EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2018 /0322

BETWEEN:

1. CONSTANTIUS FRANCOIS
2. GREGORY EDWARD
3. FELIX DUNCAN
4. NORBERT CHARLES
5. ANTHONY ST. JULES
6. TREVOR TRIM
7. FRANKIE GUSTAVE

Claimants

And

1. LUCIEN JOSEPH
2. LAURIANUS ANTOINE
3. HUMBERT GIDHARRY
4. FIRMUS POPO
5. MATTHEW HUTCHINSON
6. GUERY YOTTE
7. HILDERTH CHARLES
8. HOLIDAY TAXI LIMITED

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

Appearances:

Mrs Wauneen Louis-Harris for the Applicants/ Claimants
Mr. Alberton Richelieu with Ms Alberta Richelieu for the Respondents/ Defendants

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2018: November 27
December 4
2019: March 6

JUDGMENT

[1] ST ROSE-ALBERTINI, J. [Ag]: The claimants here are shareholders of a locally registered private entity, the Holiday Taxi Limited ("the Company"). They have filed this action against the Company and other defendants who are shareholders and directors on the Board of Directors ("the Board"), seeking the following redress:-

1. determination of a controversy with respect to the election and appointment of directors to the Board;
2. an order restraining the directors from acting pending determination of the dispute;
3. a declaration that the result of the disputed election is null, void and of no effect;
4. an order requiring that a new election be held and giving directions for the management of the business and affairs of the Company until such election is held or appointment made;
5. an order restraining the board from holding a general meeting on 7th July 2018; and
6. that the defendants be ordered to pay the costs of this application.

[2] The controversy essentially concerns the election of directors at a biennial general meeting of shareholders held on 7th November 2015 (the "November 2015 meeting") which the claimants say was unlawful because of the absence of a quorum to convene the meeting and the election was not held in conformity with the terms of the bye-laws of the Company. It is alleged that since then the directors have engaged in a number of unlawful acts which include registration of amended bye-laws without the approval of shareholders, the expulsion of shareholders from the Company and short payment of a death benefit, without any explanation of the allocation of the balance of the funds.

[3] The defendants vigorously deny all the allegations and contend that there were no procedural irregularities at the November 2015 meeting and no objection was raised concerning the election of directors. They aver that the current bye-laws have been ratified by a majority of shareholders at general and special meetings and since then the claimants have acquiesced with the actions of the Board and are estopped from bringing this action some three years later, by virtue of the doctrine of laches.

[4] The action is brought pursuant to section 133 of the Companies Act (the "Act").[1] It states:-

> "133. Court review controversy
>
> *(1) A company or a shareholder or director thereof may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the company.*
>
> *2) Upon an application made under this section, the court may make any order it thinks fit including—*
>
> *(a) an order restraining a director or auditor whose election or appointment is challenged from acting, pending determination of the dispute;*
>
> *(b) an order declaring the result of the disputed election or appointment;*
>
> *(c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the company until a new election is held, or appointment made; and*
>
> *(d) an order determining the voting rights of shareholders and of persons claiming to shares." [Emphasis added]*

[5] The section permits an application to the Court for various court orders but is silent on the procedure for initiating the proceedings. The claimants have done so by way of an application for interim relief under Part 17 of the Civil Procedure Rules 2000 (the "CPR").

[6] When the matter first came on hearing the defendants willingly agreed to provide an undertaking to the Court that the general meeting of shareholders scheduled for 7th July 2018 would be postponed to a date after determination of the substantive dispute. Recognizing that the need for an interim injunction to restrain the Board from convening the meeting became otiose, the Court determined that the matter should progress to a hearing of the substantive issues. By order dated 31st July, 2018 directions were given for an expedited trial.

The Issues

[7] The issues to be resolved are as follows:-

[1] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

1. Did the claimants commence the proceedings by the appropriate procedure?

2. Were the current directors lawfully elected?

3. If the answer to question 2 is no, to what relief if any, are the claimants entitled?

Background

[8] Some of the parties are former members of the Holiday Taxi Co-operative (the "co-operative") which was registered under the Co-Operative Societies Act[2]. The co-operative was dissolved and to replace it the Company incorporated on 8th July 2011 as Company No. 2011/C200.[3] The members of the co-operative became ordinary shareholders of the Company and continued the business of providing taxi services and other tourism/ hospitality related services on the island.

[9] The inaugural Board was appointed on 23rd July, 2011. Following this, bye-laws to govern the affairs and activities of the company were formulated and registered at the Registry of Companies and Intellectual Property (the "Registry") on 16th April, 2012 ("the 2012 bye-laws")[4]. The first biennial general meeting of shareholders was held on 26th October, 2013 ("the October 2013 meeting"). At that meeting loans made to members through the former co-operative were written off and directors were elected and appointed to the Board and Disciplinary Committee for the period 2013 to 2015. A total of 93 shareholders attended the meeting and the minutes together with record of attendance were filed at the Registry on 16th January, 2014[5].

[10] On 7th November, 2015 the second biennial general meeting of shareholders was convened ("the November 2015 meeting"). At that meeting, of the seven directors on the Board, three were declared eligible for re-election, elections were held and a new Board

[2] Cap.12.06 of the Revised Laws of St. Lucia.
[3] See Exhibit HT1
[4] See Exhibit HT2
[5] See Exhibit GM7

appointed for the period 2015 to 2017. At that meeting 83 shareholders were present. The attendance record is attached to the minutes of the meeting[6].

[11] On 23rd June, 2016 amended bye-laws were registered ("the 2016 bye-laws")[7] to replace the 2012 bye-laws and the third biennial general meeting fell due in November 2017. The defendants say that the Auditor's Report was late, which caused the meeting to be delayed until early 2018. The Board convened this meeting on 7th April, 2018 ("the April, 2018 meeting"), when uproar ensued among shareholders, resulting in premature adjournment of the meeting. At that meeting 99 shareholders were present. The attendance record is attached to the minutes of the meeting[8].

[12] The Board subsequently issued a notice to continue the meeting on 7th July, 2018 whereupon the claimants filed this action to restrain the Board from convening the meeting and sought further orders and declarations.

Did the claimants move the court by the appropriate procedure?

[13] Counsel for the defendants Mr Alberton Richelieu, took the preliminary point on procedure which has become somewhat academic but will be addressed briefly, as the Act contains other sections which permit similar applications as originating actions.

