

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 264
MC 51/2020

In the matter between:

FRANCOISE FOUNDATION

Represented by its Protector

Electing domicile at Suite 226, Eden Plaza, Eden Island

Alexander de Pierpont
(rep. by B Georges)

Applicant

and

GOLD COAST DIRECTORS LIMITED
Of Mayfair Trust Group Limited
The Quadrant, Manglier Street, Victoria
(rep. by J Camille)

Respondent

Neutral Citation: *Francoise Foundation vs Gold Coast Directors Ltd* [2021] SCSC 264
MC51/2020

Before: Govinden CJ

Summary: Application for removal of council; Section 49 of the Foundation Act 2001;
Applicant wrongly suited. Application dismissed.

Heard: 18th January 2021

Delivered: 31st May 2021

ORDER

RULING

R GOVINDEN, CJ

The background and submissions

- [1] This is an application filed under Sections 49 of the Foundations Act, 2001, herein after referred to as “the Act”, filed by a Protector of a Foundation asking for the removal of the Respondent as its council. The Applicant avers in the application that it is the Protector of a Private Foundation in Seychelles and its Registered Agent’s office is found at the Mayfair Trust Group Limited, at the Quadrant Street, Mahe, Seychelles. In further averments it states that it appointed the respondent as the Council of the Foundation, in terms of clause 10.10 of its Charter, which provides that, “each councillors in exercising its powers or performing his duties, shall act honestly and in good faith with a view to the best interests of the foundation”. It is averred that the respondent has, contrary to this clause, engaged in actions which do not comply with the prescribed obligations and duties, in that it has appointed itself as Directors of Companies owned by the Foundation in an attempt to effectively take control of assets of the Foundation and that it also sought to have the Protector of the Foundation removed by way of a letter, in an effort to reinforce their position in the Foundation so as to facilitate their takeover of the Foundation’s assets. It is the Applicant’s case that, however, this was neither done by way of an application to the court, nor by virtue of a court order, as stipulated by the law, which renders the attempt illegal. As such the applicant avers that it is desirous of removing the Councillors and appointing new Council in their stead.
- [2] Together with its Defence and Counterclaim on the merits the respondent has raised a number of preliminary objections to this application. The objection relates both to the process of service of the application and legal objections based on the provisions of the Act.
- [3] As to the objections regarding the service, it is averred that the applicant’s application was not validly served on the respondent in that;
- (a) Service of the Application was not made on the Respondent in Mauritius;
 - (b) The Application incorrectly states the Respondent’s address as “of Mayfair Trust Group Limited, the Quadrant, Manglier Street, Victoria”;

- (c) The Respondent, Gold Coast Directors Ltd (GCDL), is a company incorporated under the laws of Mauritius and has its registered office situated at Suite 345 Barkly Wharf, Le Caudan Waterfront, P. O. Box 1070, Port Louis, Mauritius.
- (d) Mayfair Trust Group Limited (Mayfair) of Second Floor, The Quadrant, Manglier Street, P. O. Box 13412 Victoria, Mahé, Seychelles, does not provide director, registered agent or registered office services for the Respondent;
- (e) Mayfair provides registered agent and registered office services for the Françoise Foundation (the Foundation), which is registered by the Registrar under the Foundations Act 2009 as amended (the Foundations Act) with registration number 000626.

[4] As to the legal objections based on the provisions of the Act, it is the applicant's contention that;

- (1) The application is bad in law and must be dismissed in that the applicant, acting in his capacity as the Protector of the Foundation, does not have the capacity, power or authority in law to represent the Foundation, in respect of the application or otherwise.
- (2) The application is bad in law and must be dismissed in that the application is wrongly suited. The current application cannot be brought in the name of the Foundation under section 49 of the Foundations Act.

[5] In his written submissions in support of these objections, learned counsel for the respondent relying on sections 34 and 35 of the Seychelles Code of Civil Procedure, herein after also referred to as "the Code", submits that the Respondent, being a company incorporated in Mauritius, should have been served in Mauritius at its registered agent's office. It is his contention that the Mayfair Trust Group Limited is not the registered agent mandated in law to accept service on behalf of the Respondent. According to him it only provides registered agent and registered office services for the Applicant, the latter being a Foundation registered under the Act. In the same vein learned counsel argued that the Respondent being a company registered outside Seychelles, being Mauritius, it could only

have been legally served pursuant to Section 47(1) of the Seychelles Code of Civil Procedure with leave of the court.

