Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

SUPPLEMENTARY COMPENDIUM OF THE RECEIVER

November 23, 2022

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TO: **THE SERVICE LIST**

COURT FILE NO. CV-11-00009062-00CL
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Di Paola, Re, 2006 CanLII 37117 (ON CA)

Date:	2006-11-01
File number:	M34238; C45750
Other citations:	[2006] OJ No 4381 (QL) — [2007] CarswellOnt 150 — 26 CBR (5th) 133 — 37 CPC (6th) 286 — 217 OAC 95 — 152 ACWS (3d) 800 — 84 OR (3d) 554
Citation:	Di Paola, Re, 2006 CanLII 37117 (ON CA), <https://canlii.ca/t/1pxbp>, retrieved on 2022-11-22

Di Paola (Re)

84 O.R. (3d) 554

Court of Appeal for Ontario,
Doherty J.A. (in Chambers)
November 1, 2006

Bankruptcy and insolvency -- Practice and procedure -- Security for costs -- Applicant bringing motion in bankruptcy proceedings claiming that its pre-bankruptcy judgment against respondent survived his discharge -- Motion dismissed -- Applicant appealing -- Respondent moving for security for costs -- Motion granted -- Rules of Civil Procedure applying to security for costs on appeal in bankruptcy proceedings -- Applicant's motion sufficiently analogous to action to warrant treating it as discrete proceeding for purposes of rule 56.01 of Rules of Civil Procedure -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 56.01, 61.06(1). [page555]

Civil procedure -- Costs -- Security for costs -- Rule 56.01 applying to proceedings without qualification and not excluding motion brought in course of proceeding -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 56.01, 61.06(1).

Following the respondent's discharge from bankruptcy, the applicant brought a motion claiming that its pre-bankruptcy judgment against the respondent for breach of fiduciary duty survived the discharge. The motion, which was brought in the bankruptcy proceedings, was dismissed. The applicant appealed. The respondent brought a motion for security for costs pursuant to rule 61.06(1) of the Rules of Civil Procedure.

Held, the motion should be granted.

Since neither the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 nor the relevant bankruptcy rules (Bankruptcy and Insolvency General Rules, C.R.C., c. 368) address the question of security for costs on appeal, the Rules of Civil Procedure apply. Rule 61.06(1)(b) provides that a judge of the Court of Appeal may make an order for security for costs where that order could be made against the appellant under rule 56.01. Rule 56.01 applies to "proceedings" without qualification, and does not exclude motions brought in the course

of a proceeding. The respondent's motion was sufficiently analogous to an action to warrant treating that motion brought in the bankruptcy proceedings as a discrete proceeding for the purposes of rule 56.01. The applicant conceded that it had no assets. The respondent was entitled to security for costs.

MOTION for security for costs. [page556]

Cases referred to Fabricut Ltd. (Re), [1985] O.J. No. 1729, 54 C.B.R. (N.S.) 84 (S.C.), apld Société Sepic S.A. v. Aga Stone Ltd. (1995), 1995 CanLII 1891 (ON CA), 21 O.R. (3d) 542, [1995] O.J. No. 54, 34 C.P.C. (3d) 206 (C.A.); Canada v. MKM Manufacturing Ltd., [2003] B.C.J. No. 2672, 48 C.B.R. (4th) 222, 2003 BCCA 652 (C.A. chambers), consd Mutual Life Insurance Co. of Canada v. Buffer Investments Ltd. (1986), 1986 CanLII 2794 (ON SC), 56 O.R. (2d) 480, [1986] O.J. No. 2955 (S.C.), not folld Other cases referred to Hughes v. Graves, 2001 NSSC 68 (CanLII), [2001] N.S.J. No. 179, 194 N.S.R. (2d) 51, 606 A.P.R. 51, 25 C.B.R. (4th) 255 (S.C.); Toronto-Dominion Bank v. Szilagyi Farms Ltd. (1988), 1988 CanLII 4745 (ON CA), 65 O.R. (2d) 433, [1988] O.J. No. 1223, 29 O.A.C. 357, 28 C.P.C. (2d) 231 (C.A.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 178 [as am.], 183 [as am.], 193 [as am.] Rules and regulations referred to Bankruptcy and Insolvency General Rules, C.R.C., c. 368, s. 3 [as am.] Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04(2), 45.01(1), 56.01, 61.06(1) [as am.] Authorities referred to Houlden, L.W., et al., The 2006 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2006)

Richard D. Howell, for moving party.

A. Melvin Sokolsky, for responding party.

[1] DOHERTY J.A. (in chambers): -- The respondent, Mr. Di Paola, moves for security for costs pursuant to rule 61.06(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[2] The appeal is brought by Participative Dynamics Inc. ("Participative") from an order of Ground J. dismissing Participative's motion for an order allowing it to continue certain proceedings against Mr. Di Paola.

[3] Participative obtained a substantial money judgment against Mr. Di Paola in 1994. The trial judge found that Mr. Di Paola had breached his fiduciary duty to Participative. The trial judgment was affirmed by this court in 1997. The judgment had not been satisfied when Mr. Di Paola went bankrupt in 2001. He was discharged from bankruptcy in 2002. In 2006, Participative brought a motion claiming that its judgment survived Mr. Di Paola's discharge by virtue of s. 178(1)(d) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). Ground J. dismissed the motion holding that the breach of fiduciary duty underlying the 1994 judgment was not the kind of breach that would cause the debt to survive Mr. Di Paola's discharge from bankruptcy.

[4] Earlier in these appeal proceedings, Participative brought a motion for an order extending the time within which to bring its appeal. Sharpe J.A. granted the motion and in the course of doing so, found that Participative had "an arguable appeal". I see no reason to depart from my colleague's holding. The material before me does not permit any better assessment of the merits of this appeal. I proceed with this motion on the basis that the appeal is arguable.

[5] A review of the material filed before Ground J. indicates that the motion giving rise to the judgment under appeal was brought in the bankruptcy proceedings. Neither party argues that the bankruptcy court did not have jurisdiction to entertain the motion. It should be noted, however, that there is authority holding that post-discharge claims to recover debts on the basis that the debts were not released by the bankrupt's discharge should be brought by way of an action in ordinary civil courts; L.W. Houlden et al., The 2006 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2006), p. 791; Hughes v. Graves, 2001 NSSC 68 (CanLII), [2001] N.S.J. No. 179, 25 C.B.R. (4th) 255 (S.C.) at pp. 258-61 C.B.R.

[6] As the motion was brought in the bankruptcy proceedings, this appeal is governed by s. 193 of the BIA. Neither the BIA nor [page557] the relevant bankruptcy rules address the question of security for costs on

appeal. Consequently, the Rules of Civil Procedure apply: BIA, s. 183(2) (Bankruptcy and Insolvency General Rules, C.R.C., c. 368, s. 3).

[7] Counsel for Mr. Di Paola relies primarily on rule 61.06(1)(b). It provides that a judge of the Court of Appeal may make an order for security for costs where that order "could be made against the appellant under rule 56.01". Broadly speaking, rule 56.01 governs the making of security for costs orders in the trial court. Counsel for Mr. Di Paola relies on 56.01(1)(d) which states:

56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

. . . . .

(d) the plaintiff or applicant is a corporation ... and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

(Emphasis added)

[8] By incorporating rule 56.01, rule 61.06 provides that a respondent in an appeal, who was a defendant/respondent in the proceedings in which the appeal is taken may, if the criteria set out in rule 56.01 are met, obtain an order of costs against an appellant who was a plaintiff/applicant in the proceedings in which the appeal is taken: see Toronto-Dominion Bank v. Szilagyi Farms Ltd. (1988), 1988 CanLII 4745 (ON CA), 65 O.R. (2d) 433, [1988] O.J. No. 1223 (C.A.).

[9] Counsel for Participative submits that rule 56.01 only applies to orders made "in a proceeding" and not to orders made on a motion brought in a proceeding. Counsel submits that the order of Ground J. was made on a motion and was not an order made in a proceeding.

[10] Counsel relies on Mutual Life Insurance Co. of Canada v. Buffer Investments Ltd. (1986), 1986 CanLII 2794 (ON SC), 56 O.R. (2d) 480, [1986] O.J. No. 2955 (S.C.) and Société Sepic S.A. v. Aga Stone Ltd. (1995), 1995 CanLII 1891 (ON CA), 21 O.R. (3d) 542, [1995] O.J. No. 54 (C.A.) (Osborne J.A. in chambers). Société Sepic S.A. does not assist Participative. Osborne J.A. held that rule 61.06(1), by its terms, applied to "appeals" and not to applications for leave to appeal. He held that the distinction between an appeal and an application for leave to appeal was well understood and could not be ignored when interpreting the language of rule 61.06. His analysis is not germane to the issue raised on this motion.