[14] Mr Richelieu submitted that the manner in which the claimants commenced the proceedings made it a nullity. The application was made *inter partes* presumably under Part 17 of the CPR but several of the remedies sought were declaratory in nature and could not be addressed under this Part. If the claimants wanted to restrain the defendants from having the meeting an *ex parte* application could have been made for that purpose and then leave it to the defendants to decide if they wished to have the order discharged. A claim form would then follow in relation to the substantive matter, which concerns the validity of an election. Counsel held the view that the statement "*may apply to the Court*"

[6] See Exhibit GM9
[7] See Exhibit HT4
[8] See exhibit GM10

does not mean that a litigant should approach the court with complete disregard for the rules of court. A party may apply to the Court in two ways, either by way of application under Part 17 of CPR for interim remedies with a claim to follow, or by way of claim form as stated in CPR 69C3.1, which governs proceedings in the commercial division. The application did not seem to conform to either, as all the remedies under section 133 were being canvassed on an interlocutory application.

[15] Counsel for the claimants Mrs Wauneen Louis-Harris felt that whether a matter is commenced by notice of application or claim form, the courts generally regard substance over form. She cited several authorities in support, leading the charge with Planviron (Caribbean Practice) Limited et al v Ferdinand James[9] There a judge at first instance had failed to deal with the substance of the appellants claim and dismissed it on the basis that the wrong procedure was utilized. The matter ought to have commenced by way of petition rather than application under the CPR. The Court of Appeal in allowing the appeal against the judge's decision, made the following pronouncement:-

> *"In the case of Cropper v Smith (1884) 26 Ch D. 700, Bowen LJ said (at p. 710) that it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their case by deciding otherwise than in accordance with their rights. He went on to say that he knew of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for discipline, but for the sake of deciding matters in controversy, and granting the necessary amendment is not a matter of favour or grace"*

[16] The principle was restated by the Privy Council in Texan Management Limited v Pacific Electric Wire & Cable[10] where the Lordships agreed that in the pursuit of justice procedure is the servant and not the master. More recently in Matthew Thomas v Ralph

[9] SLUHCVAP2013/ 0005-Digest of Decisions-December 2013 at page 50
[10] [2009] UKPC 46

Gonsalves[11] the Court of Appeal reiterated that the use of a wrong form for bringing a claim does not require a judge to proceed on that basis. The judge has the power under CPR 26.9 to put matters right and is entitled to treat a fixed date claim as an ordinary claim, without expressly stating so. What really matters is the substance and a claim brought in the wrong form makes it no different in substance to the claim which it is.[12]

[17] In a last ditch effort Mr Richelieu cited the case of Anthony Hendricks & Commissioner of Customs[13] as one instance where the Jamaica Court of Appeal took the position of form over substance, in somewhat similar circumstances. However he quickly added that the case is currently on appeal to the Privy Council and conceded the point.

[18] There is no contest that the authorities cited by Mrs Harris have settled the law on the matter, in this jurisdiction. In the administration justice the courts are more concerned with substance over form. Thus the procedural flaw in initiating the instant proceedings would not be fatal. In the circumstances, the Court has dealt with the matter as a fixed date claim. The process was not detrimental or prejudicial to the defendants who when served, responded accordingly.

[19] Notwithstanding, I consider it necessary to signal at this juncture, that applications under section 133 and other similar sections of the Act should properly commence by claim or fixed date claim, with interlocutory applications addressed under Parts 11 or 17 of the CPR, as the case may be. There was absolutely no reason for the procedure here to have been conflated in the manner that it was.

Trial

[20] The claimants deposed several joint affidavits to support their case. At trial the first claimant Constantious Francois ("Francois") and the second claimant Felix Duncan ("Duncan") were cross examined.

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[11] SVGHCVAP2014/0009 delivered on 6th April, 2016, unreported

[12] See para 1 of the headnotes

[13] Civil Appeal No.24/2014 [2018] JMCA Misc 1

[21] The first defendant Lucien Joseph ("Joseph"), fourth defendant Firmus Popo ("Popo") and Henry Inglis ("Inglis") deposed affidavits in answer and were cross examined at trial. Joseph is the President of the Board, Popo is the Company Secretary and Inglis is a shareholder and Chairman of the Disciplinary Committee.

[22] At the commencement of trial Mr Richelieu drew to the Courts attention that the exhibits tendered by Popo were mistakenly marked with the initials GM instead of FP.

The Claimants Evidence

[23] The claimants deposed that the co-operative was dissolved by some of the defendants without approval of the Registrar of Co-Operatives or the knowledge and consent of the members. The Company replaced it and soon after the 2012 bye-laws were registered to govern the affairs of the Company. Francois says in November 2015 he was handed a copy of draft bye-laws ("the 2015 draft bye-laws")[14] by an employee of the Company, when it came to his attention that Joseph intended to implement new bye-laws. In the 2015 draft bye-laws clause 13.6 which concerned the formation of the Board was amended to require that half, instead of all directors, should become eligible for re-election every two years. The claimants challenge the legality of the last election held at the November 2015 meeting, on the premise that the meeting and election were governed by the 2015 draft bye-laws, which had not been ratified by shareholders. They contend that the current directors hold office unlawfully and the Board should be dissolved. Francois stated that he informed Joseph on these matters at a special meeting of shareholders held on 9th April 2016 ("the April 2016 meeting") but his complaint was ignored.

[24] The claimants say that the 2015 draft bye-laws were subsequently registered as the 2016 bye-laws to replace the 2012 bye-laws, without their consent. They complain that there is no record of the number of shareholders who were present at the meetings at which the defendants claim that these bye-laws were ratified. There is no account of the number of

[14] See Exhibit HT3

shareholders who voted for or against it. They aver that a number of significant amendments were made in the 2016 bye-laws, which adversely affect their rights as shareholders. They include the following:-

1. In the 2012 bye-laws clause 13.6 states

   "Tenure: A Director shall be elected to the Board for a period of two (2) years and such period shall be known as a term. Directors shall be eligible for re-election at the end of the term."

   In the 2016 bye-laws clause 13.6 as amended states:

   "Tenure: A Board shall be elected for a period of two (2) years and such period shall be known as a term. One half of the Board shall seek re-election at the end of the term."

2. In the 2016 bye-laws a new qualification is inserted into clause 6.19 that "The Company shall have a first and paramount lien upon all shares registered in the name of any shareholder."
3. Clause 5 which deals with the Disciplinary Committee has been revised substantially, with several new sub-clauses inserted.

[25] The claimants deny that a motion was moved and carried at a special meeting of shareholders held on 8th February 2014 ("the February 2014 meeting") to amend clause 13.6 and assert that in any event there was no quorum to convene this meeting. They state that the Company is 180 shareholders strong and pursuant to clause 12.2 of the 2012 bye-laws it is necessary to have 40 shareholders, which is one-fifth of the total number of shareholders, to constitute a quorum for meetings. Therefore, the 29 shareholders who the defendants say voted to adopt the amendment could not have constituted a quorum.

