

SUPREME COURT OF SEYCHELLES

Reportable
CC 02/2025

In the matter between:

1. DAVID STANDISH

2. MICHAEL LEEDS
(rep. by Mr Rene Durup)

Petitioner

And

FINANCIAL SERVICES AUTHORITY
(rep by Mr Basil Hoareau)

Respondent

Neutral Citation: *David Standish and another v FSA* (CC02/2025) 3rd June 2025

Before: Burian J

Summary: Plea in Limine raised upon application to restore name of International Business Company to the Register – International Business Companies Act 2016.

Heard: 20th May 2025

Delivered: 3rd June 2025

RULING ON PLEA LIMINE

BURIAN J

Background facts and Introduction:

- [1] The Applicants, David Standish and Michael Leeds in their capacity as joint Trustees in Bankruptcy of Daniel Walter Hill have petitioned this Court to reinstate a Company, namely, 'Tribune Trustees International Limited' to the Register of International Business Companies ("the Register") pursuant to section 277 of the International Business Companies Act 15 of 2016 as amended ("the 2016 Act"). The petition is supported by an affidavit sworn by the Applicant's to which relevant documents are

exhibited. The respondent was served with a copy of the petition on the 16th April 2025 and is strenuously objecting to the application raising several points of law which I will consider below.

Points of law raised:

- The application is initiated under the wrong provision:

[2] Mr Hoareau's first ground for objection is that the application is brought under the wrong provision. The Company was an International Business Company ("IBC") incorporated with Company Registration No. 8154, under the International Business Companies Act 1994 (Cap 100A) as amended ("the 1994 Act") which was repealed and replaced by the 2016 Act. The 2016 Act came into operation on 1st November 2016 by virtue of the International Business Companies Act, 2016 (Commencement) Notice, 2016 (S.I. 72 of 2016).

[3] Counsel for the Respondent has submitted that the Company was registered for dissolution on the 18th August 2016 and as such it is not the 2016 Act which applies to the company but the transitional provisions applicable to companies dissolved under the 1994 Act. It is averred that Counsel for the Applicants has wrongly brought the application for reinstatement under section 277 of the 2016 Act when it should have been initiated under section 387 of the transitional provisions.

- No reasonable cause of action:

[4] The 2nd point of law raised is that as the application has been brought under the wrong legislative section, the prayer is also incorrect leading to the application having no reasonable cause of action. The prayer states as follows:

'wherefore the Applicant prays this honourable court to order the financial services Authority to restore the company, Tribune Trustees International Limited to the register of companies urgently and conditionally upon payment of any penalty'.

[5] Counsel submits that the prayer is thus for ‘restoration’ of the company to the Register which is not correct under section 387 of the 2016 Act. The law which is applicable to the present case refers as per paragraph [4] above to rescission of the dissolution of the company following which it would then be restored as per section (3) to the Register of Companies. It is thus argued that not only is the provision under which the application is brought incorrect, but the remedy provided for under the law is also different. As such, there can be no restoration without first a rescission of the dissolution and therefore there is no reasonable cause of action disclosed in the application.

- The application is instituted against the wrong party:

[6] Thirdly, Mr Hoareau has argued that the application has been brought against the wrong party. He states that the Financial Services Authority is not the ‘Registrar’ against whom all applications for rescission/restoration of a company should be brought.

[7] As per the definition in the Act, “Registrar” means the Chief Executive Officer of the Authority appointed under section 9 of the Financial Services Authority Act and as such the application must be initiated against the Registrar of International Business Company’s represented by its CEO, MR Randolph Samson. Counsel for the Respondent pointed out this issue of misjoinder upon his first appearance, however Counsel for the Applicants made no effort to rectify this mistake and have chosen to pursue the application against the FSA despite the plea in limine.

- Application is time-barred:

[8] Lastly, Counsel for the Respondent has pointed out the application is time-barred. As per section 387, which is rehearsed above, the time limit for bring an application for rescission of a dissolution and ultimately a restoration of a company to the Register is seven (7) years. The application in question was filed on the 11th April 2025, which is 8 years and 8 months after the dissolution of the company. As such, it is argued that the application is out of time in terms of both section 387 as well as under section 277.

[9] Relying on all four points of law raised, Mr. Hoareau is moving for the dismissal of the application.

Submissions in reply:

- [10] Mr Durup has conceded that application is brought under section 277 however argues section 387 is just a transitional provision, but that the application itself is rightly brought pursuant to section 277. It was further submitted that the application is asking for restoration and that when a party makes an application for restoration it is implied that a rescission with need to occur. i.e. the court rescinds the dissolution because this is a necessity before restoration.
- [11] Secondly, in reply to the allegation that the application has been instituted against the wrong party, Counsel argues that there is nothing in the law which says that there has to be a Respondent to the application. He compared the case to notice being served on an interested party such as the Attorney General's office, in its supervisory role as *Ministere Publique*.
- [12] Thirdly, in respect of the mandatory time limit, it was submitted that the case surrounds circumstances of fraud and it was humbly submitted that allegations of fraud would allow the court to bypass any prescribed time limits. Reference was made to the case determined in the Cayman Islands, namely, *In the matter of the Companies Act and the matter of Porton Capital Inc and Porton Capital Limited, Enigma Dianostics Limited (In Liquidation) and Harvey Eric Boulter*¹ in which case, the court being tasked with determining whether a fraud had occurred in the liquidation of the company itself was left to consider whether it could apply its jurisdiction and discretionary power to restore the company. It was argued by counsel in the above case, that where fraud is proven, the court could use its discretion to restore a company on the register.

