Civ. App. 9/2009

IN THE COURT OF APPEAL OF SIERRA LEONE

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) LTD BY THE APPLICANT

BETWEEN:-

CETEL (SL) LTD PURPORTEDLY CARRYING ON BUSINESS AS ZAIN (SL) LTD	-	APPELLANT/2ND RESPONDENT
&		
THE REGISTRAR OF COMPANIES	-	1ST RESPONDENT
AND		
ALIE BASMA	-	APPLICANT/RESPONDENT

CORAM:

Hon. Justice. E.E. Roberts	-	J.A.
Hon. Justice S.A. Ademosu	-	J.A.
Hon. Justice A. Showers	-	J.A.

JUDGMENT DELIVERED ON THE 20th DAY OF MAY 2010 BY ROBERTS J.A.

BACKGROUND

The Applicant/Respondent herein filed an Originating Notice of Motion (ONM) in the court below dated 28/04/08 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 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 of a company 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.

(c) 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.

(d) For an Order [of] 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 deem just.

(g) That the Costs of the application be provided for."

The Appellant then filed a Notice of Motion dated 11th November 2008 applying that the said Originating Notice of Motion be struck out for the reasons as stated in the said Notice of Motion (see page 110 of the Records).The Learned Judge heard arguments in respect of the said application dated 11th November 2008 and delivered his Ruling dated 21st January 2009. It is against this Ruling dated 21st January 2009 that the Appellant has appealed to this Court.

THE APPEAL

B y Notice of Appeal dated 6th March 2009 the Appellant appeals against the Ruling/Judgment of Hon. Mr. Justice N.C. Browne-Marke J.A. dated 21st January 2009 upon the following grounds:-

i. That the Learned Judge having concluded that *"Judicial Review will not lie against a person or body carrying out private law function"* and further that *"paragraph (e) of the Applicant's Application directly impinges on private law rights"* erred in law and in fact in holding that the Appellant, a private company limited by shares registered under the provisions of the Companies Act Cap. 249 of the Laws of Sierra Leone 1960 should continue to be a party and be subjected to the process of judicial review brought by the Respondent.

ii. That the Learned Judge's conclusion that *"in the instant case, the most appropriate remedy is judicial review and not a full scale trial"* in a case where private law rights are inextricably connected is not supportable in law.

iii. That the Learned Judge was wrong in law to have held that the process of judicial review was the only process available to the Respondent to compel the Registrar of Companies *"to rescind or revoke or annul her own decision."*

iv. That the decision is against the weight of the authorities.

In arguing this Appeal counsel for the Appellant and the Applicant/ Respondent filed synopses respectively relying on same as well as the several authorities cited in support of their respective arguments and submissions. I shall not repeat here the various submissions and arguments contained in the said synopses save a brief summary of each respectively as the case may be.

I shall deal with the above Grounds of Appeal in the order they were dealt with in the written submissions

GROUNDS i & iv

In arguing Grounds i & iv, counsel for the Appellant contended that the Learned Judge having concluded that "Judicial review will not lie against a person or body carrying on private law functions" and that paragraph (e) of the Applicants Application directly impinges on private law rights" erred in holding that the Appellant should continue to be a party and be subject to the process of judicial review. He further submitted that the Appellant being a private company limited by shares and registered under the provisions of the Companies Act cap 249 of the Laws of Sierra Leone 1960 is not susceptible to the process of judicial review. Counsel for the Appellant further submitted that the substantive application of the Respondent is made solely under the provisions of order 52 of the High Court Rules 2007, referring to the title of the Originating Notice of Motion. Counsel therefore submitted that if the Appellant, a private limited liability company, is not susceptible to the process of judicial review but is nonetheless a necessary party to a cause or matter then the proceedings should not in the circumstances proceed by way of judicial review. He submitted that the Learned Judge ought therefore to have struck out the Applicant/Respondent's application.