[26] The claimants further state that at the April 2016 meeting only three elements of the 2012 bye-laws were ratified in relation to clauses 5.3 and 5.4 and all remaining amendments in the 2016 bye-laws have not been ratified. Francois admitted that at the April 2016 meeting he was elected to serve on the Disciplinary Committee for a term of 2 years, but he says the committee is separate and apart from the Board and does not answer to the Board or

the Company. He agreed that at the same meeting shareholders discussed strengthening the Disciplinary Committee and amendments were made to the Company's Code of Conduct, however the latter is not part of the bye-laws. He testified in cross examination that during his tenure on the committee he challenged the validity of the Board several times but did not file a claim because he did not have the finances to do so. He simply said what he had to, at the meetings.

[27] The claimants deposed that the third biennial general meeting of shareholders fell due in November 2017, however by memorandum dated 22nd March 2018[15] Popo scheduled this meeting for 7th April 2018 ("the April 2018 meeting"). They claim that the memo was not communicated to them personally and they were not given 10 days' notice as required by the bye-laws. At this meeting the fifth claimant, Anthony St. Jules ("St. Jules") moved a motion of no confidence in the Board, which was seconded by the fourth claimant Norbert Charles ("Charles") and another shareholder Chad Eugene. Following this Francois moved a motion that election of directors be done by secret ballot, which was immediately seconded by more than 7 shareholders. Joseph refused to proceed with the motions, in breach of clause 12.1(e) of the bye-laws, which state that election of officers shall be held by ballot. When they insisted on a vote by secret ballot, Joseph adjourned the meeting and walked out.

[28] They claim that by a further memorandum dated 20th June, 2018[16] shareholders were summoned to a continuation of the third biennial general meeting scheduled for 7th July 2018. This memo contained an agenda item which read *"Amendment to Bye-laws (section 6.19, Part 12.1(a) and 12.1(j) inserted)"*. They are of the view that the Board intends to make further changes to the bye-laws without providing any information on these proposed changes or how they will affect shareholders. They are adamant that the two motions moved at the April 2018 meeting ought to be considered at a continuation meeting.

[29] They complain further that the Board has embarked on a campaign to expel shareholders who oppose its legitimacy and to date have unlawfully expelled three shareholders.

[15] See Exhibit HT5
[16] See Exhibit HT10

Between April and June 2018 letters were issued to the sixth claimant Trevor Trim ("Trim"), seventh claimant Frankie Gustave ("Gustave") and one other shareholder Anthony Richards ("Richards") expelling them from the Company[17]. They view these actions as unlawful because the Board itself is not lawfully constituted and its decisions are void and of no effect. Further the Board has failed to follow the dictates of clause 6.19 of the bye-laws which state that a first letter must be written to a shareholder requesting payment of an outstanding debt within thirty (30) days. This must be followed by a second letter, with a further thirty (30) days for settlement. It is only after two letters have been issued and a period of 60 days has elapsed and the debt remains unpaid, that the Board may by a two thirds majority, vote to expel a member.

[30] It is their belief that clause 12.1(a) of the bye-laws entitles every shareholder to attend general meetings and to vote on all issues raised at such meetings. They fear that those who have been expelled will be unable to participate and vote at the next general meeting and be wrongfully denied the right to do so. They consider this to be unfair, as they have all invested heavily in the Company and any decisions taken will affect them as shareholders.

[31] The claimants complain of mal-administration of certain financial arrangements with the Company. In particular, the operation of a death benefit whereby each shareholder contributes a levy of $50.00 on the death of a family member or fellow shareholder and the cumulative sum is paid as a benefit to the shareholder who has suffered the loss or to the family of a shareholder who has died. They aver that with 180 shareholders, the President collects a total of $9,000.00 in levies. However the Board has been paying out $7,000.00 as the benefit and is withholding the balance. They do not know what has happened to that money, which should have accumulated over time. Francois admitted in cross examination that he received the benefit but was short paid. He stated that Joseph has taken a decision to refuse payment to shareholders who have not paid their monthly dues or the levy. They disagree with this action because the shareholders have agreed that the benefit should be paid after deduction of any outstanding dues and levies. They are fearful that the defendants have been engaging in conduct which is detrimental to the Company and have

[17] See Exhibits HT6-9

failed to provide a proper account of the finances of the Company as required by law. They allege that several shareholders are reluctant to speak out at meetings for fear of victimization by the President.

[32] In their affidavits they have asked the Court to issue an order dissolving the Board and a declaration that the 2016 bye-laws is null and void and the registration thereof be cancelled. Further that a perpetual injunction be granted restraining the Board from convening a continuation of the aborted third biennial general meeting and that new elections be held in conformity with the 2012 bye-laws. They also request a declaration that the shareholders eligible to vote at the next general meeting shall be the shareholders listed at the Registry as at November 2015.

The Defendants Evidence

[33] The defendants deny that the co-operative was dissolved without the approval of the Registrar of Co-operatives. Joseph deposed that the consent of members was obtained in writing. Francois along with 113 other members of the co-operative signed the agreement to transform co-operative to a limited liability company. Edward and Duncan were among the members who signed the agreement. A copy of this agreement and the signature pages exhibited confirm that Francois was in fact a signatory[18].

[34] Popo deposed that based on a letter from Alberton Richelieu Chambers to the Registrar of Co-operatives and the Registrar's reply, the issue of dissolution was addressed conclusively when the Registrar agreed to proceed without delay to dissolve the co-operative pursuant to section 158 of the Co-Operatives Societies Act[19]. The section outlines the procedure to be followed for dissolution by members. Joseph testified that all members acknowledged the greater benefit to be derived from the Company and a resolution was passed to transfer members' shares from the co-operative to the Company. Further the fourth and fifth claimants Charles and St. Jules were never members of the co-

[18] See Exhibit GM4
[19] See ExhibitGM5-6

operative and were not involved in the transformation. St Jules became a shareholder in the Company in 2014 and Charles joined in 2017. Francois in a reply affidavit confirmed this as correct.

[35] The defendants say that the February 2014 meeting was convened to update shareholders of the Company's progress. Francois, Edward, Duncan and Trim were present when the amendment to clause 13.6 was moved by Ricky Charlemagne (now deceased) and 29 shareholders voted in favour, with 0 against. Joseph was resolute that a quorum was ascertained and the amendment was ratified at that meeting. In cross examination he explained that the main reason for the amendment was because the Board realized that when an entire board is changed that poses a problem with continuity of business with the Company's associates. If four directors remained there would be familiarity and continuity and the Company would not lose any of its business. There is no record of attendance for that meeting but Popo says the minutes were read and confirmed and signed by Edward and another shareholder.