[11] Buffer Investments Ltd. does support Participative's position. If I understand that judgment correctly, it draws a [page558] distinction between motions that commence a proceeding and are, therefore by definition, applications, and motions brought in the course of proceedings that have been commenced by action or application. Buffer Investments Ltd. holds that a motion brought in a proceeding cannot be the basis for a security for costs order made under rule 56.01.

[12] I cannot agree with the distinction drawn in Buffer Investments Ltd. I think rule 56.01 speaks to proceedings without qualification. A motion brought in the course of a proceeding is as much a part of that proceeding as any other step in the process. A party who is a defendant or a respondent in a proceeding does not lose that status because a motion is brought in the proceeding. Similarly, the plaintiff or applicant in the proceeding remains a plaintiff or applicant even when a motion is brought. Rule 56.01 looks to the status of the parties in the proceeding. In my view, it permits defendants/respondents in the underlying proceeding to move for security for costs. Rule 56.01 does not exclude a defendant/ respondent in a proceeding from seeking security for costs in a motion brought in the course of the proceedings. In so holding, I do not suggest that rule 56.01 is the only avenue by which a defendant/respondent on a motion may obtain security for costs. Motion judges have a broad discretion to impose appropriate terms when granting relief on motions. In some situations, an order for security for costs will be an appropriate term on which the relief sought by the moving party on the motion is granted.

[13] My rejection of the distinction drawn in Buffer Investments Ltd. does not, of course, compel the conclusion that rule 56.01 is available to Mr. Di Paola in these circumstances. Counsel for Mr. Di Paola referred me to Canada v. MKM Manufacturing Ltd., 2003 BCCA 652 (CanLII), [2003] B.C.J. No. 2672, 48 C.B.R. (4th) 222 (C.A. Chambers). That case did not involve a motion for security for costs pending appeal. Levine J.A. made an order for security for costs in an appeal taken in a bankruptcy matter. However, she made that order as a term of granting an extension of time within which to bring an appeal. Appeal courts have a broad discretion to impose terms when granting an extension of time. R. v. MKM Manufacturing Ltd. does not assist me in interpreting the security for costs provisions in the Ontario Rules of Civil Procedure.

[14] Clearly, the language of rule 56.01 is not tailor-made for the circumstances of this case. The proceeding for the purpose of rule 56.01 is the bankruptcy proceeding. Mr. Di Paola, who seeks the order, is not a defendant/respondent in those proceedings. Similarly, Participative, against whom the security for [page559] costs order is sought, is not a plaintiff/applicant in the bankruptcy proceeding.

[15] A similar problem arose in Re Fabricut Ltd., [1985] O.J. No. 1729, 54 C.B.R. (N.S.) 84 (S.C.). A trustee in bankruptcy moved for an order for the interim preservation of property in an ongoing bankruptcy. The trustee relied on rule 45.01(1) that applied to property that was relevant to an issue in "a proceeding". It was argued that the motion brought by the trustee in the bankruptcy proceedings for a preservation order was not "a proceeding".

[16] McKinlay J. referred to rule 1.04(2), the so called analogy rule:

1.04(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[17] She held that the motion brought by the trustee was sufficiently akin to an action as defined in the rules to justify analogizing the trustee's motion to an action, thereby bringing it within the definition of proceeding.

[18] I think Participative's motion is sufficiently analogous to an action to warrant treating that motion brought in the bankruptcy proceedings as a discrete proceeding for the purposes of rule 56.01. Participative, like a plaintiff, has initiated a proceeding in which it seeks an order permitting it to enforce a money judgment against Mr. Di Paola. Like a defendant in an action, Mr. Di Paola has been brought into court by Participative and is required to defend himself against the claim. Rule 56.01(d) is designed to afford some protection against the costs of defending against claims initiated by corporations who are immune to any costs consequences of the lawsuit because they have no assets in the province. That policy is at much in play on this motion as it would have been had Participative brought an action on the judgment.

[19] The analogy is made all the more compelling if as indicated in Houlden et al., supra, at p. 791:

The proper procedure to recover a debt which is not released by an order of discharge is for the creditor to bring an action in the ordinary civil courts.

[20] Had Participative brought an action, or even a motion in the action in which it got judgment in 1994, Mr. Di Paola would have been a defendant and Participative would have been a plaintiff.

[21] I would follow the lead of McKinlay J. and analogize the motion brought by Participative to an action and hold that for the purposes of rule 56.01 it is a proceeding. Once the analogy is [page560] made, the application of rule 56.01 becomes straightforward. Mr. Di Paola is a respondent and Participative is an applicant.

[22] Participative concedes that it has no assets. Given that concession, it falls to Participative to show why it should be permitted to proceed without providing security for costs. If I understand Participative's position correctly, it asserts it is impecunious and that any order for security for costs will effectively end its appeal. Implicit in this submission is the claim that Mr. Di Paola is at least partially responsible for Participative's impecuniosity.

[23] I accept that Participative has no assets. I have no information before me, however, of what assets Participative may have available to it to fund its appeal. Presumably, its appeal is being funded by some source outside of the company. I am not prepared to assume that Participative could not gain access to sufficient assets to comply with a security for costs order that I might make. The availability of those assets may turn on a careful assessment on the merits of the appeal by the putative funder of the appeal. As indicated earlier, I am not in a position to assess those merits.

[24] Rule 56.01 applies and by its terms Mr. Di Paola is entitled to security for costs. The figures provided by counsel for Mr. Di Paola were not challenged. Based on those figures, I would order security for costs in the amount of $10,000 to be posted within 30 days of the release of these reasons. I assume counsel can agree upon the nature of the security. Failing agreement, counsel may arrange a conference call with me.

[25] Mr. Di Paola has been successful on the motion and is entitled to his costs fixed at $1,500, inclusive of disbursements and GST.

Motion granted.

Kramer Henderson Sidlofsky LLP v. Monteiro, 2009 CanLII 38513 (ON SC)

Date:	2009-07-17
File number:	CV-08-00366353-0000
Other citation:	98 OR (3d) 286
Citation:	Kramer Henderson Sidlofsky LLP v. Monteiro, 2009 CanLII 38513 (ON SC), <https://canlii.ca/t/24qjh>, retrieved on 2022-11-23

Kramer Henderson Sidlofsky LLP v. Monteiro

98 O.R. (3d) 286

Ontario Superior Court of Justice,
Thorburn J.
July 17, 2009

Civil procedure -- Costs -- Security for costs -- Client obtaining order referring solicitors' accounts for assessment -- Solicitors moving before assessment for order for security for costs -- Order granted -- Court having jurisdiction to award security for costs of solicitor and client assessment -- Client being "active claimant . . . liable to give security for costs" within meaning of rule 56.01(2) of Rules of Civil Procedure -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 56.01(2).

The client obtained an order referring the solicitors' accounts for assessment. The solicitors moved before the assessment for an order for security for costs. The Master determined that the court had no jurisdiction to award security for costs of a solicitor and client assessment because an assessment is not a "proceeding" within the meaning of rule 56.01(1) of the Rules of Civil Procedure. The solicitors appealed.

Held, the appeal should be allowed.

The client was "an active claimant . . . liable to give security for costs" within the meaning of rule 56.01(2). Her assertion of her right to a reduction in her legal fees was a "claim". The solicitors were entitled to an order for security for costs.

APPEAL from an order dismissing a motion for security for costs.

Cases referred to Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, apld Other cases referred to Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Green v. Copperthorne Industries 86 Ltd. (1993), 1993 CanLII 8459 (ON SC), 12 O.R. (3d) 728, [1993] O.J. No. 364, 38 A.C.W.S. (3d) 651, 1993 CarswellOnt 1895

(Gen. Div.) Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.03 [as am.], 1.04(1), 56.01, (1), (2) [page287] Authorities referred to Côté, Pierre-André, The Interprettion of Legislation in Canada, 3rd ed. (Scarborough, Ont.: Carswell, 2000)

Gregory Sidlofsky, for moving party.

Evan L. Tingley, for respondent.