Counsel for the Applicant/Respondent for his part submitted that the judicial review proceedings were properly brought against the 1st Respondent. He submitted that the application for judicial review was brought exclusively against the acts or decision of the 1st Respondent but that from the facts and circumstances of this particular case the Appellant was a necessary and proper party to the application and hence was made a party. Counsel

submitted that the court below was never called to review any of the actions of the Appellant, adding that by order 52 of the High Court Rules 2007 the filing of the Originating Notice of Motion was the proper means of presenting the complaint against the 1st Respondent. Counsel therefore submitted that the order sought against the Appellant in the ONM was merely consequential as they would no doubt be affected by any order made against the 1st Respondent.

In this matter as stated earlier the originating Notice of Motion bears the name of the Registrar of Companies as the 1st Respondent and the Appellant as the 2nd Respondent.

The complaint against the 1st Respondent (Registrar of Companies) was that she refused to register and issue the Applicant/ Respondent with a certificate of incorporation in the name of Zain (SL) Limited, and that she proceeded to approve the application by the Appellant for the change of its name to Zain (SL) Limited even though the Applicant/ Respondent's application for registration was pending before her. It is in this regard that the application for a judicial review was apparently made.

The Registrar of Companies is a body corporate established or appointed under section 141(1) and (2) of the constitution of Sierra Leone Act No. 6 of 1991. See also section (14) of the Registration of Business Act 2007.I agree with the Learned Trial Judge's conclusion that the Registrar of Companies in this case appears to be performing a judicial or quasi judicial function and that even if that was wrong she was in any event carrying out administrative functions thus making judicial review an appropriate remedy in proceeding against her in respect of her acts, omissions or decisions in this regard. However the Appellant's contention here is that the Appellant was a private company limited by shares and that as the Learned Trial Judge concluded that judicial review would not lie against a person or body carrying out private law functions, he erred in holding that the Appellant should continue to be a party and be subjected to the process of judicial review.

It was also contended by the Appellant that paragraph (e) of the Originating Notice of Motion directly impinges on private rights and since it is admitted that the private law rights were inextricably linked with public law rights, the Learned Judge should have held that the process of judicial review was inappropriate and so the ONM ought to be struck out.

In dealing with the above contentions, I am obliged tofirstly consider here what I perceive to be the purpose for making the Appellant a party to the action. A further issue to be considered is whether by making Appellant a party the process of judicial review has become inappropriate and therefore the Originating Notice of Motion ought to be struck out.

At this stage I must state that from the facts and circumstances of this case the application against the Registrar of Companies alone appears good and regular as I consider her to be performing judicial or quasi judicial functions or in any event administrative functions and therefore susceptible to the process of judicial review. Indeed orders/reliefs (a) to (d) in the Originating Notice of Motion refer to and apply for her action to be "judicially reviewed". However the Appellant appears to be added as a party for the purpose of or in connection with order (e) in the originating Notice of Motion.

I shall reproduce the said order (e) for ease of reference. It reads:

> (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.*

Indeed it is accepted and rightly so by the Learned Judge that the process of judicial review would not lie against the Appellant (as a private entity carrying out private law activities) but the Appellant appears to be joined as a necessary party who would be naturally and directly affected by the process of judicial review and the reliefs and orders sought there under. Order 52 Rule 1 (2) of the High Court Rules permits an application for judicial review to contain claims in rule 1 (1) and (2) thereof in the alternative or severally. Order 52 Rule 5 (1) of the Rules enjoins the applicant for judicial review to serve the application on all persons named therein as being directly affected by it. In the instant case the Appellant is, and would surely be, directly affected by any order that may be made by the court in the judicial review application. Admittedly order 52 does not contain a definition of "person who is directly affected.." but I had cause to peruse part (order) 54 of the White Book 2005. This I am aware is not applicable in this jurisdiction but the portion/ passage I seek to refer to helps to define the expression "Persons directly affected" and the authors acknowledge that the definition

here is equally applicable to the similar expression in order 53 rule 5 (3) in the 1999 White Book (which is almost the same as our order 52 Rule 5(1). I therefore feel reasonably justified in calling in aid the White Book 2005. Paragraph 54.1.13 of the 2005 White Book states thus:

"Parties

The parties to the judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision action or failure to act is under challenge. An "interested party" is defined in r. 54.1(1)(f) as any person "who is directly affected by the claim". Under the former RSC O, 53r.5 (3), application for judicial review had to be served on persons directly affected and it is likely that the same definition of that term will apply to Pt 54. A person is directly affected if he is affected simply by reason of the grant of a remedy.... Examples of persons directly affected include the recipient of a planning permission where an individual seeks to challenge the lawfulness of the grant of planning permission. The grant of a remedy, such as the quashing of the decision to grant planning permission would directly affect the rights of the person with the benefit of the planning permission. The courts also have power to allow any other person to file evidence or appear at a judicial review hearing." See also Part (order) 54 Rule 1 (2) (f) of the White Book 2005.

The above therefore recognises that persons other than the applicant and the public body or authority carrying out public law functions could be made parties to the judicial review proceedings. Such parties would include for example persons who have the benefit of a planning permission, which is quite similar to the situation of the Appellant here who in my view has the "benefit" of the Registrar's approval of the change of name.

The above leave me with the impression that even if the Appellants were not originally named as Respondents in the ONM, they are clearly "persons directly affect "and would thus have to be served with the Originating Notice of Motion and could apply to be joined as interested parties. It is my view therefore that the Appellants were persons directly affected by the "judicial review" orders prayed for and that the injunction sought against them was a

consequential order naturally flowing and related to the substantive orders against the Registrar. For the above reasons I consider that ground 1 (and iv) of the appeal must fail.

GROUNDS ii & iv

I shall now move on to ground ii (and iv) of the Notice of Appeal. The Appellant's complaint here is that the Judge's conclusion that "in the instant case the most appropriate remedy is judicial review and not a full scale trial" in a case where private law rights are inextricably connected is not supportable in law. Counsel for the Appellant contends here that where private law rights are inextricably linked with public law rights the Respondent was not precluded from seeking the same remedies sought in the Originating Notice of Motion by the process of a Writ of Summons. And for this counsel for the Appellant relied on the case of ROY- V- KENSINGTON & CHELSEA AND WESTMINSTER FAMILY PRACTITIONER COMMITTEE [1992] 2 ALL ER 705 See judgment of Lord Bridge page 707-708 and that of Lord Lowry at page 728 730 of the Report. Counsel for the Appellant also referred to the case of ORIELLY v. MACKMAN [1982] 3 All ER 1225 and agreed with the opinion of Lord Diplock when he said (at page 1134 of the report) that:

"....it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the Court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action."

Counsel however submitted that the above was applicable in cases where only public law issues were involved. This appeared so be the consideration in the above cited case. Counsel went on to submit that in the instant case it was both public law and private law rights that are inextricably linked and that on the authority of the Roy Case (above)the Respondent could have proceeded by a writ of summons. He therefore submitted that it was wrong for the Judge to hold that "the most appropriate remedy was judicial review and not a full scale trial."

In the ORIELLY case the appellants who were prisoners serving terms had been disciplined by the Board of visitors and three of them issued originating summons and the fourth a Writ of Summons against the Board seeking declarations that decisions of the Board were null and void for failure to observe the principles of natural justice and for bias

respectively. The Board applied to have the actions struck out for abuse of process and the House of Lords held that as a general rule it was an abuse of process "*to permit a person seeking to establish that the decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action*".

The issue in the ORIELLY case seem to me to be purely public law rights to which the above dictum applied correctly. However not only was the dictum admitted to be a "general rule", but surely there is the question of what happens when private and public law rights are involved.

The ROY case however seems to suggest that where private law and public law rights exist ,a litigant having come by a Writ of Summons cannot be barred or have his writ struck out but may be allowed to seek the similar remedies (as in this ONM) by the process of a Writ of Summons.

There are some observations I wish to make as regards the Roy case. In as much as the case is relevant and extremely useful to the instant Appeal, I observe that in that case where private and public law rights were concerned the Defendant (committee) applied to strike out the writ so issued as an abuse of process. This must be distinguished from the instant case where it is the reverse i.e. judicial review process is employed and an application to strike it out as an abuse of process is being made.