[36] Popo deposed that at the November 2015 meeting Francois was present and raised no objections to the election of directors. He and Joseph both said that the meeting was governed by the 2012 Bye-laws, however election of directors was held in accordance with the amended clause 13.6, which had already been ratified by shareholders at the February 2014 meeting. Popo deposed further that by memorandum dated 8th December, 2015 the 2015 draft bye-laws were circulated to shareholders[20]. That document contained all the proposed amendments and the Board requested that shareholders submit the clauses they wished to review, along with proposed changes, in writing.

[37] In cross examination Popo clarified that he was not a shareholder in 2014. It was only after he was offered the position of Secretary in February 2015 that he became a shareholder. He was subsequently elected as a director and appointed to the Board at the November 2015 meeting. At that meeting he acted on the instructions of the Board in relation to the amendment to clause 13.6 for the election. As Secretary he has possession and control of

[20] See exhibit LJ1

the corporate records of the Company and he has furnished all relevant documents as exhibits.

[38] The defendants deny that the 2016 bye-laws were registered without the approval of shareholders. They aver that the April 2016 meeting was convened to inform shareholders of the Boards intentions concerning all amendments contained in the 2015 draft bye-laws. Francois was present at the meeting and never raised any issue concerning illegality of the Board. Joseph and Popo both said that all amendments were confirmed by the shareholders by ordinary resolution, at that meeting and thereafter the 2016 bye-laws were registered in June 2016. In their view there were no procedural irregularities as the amendments were confirmed by the majority of shareholders who attended the meeting.

[39] Inglis deposed that he was present at the April 2016 meeting when resolutions were passed to strengthen the powers of the Disciplinary Committee and the Code of Conduct[21]. In cross examination he stated that there was a quorum, with 50 to 60 shareholders present. He was aware of this because the President said so at the start of the meeting. At that same meeting Francois was nominated and accepted to serve on the Disciplinary Committee. Subsequently a joint meeting of the Board and Disciplinary Committee was held on 15th May, 2016 to ensure that the Board and committee worked together and committee members were reminded that the Board is the governing arm of the Company[22]. He, Inglis was appointed Chairman of the Disciplinary Committee at a meeting held in August 2016[23]. At the last meeting of the Committee held on 21st July, 2017 Francois was present and raised no objection to the amended bye-laws on disciplinary matters and is aware that all amendments were confirmed by shareholders[24].

[40] The defendants agree that the third biennial general meeting was due in November 2017. It was not scheduled because the Auditor's Report which is an essential component of that meeting was not available. This was communicated to all shareholders and the majority agreed to delay the meeting. No one complained at that time. Popo and Joseph both say

[21] See Exhibit HI2
[22] See Exhibit HI1
[23] See Exhibit HI3
[24] See Exhibit HI5

that the memorandum of 22nd March, 2018 giving notice of the April 2018 meeting was posted at all stations from which the Company operates, as it is impracticable to personally hand each shareholder with notification of meetings. Everyone received 10 days' notice as required and in any event, Francois who says he did not receive the notice attended the meeting.

[41] Popo testified that amendments to the 2016 bye-laws were included as an agenda item for discussion for the April and July 2018 meetings, to obtain the views of shareholders on whether the proposed changes were likely to affect them adversely of beneficially. Joseph testified that the Board furnished shareholders with all the necessary information and circulated the amendments along with the memo of 22nd March 2018. In particular the insertion of clause 12.1(j) was intended to ensure that shareholders repay debts owed to the Company and the intention was to have these matters ventilated at the general meeting[25]. Regrettably, these amendments have not been addressed as the meeting is in abeyance.

[42] Joseph deposed that he was in the process of reading the President's Report at the April 2018 meeting, when he was rudely interrupted by the mover of a no confidence motion. He informed Francois that the motion was illegal, but Francois insisted that it was constitutional, based on the advice he had received from his lawyer. Joseph and Popo both say that Joseph asked those in agreement to indicate by show of hands. Of the 99 shareholders present only 12 did so[26]. Upon realizing that they were in the minority the claimants created chaos and behaved in an unruly manner. Joseph testified that the meeting came to an abrupt end before addressing election of officers and at no time was a motion moved for election of directors by secret ballot.

[43] The defendants deny that Trim, Gustave and Richards were expelled from the Company for challenging the legitimacy of the Board or for opposing the Board's actions. Popo deposed that the expulsions were on account of failure to repay loans borrowed from the Company. Demand was made in accordance with the bye-laws and they refused to pay.

[25] See Exhibit HT5
[26] See Exhibit GM10

These decisions were taken by the Board in accordance with the bye-laws and remain valid, as they have not been appealed or reviewed[27]. The defendants further say that Trim and Gustave have no locus standi in the affairs of the Company or these proceedings, as they are no longer shareholders and have not come the Court with clean hands, having failed to disclose the real reason for their expulsion.

[44] The defendants also deny the complaints of mismanagement of the finances of the Company. Joseph deposed that a shareholder pays an initial fee of $4000.00 upon approval of membership and thereafter monthly dues of $50.00 towards operational expenses. The dues collected amounts to $53,000.00 per annum but it costs $93,000.00 per annum to run the Company. The shortfall is derived from investing in the purchase of buses which are used by the Company for land tours, contracts with Sky Rides and the various cruise lines and other business that the Company negotiates. He stated that the Board provides the shareholders with annual financial statements and an Auditor's Report, at every biennial general meeting. These documents are subsequently filed at the Registry. At every quarterly meeting a Treasurer's Report on the accounts of the Company is circulated to shareholders in advance of the meeting. Currently there is a completed audit of the finances of the Company, prepared by the Company's auditor Mr. Mario Lendor.

[45] Concerning the death levy, Joseph deposed that it started as a distress fund to assist shareholders in time of need. The fund was being abused and shareholders took the decision to convert it to a death benefit paid upon the death of a shareholder or registered beneficiary. To fund the benefit each member contributes a levy of $50.00 when a death occurs. All matters concerning the levy were discussed and agreed by shareholders at the October 2013, November 2015 and February 2014 meetings. The Company is experiencing great loss as shareholders are delinquent with payment of the levy, yet when the need arises the Company is expected to pay the benefit. He stated that to date shareholders cumulatively owe the Company $54,127.25 in outstanding levies[28] and contrary to what the claimants have said the levy is not collected by him as President but

[27] See Exhibits GM2-3 and Minutes of Board Meetings of 30th May and 22nd June, 2018
[28] See Exhibit LJ5

by the Company and held in trust for shareholders, in account No. 7100386 at the Bank of Nova Scotia. He is not a signatory to that account and has never refused to pay the benefit. The shareholders have failed to understand that when levies are not paid in a timely manner or at all, it places severe financial strain on the Company. It is for this reason the Board took the decision to withhold a portion of the benefit which is deposited to the account, in order to generate a fund to facilitate timely payment of the death benefit. Joseph deposed that Francois is the main perpetrator of non-payment, despite having been a recipient of the benefit and has been encouraging other shareholders to do the same.