[6] As to the other legal arguments, he argued that the application is wrongly brought in the name of the Foundation because by virtue of Section 57(1) of the Act an application may only be brought by a founder, a councillor, a beneficiary or a supervisory person including a protector, but not by the foundation itself. Secondly, learned counsel, relying on the affidavit of the director of the respondent and its supporting documents attached to his submissions submits that that at any rate Alexander de Pierpont has ceased to be the protector of the Foundation since the 6th July 2020 and as such he has no capacity to act as such.

[7] The Applicant has countered the respondent's written submissions in its submissions on the points of law. As to the issue of defective service on the Respondent, learned counsel submitted as follows;

(a) That the Respondent has accepted service and has instructed a lawyer to represent them in these proceedings.

(b) That, Clause 5.2 of the Charter of the Foundation and Section 31 (2) of the Act state "Documents may be served on the Foundation by service of such documents on its registered agent". Clause 5.1 of the Charter provides that the Registered Agent of the Foundation is the MAYFAIR TRUST GROUP LIMITED of the second floor, the Quadrant, MANGLIER Street , P. O. Box 1312, Victoria. Further according to learned counsel as the council of the Foundation is ipso facto the foundation under Section 49(20) of the Act, service on the Registered Agent is effectively service on the Foundation.

(c) As to the arguments that the respondent is not properly represented, the Respondent relies on Sections 2 and 49(2)b of the Act and Clause 17.3 ; 17.8 of the Charter of the Foundation in support of his argument that Mr de Pierpont as protector can validly represent the interests of the Foundation.

- (d) In answer to the argument that the Respondent has been wrongly suited, it is submitted that Section 49 of the Act provides the manner in which a councillor may be removed and that this is exactly what the applicant did in this case.

Analysis and determination

- [8] The provisions of the Code that invites the court consideration in this preliminary objections are those of Section 34 and 35. They are as follows;

Mode of service

34. *Service of the summons shall be effected by delivering or tendering a copy thereof to the defendant personally, or if he cannot be found, to any member more than sixteen years old of the family of the defendant residing with him, or to any agent or manager of the defendant at the place where he carries on his business.*

Service on agent

35. *If the defendant have an agent empowered to accept service on his behalf, service on such agent shall be sufficient.*

- [9] The relevant provisions of the Act, which has come up for consideration are Section 34 to 49, the latter reads as follows;

49. (1) *A councillor may be removed in accordance with charter, regulations or this Act.*

(2) *Where the charter or regulations do not provide, or do not adequately provide for the removal of a councillor —*

(a) *a founder;*

(b) *a councillor;*

(c) a beneficiary; or

(d) a supervisory person,

may apply to the court for the removal of a councillor, for any of the following causes —

(i) where the interests of the councillor are incompatible with the interests of a founder, a beneficiary or with the objects of the Foundation;

(ii) where the councillor is disqualified from being a councillor under section 35; or

(iii) where the councillor has failed to carry out or failed to carry out properly, the duties or functions required of a councillor in fulfilment of the councillor's obligations under the charter, regulations or this Act.

(3) Upon an application under subsection (2), the court may order the removal of a councillor.

57. *(1) Subject to the terms of the charter or regulations, where a person ceases to be qualified to act as the protector or has failed to carry out or to properly carry out the duties required of a protector under the charter, regulations or this Act, on an application to the court by a founder, a councillor, a beneficiary or a supervisory person, the court may order the removal of the protector, and the appointment of a fit and proper consenting person to act as the protector.*

(2) The charter or regulations and this Act shall apply to a protector appointed by the court under subsection (1), as they apply to a protector appointed pursuant to the charter or regulations.

[10] In terms of section 49 (1) of the Act a councillor may be removed in accordance with the charter, regulations or the Act. Section 49(2)(d) goes on to provide that in case the charter or regulations do not so provide or do not adequately provide for the removal of a councillor, a supervisory person may apply to the court for the removal of a councillor.