Endorsement of THORBURN J.: -- Overview of the Facts

[1] The moving party, Kramer Henderson Sidlofsky LLP, was solicitor of record for Juanita Monteiro. The firm carried the respondent financially throughout ten years of litigation that proceeded through all levels of court. By the conclusion of the litigation, the moving party was owed approximately $350,000 for fees and disbursements.

[2] The litigation was successful and the respondent obtained judgment in the amount of $712,879.42, interest in excess of US$500,000 and costs of approximately CDN$100,000. The respondent refused to sign a direction making judgment proceeds payable to the moving party and instead attempted to deal directly with the bank. The moving party sought a direction so that it could collect its fees from the judgment issued. The direction was obtained and the net funds were wired to the respondent. The net funds were in excess of US$1 million.

[3] After receipt of the funds, the respondent obtained an order referring the firm's 17 accounts for assessment.

[4] The assessment is scheduled to take ten days and will require significant preparation given the complexity of the litigation, the amount of paperwork, the 1,530 billable hours spent on the file, its duration and the four lawyers who worked on the file.

[5] The respondent is a resident of Kuwait with no assets in Ontario. The respondent is not impecunious.

[6] The parties agree that but for the fact that the respondent claims this is not proceeding within the meaning of rule 56.01 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194], the moving party would be entitled to security for costs in this instance. Master Haberman's Order

[7] Master Haberman determined that the court had no jurisdiction to award security for costs of a solicitor and client assessment because an assessment is not a "proceeding" within [page288] the meaning of rule 56.01(1). Proceeding is defined in rule 1.03 of the Rules of Civil Procedure to be an action or application. In making the above finding, Master Haberman noted that "it seems to me that it is somewhat incongruent for the availability of a Rule 56.01 order to depend on whether or not it is brought within an application and perhaps that is something that the Rules Committee should examine". Order Sought

[8] This is an appeal of Master Haberman's endorsement. Both parties agree that the standard of review on the appeal of this question of law is correctness.

[9] The moving party seeks security for costs. Rule 56.01(1) provides that the court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that "the plaintiff or applicant is ordinarily resident outside Ontario". The Principles of Statutory Interpretation

[10] The proper interpretation of statutes and ancillary rules was addressed by the Supreme Court in Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43. The court quoted Elmer Driedger's approach, at para. 26:

. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[11] The court in Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 emphasized that words find their meaning in relation to the purpose of the statute and the intention of the legislature.

[12] Rule 1.04(1) of the Rules provides that "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination or every civil proceeding on its merits."

[13] It is clear from the above that the Rules should be liberally construed to ensure a fair determination. The Issue

[14] Rule 56.01 of the Rules of Civil Procedure provides as follows:

56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
(a) the plaintiff or applicant is ordinarily resident outside Ontario; [page289]
(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
(f) a statute entitles the defendant or respondent to security for costs.

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs.

[15] The appellant's argument on this appeal rests on the interpretation of rule 56.01(2) of the Rules of Civil Procedure.

[16] The question to be determined is whether the moving party is "an active claimant . . . liable to give security for costs" within the meaning of rule 56.01(2). Whether the Moving Party is Entitled to Security for Costs

[17] The parties agree that the respondent "would, if a plaintiff, be liable to give security for costs".

[18] On the facts of this case, the respondent would seem to be a "claimant" who has asserted her right to a reduction in her legal fees. The word "claim" is defined in the Concise Oxford Dictionary, 11th ed. (London: Oxford University Press, 2004), at p. 262, as "assert that something is the case; demand as one's property or earnings". The word "claimant" is defined in Black's Law Dictionary, 8th ed. (Toronto: Thomson, 1999) as "One who asserts a right or demand."

[19] Moreover, the French version of rule 56.01(2) provides as follows:

56.01(2) Le paragraphe (1) s'applique, avec les adaptations nécessaires, à une partie à un litige . . . laquelle partie est un auteur de demande actif . . .

[20] The word "litige" is defined in Le Nouveau Petit Robert, 4th ed. (Paris: SNL Le Robert, 2007) as a "dispute" (at p. 1468). The word "litige" is defined in Expressions Juridiques en un Clin d'[pounds]il by L. Beaudoin and M. Mailhot (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1997) as "conflit, différend pouvant se solder par une transaction ou par un procès".[page290]

[21] The Rules of Civil Procedure are set out in both English and French. It is a well-established rule of statutory interpretation that when the English and French versions of legislation differ, the shared meaning is the correct one (see Côté in The Interpretation of Legislation in Canada, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at p. 327).

[22] The respondent in this case would seem to be a claimant and is clearly involved in a dispute or litigious process with the moving party which must be resolved.

[23] I note that if the moving party is precluded from obtaining security for costs, this could result in distinctions that are clearly inconsistent with the objectives of the statutory provision, existing case law [See Note 1 below] and for which there is no policy rationale. This would not be in keeping with the principle enunciated by the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd. (Re), supra, that words find their meaning in relation to the purpose of the statute and the intention of the legislature. It would also not be in keeping with the stated purpose of the Rules, to effect, "the just, most expeditious and least expensive determination or every civil proceeding on its merits".

[24] For the above reasons, I believe the moving party is entitled to security for costs. Quantum of Security for Costs

[25] Rule 1.03 defines "action" as a proceeding commenced by statement of claim, notice of action "unless the context requires otherwise". The moving party suggests that in the context of this case, the word "action" should include an application for assessment. However, in view of my finding regarding the interpretation of rule 56.01(2) it is not necessary for me to make that determination.

[26] The responding party further asserts that the sum requested for security for costs is excessive as the moving party seeks partial indemnity costs in the amount of $31,875, which includes 125 hours of time to be spent by four lawyers who worked on the file.

[27] Given the history of this matter, its duration and complexity, I do not consider this amount to be excessive and I therefore order security for costs in the amount of $31,875 as requested.

[28] The appeal is therefore granted with partial indemnity costs of this attendance only, to the moving party.

Appeal allowed.

Notes

Note 1: Green v. Copperthorne Industries 86 Ltd. (1993), 1993 CanLII 8459 (ON SC), 12 O.R. (3d) 728, [1993] O.J. No. 364, 1993 CarswellOnt 1895 (Gen. Div.), at paras. 8-9 and 17.

AFFIDAVIT OF TRANSLATION

I, JONATHAN WHITESIDE, of the city of Toronto, Province of Ontario, Dominion of Canada, **MAKE OATH AND SAY AS FOLLOWS:**

I am fluent in both the English and Spanish languages. I hereby state that the translation of the following is a complete and accurate translation from the Spanish to English language.

- **PROVISIONAL FILE No. 496 of the Metropolitan Prosecutor's Office of the Office of the Attorney General of the Republic of Panama, dated August 22, 2022**

I make this solemn declaration conscientiously believing it to be true and for no other improper purpose, knowing it is of the same force and effect as if made under Oath.

Jonathan Whiteside, Translator
1377 Weston Rd.,
Toronto, ON. M6M 4S1
416-244-4831

SWORN in the
City of Toronto
in the Province of Ontario
this November 21st, 2022.

HEATHER MICHELLE SANCHEZ, NOTARY
Notary Public for the Province of Ontario
1377 Weston Rd., unit 1A, Toronto, ON, M6M 4S1

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ATTORNEY GENERAL'S OFFICE

CRIMES AGAINST THE PUBLIC TRUST OF THE METROPOLITAN PROSECUTOR'S OFFICE

[Logo: National Attorney General's Office]

JONATHAN WHITESIDE PROFESSIONAL TRANSLATION SERVICES TORONTO, ON

PROVISIONAL FILE No. 496 FILE

Panama. August 22, 2022 No. 2021000036.

This agency of the Attorney General's Office is in charge of the criminal investigation identified under number No. **202100003611** for the alleged commission of the crime **AGAINST THE PUBLIC TRUST** in the form of forgery of documents in general.

It is the responsibility of the Attorney General's Office to prosecute crimes, directing the investigation, practicing or ordering the execution of the necessary procedures to determine the existence of the crime and those liable pursuant to the Criminal Procedure Code, and thus exercise the corresponding actions at the courts and tribunals where we act.

I. BACKGROUND.

Javier Alcides de Leon Almengor, authorized attorney of Harald Johannessen Hals in his capacity as treasurer of GABINVEST S.A., filed a complaint for the commission of the crime outlined in Article 366 of the Code of Criminal Procedure.