[46] The defendants assert that the claimants are disingenuous and have waited almost 3 years after the November 2015 election to complain of irregularities. Popo and Joseph both said that the claimants concerns are misguided and the conduct of Francois in particular, has been designed to disrupt the business of the Company. He served on the Disciplinary Committee for over two years and benefited from the death levy without complaining. They both say that the Board has conducted the affairs of the Company with due care and diligence and has always acted in the best interest of the Company.

Were the current directors lawfully elected?

[47] On this issue the claimants' main contention is that election of directors was held on the basis the 2015 draft bye-laws and that failure to follow the dictates of the 2012 bye-laws rendered the election of directors and their appointment to the Board a nullity. Mrs Harris submitted that section 13.6 of the 2012 byelaw clearly states that a term is for 2 years and all directors will be eligible for re-election at the end of the term. She submitted that the reason is to allow democracy to prevail in the election process and is to be contrasted with the amended clause 13.6 which says that half of the board will remain and half will seek re-election. Counsel submits that the latter hinders the democratic process in a company of this nature. The defendants seek to support the flawed process by relying on a resolution passed at the February 2014 meeting. She calls it a curious meeting and questions whether a quorum was ascertained to convene the meeting. Joseph who has

been involved in the co-operative and the Company for well over 25 years did not know what a quorum meant and it is for the defendants to show that it was attained, to validate any resolution passed at that meeting. They have failed to do so by not providing evidence of the number of persons who attended the meeting, as there is no attendance record to substantiate.

[48] The defendants on the other hand contend that the 2012 bye-laws were in effect at the time and governed all aspects of the meeting; except the election of directors for which the amended clause 13.6 was applied because it was previously ratified by a majority vote at the February 2014 meeting.

[49] Mr Richelieu commenced oral submissions by reminding the Court that the Act is fashioned on the Canadian Corporations Act and authorities from that jurisdiction would assist the Court in dealing with the issues presented. The Court is being asked to engage in a sensitive fact finding exercise, for which the defendants have produced all relevant documents to substantiate their position. He urged the Court to consider the words of Coats J of the Ontario Superior Court of Justice in Dolly Bhadra v Diptendu Chatterjee et al[29] where he opined that our model of corporate governance presumes the prominence of a democratic process. Directors are elected by shareholders and they direct the affairs of the corporation. If a court gives effect to the position of a minority, the democratic process would be usurped by imposing the will of the minority on the majority. This in turn would undermine and disturb the principles of corporate law as we know it[30].

[50] Counsel expressed the view that when dealing with such matters the Court should consider the nature of the business and the cultural setting in which the parties operate. He referred to an article from the Alberta Law Review[31] which postulates that not every procedural error will justify a personal action. In refusing to impeach every irregularity the courts have been motivated by the practical considerations that the attendees at such meetings are not all lawyers and it is very likely the something irregular will occur. It could

[29]2016 ONSC 4845

[30]See paragraph 149 of the judgment

[31]Challenging Directors and the Rule in Foss v Harbottle (1965) 4 Alberta Law Review 96 at 100

not have been the intention that every slip should enable a resolution to be attacked. Equally it has been recognized that procedures should also fairly strictly be followed because they have been established for the protection of shareholders who attend these meetings. He pressed for a careful approach by the Court when dealing with the members and directors of the Company, because they are all ordinary men sitting in a forum, without a lawyer's mind. The point has been well taken in several authorities that generally directors are laymen operating in circumstances where procedural irregularities will more than likely occur but this should not invalidate the outcome, if it represents the will of the majority.

[51] Mr Richelieu argued that there was nothing irregular about the election and the claimants are only seeking to create confusion over the 2015 draft bye-laws. Even if it may have existed and reflected what is now in the 2016 byelaws, it is clear that it did not govern the election. As the defendants have testified it was in fact governed by the 2012 bye-laws in conjunction with the amendment to clause 13.6 which was ratified in 2014. The minutes of the February 2014 meeting confirm that a resolution was moved to amend clause 13.6. In cross examination Francois said the meeting never took place, yet in his affidavit evidence he deposed that the motion was never made at that meeting. This, he says, goes to his credibility which is questionable at best. Duncan on the other hand said the meeting took place, he attended but later walked out. Joseph's evidence is that membership fluctuates from 140 to 150 and a quorum ranges from 28 to 30 members. It is not unreasonable to infer that 29 members formed a quorum at the meeting and the Court can draw this inference from the evidence. Counsel argued that on the totality of the evidence the defendants have established that the resolution was passed. If the claimants were dissatisfied further remedies were available at sections 114 and 120 of the Act, which provides for submission of a notice for proposals from a shareholder on any matter he or she wishes to raise at a meeting. If the company refuses to include the proposal at the meeting the aggrieved shareholder may apply to the court and the court may restrain the meeting from taking place and make such order as it deems fit. The claimants never engaged in that process and instead challenge the election 3 years later. He urged the court to find that the election was valid.

Discussion

[52] The procedure for election of directors for constituting the Board is contained in clause 13.6 of the bye-laws and these bye-laws are formulated in accordance with section 64 of the Act. The section states:-

> "64. *Bye-law powers*
>
> *(1) Unless the articles, bye-laws, or unanimous shareholder agreement otherwise provides, the directors of a company may by resolution make, amend, or repeal any bye-laws for the regulation of the business or affairs of the company.*
>
> *(2) The directors of a company shall submit a bye-law, or any amendment or repeal of a bye-law made under subsection (1) to the shareholders of the company at the next meeting of shareholders after the making, amendment or repeal of the bye-law; and the shareholders may, by ordinary resolution, confirm, amend or reject the bye-law, amendment or repeal.*
>
> *(3) A bye-law, or any amendment or repeal of a bye-law, is effective from the date of the resolution of the directors making, amending or repealing the bye-law until—*
> *(a) the bye-law, amendment or repeal is confirmed, amended or rejected by the shareholders under subsection (2);*
>
> *(b) the bye-law, amendment or repeal ceases to be effective under subsection (4),*
>
> *and, if the bye-law, amendment or repeal is confirmed or amended by the shareholders, it continues in effect in the form in which it was confirmed or amended.*
>
> *(4) When a bye-law, or an amendment or repeal of a bye-law is not submitted to the shareholders as required by subsection (2), or is rejected by the shareholders, the bye-law, amendment or repeal ceases to be effective; and no subsequent resolution of the directors to make, amend or repeal a bye-law having substantially the same purpose or effect is effective until the resolution is confirmed, with or without amendment, by the shareholders.*
>
> *(5) A shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with sections 114 to 122, make a proposal to make, amend or repeal a bye-law' [Emphasis added]*

[53] Section 64 (2) clearly says that directors must submit an amended bye-law to the shareholders at the next meeting after the making the amendment and the shareholders may by ordinary resolution confirm such amendment and it shall subsequently be filed with the Registrar.

