

1978 December 30

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SPARTACOS ESTATE LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 243/77).

Immovable Property Acquisition (Aliens) Law, Cap. 109 (as amended by Laws 52 of 1969 and 55 of 1972)—Company—Which has adopted the First Schedule (Table A) to the Companies Law Cap. 113—Whether an “alien controlled company” within section 2(b) of Law 55 of 1972—Regulations 98 and 104 of Table A (supra).

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The applicant Company, a Company limited by shares, had three directors of whom two were Cypriot nationals and the third an alien and more than half of its share capital belonged to Cypriots. The alien shareholders and the alien director had no special powers and none of them had ever held the office of the Chairman of the Company or the Board of Directors.

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When the Company sought to register in its name certain immovable property the respondent refused to effect the registration.

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The reasons for the refusal, as embodied in a letter of the respondent, were the following:

“(a) In accordance with regulations 98* and 104* of the First Schedule of Table ‘A’ of the Companies Law which are adopted by the Articles of Association of

* Quoted at p. 369 *post*.

the Company, two of the Directors constitute a quorum and the Chairman has a second or casting vote.

- (b) In view of the above at a meeting of the Directors at which the alien and one of the Cypriots are present and the alien will chair the meeting, he will control the decision of the Company. 5
- (c) Consequently, before I proceed to register the transfer of the immovables in the name of the Company, you are requested to amend the Articles of Association of the Company so that either the alien will not have a right to be elected Chairman or regulation 104 will be exempted." 10

Hence the present recourse in which the only issue for determination was whether the applicant Company was an "alien controlled Company" within the meaning of the Immovable Property Acquisition (Aliens) Law, Cap. 109 (as amended by Laws 52 of 1969 and 55 of 1972). 15

Section 3(1) of Cap. 109 (as amended by Law 55 of 1972) provides that no alien shall acquire otherwise than *mortis causa* any immovable property without the permit of the Council of Ministers first obtained. An "alien" is defined by section 2 of Cap. 109 (as amended by Law 52 of 1969) as meaning any person not being a citizen of the Republic and including an "alien controlled Company"; and an "alien controlled Company", is defined* by section 2(b) of Law 55 of 1972 and so far as relevant, reads as follows: 20 25

"'Alien controlled Company' means in connection with the acquisition of immovable property, any body -

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- (d) in which an alien has, at the time of the acquisition by the body concerned of immovable property, such powers conferred upon him by the memorandum or articles of association of, or other document regulating the said body, as to ensure that the affairs of the said body shall be conducted in accordance with his wishes." 30

Held, (1) that the words "at the time of the acquisition by the body concerned of immovable property" in the said para- 35

* See the whole text of the definition at p. 370 *post*.

graph (d) of section 2(b) of Law 55 of 1972 restrict the meaning of the remaining paragraph; that they exclude the possibility of the alien obtaining these powers in the future and/or upon the happening of some event, such as the alien becoming chairman and the other Cypriot directors, with the exception of one,
 5 being absent from a meeting so that with the alien and a Cypriot director constituting a quorum and the alien chairman making use of his casting vote.

(2) That by accepting the interpretation given to this paragraph by the respondent one would be led to a situation whereby every company registered in Cyprus which has at least adopted Table 'A' of the First Schedule—and even this not necessarily—would be considered as “an alien controlled Company” because no one can exclude the possibility of an alien—resident in
 10 Cyprus for Exchange Control Law purposes—becoming one of its directors and at some future date chairing one of their meetings when upon the absence of all other directors but one he might use his casting vote and ensure that the affairs of the Company shall be conducted at such meetings in accordance with his wishes; that this was not the intention of the legislator as manifested by the words used in this paragraph; that this
 15 paragraph must have been included to cover cases where an alien in a Company may by its very structure, such as the use of veto or the necessity of his participating and consenting to any decision, ensure that the affairs of the Company are conducted in accordance with his wishes; and that, accordingly, this recourse will succeed and the *sub judice* decision will be annulled.

Sub judice decision annulled.

30 **Recourse.**

Recourse against the decision of the respondent not to transfer in applicants' name immovable property unless and until the applicant company amended its articles of association.