Law and Analysis:

- [13] I will first consider whether the application has been wrongly instituted against the Financial Services Authority. The Applicant has chosen to include the Financial Services Authority as a Respondent and whilst I do agree that there is no legal requirement for there to be Respondent in applications brought pursuant to section 387 or section 277, I

¹ Cause No:FSD 226 of 2021

am of the view that there is strict requirement for notice to be served on the Registrar of Companies.

[14] In accordance with section 277 (3) of the Act, a notice is required to be served on the Registrar who is entitled to appear and be heard on the hearing of the application. The Registrar is defined as meaning the Chief Executive Officer of the Authority appointed under section 9 of the Financial Services Authority Act. According to the notice on file a copy was served on a Mr Andre Sedgwick, a representative of the Financial Services Authority and not the Registrar. In order to ensure compliance with subsection 3 above, I am of the belief that the case should proceed with the Registrar of International Business Companies as the proper Respondent.

[15] As this is an issue of misjoinder, I must consider whether this procedural defect can be remedied. Section 112 of the Seychelles Code of Civil Procedure ('the Code') reads as follows:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

[16] Therefore, I believe that provided that none of the points of law dispose of the application, I may apply section 112 of the Code to strike out the Financial Services Authority and replace it with the Registrar of International Business Companies, with fresh notice on the Registrar.

[17] Counsel for the Respondent has also objected to the application on the basis that it has been brought under the wrong provision of the law and as such the application has no cause of action and should be struck out. Counsel for the Respondent has argued that the application is seeking restoration under section 277, which applies only to companies struck off under the Act. Therefore, the application is brought under the wrong provision and as such discloses no cause of action as it has failed to apply for rescission as required under section 387 of the Act. I have considered the affidavit evidence and the 2016 Act, specifically section 277 and the transitional provisions, specifically section 387.

[18] The Petition is brought under section 277 of the 2016 Act as amended by Act 32 of 2021 and later 63 of 2021 under which the present application is made, provides in its subsections (1) and (2) in relevant part reads as follows:

277. (1) Subject to subsection (2), where the name of a company has been struck off the Register for any reason, an application to restore the name of the struck off or dissolved company to the Register may be made to the Court by —

(a) a creditor, member, former member, director, former director, liquidator or former liquidator of the company; or

(b) any other person who can establish an interest in having the company restored to the Register.

(2) An application to restore the name of a struck off or dissolved company to the Register under subsection (1) may be made to the Court —

[...]

(b) within five years of the date of dissolution under Sub-Part I, II, III or IV of the Part XVII of this Act.

[19] Therefore an application under section 277 can be made by an interested party asking the court to restore the company to the Register within 5 years of the date of dissolution.

[20] The purpose of Part XXII – Transitional provisions specifically section 386 and 387 was to deal with companies which were struck off or dissolved under the 1994 Act.

[21] Section 386 reads as follows:

“(1) Every application to restore a former Act company that has been struck off the register kept under the former Act but not dissolved, made on or after the Act commencement date, whether to the Registrar or to the Court, shall be made under, and determined in accordance with, this Act as if the former Act company had been a company struck off the Register under this Act.

(2) Where, pursuant to an application made under subsection (1), a company is restored, it shall be restored to the Register maintained under this Act.”

[22] Therefore for a company simply struck off, it is clear that an applicant would be able to apply for a simply reinstatement pursuant to section 277 however the situation is different if the company has been dissolved under the 1994 Act.

[23] Pursuant to section 387:

“(1) An application may be made to the Court under this Act to rescind the dissolution of a former Act company dissolved under the former Act as if was a company dissolved under this Act on the date that it was dissolved under the former Act.

(2) An application made under subsection (1)-

(a) Shall be made within seven years of dissolution of the former Act company under the former Act;

(b) Shall be determined in accordance with the Act.

(3) If the dissolution of a former Act company is rescinded in accordance with this section, the company shall be restored to the Register maintained under this Act.”