Attorney De Leon states that on September 10, 2013, a Shareholders' Meeting of the Company GABINVEST S.A. was held. The agenda of the meeting included the appointment of the Board of Directors of GABINVEST S.A. Mr. EDUARDO SAN JUAN was appointed President and Legal Representative of the aforementioned corporation; DAVID HARRY as Secretary and HARALD JOHANNESSEN as Treasurer. This decision was registered under Public Deed 16715, dated September 10, 2013, issued by the First Notary Office of the Circuit of Panama, and duly recorded in the Public Registry of Panama.

On January 16, 2020, ALVARO ALMENGOR, on behalf of the Law Firm HATSTONE ASOCIADOS, subscribed a Shareholders' Meeting Minutes, whereby the appointments of the acknowledged Board of Directors of the aforementioned company, GABINVEST S.A., were annulled and a new Board of Directors was appointed. A new Board of Directors was appointed, consisting of ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. They did not

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have the endorsement to carry out said meeting. This decision was registered under Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama and its subsequent registration in the Public Registry of Panama.

In this line of argument, on April 29, 2020, ALVARO ALMENGOR and MANUEL CARRASQUILLA, acting as President and Secretary respectively (illegally) of the company GABINVEST S. A., signed a Minutes of the Shareholders' Meeting of the aforementioned company, wherein they indicated "that due to the exceptional circumstances derived from Covid19, it is extremely difficult to hold physical meetings. Therefore, this meeting will have to be held by telephone".

Likewise, they inserted a clause in said Minutes amending the Articles of Incorporation stating "Shareholdrs" Meetings may be held by telephone and other electronic means of communication and shall be considered meetings where shareholders were physically present. Meetings of the Board of Directors may also be held by telephone and other electronic means of communication and shall be considered meetings where directors were physically present".

Additionally, in the aforementioned meeting, they appointed a Board of Directors executed through Public Deed 791 of January 16, 2020, wherein they appointed ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary, LIDIA RAMOS as Treasurer. Said Minutes was notarized under Public Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama, and subsequently registered in the Public Registry of Panama.

The actions carried out by the defendants violated the bylaws of the Articles of Incorporation of GABINVEST S A., because the shareholder of the aforementioned company never participated in the Shareholders' Meeting to remove the Board of Directors presided by its attorney, JOSE EDUARDO SAN JUAN. This is because the meeting was not requested, as it was falsely stated in Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama. Likewise, false information was inserted through Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama, since the Articles of Incorporation of the affected company did not establish in any of its clauses the holding of meetings by telephone or any other electronic means, as it is intended to be amended in the same Public Deed in its twelfth clause. This situation is contradicted by the holding of that same meeting. Therefore, the crime is totally configured.

Mr. JUAN GUILLERMO GUTIERREZ STRAUSS, in his capacity as PRESIDENT of the company XELA ENTERPRISES, sole shareholder of the company GABINVEST S.A., executed a notarial affidavit before a Notary Public in the City of GUATEMALA, Republic of GUATEMALA, on December 3, 2020, wherein, regarding the facts that concern us today, he stated the following: No participation in the Shareholders' Meeting of the company GABINVEST S.A., held on January 16, 2020, whereby

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the appointments of the acknowledged Board of Directors of the company GABINVEST S.A. were made, was valid. In this sense, a new Board of Directors was appointed, presided by Mr. ALVARO ALMENGOR as President, MANUEL CARRASQUILLA as Secretary and LIDIA RAMOS as Treasurer. My client does not know these persons and they do not have the endorsement, authorization or mandate to represent the company GABINVEST S.A. because they are not members of the Board of Directors proposed and elected by the Shareholders of the aforementioned company.

Attorney Javier de Leon, in his complaint, submitted the following evidence:

- Electronic copy from the Public Registry of Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of the Province of Panama.
- Electronic copy of Public Deed 4957 of April 29, 2020, issued by the Eighth Notary Office of the Circuit of the Province of Panama.
- Certificate of incorporation of the company GABINVEST S.A.
- Certificate of incorporation of the corporation LISA.
- Notarized statement of the shareholder of GABINVEST S.A., wherein the shareholder makes clear that it did not participate in the aforementioned meetings.

II. ACTIONS IMPLEMENTED.

- The Judicial Investigation Directorate forwarded a field investigation form, dated February 25, 2021.
- The Judicial Investigation Directorate forwarded information from the database of the Electoral Tribunal and the Authority of Transit and Land Transportation regarding Mr. Alvaro Almengor with identity card No. 8-751-1550.
- On January 26, 2021, by Resolution No. 147, the complaint filed by Mr. Javier de Leon was admitted.
- The Superior Prosecutor's Office for International Affairs, by means of Official Notice FSAI-1917-2021, forwarded 23 pages translated from English to Spanish of the documentation received through Official Letter No. 1723 dated May 20, 2021.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-84968-2021, forwarded authenticated copies of Public Deed 4957 dated April 29, 2020, issued by the Eighth Notary Office of the Circuit of Panama.
- The Public Registry of Panama, through Official Notice No. DG-346-2021, dated May 12, 2021, forwarded information of entries of Public Deed 791 of January 16, 2020 and Public Deed No. 4957 of April 290, 2020, issued by the Eighth Notary Office of the Circuit of Panama.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-52567-2021. forwarded the certificate of the law firm Hastone Asociados.

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- The National Directorate of Financial Benefits, Individual Accounts Department, declares that, after verifying in its systematic records as of January 2021, Mrs. Alvaro Almengor, with ID No. 8-751-1550, appears registered by his employer at the Ministry of Labour and Labour Development, on December 2020.
- The Ministry of Commerce and Industry, General Directorate of Domestic Commerce, through Official Notice DGCI-DG-No. 095-21, informed us that after reviewing their files, they indicate that the commercial name HASTONE ASOCIADOS is **NOT** registered in their system www.panamaemprende.gob.pa. They do not have business registration, business license, or notice of operations.
- The Instituto de Acueductos y Alcantarillados Nacionales [National Aqueduct and Sewer Institute], through Official Notice No. 356-AL, informed us that Alvaro Almengor, with identity card No. 8-751-1550, does not have a water supply contract.
- On December 14, Mr. Juan Miguel Gutierrez gave an interview to state the following: The events occurred in the changes made to the Panamanian companies GAVISMENTS, S.A. I am the beneficiary and shareholder of a Canadian company, XELA ENTRERPRISES LTD, which in turn is the shareholder of GAVISMENTS. S.A. As a shareholder, he is affected by the events that occurred. For a case involving the company he manages in Canada, a commercial judge of the province of Ontario issued an order limiting him from participating or advancing this case. This situation makes him feel as if he is a judicial hostage because, despite being a victim and plaintiff, this order prohibits him from participating or advancing in this case. In the changes made to GAVISVENT, his name is directly mentioned as a participant. However, I was not present at that meeting. GAVISMENT's Articles of Incorporation state that all meetings must be attended in person or represented by the shareholders. In this case, he was not summoned nor invited to the meeting. I state for the record that I personally did not participate in that meeting. 100% of GAVISMENTS shares belong to XELA INTERPRISES, the company he represents. The share certificates are under the administration of GAVISMENT S.A. and XELA INTERPRISES. The books of shares are carried by the administration of GAVISVEMTS S.A. This office proceeded to ask the interviewee the type of proceeding for which the company XELA INTERPRISES is under judicial administration. The interviewee answered: This is a court order for payment to a woman who is his sister. The proceeding is ongoing in a Commercial Court of the Province of Ontario, seeking payment arrangements. This proceeding is not related to GAVISMENT. The interviewee should state what damage he has suffered as a representative and shareholder of GAVISMENT as a result of the shareholder's meeting to which he was not summoned: The interviewee answered the question. He is currently under a court order from the authorities in Canada and is therefore not authorized to respond. The interviewee reiterates what was stated at the beginning of the interview, regarding the fact that he was not summoned to participate in the Shareholders Meeting.
- On December 1, 2021, the law firm Tejada Abogados provided evidence such as the legal

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opinion issued by DLA (Canada) LLP, dated October 18, 2021, duly legalized and apostilled and its translation into Spanish, which clearly states the meaning and scope of the Order issued by the Ontario Court on July 5, 2019. A letter of undertaking executed between Hatstone Abogados and KSV Kofman Inc. (now KSV Restructuring Inc.) (the "Receiver") dated January 15, 2020, and its corresponding translation into Spanish.