M. Christofides, for the applicant.

35 *R. Gavrielides*, Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant Company seeks:

(a) A declaration that the act and/or decision of the respond-

ent not to register in its name immovable property transferred by virtue of a declaration of transfer No. P.4054/77 unless, and until the applicant Company amended its articles of association is null and void and of no legal effect. 5

- (b) A declaration that the omission of the respondent to register in the name of the applicant Company the immovable property transferred to it by virtue of declaration of transfer No. 4054/77 is null and void and of no legal effect, and that everything omitted should have been performed. 10

The applicant Company—a Company limited by shares—has three directors of whom two are Cypriot nationals and the third an alien, and more than half of its share capital belongs to Cypriots. The alien shareholders and the alien director have no special powers and none of them has held the office of the Chairman of the Company or the Board of Directors. By virtue of the aforesaid declaration of transfer certain immovable property situated in Strovolos area was transferred in the name of the applicant Company. The respondent refused to effect the said registration because the applicant Company was considered to be “an alien controlled Company”. The refusal of the respondent, subject-matter of this recourse, was communicated to the applicant Company by letter of the District Lands Officer Nicosia, dated the 2nd August, 1977, and reads as follows:— 15 20 25

“Regarding the declaration of transfer No. P.4054/77 by virtue of which certain immovable property in the area of the village Strovolos have been transferred to the name of your Company, I wish to inform you the following:— 30

- (a) In accordance with regulations 98 and 104 of the First Schedule of Table ‘A’ of the Companies Law which are adopted by the Articles of Association of the Company, two of the Directors constitute a quorum and the Chairman has a second or casting vote. 35
- (b) In view of the above at a meeting of the Directors at which the alien and one of the Cypriots are present and the alien will chair the meeting, he will control the decision of the Company.

- (c) Consequently, before I proceed to register the transfer of immovables in the name of the Company, you are requested to amend the Articles of Association of the Company so that either the alien will not have a right to be elected Chairman or regulation 104 will be exempted.”

Regulations 98 and 104 read as follows:-

“98. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. It shall not be necessary to give notice of a meeting of directors to any director for the time being absent from the Republic.

104. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in the case of an equality of votes the chairman shall have a second or casting vote.”

Reference, however, must be made to regulation 99 which is the one that regulates the question of the quorum necessary for the transaction of the business. It reads:-

“99. The quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall be two.”

The issue for determination in this recourse is whether the applicant Company is an “alien controlled Company” within the meaning of the relevant legislation, namely The Immovable Property Acquisition (Aliens) Law, Cap. 109, as amended by The Immovable Property Acquisition (Aliens) Law 1969, (Law No. 52 of 1969), and The Immovable Property Acquisition (Aliens) (Amendment) Law, 1972, (Law No. 55 of 1972), hereinafter to be referred to as the “Law.”

Section 3(1) of the Law as amended by section 3 of Law No. 55 of 1972 provides that no alien shall acquire otherwise than

mortis causa any immovable property without the permit of the Council of Ministers first obtained.

An "alien" in so far as relevant to our case is defined by section 2 of the Law, as amended by section 2 of Law 52 of 1969 as follows:-

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" 'alien' means any person not being a citizen of the Republic and includes an alien controlled company,...."

The definition of an "alien controlled Company" is to be found in section 2(b) of Law 55 of 1972; it reads:-

" 'alien controlled company' means in connection with the acquisition of immovable property any body-

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(a) in which one-half or more than one-half of the directors, or persons occupying the position of directors by whatever name called, are aliens; or

(b) in which one-half or more than one-half of the voting power is in the hands of persons who are aliens, or who exercise their voting powers directly or indirectly on behalf of persons who are aliens; or

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(c) in which one-half or more than one-half of the shares is in the hands of aliens; or

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(d) in which an alien has, at the time of the acquisition by the body concerned of immovable property, such powers conferred upon him by the memorandum or articles of association of, or other document regulating the said body, as to ensure that the affairs of the said body shall be conducted in accordance with his wishes:

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Provided that where the powers referred to in this paragraph are conferred on two or more persons acting jointly, the body concerned shall not be deemed to be an alien controlled company unless one-half or more than one-half of such persons are aliens; or

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(e) in which the controlling interest therein, if any, is in substance vested as to the one-half or more than one-half in aliens or in a body falling within any of the other paragraphs of this definition."