- [24] As rightly argued by Counsel for the Respondent, the provision under which this application should have been brought is section 387. I also agree that the prayer in respect of applications under section 277 and section 387 are different. Under section 277 a party is moving for restoration within 5 years whilst section 387 requires an application for the rescission of the dissolution of the company and upon this prayer being granted the company is restored to the Registry maintained under the 2016 Act. Agreeing that the application has been brought under the wrong provision, I must decide whether this is fatal to the application.
- [25] I have considered the case of *Ex Parte Grand Tech Company Ltd*², in which case the court dealt with the company restoration under IBC Act 2016 even though the company had originally been struck off under IBC Act 1994. The court in this case accepted the application if it meets the requirements for reinstatement.
- [26] I am of the view that a pragmatic but principled approach must be taken and I am guided by the need to uphold the rule of law, proper procedure and access to justice. I have considered whether the error is technical or formal and whether it goes to the root of the case. I am of the opinion this is a procedural error and would not be fatal to the application. Considering the application before me, it is evident that the Applicant is seeking the rescission of the dissolution of the company and its ultimate restoration on the Register. I am satisfied that the Court has jurisdiction under the Act to entertain the application. In coming to this decision, I applied the principle that a procedural error citing the wrong provision when the correct statutory relief exists, and the court has jurisdiction, is not fatal unless it causes prejudice or a miscarriage of justice. I believe that the opposing party is not prejudice by this procedural error and that all the relevant elements of a valid application are present. Namely, that the company was struck out under the 1994 Act and that a legitimate interest in rescission exists. As such, I am of the view that I can exercise my discretion and proceed with the application as if it were made under the correct provision of the law.

² XP11/ 2024

[27] The Applicants claim to be an interested parties entitled to bring an application in that the Company is a defendant to legal proceedings brought by the Applicants in the UK and that they require the Company to be restored to the Register for it to be properly served and made a party to the case before the UK court.

[28] Though I am satisfied that the Applicants are interested parties and as such have standing for the purpose of bring an application for restoration, my attention has been drawn to sub-section (4A) of section 277, which provides for certain matters as to which the Court must be satisfied before making a Restoration Order as follows:

(4A) The Court shall not restore the name of a struck off or dissolved company if the Court is not satisfied that the company is in compliance of its obligations—

(a) under this Act relating to accounting records, register of members and register of director; and

(b) under the Beneficial Ownership Act, 2020 (Act 4 of 2020) relating to register of beneficial owners.

[29] Considering the requirements above and the status of the Applicants, I do not believe that they would be able to comply with section 277 4A subsections (a) and (b) above. They are not directors nor shareholders of the company and as such would have no means of ensuring compliance with the Beneficial Ownership Act 2020 nor the company's obligations to file up to date accounting and registration records.

[30] The present application was filed 8 years and 8 months after the date of dissolution of the company. The time limit as per section 387 is seven years after the dissolution and if applying section 277 it is five years. No matter which provision of the law is applied in this case, the application is clearly prescribed. I note that delay has been condoned by the courts in the past by applying their judicial discretion as canvassed in the case of *Ex Parte: Orion International Ltd*³. It was determined in Orion (supra) that as the delay was not for an inordinately long period and appeared to be a genuine omission on the part of the applicant then it would not be manifestly unjust or perverse to condone the delay. However, I am of the view that the present case be differentiated from the case of Orion,

³ (133 of 2009) [2010] SCSC 106 (15 July 2010)

because in the case before me, the application has been filed well over the prescribed time-limit and the Respondent who is strenuously objecting to the application for restoration is at the risk of prejudice if the delay is condoned.

- [31] I agree with Judge Renaud in *Orion* (*supra*) that the discretion of the court to condone or not condone the delay is a judicial exercise of the power and not an arbitrary one. In *Sharp v Wakefield*⁴, *Halsbury L.C.* referred to this discretionary power of courts and stated:

“An extensive power is confided to the Justices in their capacity as Justices to be exercised judicially and ‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself. There is no limitation upon the absolute discretion of the Justice, provided that, there is a real judgment exercised in respect of the individual case.”

- [32] I have also considered the case of *Enigma Dianostics Limited* (*supra*) and I am of the view that this case can also be differentiated to the present application. The case of *Enigma Dianostics Limited* revolved around a liquidation of a company which allegedly occurred by fraud. The court was asked to make a legal determination on as to whether a fraud had been committed and if found in the affirmative then it was argued that it would be able to set aside any limitations and restore the company. In the present case, fraud did not play a role in the dissolution of the Company, any allegations of fraud are in respect of an alleged case before the UK court and as such it is not for this Court to factually determine. As such the principle that ‘fraud unravels all’ is inapplicable to the present application.

- [33] It is my considered opinion that there is no hard and fast rule to be laid down to govern the matter or control the exercise of judicial discretion and each case must depend on its own facts. Applying this rule to the facts before me, I do not believe that the time limit can be waived in this instance. I am of the view that too long a

⁴ (1891) A.C. 173

period has passed since the dissolution of the company to waive the time period as prescribed by law. I am additionally not satisfied that the Applicants will be able to ensure compliance with 4A as stipulated in paragraph 26 above. There are risks and regulatory concerns which in my opinion would cause prejudice to the Respondent who would be obligated to restore a company but would find themselves in a position of being unable to ensure compliance with beneficial ownership regulations. The company may remain a no-compliant entity even post restoration and this poses a risk of non-compliance with international standards and could expose the country to blacklisting.

[34] In view of the foregoing, I find merit in the plea in limine litis raised by the Respondent, in that the application is time-barred. Accordingly, I find in favour of Respondent and I am not satisfied that there are sufficient reasons to use my discretion to waive this time-period. In the circumstances, I have no hesitation in dismissing this application with costs.

Signed, dated and delivered at Ile du Port on 3rd June 2025



N.Burian

Judge of the Supreme Court