[54] On the authority of section 64 (3) a bye-law is effective from the date that a resolution is passed by directors making, amending or repealing it, until it is confirmed, amended or rejected by the shareholders, in accordance with section 64(2). This connotes that the decision is first taken at a board meeting and then presented to shareholders at the next general meeting for ratification.

[55] Pursuant to section 64(4) it is only if an amended bye-law is not put to the members at the next meeting of shareholders that it ceases to be effective, until such time as it is confirmed by the shareholders.

[56] A quorum must be attained for convening shareholder meetings and clause 12.2 says it is one-fifth of the total number of shareholders. A bye-law is amended by ordinary resolution and section 551 of the Act defines an ordinary resolution as one which is passed by a majority of the votes cast by the shareholders who voted in respect of the resolution.

[57] It has been said that the Company has 180 shareholders and the claimants say a quorum should be 40 members. No evidence has been proffered by either side to substantiate this. A register of shareholders was not provided. In the transformation agreement 115 members consented to dissolve the co-operative and became shareholders of the Company. Popo testified that over time shareholders left, migrated or died and the Board is currently conducting a review to ascertain the current membership. On the evidence new shareholders are also accepted from time to time. Attendance records were furnished for the three biennial general meetings held to date which shows the turnout at these meetings were 93 members in 2013, 83 in 2015 and 99 in 2018. Attendance records were not provided for the special meetings. At paragraph 1 of the minutes of the February 2014 meeting it is stated that the list of shareholders forming the quorum is attached but that list is missing from the document. In my view there is greater merit in the defendants' assertion that the membership of the company in 2014 may have been 140 to 150 members.

[58] Francois gave conflicting evidence about the meeting. Duncan admitted it was held at the Gros Islet Community Center and the minutes confirm this. He attended and arrived late. He did not do a head count of shareholders who were present. He was there for about half

hour and recalls that the meeting was about amending the bye-laws and the members were having a discourse about this. Ricky Charlemagne (now deceased) was at that meeting but he does not recall whether he was part of the discussion. He recalled that Edward was also present. From his testimony it is clear that Francois was not being truthful about the events which transpired at the February 2014 meeting. The minutes were confirmed by Robert Lewis, seconded by Edward and signed by both of them. Edward has provided no assistance to the Court in elucidating this issue. He was required to attend court for cross examination but conveniently was out of state and efforts to receive his further testimony via skype proved unsuccessful.

[59] The attendance records reveal a trend of more than 50 members at general meetings. The defendants' assertion of fluctuation in membership over the years was unchallenged. In my view the fact that the minutes referenced a quorum is some indication that it was likely ascertained. If 29 members voted in favour of the resolution with Francois and Duncan present and not participating, at a minimum there would have been at least 31 shareholders present at the meeting. That would have satisfied a quorum of one fifth for a membership of 150, at that time. If 29 voted in favour of the amendment to clause 13.6 and none against, it would mean that the resolution was passed by a majority of the votes cast by the shareholders who voted in respect of that resolution. I accept the minutes of the February 2014 meeting for what it portrays, and conclude that the meeting was duly convened and the amendment of clause 13.6 was ratified by shareholders. The 2012 bye-laws were still in effect when election was held in November 2015. I have found no compelling reason to discount the defendants' evidence that these bye-laws formed the basis of the proceedings, with the exception of the amendment to clause 13.6. The amended clause was correctly implemented on the basis of subsections 64(2) and 64(3)(a) of the Act. Consequently I am of the view that there was nothing unlawful about the 2015 election to negate the legitimacy of the directors or the Board.

[60] In the event that I am wrong in this conclusion, it is my considered view that the doctrine of laches which I will examine in the following segment of this judgment, will afford a complete bar to the claimants, in seeking to impugn the legality of the Board, as the basis

for restraining the directors from acting on behalf of the Company, until fresh elections are held.

The 2016 Bye-laws

[61] The claimants contend that these 2016 bye-laws have not been ratified by the shareholders and are invalid. The suggestion is that resolutions were passed at the April 2016 meeting which formed the basis for the amendments contained in the 2016 bye-laws. They assert that the minutes show that these resolutions only concerned the Disciplinary Committee and the Code of Conduct. The amendments to clause 6.19 and other clauses were not addressed at that meeting and the 2012 bye-laws remains the effective byelaws for all intents and purposes. They claim that all decisions taken by the Board after 7th November, 2015 including the expulsion of members would be illegal and the Board should be restrained from conducting the affairs of the company, until fresh elections are held.

[62] Mrs Harris submitted that the relief available under section 133 is not generally equitable, though there may be an element of equity in the injunctive orders sought by the claimants. With respect to laches a claimant would only be debarred for dishonesty and unconscionable behavior. If in seeking an injunction after acquiescence the evidence falls short of this threshold, the court still has the discretion to award damages in lieu of an injunction[32]. Counsel submitted that the claimants have not been dishonest or unconscionable in seeking to enforce their rights as shareholders. On the contrary it would be unconscionable to not approach the court in circumstances where meetings are being held without a quorum being properly ascertained and there are serious issues concerning administering the death benefit and the defendants have not shown that it was the Board which took the decision to withhold a portion of the benefit. Although Francois was appointed to the Disciplinary Committee he was elected by the shareholders and not the Board, thus his acceptance of the appointment was not an act of acquiescence to the validity of the Board.

[32] David Bean on Injunctions at para 2.18

[63] Counsel argued that if the Court should find that the claimants have acquiesced in the actions of the defendants that should not warrant losing their entitlement to relief since it cannot be said that they are dishonest or unconscionable in seeking to enforce their right after the delay. Mrs Harris urged the Court to reject the outcome in Shaw & Another v Applegate[33] on the question of payment of damages in lieu of an injunction, because the issues which arise in relation to infringement of the claimants rights by the defendants are incapable of being compensated in damages. She relied on the Jamaican case of Georgia Waugh Richards v Jamaica Teachers Association[34] in which the result of an election was challenged and the court granted injunctive relief restraining the defendants from proclaiming, declaring or affirming the results of an election, until further order.

