referred to were admittedly otherwise well remunerated already in the form of salaries, a share in the profits by way of bonus, and other prerequisites. The only other hypothesis is that of a gift. Where, as here, the donor is making the gift, the onus on the alleged donee is a heavy one in order to bind a donor to a gift he has denied making. The fact that the alleged donor continued to exercise dominion and control hardly supports the respondents' contention that the tearing up of the trust deed - in a fit of temper, according to the appellants - was any evidence of the first appellant's *animus donandi*. On top of all this, it was never in dispute that the respondents first stood in a fiduciary relationship with the first appellant: they were his trustees and nominees and he was the beneficiary under the trust. Where there is a relationship of trust and confidence, and inexplicably large gifts are made, the presumption of undue influence will be rebuttable only on proof of full, free and informed thought on the part of the donor: see *Re Craig, Meneces v Middleton* (2). Thus even if the first appellant had not denied making the gratuitous transfer or gift, the respondents would still be in some difficulty to retain trust property for which not a single ngwee was paid where the beneficiary has asked for its return.

It seems clear to us that there was before the learned trial Judge more than sufficient evidence to resolve the question of beneficial ownership, had he cared to do so. We find that we are in a position to put matters right. We adjudge and hold that the respondents were, and continue to be, nominees. The ground of appeal in this respect is upheld. It follows also that we do not consider it just and equitable to wind-up the company at the instance of the nominees over the wishes of the beneficiary, the principal and true owner. We allow the whole of this appeal; reverse the decision below and enter judgment for the appellants. Since the respondents have demonstrated that they are no longer willing to honour their trust and in order to bring the whole of this matter to finality - in keeping with the first appellant's counter - prayer to this effect, we direct and order that the respondents do sign share transfers in blank in respect of their shareholdings; in default, the company secretaries are hereby authorised to execute such blank transfer on the respondents' behalf and to complete the same to the order of the first appellant, Savvas Panayiotides. The appellants will also have their costs, both here and below, to be taxed in default of agreement.

Appeal allowed.