The second observation is that the decision was that the Applicant in the Roy case must be allowed to proceed by the means (writ) already employed. It did not state clearly what would have happened if a judicial review process had been employed and there was an application to strike out the proceedings.

I also observe that in the Roy Case the court observed and accepted that private law rights dominated the proceedings. For my part I cannot say the same for the instant case. In my view public law rights seem to dominate the instant proceedings as most of the acts/omissions complained of were those of the Registrar's. See the Originating Notice of Motion and the supporting affidavits. The Roy case also recognised the need and desire to get rid of the rigidity and procedural technicalities and hardship on parties. Lord Lowry had this to say at page 730 of the Report.

"In conclusion, my Lords, it seems to me that, unless the procedure adopted by the moving party is ill-suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings."

Again in the case of IRC & ANOTHER V ROSSMINSTER LTD (1980) 1 ALL ER 80 I find the following dictum of Lord Scarman to be very helpful. (at page 104 of the Report).

"The application for judicial review is a recent procedural innovation in our law. It is governed by RSC Order 53 r 2, which was introduced in 1977. The rule made no alteration to the substantive law; nor did it introduce any new remedy. But the procedural reforms introduced are significant and valuable. Judicial review is now the procedure for obtaining relief by way of prerogative order, i.e. mandamus, prohibition or certiorari. But it is not confined to such relief: an applicant may now obtain a declaration or injunction in any case where in the opinion of the court "it would be just and convenient for the declaration or injunction to be granted on an application for judicial review". Further, on an application, the court may award damages, provided that the court is satisfied that damages could have been awarded, had the applicant proceeded by action. The rule also makes available at the court's discretion discovery, interrogatories and cross-examination of deponents. And, where the relief sought is a declaration, an injunction or damages but the court considers it should not be granted on an application for judicial review, the court may order the proceedings to continue as if they had been begun by writ.

Thus the application for judicial review, where a declaration, an injunction or damages are sought, is a summary way of obtaining a remedy which could be obtained at trial in an action begun by writ: and it is available only where in all the circumstances it is just and convenient. If issues of fact, or law and fact, are raised which it is neither just nor convenient to decide without the full trial process, the court may dismiss the application or order, in effect, a trial."

Here the RSC order 53 Rule 2(referred to in the Judgement of Lord Scarman) is similar to our order 52 rule 2 and Lord Scarman seems to recognise inter alia the following:

a) that the rule under consideration brought in some procedural reform and flexibility, and

b) Under the said rule (under judicial review process) the court can now "award damages provided that court is satisfied that damages could have been awarded had the applicant proceeded by action."

The above passage in the judgment of Lord Scarman and the above observations together with the passage in paragraph 54.1.13 of the 1995 White Book (cited earlier) fortify my view that in the instant case the Appellant could be made a party in these proceedings and that the relief sought against them (i.e injunction) could well be granted in the present (judicial review) proceedings. With respect to counsel for the Appellant, to say that the Respondent could come by Writ of Summons (See Roy Case) is not the same as saying that he cannot and ought not to be permitted to come by judicial review proceedings especially in the light of the authorities cited above.

Counsel for the Appellant referred to and relied on the case of MERCURY COMMUNICATIONS LTD V. DIRECTOR GENERAL OF TELECOMMUNICATION & ANOR 1996 1 All ER 575. Indeed this case recognises and accepts that in a case where private law and public law rights are concerned it may yet be suitable to proceed by writ of summons and here Lord Slynn went on to reject the suggestion that the issues in that case were only suited or "can only be ventilated by way of an application for judicial review". I am not sure how this advances the argument of the Appellant. Perhaps one would agree that generally in a case where public and private law rights are concerned it could well be suitable to proceed by writ of summons. But what are the peculiarities of the present case? In the present case indeed public law and private law rights are concerned but it is my view (and a view also held by the Judge) that public law rights clearly dominate. Here also the process already started is a judicial review process. The important questions here are: 1. In the present case is this process (judicial review) inappropriate? 2. And ought it be struck out as an abuse of process? The fact that another process may also be appropriate is of little significance especially in the light of the predominance of public law rights and the safeguards that judicial review process guarantee to an authority like the Registrar.

I must state here that an important difference between the judicial review process and the ordinary action (Writ/ Originating Summons) is the (traditional) safe

guards guaranteed in the former and these safeguards include the need for leave (which though is no longer required in our rules), limited time (speed) and the need to support the application with affidavit(s). In this regard therefore it is my view that perhaps it is easier to (successfully) allege an abuse of process where you proceed by writ when you could have come by judicial review than the reverse. And perhaps it is no surprise therefore that most of the cases cited in this Appeal are situations where an application is made to strike out the proceedings that were begun by writ. Understandably, the public bodies or authorities are more likely to complain of an abuse of process (when you proceed by action against them) as they would be deprived of the guaranteed safe guards that a judicial review process provides.

Again and rather significantly, the Mercury case seems to emphasise one salient point, that is to say, the court in these circumstances must concern itself with the overriding question of whether the proceedings adopted constituted an abuse of process. For my part and considering this guide provided in the Mercury Case and having regard to the predominance of the public law rights over the private law rights, I hold that the judicial review process was appropriate and not an abuse of process. For the above considerations ground ii (and iv) of the Appeal must fail.

GROUNDS III & IV

In ground iii the Appellant's complain was that the learned Judge was wrong in holding that the process of judicial review was the only process available to the Respondent to compel the Registrar to rescind, revoke or annul her own decision. Counsel for the appellant referred to page 285 of the Records and to the Judge's reference (with approval) to the case of R V. EPPING & HARLLOW COMMISSIONERS EX. P. GOLDSTRAW 1983 3 ALL ER 257, adding that the Learned Judge quoted with approval the dictum of Sir John Donaldson MR in the Epping Case when he opined that "it is a cardinal principle that save in the most exceptional circumstances (the jurisdiction to grant judicial review) will not be exercised where other remedies are available and have not been used"

In dealing with the contention I must firstly carefully peruse the words of the learned Judge which the Appellant alleges here to constitute the error. In paragraph 44

of the Appellants written submission the appellant referred the following words of the learned Judge (at page 288 of the Records)

"I am satisfied that in the instant case the most appropriate remedy is judicial review and not a full scale trial."

I could see some merit (in general terms) in the Appellant's contention that the Applicant/Respondent could have come by writ and that judicial review was not the only process available. But that is not to say that the learned Judge erred. I see and perceive the words of the learned Judge as saying (and correctly so) that "in the instant case" judicial review was the most appropriate (not the only) process available to the Applicant. He clearly appears to have considered the circumstances of the instant case including the view that public law rights predominated the proceedings . In fact on the same page 285 of the Record immediately following his words quoted above he went on to state:

> **"Save for the Applicant's tangential and oblique reference to the 2nd Respondent's failure to pass the appropriate Resolution sanctioning the change of name, there are no issues in dispute between the Applicant and the 2nd Respondent that would necessitate the issuing of a Writ of Summons. The complaint is against the conduct of the 1st Respondent and her decision-making process."**

Again it is clear that the learned judge had reviewed the circumstances of this case and held that judicial review was the most appropriate process and having regard to the conclusion that public law rights predominate I must say I do not disagree with him in this regard. However and most importantly it is my view that the process of judicial review is not inappropriate having regard to the predominance of public law rights and the flexibility and innovation of order 53 of the High Court Rules. Indeed I cannot find any reason for me to hold or describe the judicial review process as an abuse of process in these circumstances. I therefore do not find any merits in ground iii and so this ground most also fail.

In am aware of the powers of this court under the Court of Appeal Rules 1985 (particularly rules 31 and 32) as well as Rule 9 of order 52 of the High Court Rules

which include the power to convert the present process and order it to proceed as if it was begun by a writ of summons. I however do not deem it fit or necessary to involve these provisions in the instant case.

In the result the appeal is dismissed. The Respondent shall have the cost of this appeal such cost to be taxed.

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Hon. Justice E.E. Roberts, J.A.

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Hon. Justice S.A. Ademosu, J.A.

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Hon. Justice A. Showers, J.A