[64] The defendants' counter position is that there were no irregularities in ratifying the amendments contained in the 2016 bye-laws but if the Court should find that there were, the claimants by their very conduct subsequently acquiesced with registration and implementation of the bye-laws and are therefore estopped by virtue of the doctrine of laches from bringing this action some three years later, to enforce their rights as minority shareholders. Mr Richelieu submits that raising these issues at this stage has had the effect of creating severe financial hardship on the Company which is in the business of plying in the tourist industry and requires all hands on deck.

[65] He distinguishes the Georgia Waugh Richards case on the basis that the election in that case was held in June 2014 and the applicant promptly moved the court for a restraining order in July 2014, one month after the election was held. In the instant case the claimants have acquiesced for over 3 years since the election and more than two years since the registration of the 2016 bye-laws. Such delay must defeat any equitable relief that they seek.

[66] Counsel relied on the Jamaican case of Junior West v Gerald Miller[35] in which injunctive relief was refused because an application was filed two years after an alleged breach of the claimant's right of access to his home. The court held that in light of such delay by the

[33] [1978] 1 All ER 123
[34] [2014] JMSC Civ 129
[35] [2017] JMSC Civ 105 at para 22

claimant any injunctive relief granted would disturb, rather than preserve the status quo. Moreover in the instant case Francois served on the Disciplinary Committee from 2016 to present and participated in the amendment of clause 5 of the bye-laws which strengthened disciplinary measures. He received a death levy during the tenure of the current Board. Duncan has attended most if not all shareholders meetings. Charles only became a shareholder in 2017 and is not privy to the matters he complains of.

[67] Mr Richelieu submitted that section 133, when invoked, attracts equitable principles because it is asking that judgment be rendered in a declaratory form. In support he referenced the Canadian case of W. Yvon Dumont v Manitoba Federation Inc et al[36] which also concerned an election controversy where the losing candidate challenged the successful candidate under section 139 of the Canadian Corporations Act, which is the equivalent of section 133 in this jurisdiction. In that case the proposition was upheld when Husband JA writing for the Manitoba Court of Appeal said at paragraph 50 of the judgment:-

> *"The relief requested by Dumont is a declaration. There has been significant debate in literature and jurisprudence as to whether declaratory relief constitutes equitable relief or is a sui gereris remedy and, if the latter, whether equitable principles should bar relief. The debate has been ended in Canada with the decision of the Supreme Court in Hongkong Bank of Canada v Wheeler Holdings Limited [1993] 1 S.C.R. 167. Sopinka J., writing for the Court, wrote on the interplay between relief and equitable principles. His conclusion was as follows at (at page 129):*
> *…..I would conclude that in the exercise of the discretion whether or not to grant a declaration, the court may take into account certain equitable principles such as the conduct of the party seeking the relief. In the context of this case, then, the allegation that the 1998 purchasers have unclean hands should be addressed."*

[68] Husband JA accepted as established and undisputed that the remedy of a declaratory judgment is equitable in origin and that its award is subject to the discretion of the Court. He determined that under section 139 of the Corporations Act the court is entitled, in the exercise of it discretion, to consider equitable principles as well as other factors. By way of example he introduced four main factors which would influence the exercise of judicial discretion in that case as (1) the intention of the CEO; (2) the lack of evidence of

[36] 2004] MBCA 149

wrongdoing; (3) the acquiescence of Dumont; and (4) the essential fairness of the electoral process[37].

[69] Mr Richelieu suggests that similar factors should guide the court in the instant case. Concerning acquiescence Husband JA provided further guidance when he said:-

> *"The kind of acquiescence involved in this case involved in this case is well described by Sir Samuel Griffith in his judgment in Cashman v 7 North Golden Gate gold Mining Co (1897) , 7Q.L.J. 152 (at p 153):*
>
> > *The term acquiescence …..may be fairly applied to a man who seeing an act about to be done to his prejudice stands by and does not object to it. He may be very properly said to be acquiescent in that act being done. But the difference in point of law and the legal consequences of the two kinds of acquiescence is quite clear. A man who stands by and sees an act about to be done which will be injurious to himself and makes no objection, cannot complain of that act as a wrong at all"*[38]

[70] In concluding this point Counsel invited the Court to consider further dicta of Husband in W. Yvon Dumont v Manitoba Federation Inc et al[39] where he cited with approval the following comment from an earlier case, which Counsel says is apposite for the instant case:-

> *"The court should not be too ready to act a as a political arbiter to settle the internal struggles of its members, even though there have been irregularities, these irregularities do not substantially affect the majority wishes of the voting constituents of the corporation."*[40]

[71] The Manitoba Court of Appeal then concluded that despite departures from the relevant bye-law there was good reason to conclude that the departures did not substantially affect the majority wishes of qualified shareholders.

Discussion

[72] The defendants insist that the April 2016 meeting was convened for consideration of the 2015 draft byelaws which contained all the amendments and that the amendments were

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[37] See paragraphs 51 & 56 of the judgment
[38] See paragraph 62 of the judgment
[39] supra note 36
[40] See Association Pakistani Canadiansof Manitoba Inc v Sheikh at al (1987), 50 man.R. (2d) 146(Q.B.) per De Greaves J

ratified at that meeting. No reference is made to a quorum in the minutes of the meeting; however Inglis testified that 50 to 60 shareholders were present. The minutes did not state with certainty the extent of the amendments were which were ratified. Copies of some of the resolutions were attached but there was no record of how these resolutions were dealt with at the meeting, save for the amendments to clauses 5.3 and 5.4. The claimants say these are the only amendments which were ratified at that meeting.

[73] Halsbury's Laws of England[41] explains the defence of laches as follows:-

> *253. The defence of laches*
>
> *A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation1 'equity aids the vigilant, not the indolent' or 'delay defeats equities'2. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time3. He is then said to be barred by his unconscionable delay ('laches') 4……...*
>
> *254. The nature of laches.*
> *In enacting a statute of limitation the legislature specifies fixed periods after which claims are barred; equity does not, however, fix a specific limit, but considers the circumstances of each case1. In determining whether there has been such delay as to amount to laches, the chief points to be considered are:*
> *(1) acquiescence on the claimant's part; and*
> *(2) any change of position that has occurred on the defendant's part.*
>
> *Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it2. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches3.*
>
> *The modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases; a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights4……*

[41] (Volume 47 (2014) at para 253-255 and 257

255. Acquiescence as an element in laches.
The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time1. Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them2. Hence acquiescence depends on knowledge, capacity and freedom……

257. Change in defendant's position resulting in delay in bringing claim.
Regard must be had to any change in the defendant's position which has resulted from the claimant's delay in bringing his claim. This may be, for example, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if it turns out to be unfounded, have perished1……."

[74] I consider the above principles applicable to the instant case. In Shaw & Another v Applegate the court determined that the real test of acquiescence is whether on the facts of the particular case the situation had become such that it would be dishonest or unconscionable for the plaintiff to continue to seek to enforce an infringed right.

