



[2018] JMSC. Civ 76

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 00357

IN THE MATTER of the Registrar of Companies

AND

IN THE MATTER OF an Application under section 353 (1) of the Companies Act for an Order directing SIMULTECH (JAMAICA) LIMITED to file returns

AND

IN THE MATTER of the COMPANIES ACT

BETWEEN THE REGISTRAR OF COMPANIES CLAIMANT

AND SIMULTECH (JAMAICA) LIMITED DEFENDANT

IN CHAMBERS

Ms. Heather May Sutherland instructed by Ferguson & Sutherland for the Claimant

Mr. Gordon Robinson instructed by Mrs. Winsome Marsh & Co. for the Defendant

Heard: April 24 and May 9, 2018

Company Law - Duty of company to file annual returns - Whether non-operational company obligated to file annual returns - Section 121 of the Companies Act

CORAM: A. NEMBARD, J (AG.)**BACKGROUND**

- [1] By way of a Fixed Date Claim Form filed on 28 January 2016, the Claimant, the Registrar of Companies, claims against the Defendant, Simultech (Jamaica) Limited, (Simultech), for an Order that:-
- (i) The Defendant, Simultech (Jamaica) Limited and its Directors file with the Registrar of Companies within thirty (30) days of the date of the service of the Order herein, Annual Returns, the Company having a share capital, for the years 2006-2013;
 - (ii) Costs to the Claimant to be taxed or agreed.
- [2] The Fixed Date Claim Form is supported by the Affidavit of Toni-Ann Stewart, which was also filed on 28 January 2016.
- [3] In her Affidavit, Miss Stewart states, at paragraph three (3), that Simultech was incorporated on 23 September 2005, under the Companies Act, as a company limited by shares. The Certificate of Incorporation in respect of Simultech is exhibited to the said Affidavit as exhibit TS1.
- [4] The registered office of Simultech is indicated as 7 Waterloo Avenue, Kingston 10, Half Way Tree P.O., in the parish of St. Andrew.
- [5] Simultech's Director is named as Mr. Christopher J. Armond. Exhibited to Miss Stewart's Affidavit, as exhibit TS3, is the Particulars of Directors/Managers.
- [6] Miss Stewart testified that, to the best of her knowledge, information and belief, after its incorporation, Simultech commenced carrying on business and that based on her own investigations and observations Simultech is still doing so.
- [7] In or around August 2014 Miss Stewart indicates that she conducted a search at the Companies Office of Jamaica, which said search revealed that Simultech had failed to file its Annual Returns for the years 2006-2013.

- [8] On 28 August 2014 Miss Stewart indicates that she served a notice at Simultech's registered office requiring that it files its annual returns for the years 2006-2013.
- [9] Notwithstanding the service of that notice, the annual returns for the years 2006-2013 have not been filed.

THE DEFENDANT'S POSITION

- [10] Mr. Christopher Armond has filed an affidavit in response. That affidavit was filed on 9 November 2016.
- [11] In that affidavit Mr. Armond states, at paragraph three (3), that the purpose of incorporating Simultech, with other beneficial shareholders who reside abroad, was to pursue the business of lottery games but that, due to the inability to attract investors, Simultech never commenced business.
- [12] Mr. Armond further states in his said Affidavit that Simultech has never done any business and that he has never received any notices from the Companies registry regarding Simultech.

ISSUES

- [13] The issues for resolution by the Court are:-
- (i) Is Simultech obligated to file annual returns for the period 2006-2013?
 - (ii) Has Simultech been non-operational since its incorporation and was it non-operational during the period 2006-2013?
 - (iii) Is a company obligated to file annual returns despite being non-operational?

THE LAW

[14] Section 121 of the Companies Act (the Act) provides:-

“Every company shall deliver to the Registrar successive annual returns each of which is made up to a date not later than the date which is from time to time the return date...”

[15] The Act defines a company, at section 2, as meaning:-

“...a company formed and registered under this Act or an existing company.”

[16] Section 337 (1) of the Act reads as follows:-

“Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation.”

(2) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter and stating that no answer thereto has been received and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette and in a daily newspaper circulating in the Island with a view to striking the name of the company off the register.”

[17] The Court was referred to the authority of **Waldron v Liege Investments PTY Limited** [1977] V.R. 492, in which the Defendant Company was convicted of having failed to lodge its annual return as required by section 158 of the Companies Act 1961.