- The National Judicial Investigation Directorate informed us that Mr. Alvaro Almengor, with identity card No. 8-751-1550, does not have a detention or arrest warrant. The company EDEMET S.A. (NATURGY) informed us that Alvaro Almengor, with personal identity card No. 8-751-1550, does not have a contract for the supply of electricity.
- The Public Registry of Panama, through Official Notice No. CERT-SIR-177187-2022, forwarded us a certificate and Public Deed 16725 of September 10, 2013, issued by the First Notary Office of the Circuit of Panama.

III. CONSIDERATIONS OF THE INVESTIGATING OFFICE.

Under the provisions of the Constitution of the Republic of Panama, the Public Prosecutor's Office is responsible for prosecuting crimes, exercising the actions derived from them before the criminal judges and courts, carrying out the investigation of the crimes, executing or ordering the execution of useful procedures to determine the existence or not of the crime and those liable for it, pursuant to the Criminal Law and the Criminal Procedure on the matter.

This provision requires this investigating office to examine the concurrence or not of the elements that constitute the criminal offences complained of with the criminal action outlined in the Criminal Code.

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In this regard, the plaintiff refers to the occurrence of several crimes. Therefore, we will begin with the analysis of the facts complained about regarding the alleged commission of the crime against public trust based on the alleged forgery at a shareholders meeting of the company GAVISMENT S.A., where Mr. De Leon states that the only shareholder of GAVISMENT S.A. is the company XELA ENTERPRISES LTD. However, on January 16, 2020, Alvaro Almengor, on behalf of the Law Firm Hatstone Asociados, subscribed a Shareholders' Meeting Minutes whereby he annulled the appointments of the acknowledged Board of Directors of the corporation GABINVEST S.A. A new Board of Directors was appointed, constituted by Alvaro Almengor as President, Manuel Carrasquilla as Secretary and Lidia Ramos as Treasurer, without them having the endorsement to hold such meeting. This was registered under Public Deed 791 of January 16, 2020, issued by the Eighth Notary Office of the Circuit of Panama and its subsequent registration in the Public Registry of Panama. In said Public Deed they indicated **"that due to the exceptional circumstances derived from Covid19, it is extremely difficult to hold physical meetings. Therefore, this meeting will have to be held by telephone". Likewise, they have one of the clauses of the Articles of Incorporation amended**

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in said Deed stating, "Shareholders' meetings may be held by telephone and other electronic means of communication and shall be considered meetings in which the shareholders were physically present. Meetings of the Board of Directors may also be held by telephone and other electronic means of communication and shall be considered meetings at which directors were physically present."

Now, considering the alleged commission of a crime of forgery of documents in general, it is important to point out that the existence of the company GABINVEST S.A. has been confirmed in the preliminary investigation, according to the information received by the Public Registry of Panama. The Public Registry of Panama certifies that it is a corporation registered in the Commerce Department under folio No. 117511 since September 23, 1983. Its registration is still in force.

Therefore, this investigative agency considers that, up to this stage of the preliminary investigation, Mr. Harald Johannessen Hals, in his capacity as treasurer of the company GABINVEST S.A., has not accredited his capacity as shareholder or heir of GABINVEST S.A. shares.

The lack of legitimacy of Mr. Harald Johannessen Hals is evident, according to the legal provisions, to be considered a victim in this case, despite the fact that at the beginning of the investigation, Mr. Harald Johannessen Hals was admitted to be a victim. During the progress of the investigation, it has not been possible to confirm his rights.

This is based on the provisions of Article 112 of the Code of Criminal Procedure which establishes that: Article 112. Public action dependent on private instance. Crimes of public action dependent on private instance require the complaint of the offended party.
The following are crimes of public action dependent on private instance:

1.
2.
3.
4.
5.
6. **Forgery of documents to the detriment of individuals.**
7.

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Article 113. Legitimacy of the Complainant. In the cases provided for in the preceding article, when the law requires a complaint from the offended party to initiate the investigation, it shall be sufficient for the victim to file a request to the Prosecutor to investigate the crime.
This request may be made verbally or in writing, but the interested party must prove his or her status

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as a victim ...

In this regard, Article 3 of the Code of Criminal Procedure establishes that criminal legislation should only intervene when it is impossible to use other social control mechanisms.

Above all, we consider it appropriate to point out that, in order to consider that a given conduct is within the scope of criminal law, the facts must fully comply with the elements that make up the criminal offence. At the same time, an analogy cannot be applied between the fact and what is stipulated in the rule, without it having to be entirely described by the criminal offence, and committed by the person who may be held liable.

In other words, if all the elements of the criminal offence invoked are not confirmed, the possibility of attributing the commission of a crime to any person is immediately ruled out, without prejudice that the same situation could be examined in a jurisdiction other than the criminal jurisdiction, pursuant to the principle of the minimum application of the criminal law, outlined in Article 3 of the Code of Criminal Procedure, which states the following:

> "Article 3. Criminal law should only be applied when it is not possible to use other mechanisms of social control. The principle of its minimum application is provided for."

The principle of minimum intervention in criminal law, also known as the "ultima ratio principle", has a double meaning: first of all, it implies that criminal sanctions should be limited to the essential circle, to the benefit of other sanctions or even tolerance of lesser offences, i.e., the right to punishment. It does not have to punish all conduct harmful to the legal rights previously considered worthy of protection, but only the most dangerous modalities of attack to them. Secondly, minimum intervention in criminal law responds to the legislator's conviction that punishment is an irreversible evil and an imperfect solution that should be used only when there is no other remedy, i.e., after the failure of any other means of protection. Therefore, criminal law must be the "last resort" or, in other words, the last resort to be used in the absence of other punitive means. The legislator considers that when criminal law intervenes it must be for the protection of those "majority interests necessary for the functioning of the rule of law".

Consequently, this jurisdiction must be resorted to when the other mechanisms of social control and peaceful conflict resolution are ineffective, that is, we must only use the criminal jurisdiction when it is not possible to resolve the conflict in any other way or when the other mechanisms are inadequate.

Based on the foregoing, it is appropriate to rule pursuant to the provisions of Article 275 of the Code of Criminal Procedure, which states the following:

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> Article 275: Provisional Filing. The Prosecutor may order the case to be closed, stating the reasons if he has not been able to identify the perpetrator or participant or if it is manifestly impossible to gather convincing evidence. In this case, the investigation may be reopened if elements subsequently emerge that allow the identification of the perpetrators or participants.
>
> Likewise, it will order the file if it considers that the fact does not constitute a crime, dismissing the complaint or the proceedings. Its decision will be reviewed by the judge responsible for procedural safeguards if the victim so requests".

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The correct application of the aforementioned regulations leads us to dismiss the complaint because no crime has been committed, and the claims presented by the plaintiff do not correspond to the criminal offences alleged to have been committed.

Considering the facts presented and the aforementioned legal regulations, the Deputy Prosecutor of the Crimes Against the Public Trust Department DECIDES:

FIRST: To order the provisional filing of file No. **202100003611** for an alleged **CRIME AGAINST THE PUBLIC TRUST** in the modality of forgery of documents in general and other alleged crimes complained about by Mr. Javier de Almengor, attorney of Harald Johannessen Hals in his capacity as treasurer of GABINVEST S. A.

SECOND: To communicate this resolution to **Mr. Harald Johannessen Hals**, informing him of the provisions of the last paragraph of the aforementioned Article 275 of the Code of Criminal Procedure, which indicates that, if the victim disagrees with this decision, he may request the judge responsible for procedural safeguards to review it.

THIRD: To communicate this resolution to the defendants **Alvaro Almengor, Lidia Ramos and Manuel Carrasquilla**, informing them of the provisions of the last paragraph of Article 275 of the Code of Criminal Procedure.

FOURTH: After communicating with the victim, if he disagrees with the decision taken, inform him that it may be reviewed by the judge responsible for procedural safeguards if he so requests.

FIFTH: To release it on the Technological Platform of the Accusatory Criminal System Website.

LEGAL GROUNDS: Articles 22, 68, 110, 275 of the Code of Criminal Procedure and Articles 2 and 3 of the Criminal Code of the Republic of Panama.

SERVE, COMMUNICATE AND EXECUTE.

[Signature]

ATTY. ELBA MARLENE AROSEMENA

Deputy Prosecutor of the Crimes Against Public Trust Department

Metropolitan Prosecutor's Office

ATTORNEY GENERAL'S OFFICE
METROPOLITAN PROSECUTOR'S OFFICE
CRIMES AGAINSTTHE PUBLIC TRUST DEPARTMENT
In Panama, at 3:41 in the afternoon, on the 23rd day of August 2022, I notified [Illegible Signature] for the record.