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Considering that two out of the three directors of the applicant Company, and that more than half of the votes and shares belong to Cypriots, paras. (a), (b) and (c) of section 2 of the Law hereinabove set out are inapplicable. Likewise paragraph (e) has no relevance to our case as it refers to the "controlling interest" in a Company, with which we are not concerned. It remains, therefore, to examine whether the present case comes within the ambit of para. (d) which is the one upon which the respondent based his decision. Its prerequisites are that the alien must have at the time of the acquisition of the immovable property such powers as to ensure that the affairs of the Company shall be conducted in accordance with his wishes; these powers must be conferred upon him by the memorandum or articles of association or some other document regulating the conduct and the affairs of the Company.

The management of a Company is in the hands of its directors and the powers delegated to them are set out in the Company's articles of association, which normally contain a general clause providing among other things that the directors may exercise all the powers of the Company that are not by law or the regulations required to be exercised by the Company in a general meeting. This power is to be found in regulation 80, of Table 'A' of the First Schedule to the Law, which has been adopted by the applicant Company.

It is true that the directors possess the whole powers of the Company subject to the provisions of the articles and of the Companies Law and in this case there appears to be no limitation or restrictions to the alien director becoming a chairman. Para. (d) of section 2(b) hereinabove set out, might but for its very definite wording have been considered as being applicable to a situation created by the existence of an alien director as in the present case. According to its very wording the alien must have such powers as to ensure that the affairs of the said body shall be conducted in accordance with his wishes at the time of the acquisition by the body concerned of the immovable property.

I stress, however, the significance of the words "at the time of the acquisition by the body concerned of immovable property", which by their inclusion restrict the meaning of the remaining paragraph. They exclude the possibility of the alien

obtaining these powers in the future and/or upon the happening of some event, such as the alien becoming chairman and the other Cypriot directors, with the exception of one, being absent from a meeting so that with the alien and a Cypriot director constituting a quorum and the alien chairman making use of his casting vote. 5

I cannot agree with the approach of the respondent on the matter as by accepting his interpretation of this paragraph we would be led to a situation whereby every Company registered in Cyprus which has at least adopted Table 'A' of the First Schedule—and even this not necessarily—would be considered as “an alien controlled Company” because no one can exclude the possibility of an alien—resident in Cyprus for Exchange Control Law purposes—becoming one of its directors and at some future date chairing one of their meetings when upon the absence of all other directors but one he might use his casting vote and ensure that the affairs of the Company shall be conducted at such meetings in accordance with his wishes. 10 15

This is a possibility as under regulation 77 of Table 'A' “the shareholding qualification for directors may be fixed by the Company in general meeting and unless and until so fixed, no qualification shall be required”. Consequently, if a Company has no shareholding qualification as above fixed, then any Company which has adopted Table 'A' or has articles of association in similar terms, may at any time appoint as one of its directors an alien. If, on the other hand, a shareholding qualification has been fixed, again there is nothing to prevent a Company from having an alien as a shareholder acquiring the necessary shareholding qualification and ultimately becoming one of its directors and chairman at that and making use of the casting vote in order to ensure that the affairs of the Company at that meeting are determined according to his wishes provided all other directors, except one, are present at such a meeting. 20 25 30

I am certain that this was not the intention of the legislator as manifested by the words used in this statutory provision. 35

This paragraph must have been included to cover cases where an alien in a Company may by its very structure, such as the use of veto or the necessity of his participating and con-

senting to any decision, ensure that the affairs of the Company are conducted in accordance with his wishes.

5 I have made a passing reference to the Exchange Control Law (Cap. 199) in so far as relevant to the acquisition of securities etc., in Companies, the test applicable thereunder is not nationality but residence, which is equally applicable to both Cypriot and foreign nationals. It cannot, therefore, be said that its provisions and the permits required thereunder for the acquisition of securities change the situation in general with
10 respect of an alien as defined in section 2 of Law 52 of 1969.

For all the above reasons the present recourse succeeds and the *sub judice* decision is annulled. In the circumstances, however, I make no order as to costs.

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*Sub judice decision annulled.
No order as to costs.*