- [18]** Section 158 (4) provides that the return shall be lodged within one (1) or (in certain cases) two (2) months after the annual general meeting. The company had held no annual general meeting during the year in question.
- [19]** It was held that if a company fails to lodge an annual return in respect of a calendar year by 31 January in the following year an offence is committed against section 158. It is not a necessary element of the offence to also prove that the company had held an annual general meeting during the year notwithstanding the fact that if an annual general meeting has not been held during the year, it is not possible for the company to prepare an annual return containing the particulars prescribed by the Act.
- [20]** It has been submitted on Simultech's behalf that it has never conducted any business. It was further submitted by learned Counsel Mr. Gordon Robinson, as the Court understood the submissions, that the purpose for which the filing of annual returns is required cannot properly be realized in the instant matter.
- [21]** The Court was provided with a document that is posted on the website of the Companies Office of Jamaica and entitled "Compliance", which indicates the purposes for the request to file annual returns.
- [22]** These purposes are indicated as being to identify changes in the ownership or management structure of a company during the period for which the return is made and to identify changes in the value of shares and share transactions during the period for which the return is made.
- [23]** It was submitted that it could not be said that Simultech, not having conducted any business in Jamaica, has had changes to its management structure or in the value of its shares or share transactions.
- [24]** Learned Counsel Ms. Heather May Sutherland, on the other hand, has submitted, on behalf of the Registrar of Companies, that the Act creates an obligation on the part of every company to file annual returns and that it makes no distinction between companies that are operational and one that is not.

- [25] Learned Counsel Miss Sutherland submitted further that section 337 of the Act gives the Registrar of Companies a discretion to remove a company from the Register of Companies and does not impose a duty so to do. Simultech cannot now seek to rely on this said discretion to absolve itself of the obligation imposed by section 121 of the Act, it was submitted.
- [26] It was further submitted that, in any event, the failure to file annual returns in and of itself, does not amount to reasonable cause to provoke the Registrar of Companies to act under section 337 of the Act. This, it was submitted, is particularly so when one considers the potential consequences of removing a company from the Register of Companies where the company has not initiated such a removal.

FINDINGS

- [27] It is clear from a reading of section 121 of the Act, that every company has a duty to file annual returns. The legislation uses the word 'shall' which indicates that the obligation referred to is mandatory.
- [28] Simultech accepts that it has not filed its annual returns for the years 2006 to 2013.
- [29] On a careful reading of the Act, the Court finds that the explanation that Simultech has been non-operational is not one to which it can properly have regard in order to absolve Simultech of its obligation to file its annual returns. Nor would Simultech be able to rely on the discretion given to the Registrar of Companies, pursuant to section 337 of the Act, for its failure to fulfil its obligation to file its annual returns.
- [30] Learned Counsel Ms. Sutherland has urged the Court to have no regard to the submission that Mr. Armond has been resident outside of Jamaica during the period for which the annual returns should have been filed. This, in light of the fact that Simultech was incorporated at a time when Mr Armond was also outside of the jurisdiction.

- [31] The Court finds that Simultech has in fact failed to file its annual returns for the years 2006-2013. This in circumstances where the Act mandates every company to file annual returns, evidenced by the use of the word 'shall' in section 121 of the Act.
- [32] The investigations that Miss Stewart indicates she has carried out are immaterial in light of this obligation for every company to file annual returns as is mandated by section 121 of the Act.
- [33] The explanation proffered by Simultech could, at its highest, go towards mitigation. The best that this Court can do in the circumstances is to allow Simultech time within which to comply with section 121 of the Act and within which to pay the penalty fees.
- [34] Simultech's remedy is also provided by the Act. The Act establishes a process by which a company that is not operational can seek to have its name removed from the Register of Companies.
- [35] This Court would strongly encourage Simultech so to do should it remain non-operational.

CONCLUSION

- [36] In concluding, the Court finds that Simultech is in breach of section 121 of the Act for having failed to file its annual returns for the years 2006-2013. The duty to file annual returns is one which the Act makes mandatory for every company and is evidenced by the use of the word 'shall'. Simultech's explanation that it has not been operational and that its Director has been living outside of Jamaica is not one that the Court can properly consider with a view to absolving it of its statutory obligation. At best, this explanation would amount to mitigation. Simultech cannot rely on the discretion given to the Registrar of Companies under section 337 (1) of the Act.

[37] In light of the foregoing Simultech is to file its annual returns for the period 2006-2013.

DISPOSITION

[38] It is hereby ordered that:-

- (i) The Defendant, Simultech (Jamaica) Limited and its Directors are to file with the Registrar of Companies, its annual returns for the years 2006-2013;
- (ii) The said annual returns for the period 2006-2013 are to be filed on or before 9th October, 2018.
- (iii) Costs to the Claimant to be taxed if not sooner agreed;
- (iv) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders herein.