[Signature]
Signature

ATTORNEY GENERAL'S OFFICE
METROPOLITAN PROSECUTOR'S OFFICE
CRIMES AGAINST THE PUBLIC TRUST DEPARTMENT
I CERTIFY THE FOREGOING IS A TRUE COPY OF ITS ORIGINAL.
In Panama on the 23rd day of August 2022.

[Signature]
Signature

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MINISTERIO PÚBLICO
SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA
FISCALÍA METROPOLITANA

ARCHIVO PROVISIONAL No. 496 Panamá, 22 de agosto de 2022	CARPETILLA N° 202100003611

Esta agencia del Ministerio Público tiene a su cargo, la investigación penal identificada con el número N° **202100003611**, por la presunta comisión del delito **CONTRA LA FE PÚBLICA, en la** modalidad de Falsificación de Documento en General.

Corresponde al Ministerio Público perseguir los delitos, dirigiendo la investigación, practicando u ordenando la ejecución de las diligencias útiles, para determinar la existencia del ilícito y los responsables de conformidad con las disposiciones del Código Procesal Penal y así ejercer las acciones ante los Juzgados y Tribunales en que actuamos.

I. ANTECEDENTES.

Mediante querella suscrita por el licenciado Javier Alcides De León Almengor apoderado principal de Harald Johannessen Hals en calidad de tesorero de GABINVEST, S.A. se adecua a la acción por comisión del tipo descrito en el artículo 366 del Código Penal.

Manifiesta el licenciado De León que para la fecha del 10 de septiembre de 2013, se realizó una reunión de Accionistas de la Sociedad GABINVEST S.A., en la cual dentro de su orden del día estuvo la escogencia de la Junta Directiva de la misma, siendo su poderdante EDUARDO SAN JUAN Presidente y Representante Legal de la precitada Sociedad Anónima; DAVID HARRY como Secretario y HARALD JOHANNESSEN como Tesorero, decisión que quedó inscrita mediante Escritura 16715 de fecha 10 de septiembre de 2013, de la Notaría Primera de Circuito de Panamá, y su debida inscripción en el Registro Público de Panamá.

Que para la fecha del 16 de Enero de 2020, ALVARO ALMENGOR, en representación de la Firma de Abogados HATSTONE ASOCIADOS, suscribe un Acta de reunión de Accionistas, mediante la cual deja sin efecto los nombramientos de la Junta Directiva reconocida de la prenombrada Sociedad Anónima GABINVEST S.A., y disponen el nombramiento de una Nueva Junta Directiva siendo los mismos, ALVARO ALMENGOR como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera, sin que los mismos tuvieran el aval para realizar dicha convocatoria. Dicha Decisión quedó consignada a través de la Escritura 791 de 16 de Enero de

2020, de la Notaría Octava de Circuito de Panamá y su posterior inscripción en el Registro Público de Panamá.

En ese orden de ideas, para la fecha del 29 de abril de 2020, ALVARO ALMENGOR, en conjunto con MANUEL CARRASQUILLA, actuando como Presidente y Secretario respectivamente (ilegalmente), de la Sociedad GABINVEST S.A., suscriben un Acta de Reunión de Accionistas de la citada Sociedad, en la cual indicaron "que debido a las circunstancias excepcionales derivadas del Covid19, es extremadamente difícil celebrar reuniones físicas, por lo que esta reunión tendrá que realizarse por teléfono"

Así mismo hacen insertar en dicha Acta una cláusula modificando el Pacto Social señalando "Las reuniones de accionistas pueden realizarse por teléfono y otras formas electrónicas de comunicación y se considerarán reuniones en las que los accionistas estuvieron físicamente presentes. Las reuniones de la junta Directiva también pueden realizarse por teléfono y otras formas electrónicas de comunicación y se consideraran reuniones en las que los directores estuvieron físicamente presentes"

Adicionalmente en esa supuesta reunión conformaron el nombramiento de Junta Directiva impuesta mediante Escritura 791 de 16 de enero de 2020, en la nombraron a ALVARO ALMENGOR como Presidente, MANUEL CARRASQUILLA como Secretario, LIDIA RAMOS como Tesorera. Dicha Acta fue elevada a escritura pública 4957 de 29 de Abril de 2020 de la Notaría Octava de Circuito de Panamá, y posteriormente inscrita en el Registro Público de Panamá.

Que las acciones desplegadas por los querellados violentaron los estatutos del Pacto Social de la Sociedad GABINVEST S.A., toda vez que el accionista de la referida Sociedad jamás participó en reunión de Junta de Accionistas para remover la Junta Directiva Presidida por su poderdante JOSE EDUARDO SAN JUAN, ya que no se solicitó la convocatoria para la celebración de la misma, tal como se aseveró falsamente en la Escritura 791 de 16 de enero de 2020 de la notaría octava de circuito de Panamá; de la misma forma, se insertó información falsa a través de la Escritura 4957 de 29 de Abril de 2020, de la Notaría Octava de Circuito de Panamá, toda vez que el Pacto Social de la Sociedad Anónima afectada, en ninguna de sus cláusulas establecía la celebración de reuniones a través de teléfono ni ningún otro medio electrónico, como pretende modificar en la misma Escritura Pública en su cláusula Duodécima, situación que se contradice con la celebración de esa misma reunión, por lo que el hecho punible se configura totalmente.

El señor JUAN GUILLERMO GUTIERREZ STRAUSS, en su calidad de PRESIDENTE de la Sociedad XELA ENTERPRISES, única accionista de la Sociedad GABINVEST S.A., rindió declaración jurada

Notarial ante Notario Público en la Ciudad de GUATEMALA, República de GUATEMALA, para la fecha del tres (3) de diciembre de 2020, en la cual con los hechos que hoy nos ocupan declaró lo siguiente: ninguna forma para participar en la Asamblea de Accionistas de la entidad GABINVEST S.A., celebrada el dieciséis de enero de dos mil veinte, mediante la cual se dejó sin efecto los nombramientos de la Junta Directiva reconocida de la entidad GABINVEST, S.A. , disponiendo en tal sentido, el nombramiento de una nueva junta Directiva, presidida por el señor ALVARO ALMENGOR como Presidente, MANUEL CARRASQUILLA como Secretario y LIDIA RAMOS como Tesorera. Dichas personas no son del conocimiento de mi representada, y tampoco tienen el aval, autorización o mandato para representar a la entidad GABINVEST, S.A. por no ser miembros de Junta Directiva propuestos y electos por el Accionista de la mencionada sociedad.

El licenciado Javier De León en su escrito de querella presenta las pruebas que se detallan a continuación:

- Copia electrónica del Registro público de la Escritura Púbica 791 del 16 de enero de 2020 de la Notaría Octava de Circuito de la Provincia de Panamá.
- Copia electrónica de la Escritura Pública 4957 del 29 de abril de 2020 de la Notaría Octava de Circuito de la Provincia de Panamá.
- Certificación de existencia de la Sociedad Anónima GABINVEST S.A.
- Certificación de la existencia de la Sociedad Anónima LISA
- Declaración Notarial del Accionista de la Sociedad Anónima GABINVEST S.A. en la cual deja claro su no participación en las reuniones aludidas.

II. ACTIVIDADES REALIZADAS.

- La Dirección de Investigación Judicial remite formulario de investigación de campo, fechado 25 de febrero de 2021.
- La Dirección de Investigación Judicial remite información de la base de datos del Tribunal Electoral y la Autoridad de Tránsito y Transporte Terrestre, del señor Alvaro Almengor con cédula No. 8-751-1550.
- El 26 de enero de 2021 mediante resolución No. 147 se admite la querella presentada por el licenciado Javier De León.
- La Fiscalía Superior de Asuntos Internacionales, mediante nota FSAI-1917-2021, remite 23 fojas traducidas del idioma inglés al idioma español de la documentación recibida mediante oficio No. 1723 con fecha de 20 de mayo de 2021.
- El Registro Público de Panamá, mediante Nota No. CERT-SIR-84968-2021, remite copias autenticadas de Escritura Pública4957 del 29 de abril de 2020 de la Notaria Octava del Circuito de Panamá.

- El Registro Público de Panamá, mediante Nota No.DG-346-2021, fechada 12 de mayo de 2021, remite información de entradas de las Escrituras Públicas 791 de 16 de enero de 2020 y Escritura Pública No. 4957 de 290 de abril de 2020 ambos de la Notaria Octava del Circuito de Panamá.
- El Registro Público de Panamá, mediante Nota No. CERT-SIR-52567-2021, remite certificación de la Sociedad Hastone Asociados.
- La Dirección Nacional de Prestaciones Económicas departamento de Cuentas Individuales, manifiesta que al verificar en sus registros sistemáticos al mes de enero de 2021, el señora Alvaro Almengor con No. de cédula 8-751-1550 figura con el patrono Ministerio De Trabajo Y Desarrollo Laboral, para el mes de diciembre de 2020.
- El Ministerio de Comercio e Industria Dirección General de Comercio Interior, mediante nota DGCI-DG-No. 095-21, nos informa que al revisar sus archivos indica que bajo el nombre comercial HASTONE ASOCIADOS **NO** aparece registrado en su sistema www.panamaemprende.gob.pa, no poseen Registro Comercial, licencia Comercial, ni de Aviso de Operaciones.
- El Instituto de Acueductos y Alcantarillados Nacionales, mediante Nota No. 356-AL, nos informa que Alvaro Almengor con cédula de identidad personal No. 8-751-1550 no mantiene contrato de suministro de agua.
- El día 14 de diciembre rinde entrevista el señor Juan Miguel Gutiérrez a fin de manifestar lo siguiente: La situación de los hechos se da en los cambios efectuados en las sociedades panameñas GAVISMENTS, S.A., la cual yo soy el beneficiario y soy accionista de una empresa canadiense XELA ENTRERPRISES LTD, que a su vez es el accionista de GAVISMENTS, S.A, y como accionista se ve afectado de los hechos que se dieron. Por un caso que involucra a la empresa que el dirige en Canadá, una Juez Mercantil de la provincia de Ontario emitió una orden limitándolo a participar o avanzar este caso, cosa que le hace sentir como secuestrado judicialmente, ya que a pesar de ser victima y querellante dicha orden le prohíbe participar o avanzar en este caso. Ya que en los cambios que efectuaron en la sociedad GAVISVENT, directamente se menciona su nombre como participante, sin embargo, no estuve presente en dicha asamblea. El pacto social de GAVISMENT ordena que todas las reuniones deben se presenciales O representadas por los accionistas, en este caso no fue convocado, ni invitado a la celebración de esa asamblea. Dejo constancia que yo personalmente no participe en esa asamblea. Indica que el 100% de las acciones GAVISMENTS le pertenece a XELA INTERPRISES, empresa a la cual el representa. Y que los certificados de acciones están bajo de la administración de GAVISMENT S.A. Y XELA INTERPRISES. Los libros de acciones lo mantienen la administración de GAVISVEMTS, S.A. El despacho procede a preguntarle al entrevistado el tipo de proceso por la cual se encuentra bajo administración judicial la empresa XELA INTERPRISES. Contestó el entrevistado: Se trata de una orden judicial de pagó a una señora que es su hermana. El proceso se encuentra,

en un Juzgado Comercial de la Provincia de Ontario, en la posición de buscar los mecanismos de pago. Este proceso no guarda relacionado con GAVISMENT. Diga el entrevistado cuál ha sido el perjuicio que ha tenido como representante y accionista de GAVISMENT producto de la reunión de junta de accionista a la cual no fue convocado: contestó el entrevistado, con respecto a lo preguntado, ahora mismo mantiene una orden Judicial por parte de las autoridades en Canadá por lo que no está facultado para responder. El entrevistado reitera lo indicado al inicio de la entrevista, en cuanto que no fue convocado para participar a la reunión de Junta de Accionistas

- El día 1 de diciembre de 2021, la firma Tejada Abogados aporta elementos de convicción como la opinión legal emitida por DLA (Canadá) LLP, de la fecha 18 de octubre de 2021, debidamente legalizado y apostillado y su traducción al idioma español, en la cual se establece claramente el sentido y alcance de la Orden dictada por el Tribunal de Ontario de 5 de julio de 2019. Carta de compromiso suscrita entre Hatstone Abogados y a KSV Kofman Inc. (ahora KSV Restructuring Inc) (el "Administrador Judicial") de fecha 15 de enero de 2020 y sus correspondiente traducción al español.
- La Dirección Nacional de Investigación Judicial nos informa que el señor Alvaro Almengor con cédula de identidad No. 8-751-1550 o mantiene orden de conducción o de aprehensión.
- La Empresa EDEMET, S.A. (NATURGY), nos informa que Alvaro Almengor con cédula de identidad personal No. 8-751-1550 no mantiene contrato de suministro de energía eléctrica.
- El Registro Público de Panamá mediante Nota No. CERT-SIR-177187-2022, nos remite certificación y Escritura Pública 16725 de 10 de septiembre de 2013 de la Notaria Primera del Circuito de Panamá.

III. CONSIDERACIONES DEL DESPACHO INVESTIGADOR.

Corresponde al Ministerio Público por disposición de la Constitución Política de la República de Panamá, perseguir los delitos ejerciendo las acciones derivadas de ellos ante los jueces y tribunales penales dirigiendo la investigación de los delitos, practicando u ordenando la ejecución de las diligencias útiles para determinar la existencia o no del delito y sus responsables de conformidad con lo que dispone la Ley Penal y el Procedimiento Penal en la materia.

Este mandado supone que este despacho de investigación examine la concurrencia o no de los elementos que constituyen los tipos penales querellados con la acción dolosa regulada en el Código Penal.

En ese orden la parte querellante refiere la ocurrencia de varios delitos, por lo que iniciaremos con el análisis de los hechos querellados respecto a la posible comisión del delito Contra la Fe Pública, en virtud de la supuesta falsedad ante la celebración de una reunión de junta de accionistas de la

sociedad GAVISMENT, S.A., donde el licenciado De León manifiesta que el único accionista de GAVISMENT, S.A. es la sociedad XELA ENTERPRISES LTD, sin embargo el día 16 de enero de 2020, Alvaro Almengor en representación de la Firma de Abogados Hatstone Asociados suscribe un acta de reunión de Accionistas, mediante la cual deja sin efecto los nombramientos de la Junta Directiva reconocida de la Sociedad Anónima GABINVEST S.A. y disponen el nombramiento de una nueva Junta Directiva siendo los mismo, Alvaro Almengor como presidente, Manuel Carrasquilla como secretario y Lidia Ramos como tesorera sin que los mismos tuvieran el aval para realizar dicha convocatoria y la misma quedo consignada a través de la Escritura Pública 791 de 16 de enero de 2020 de la Notaria Octava de Circuito de Panamá y sus posterior inscripción en el Registro Público de Panamá; y en la cual indicaron **"que debido a las circunstancias excepcionales derivadas del Covid19, es extremadamente difícil celebrar reuniones físicas, por lo que esta reunión tendrá que realizarse por teléfono"**, así mismo hacen insertar en dicha acta modifican una de las cláusulas del Pacto Social señalando **"Las reuniones de accionistas pueden realizarse por teléfono y otras formas electrónicas de comunicación y se considerarán reuniones en las que los accionistas estuvieron físicamente presentes. Las reuniones de la Junta Directiva también pueden realizarse por teléfono y otras formas electrónicas de comunicación y se consideraran reuniones en las que los directores estuvieron físicamente presente."**

Ahora bien, ante la posible comisión de un delito de Falsedad de Documentos en General, es importante puntualizar que se ha corroborado dentro de la investigación preliminar la existencia de la sociedad GABINVEST, S.A.., de acuerdo a la información recibida por el Registro Público de Panamá, el cual certifica que es una sociedad anónima, que se encuentra registrada en la sección mercantil, con folio No.117511 desde el 23 de septiembre de 1983, que la misma se encuentra vigente.

Siendo así, esta agencia de investigación es del criterio que, hasta esta fase de investigación preliminar, el señor Harald Johannessen Hals, en su calidad de tesorero de la empresa GABINVEST, S.A no ha acreditado su calidad de socio o heredero de las acciones de la sociedad GABINVEST, S.A.

Siendo, evidente la falta de legitimidad del señor Harald Johannessen Hals a la luz de lo que presupuestos de ley, para que sea considerado víctima dentro de la presente causa, pese a que al inicio de la investigación se admitió la calidad de víctima del señor Harald Johannessen Hals, durante el desarrollo de la investigación no se ha podido obtener acciones que acrediten sus derechos.

Esto es en base a lo establecido en el artículo 112 del Código Procesal Penal que establece que:

Artículo 112. Acción pública dependiente de instancia privada. Los delitos de acción pública dependiente de instancia privada requieren de la denuncia de la parte ofendida.
Son delitos de acción pública dependiente de instancia privada los siguientes:

1.
2.
3.
4.
5.
6. **Falsificación de documentos en perjuicio de particulares.**
7.

Artículo 113. Legitimidad del Denunciante. En los casos previstos en el artículo anterior, cuando la ley exija denuncia del ofendido para iniciar la investigación bastará que la víctima presente ante el Fiscal la solicitud de que se investigue el delito.
Esta solicitud puede hacerse verbalmente o por escrito pero el interesado deberá acreditar su condición de victima.....

Al respecto el artículo 3 del Código Penal estable que legislación penal solo debe intervenir cuando no es posible utilizar otros mecanismos de control social.

Sobre todo, lo expuesto en líneas anteriores, consideramos oportuno advertir, que para estimar que una conducta se encuadra con una norma penal, los hechos deben ajustarse en su totalidad a los elementos que componen el tipo penal, a la vez que no puede aplicarse analogía entre el hecho, y lo que estipula en la norma, sin, que debe ser enteramente descrito por el tipo penal, y cometido por quien pudiera resultar responsable.

Es decir que, de no concurrir todos los elementos del tipo penal invocado, inmediatamente queda descartada la posibilidad de atribuir la comisión de un delito a alguna persona, sin perjuicio que la misma situación, pudiera ser examinada en una jurisdicción distinta a la penal, de conformidad con el principio de la mínima aplicación de la ley penal, consagrada en el artículo 3 del Código Penal que señala lo siguiente:

> "Artículo 3. La legislación penal solo debe intervenir cuando no es posible utilizar otros mecanismos de control social. Se instituye el principio de su mínima aplicación."

El principio de intervención mínima en el derecho penal, denominado también "principio de ultima ratio", tiene un doble significado: en primer lugar implica, que las sanciones penales se han de limitar al círculo de lo indispensable, en beneficio de otras sanciones o incluso de la tolerancia de los ilícitos más leves, es decir, el derecho penal, no ha de sancionar todas las conductas lesivas a los bienes jurídicos que previamente se ha considerado dignos de protección, sino únicamente las modalidades de ataque más peligrosas para ellos. En segundo lugar, la intervención mínima en el derecho penal responde al convencimiento del legislador de que la pena es un mal irreversible y una solución imperfecta que debe utilizarse solamente cuando no haya más remedio, es decir, tras el fracaso de cualquier otro modo de protección. Por tanto, el recurso al derecho penal ha de ser la "última ratio" o lo que es lo mismo el último recurso a utilizar a falta de otros medios lesivos. Considera el legislador que cuando el derecho penal intervenga ha de ser para la protección de aquellos "intereses mayoritarios y necesarios para el funcionamiento del Estado de derecho".

En consecuencia, debe recurrirse a esta jurisdicción cuando los otros mecanismos de control social y de solución pacífica de conflictos resulten ineficaces; es decir, que solo debemos utilizar la jurisdicción penal, cuando no sea posible resolver el conflicto de otra manera o cuando los otros mecanismos resulten inadecuados, de allí que ante esta extrema necesidad la vía sea, activar el sistema jurisdiccional.

Conforme queda expuesto procede resolver según lo establecido en el artículo 275 del Código Procesal Penal, el cual dispone lo siguiente:

> Artículo 275: Archivo Provisional. El Fiscal puede disponer el archivo del caso, motivando las razones, si no ha podido individualizar al autor o partícipe o es manifiesta la imposibilidad de reunir elementos de convicción. En este caso, se podrá reabrir la investigación si con posterioridad surgen elementos que permitan identificar a los autores o partícipes.
>
> Así mismo, dispondrá el archivo, si estima que el hecho no constituye delito, desestimando la denuncia o las actuaciones. Su decisión será revisada por el Juez de Garantías si la víctima lo solicita".

La correcta aplicación de la normativa citada nos lleva a desestimar la querella, ya que no se configura ningún delito y las acciones de reclamo, presentadas por el querellante no encuentran adecuación típica en los tipos penales que se señalan infringidos.

En atención a los hechos planteados y a la normativa legal citada, la Fiscal Adjunta, de la Sección de Delitos Contra La Fe Pública, DISPONE:

PRIMERO. Ordenar el Archivo Provisional de la carpetilla **N°202100003611**, por un presunto **DELITO CONTRA LA FE PÚBLICA**, en la modalidad de Falsificación de Documentos en General y otros, hechos querellados por el Licenciado Javier De Almengor apoderado principal de Harald Johannessen Hals en calidad de tesorero de GABINVEST, S.A

SEGUNDO. Comunicar al **señor Harald Johannessen Hals,** la presente resolución, dándole a conocer lo establecido en el último párrafo del referido artículo **275** del Código Procesal Penal, que en lo medular indica, que, si la víctima se encuentra en desacuerdo con esta decisión, podrá solicitar al Juez de Garantías, la revisión de la misma.

TERCERO: Comunicar a los querellados **Alvaro Almengor, Lidia Ramos y Manuel Carrasquilla** la presente resolución, dándole a conocer lo establecido en el último párrafo del referido artículo **275** del Código Procesal Penal.

CUARTO: Luego de la comunicación a la víctima, en caso de manifestar su desacuerdo con la decisión asumida, informarle que la misma puede ser revisada por el Juez de Garantías si así lo solicita.

QUINTO: Désele salida en la Plataforma Tecnológica del Portal del Sistema Penal Acusatorio.

FUNDAMENTO DE DERECHO: Artículos 22, 68, 110, 275 del Código Procesal Penal y Artículos 2 y 3 del Código Penal, de la República de Panamá.

COMUNÍQUESE Y CÚMPLASE,

LCDA. ELBA MARLENE AROSEMENA
Fiscal Adjunta de la Sección de Delitos Contra la Fe Pública
Fiscalía Matropolitana.

MINISTERIO PUBLICO
FISCALIA METROPOLITANA
SECCION DE DELITOS CONTRA LA FE PUBLICA
En Panamá a los 3:41 de la tarde
del 23 de agosto de 2022 notifiqué a
y para constancia

MINISTERIO PÚBLICO
FISCALIA METROPOLITANA
SECCIÓN DE DELITOS CONTRA LA FE PÚBLICA
CERTIFICO QUE LO ANTERIOR ES FIEL COPIA DE SU ORIGINAL
En Panamá a los 23 de agosto de 2022

REPÚBLICA DE PANAMÁ
MINISTERIO PÚBLICO
FISCALÍA METROPOLITANA
Sección de Delitos Contra La Fe Pública

From: Monique Jilesen
To: Chris Macleod; Derek Knoke
Cc: Joan Kasozi; Brian Greenspan
Subject: RE: Epiq and document review
Date: September 13, 2022 10:08:52 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png

Chris,

Until this morning, we had not yet heard that all of the ATS data has yet been uploaded. We need to confirm that information with Epiq.

In any event, paragraph 8 of the October 27, 2020 Order provides that "at the request of the Receiver, [Epiq] will be authorized to load the data onto the Relativity document review platform.

In light of the funding issue, the Receiver has not requested that Epiq load the data onto Relativity. As a result, the timetable starting in paragraph 10 of the October 27, 2020 Order has not yet begun to run. We will provide with notice if and when the data is loaded onto relativity in accordance with the Order.

Thanks

Monique

From: Chris Macleod <cmacleod@cambridgellp.com>
Sent: Tuesday, September 13, 2022 8:38 AM
To: Monique Jilesen <mjilesen@litigate.com>; Derek Knoke <dknoke@litigate.com>
Cc: Joan Kasozi <jkasozi@cambridgellp.com>; Brian Greenspan <bhg@15bedford.com>
Subject: Epiq and document review

EXTERNAL MESSAGE

Monique and Derek-

Who do we coordinate with at Epiq to review the uploaded documents on relativity?

Thanks,

Chris

Chris Macleod

Partner, Cross-Border Litigation & Business Litigation Groups

CAMBRIDGE LLP

333 Adelaide Street West, 4th Floor
Toronto, ON, M5V 1R5
Phone: (416) 477 7007 Ext. 303
Direct: (647) 346 6696
Email: cmacleod@cambridgellp.com
Website: www.cambridgellp.com

MARGARTIA CASTILLO et al.
Applicants

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

SUPPLEMENTARY COMPENDIUM OF THE RECEIVER

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Lawyers for the Receiver