[11] Section 2 of the Act defines “supervisory person” as “ *a person having supervisory powers in relation to a Foundation and includes the protector and any other person appointed by the Foundation or protector as such* ”

[12] “Council of the Foundation” means “ *the council of a Foundation referred to under section 32.* ” Section 33 of the Act relates to the powers and functions of the council, which consist of one or more persons. The substance of those provisions are as follows;

Sub-Part — Council of Foundations

32. A Foundation shall have a council which consists of one or more persons.

33. The duties of a council are —

(a) to carry out the objects of the Foundation;

(b) to manage and administer the assets of the Foundation; and

(c) to do such other acts as may be provided by the charter, regulations and this Act.

[13] On the other hand “councillors” of a foundation, are members of the Council appointed by virtue of section 2 of the Act, in accordance with section 34. They are empowered and given statutory functions by virtue of Sections 34 to 49 of the Act.

[14] It is apparent in the case that the Applicant had appointed only a council under Section 32 of the Act in order for the latter to carry out its duties under Section 33. The Council is admittedly Gold Coast Directors Limited. There was no separate appointment of councillors to or of the Council to be member of that council. The Applicant being satisfied with that one juristic entity to be its council. In fact the applicant avers that it appointed

the respondent as the Council of the Foundation, in terms of clause 10.10 of its Charter, which provides that, *“each councillor in exercising its powers or performing his duties, shall act honestly and in good faith with a view to the best interests of the foundation.* The Applicant could have chosen to appoint a group of councillors to be member of its council but it chose not to do so.

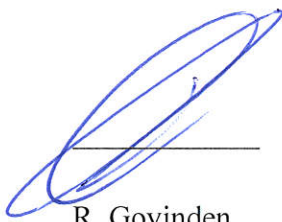
- [15] The provisions of the Act relating to removal of the council as compared to removal of councillors would therefore the right provision to be used by the Applicant in this case, put aside the other issues of law that these preliminary objections raise. However, it appears that there are no provisions for the removal of a council but there are for removal of councillors. Removal of councillors would have effectively consisted of removal of a council where the councillors consist of a unit that composed the council. However, this is not the case where there is only one member council, as in the present case. Nonetheless, I would not allow the lacuna in the law prevent its due execution, I will therefore impose a strained interpretation to the provisions and in so doing I will attach a purposive and liberal interpretation to the term “council”, in order to cure the defect in the law and render a remedy in an instance where the founder wants to remove a one member council. Accordingly, I consider that the provisions of section 49(1), 49(2) shall apply ipso facto to the removal of a one-member council as it does to a multi-member council.
- [16] Hence, the Respondent can be removed from its office of council of the Foundation in accordance with its Charter, regulations or the Act, or, in the absence of any act of removal, in accordance to these means by a supervisory person, which under Section 2 of the Act includes the Protector and any person appointed by the Protector.
- [17] In this case the Applicant is the Protector and hence, I find that it has the capacity, power and authority in law to apply for the removal of the Respondent as the council.
- [18] It is to be noted that the Foundation is a person in law. Once it is established in accordance with Section 3 and 4 of the Act, it is a legal entity distinct from the Protector, who is appointed under Section 52; 53 or 57 of the Act. It is also separate and distinct from a council or councillors. The Protector and the Council or councillors have different and sometimes directly opposite rights and duties under the Act. The legislative intent being to

ensure that the separation of powers brings about greater transparency and scrutiny in their respective roles. Each of the two entities which make up the Foundation may at the same time be at loggerheads as to who is acting in the best interest of the Foundation, as it is in this case. Each of them should therefore be able to assert their statutory authority fully, leaving the Foundation outside the fray. It is because of this that I find that as the Application has to be brought by the Protector in his capacity as the Protector and acting as such, he cannot bring the action as the Foundation under section 49. It on this basis that I find that the two Plea in limine litis raised by the Learned counsel for the Respondent on the capacity and legal representation of the Applicant to be valid. The Applicant has been wrongly suited and the Francoise Foundation has no capacity to bring the action before the court.

Final determination

[19] I accordingly dismiss the application on this basis.

Signed, dated and delivered at Ile du Port, Victoria on 31st of May 2021



R. Govinden

Chief Justice