[75] The question for the Court is whether there has been sufficient acquiescence to preclude the claimants from enforcing their right to redress in respect of irregularities which may have occurred in giving effect to the 2016 bye-laws. In Shaw & Another v Applegate the court ruled that the plaintiffs were not acting dishonestly or unconscionably in seeking to enforce their rights under a covenant since their failure to sue at an earlier date was as a result of their doubts as to what were their true rights. In my view the same can hardly be said of the instant case. Francois was the only applicant who was cross examined on his reasons for not having initiated proceedings much earlier. His response was that he said what he had to say at the meetings and kept all the matters that he agreed or disagreed with in a file at his home. Further he did not have the finances to take legal action. It is trite law that he who asserts impecuniosity must prove it. Apart from a bare assertion there was no evidence on which the Court could make an informed assessment on the authenticity of his alleged penury. I contrast this with the respondent's evidence that the claimants continued to attend shareholders meetings through 2016 and 2017 and never took any steps under the relevant provisions of the Act to challenge or clarify these issues in a timely manner. Francois was appointed to serve on the disciplinary committee which by virtue of clause 6 of the bye-laws is a committee of the board. He received a death benefit

during the current tenure of the board and did not seek to enforce his rights then. It appears that business continued as usual and the Board was left to conduct the financial, administrative and corporate affairs of the Company without restraint after the election.

[76] The evidence reveals that the amendment to clause 13.6 was ratified at the February 2014 meeting. Some were ratified at the April 2016 meeting and are recorded in the minutes. Others were captured in attachments to the minutes of this meeting and in some cases there is uncertainty as to how they came about. It is not disputed that the 2015 draft bye-laws which contained all amendments was circulated in the memo of 8th December, 2015 seeking feedback and proposals from shareholders. The defendants also said that it was the subject of discussion at the April 2016 meeting. It appears that Joseph may not have a full understanding of how a quorum is ascertained and Popo may not have a full understanding of the importance of documenting all resolutions passed at shareholders meetings in the minutes. I did not consider these shortcomings to mean that the requirements of the Act were not complied with. I found Joseph and Popo to be ordinary lay men, not in any way learned in the law, attempting to conduct the affairs of the Company in the way they best knew how. I found no malice or deliberate intent on their part to shut out any shareholders from the process which governs amendments to the bye-laws. The exhibits provided by way of letters, memos, notices of meetings, minutes of meetings, copies of resolutions and attendance records provided the Court with some insight into the manner in which the affairs of the Company was being conducted. In my view the Board should be commended for their efforts at maintaining a platform for corporate and administrative cohesion in the Company.

[77] Applying the law and the facts as I found them, I am persuaded that the doctrine of acquiescence and laches afford the defendants a good defence. The claimants having refrained, without good cause, from taking steps to seek redress in a timely manner is sufficient reason for finding that it is indeed dishonest and unconscionable to bring this action almost three years later.

[78] I am fully persuaded from the arguments and legal authorities advanced by Mr Richelieu that an order declaring the 2016 bye-laws invalid or restraining the Board from acting,

ought to be refused on the basis of delay and acquiescence. The bye-laws currently in effect have been registered since June 2016 and in my view should continue to govern the affairs of the Company.

[79] The current board was elected in November 2015 for a term of 2 years and fresh elections are now past due. The Court will therefore order that the Board proceeds to convene the third biennial general meeting of shareholders and that a new board be elected in accordance with the dictates of the 2016 bye-laws.

[80] Having made the above findings issue number 3 at paragraph 7 above inevitably fell away.

Dissolution of the Co-Operative

[81] Much was said on this issue. Dissolution occurred several years ago and by all indications the members of the co-operative moved forward as shareholders of the Company. This was confirmed by the transformation agreement and the attendant signature pages shown in Exhibit GM4. Although Francois attempted to say that he does not recall signing the agreement, he was unable to refute the obvious, that his Taxi registration number, his name, signature and the date of signing were all captured in the document. The agreement contained 115 consenting signatories. The documentary evidence also confirmed that the Registrar of Co-Operative undertook to invoke section 158 to bring about a dissolution by members. I did not consider the issue to be germane to the matters which were before the Court for determination.

Death Levy

[82] The Court was not required to adjudicate on this matter, on a section 133 application, however I digress here to say that I found the explanations given by the defendants in relation to the administration of the levy and the general finances of the Company to be reasonable. There was nothing to suggest impropriety on the part of the Board and the

evidence showed that the actions of the Board were primarily to safeguard the financial interests of the Company and by extension shareholders.

Expulsion of Shareholders

[83] I make no finding on this issue. In my view these are internal matters to be resolved by the Board in accordance with the procedure set out in clause 6.17 of the bye-laws for appeals against expulsion. The Board is charged with running the affairs of the Company and is responsible for holding shareholders accountable for debts owed to the Company.

Conclusion

[84] It is understandable that where a Company is comprised of members having diverse backgrounds and expectations as is the case here, misunderstandings will arise from time to time. However it is in the best interest of all concerned if these matters be resolved amicably, through timely mediation or arbitration. Clause 33 of the 2016 bye-laws provide that disputes arising between current and former shareholders, directors, the Board and the Company should be resolved through an attempt at arbitration.

[85] There is much need for a further understanding on the role of the Board, shareholders and the Disciplinary Committee and the interactions between these constituents for proper conduct of the affairs of the Company. It must be understood that all times, it is the interest of the Company which is paramount, in decision making.

[86] The Court would therefore urge that a new board seek very early to facilitate some form of training for directors and shareholders, in the area of administration and conduct of corporate meetings. It would also be useful to ensure that a legal practitioner is present at such meetings to guide both the Board and shareholders in ensuring that the provisions of the bye-laws are adhered to and that the minutes of meetings more accurately reflect what has transpired at meetings.

[87] In concluding I therefore make the following orders:-

1. The election of directors held in November 2015 was lawful and the conduct of the board through the various decisions taken by the defendants in relation to the operations and affairs of the company were justifiable and lawful, therefore the action is dismissed.

2. The board shall proceed to convene the next biennial meeting of the shareholders and election of directors, in accordance with the 2016 bye-laws, no later than 30th April, 2019.

3. The legal practitioner for the Company shall be invited to attend shareholders meetings to guide the board on the requirements of the 2016 bye-laws and to ensure that these meetings are properly administered.

4. All shareholders meetings shall be audio recorded in entirety and the minutes shall be reproduced from the audio recording.

5. The shareholders will determine by majority vote which directors will go up for re-election and elections shall be held by ballot.

6. The claimants will pay costs of this application to the defendants, to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar