

Government of Liberia, represented by the Minister of Information of the Republic of Liberia, and all persons operating under his Authority of the City of Monrovia, Liberia **MOVANT** Versus The **Independent Newspaper, Inc.** represented by & thru its shareholder and Incorporator **Sam O. Dean** of the City of Monrovia, Liberia, **RESPONDENT**

MOTION TO DISMISS

MRS. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT

This is a Motion to Dismiss a Petition for Prohibition. The Petitioner/Respondent is one of the several news papers in this community. On February 20, 2007, the said Petitioner/Respondent published a photograph which the Respondent/Movant referred to as an obscene photograph because it depicted a group of three nude persons engaged in what is referred to under Liberian Law as deviant sexual behavior or conduct; an offense under the New Penal Code, Section 18.7. When this publication hit the market on February 20, 2007, the Ministry of Information, Culture and Tourism, the agency of government authorized by law to oversee the printing and publishing business, reacted by censuring the Petitioner/Respondent for the obscene publication and forbidding it from a repeat of the same. It is obvious that the Independent Newspaper paid no heed to the criticism and strong warning because it again published the same photograph on its front page exactly one week after the first publication. The Ministry of Information, Culture and Tourism responded to the defiance by shutting down the offices of the Newspaper and seeking to have the editor, Sam O. Dean, arrested. The Ministry also addressed a letter to the said editor, Sam O. Dean, revoking the Independent Newspaper's permit to engage in the publishing business for a period of one year. The said letter is quoted verbatim as follows:

"REPUBLIC OF LIBERIA
MINISTRY OF INFORMATION, CULTURE AND TOURISM
P. O. BOX 10-9021-CAPITOL HILL
1000 MONROVIA, LIBERIA

Office of the Minister
Cell 06-546166
MICAT/-1/LKB/0/047/ '07/RL

February 27, 2007

Mr. Sam O. Dean
Publisher
The Independent Newspaper
Monrovia, Liberia

Dear Mr. Dean:

The Ministry of Information, Culture and Tourism has the statutory responsibility to direct and supervise all matters relating to the information programs of the Government of Liberia, internal and external. This responsibility includes the mandate to select, in accordance with prevailing policies, subjects to be broadcast or covered by news, feature articles, slides, films filmstrips, and other means of communication for internal or external distribution.

In addition, Chapter 31.8 of the New Executive Law creating the Ministry of Information, Culture and Tourism gives the Ministry the mandate to "formulate and promulgate regulations governing communication in the country in respect of satellite and cable communications, journalists and journalism, importation, exportation publication and distribution of books, periodicals, newspaper, booklets, tracts, and other media-related activities.

Your publication of February 20, 2007 and subsequent publication of February 27, 2007 depicting obscene and nude photos on the cover of your newspaper is a direct violation of the statutory mandate of the Ministry as it relates to the regulations affecting journalists and journalism in Liberia; and as such the Ministry hereby revokes your operational permit to publish in Liberia for a period of one year as of February 27, 2007.

Regards,

Dr. Laurence Konmla Bropleh
MINISTER-DESIGNATE

CC: Ministry of Justice cc

- " Liberia National Police
- " Press Union of Liberia (PUL)
- " File."

The Ministry also sent out a public announcement to all publishing houses forbidding them from publishing for the Independent Newspaper. We must add that the Press Union of Liberia had on February 22, 2007, suspended the membership of the Independent Newspaper for a period of three months. The Ministry, however, reopened the offices of the newspaper after a few days with regrets for shutting them down in the first place, but has failed or refused to lift the one year ban or suspension. It is this ban or suspension of the newspaper's permit that has led to the filing of this Petition for Prohibition.

On March 1, 2007, the Petitioner/Respondent, The Independent Newspaper filed a Petition for Prohibition before the Justice in Chambers, Her Honour Gladys K. Johnson. Upon receiving the Petition, the Chambers Justice ordered the Clerk of the Supreme Court to issue the Alternative Writ and inform the Respondent, the Ministry of Information to file its Returns as per the procedure in this jurisdiction, which the Respondent did along with a Motion to Dismiss the Petition for Prohibition. The Justice in Chambers, pursuant to the practice, in cases in which constitutional issues are squarely raised, ordered the Clerk of the Supreme Court to forward the Petition for Prohibition, the Returns thereto, and the Motion to Dismiss to the Full Bench for determination. The Supreme Court had the option to consolidate all the processes filed, or hear the Motion by itself and proceed to hear the Petition and the Returns subsequently, if need be. The Supreme Court selected the latter option.

We quote below the Motion to Dismiss and the Resistance thereto:

Motion to Dismiss

"1. That Petitioner lacks the legal capacity to sue as a juridical person in that, although it refers to itself as Independent Newspaper, Inc. it has exhibited no articles of incorporation or by-laws and a business registration certificate from the Ministry of Commerce giving it authority to operate as a business entity in the Republic of Liberia."

"2. That having capacity to sue is the first legal requirement for a court to acquire jurisdiction of the parties to *any* dispute; hence, Petitioner's lack of capacity is a fatal defect for which the Petition must crumble."

"3. That assuming without admitting that Respondent is a corporation, the Petition is a fit subject for dismissal because it has named Mr. Sam O. Dean, its shareholder and incorporator as the person through whom it filed the Petition against Movant. Under the Associations Law of Liberia "the naming of a shareholder, member, director,

officer or employee of the corporation as a party to a suit in Liberia to represent the corporation is subject to a motion to dismiss if such party is the sole party to sue."

"4. That this motion is being filed in good faith and in an effort to uphold the procedural law in this jurisdiction and the rule of law in general.

" Respondent's Resistance

"1. Whether or not a motion to dismiss is the proper remedy where a party observes the alleged omission of pertinent documents in the records certified to the Supreme Court? We categorically say no to the first issue. Under our law and practice, a motion to dismiss is predicated upon (a) that the court has not jurisdiction of the subject matter of the action; (b) that the court has no jurisdiction of the person; (c) that the court has no jurisdiction of a thing involved in the action; (d) that there is another action pending between the same parties for the same cause in a court in the Republic of Liberia; and (e) that the party asserting the claim has not the legal capacity to sue. See 1LCR Sections 11.2, page 118."

"In the current case, none of these conditions obtains. The Respondent is a bona fide corporate entity operating under the business laws of Liberia, and therefore has capacity to sue in that it has acquired articles of incorporation and displayed a genuine past revenue receipts from the Ministry of Finance which are prerequisites for obtaining a permit from the Ministry of Information. See Count One (1) of Petitioner's Petition."

"Assuming without admitting that the Independent Newspaper does not have Articles of Incorporation, then why was it given a permit to operate as media entity? Which conditions or requirements convinced the Ministry to issue the Independent a permit? Moreover, assuming without admitting that the Independent is an illegal entity, can the government revoke the permit of a nonexistent entity which has not been duly certified by it to operate? The argument that the Independent is not a legal entity is vague, pointless and lopsided and it is intended to evade the illegal and arbitrary revocation of the paper's license without due process, thereby violating Article 15, Article 16, and Article 21 of the Constitution. Furthermore, Respondent avers and contends that Movant's Motion is a fit subject for dismissal in that, Movant contradicted his argument when he confirmed and affirmed the attachment or articles of incorporation by Respondent in Count two (2) of his Returns to Petitioner's Petition. Respondent says claim by Movant that the New Generation Communications Inc. which ' published the Independent Newspaper is a separate and distinct entity is baseless and demonstrates Movant's lack of understanding on

how the media industry operates. The fact of the matter is that every media institution worldwide is published under a parent corporate entity. Liberia is no exception to this rule. For instance, THE NEWS NEWSPAPER IS published by the LIBERIA MEDIA AND MARKETING SERVICES INCORPORATED; THE INQUIRER NEWSPAPER IS PUBLISHED BY NEW ERA PUBLICATIONS LIMITED; THE PLAIN TRUTH IS PUBLISHED BY THE FAMILY MEDIA AND MARKETING SERVICES. MOREOVER, THE PUBLIC AGENDA NEWSPAPER IS PUBLISHED BY THE MAYABAH COMMUNICATIONS INCORPORATED. WHILE THE INDEPENDENT IS PUBLISHED BY THE NEW GENERATION COMMUNICATIONS INCORPORATED

As agents of these parent bodies, these newspapers are given the power to sue or to be sued by any agency or individual on behalf of the parent company."

"2. Whether or not a party who acknowledges receipt of the articles of incorporation of a legal entity, that is, New, Generations Communications Inc., which publishes the Independent Newspaper, cannot benefit from a motion to dismiss on grounds of lack of capacity to sue? We say yes because Count two of Movant's Returns acknowledges receipt of Respondent's articles of incorporation, hence, the motion is a fit subject for dismissal it is made in bad faith. Besides, it appears that the Movant does not understand that the New Generation Communications, Inc., and the Independent are one and the same, and under corporation law are inseparable and indistinct. Respondent says Movant's motion should therefore be dismissed. See Count two (2) of Movant's Returns to Petition's Petition Count three (3) of Movant's motion is monotonous, witless and completely out of order. Hence, it should not be entertained to save precious time and energy. The fact of the matter is that the Respondent as leading shareholder and incorporator has acted on behalf of the corporation, thus, he is clothed with the responsibility to bring a law suit on behalf of the corporation."

Several issues were raised and argued by the parties, but we consider the following two issues to be determinative of this Motion:

1. Assuming that the Independent Newspaper is unincorporated, whether its lack of incorporation deprives it of a legal capacity to file this suit thereby rendering this Petition a fit subject for dismissal.
2. Whether because the Petition was filed by and thru the shareholder and incorporator (also editor) of the Independent Newspaper, Sam O. Dean, the said

Petition was filed contrary to a provision of the Associations Law as found in LCLR tit 5. Sub sec. 2.5 which in relevant parts states that "the naming of a shareholder, member, director, officer or employee of the corporation as a party to a suit in Liberia to represent the corporation is subject to a Motion to Dismiss if such party is the sole party to sue or defend." We shall dispose of the issues in the order in which they appear, beginning with the first issue. The Movant in support of his contention that the Independent Newspaper lacks the legal capacity to file suit, argued that the Independent Newspaper referring to itself as an incorporated entity by inserting the abbreviation, "Inc." after its name, without making profert of its incorporation documents renders the Petition a fit subject for dismissal for lack of legal capacity under a provision of the Civil Procedure Law of Liberia, 1LCLR tit 1 sub sec. 11.2 (e) which sets as ground to dismiss an action if the party asserting the claim has no legal capacity to sue. The Movant argued that the documents attached as exhibits by the Petitioner were the incorporation documents of an organization designated as the New Generation Communications, Inc., and not those of the Petitioner and that said Petition should therefore be dismissed.

The Petitioner/Respondent, in countering the above contention stated or explained that the Independent Newspaper is published by the New Generation Communications, Inc., and that the two are one and the same. He explained further that in the media industry worldwide, including Liberia, every newspaper has a parent publisher under whose banner the newspaper operates. This is true of all the other newspapers currently in operation in Liberia. None of the other newspaper has separate incorporation papers from those of their publishers, he argued.

The law with respect to the legal capacity of unincorporated associations to sue or be sued, as found under our Civil Procedure Law, is stated as follows:

"An unincorporated Association may sue and be sued." 1LCLR Section 5.16. In other to fully delve into this issue it is necessary that we distinguish between an unincorporated entity referred to in legal parlance as a corporation de facto and an incorporated entity referred to as a corporation de lure. The Supreme Court in Samuel Holder et at vs. Joseph F. Dumbar 17 LLR 719, 724 (1947) , while quoting from the Common Law, said:

"A corporation may exist without being legally constituted. Such a corporation is called a corporation de facto as distinguished from a corporation de lure. A corporation de jure is a corporation which is in all respects legal; a body which has a right to corporate existence and to exercise corporate powers of which it cannot be

deprived even by the State in a direct proceeding. A corporation de facto on the other hand is an association which actually exists for all practical purposes as a corporate body but which because of failure to comply with some provisions of law has no legal right to corporate existence as against a direct attack by the State. It may be ousted in a direct proceeding brought by the state for that purpose, but with a few exceptions ...it has a corporate existence even against the State on a collateral attack." 14C. J. 204 Corporations, Section 215. It is stated further under this section that:

"The general rules, supported by an almost unanimous consensus of judicial opinion and sometimes expressly declared by statute, is that the legality of the existence of a de facto corporation can be questioned only by the state in a direct proceeding, and cannot be collaterally attacked or litigated in actions or proceedings between private individuals or other corporations or between them and the alleged corporation itself."

"The doctrine in relation to de facto corporations is based upon the principle that the state which alone has the power to incorporate, may waive irregularities in the organization of corporations, and so long as the state remains inactive in the premises others must acquiesce. The passage goes on to state that, "since the legality of the existence of a de facto corporation cannot be questioned except in a direct proceeding by the state, a de facto corporation is reality and has a substantial legal existence, and the general rule is that such a corporation can make contracts, purchase, hold and convey property, incur liabilities *ex contractu* and *ex delicto*, and sue and be sued, to the same extent and in the same manner as if it were a corporation *de jure*." (Emphasis is ours).

In *Robert Gibson et al, Vs. Church of Christ Mission in Liberia* 24LLR 263, 282 (1975), the Supreme Court also said: "It is ordinarily essential to the existence of a de facto corporation that there be (1) a valid law under which a corporation with the powers assumed might be incorporated (2) a bona fide attempt to organize a corporation under such law and (3) an actual exercise of corporate powers. There cannot be a corporation de facto when there cannot be one *de jure*; that is a law authorizing the formation of a corporation such as that attempted to be created is essential to even a de facto existence." Carved from 18 AM Jur. 2d. Corporations, sections 51, 52. After stating the law as found under the common law and our Associations Law with respect to the powers of incorporated and unincorporated organizations, the question at this point is whether the Petitioner, assuming it is not a corporation *de jure* as argued by Counsels for the Respondent, has the legal right to operate as a corporation de facto. We hold that the Independent Newspaper, if not a corporation de jure because of failure to have its own articles of incorporation, by-laws, and constitution, and a certificate from the Ministry of Commerce, but

instead made profert of the incorporation documents of its publisher, as the organization under which it is incorporated, had the belief that it was incorporated. And having thus believed and held itself up openly as such in the community, we are of the opinion that the Independent Newspaper had (has) the intent and did attempt to be organized and recognized under the Associations Law of Liberia. We gathered from the records that the New Generation Communications, Inc., is the parent company and that the two entities are one and the same. We have no doubt, that the Ministry of Information that granted the permit authorizing the Petitioner to operate as a legal entity, inspected the Petitioner's documents prior to issuance of the permit. We have the belief that if the Ministry had discovered irregularities it would have either refused issuance of the permit outrightly, or given the Petitioner an opportunity to regularize those irregularities before granting the permit. The Ministry of Information, along with the other government agencies, are charged with the responsibility of examining or inspecting the business documents of prospective business entities before legalizing them to operate. They must have done the same in the case of the Independent Newspaper when said entity made its application for permit to engage in its business. Further, the Ministry of Information did in fact obligate itself to lift the ban after the one year suspension. To us this means that all was well until the Petitioner defiantly repeated the publication of the obscene photograph. All must have also been well with the legal capacity of the Petitioner to operate because it gained membership status into the Press Union of Liberia (PUL). Under that presumption, we must conclude that the inspection of the Petitions portfolio proved satisfactory, thereby qualifying it to be certificated as a legal business entity. It is therefore really not necessary for a determination of this case, for this bench to decide whether the Independent Newspaper is a corporation de facto or de lure because such a finding will not change the outcome of this Motion to Dismiss. What is essential is whether the said entity has the legal capacity to sue and be sued or to file this Petition. We again answer yes on the basis of our Associations Law and the Common Law provisions relied on in the Supreme Court cases cited supra in matters relating to said issue in which cases the Supreme Court held that corporations de facto and de jure have the capacity to sue and be sued. We hold further that the Independent Newspaper having been authorized by a permit granted it by the government to engage in business was as well authorized by said permit to sue in defense of, or in prosecution of its rights.

We have quoted in length some passages from the Corpus Juris and Am Jur. 2d, as cited in the cited cases supra and a provision of our own statutes. We therefore hold that, the Ministry of Information being authorized by the Republic of Liberia to license businesses to exist as legal entities, and the said Ministry, in exercising said

authority, having issued license to the Petitioner to engage in the newspaper publication business, did by so doing, clothe the said Petitioner, the Independent Newspaper, with the legal capacity to so operate, whether as a de facto or de jure corporation. The rule is that after the state has granted the permit, the said State cannot challenge the legal existence of said entity in a collateral proceeding. In other words the Ministry of Information, the government agency that granted the permit if desirous of, or if the need arises, to attack the legality of the entity's existence, it must do so by a direct attack, in a special proceeding for that purpose. The issue cannot be raised collaterally as has been done in this case. In the case at bar the State, through the Ministry of Information, after been brought before the Justice in Chambers on a Petition for Prohibition growing out of said State's decision to ban or suspend the license of the Petitioner to operate for a period of one year, the said State now contends that the Petitioner in fact is not an incorporated entity and therefore lacks the legal capacity to sue. We hold otherwise. The Motion to Dismiss on the ground Law and the above cited provisions of the common law. Thus the point of contention of the Movant must crumble.

The second issue is whether the Petition is in violation of a provision of the Association's Law because the Petition was filed by and through a shareholder/incorporator. The Movant argued that a corporation is a legal person, and as such it can sue and be sued in its own name We concede that to be the law. However, we hold that a corporation though a "legal person" that can sue and be sued in its own name, the "by and through" of the shareholder in this case is only for service of process convenience. It is an indisputable fact that the "legal person," the corporation, has no hands, no feet, eyes and ears and lacks the ability to speak for itself. Therefore, for purposes of achieving its goals and for the convenience of those who interact with this "legal person," it is practical and logical that actions for and against it be channeled by and through a designated person. It was by parity of that same reasoning that when it came time to make an arrest for the violation of the Penal Code it was not that "legal person" the Independent Newspaper, but Sam O. Dean who was being sought after. In the instant case, Mr. Sam O. Dean is that designated person by and through whom service of process was to be channeled. Mr. Sam O. Dean, in filing the Petition indicated that the Petitioner is the Independent Newspaper, Inc., filing the Petition by and through him, did not mean that he was assuming the identity of the "legal person," the Independent Newspaper, or that he was to be substituted for the corporate entity. The practice in this jurisdiction recognizes and accepts the representation to be for service of process only and not for holding the officer or representative liable or answerable for the obligations of the corporation. We hold further that the phrase "sole party" in the said provision of law

is intended to state that a manager, employee or other officer of a corporation cannot sue or be sued in their individual name or capacity in matters involving a corporate entity without the name of the entity being stated or indicated as the Complainant or Defendant. The proper Petitioner in the Independent Newspaper, Inc., case is not Sam O. Dean, but rather the Independent Newspaper, Inc. The Practice of corporations suing or being sued and through a named person is not a novel practice in this jurisdiction. In Eric R. Either, Petitioner, vs. Joseph Sawyer and Alfred B. Flomo, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County Respondents 26 LLR 247, 252-253 (1977). The Supreme Court held also that:

"When a corporation sues or is sued in its corporate name, the action is by or against the corporation itself as a legal entity, and its members are not in any legal sense parties to the action. 19 AM JUR. 2d, Corporations, 1453, 1475 (1965). For the purpose of bringing the corporation into court, service of process upon a corporation must necessarily be upon its officers or agents through whom it is capable of acting, or upon some person designated by law as a person upon whom process may be served. Rev. Code 1:3.38(6). It has always been the practice in this jurisdiction for the corporation to sue and be sued in its corporate name, by and through its president, manager, or agent." The following are few examples of cases brought by and through a designated person along with the corporate entity: Liberia Electricity Corporation (LEC) represented by and thru its Managing Director Samuel Burnette, Jr. Vs. the Board of General Appeals Charles S. Mongrue, 32 LLR 487 (1984). Firestone Plantations Company, by and thru its General Manager, and Philip G. Williams Vs. BETO BEHYE, 40 LLR 248 (2000), American Life Insurance Company, by and thru its General Manager (Vice President), Allen Brown Vs. Emmanuel Sandy, 32 LLR 242 (1984), Mamade Darame Vs. West Africa Trading Corporation, by and thru its Manager, Habib Nasr, 20 LLR 74 (1970), Liberia Telecommunications Corporation, by and thru its Managing Director, Sekou Kromah, et al Vs. His Honour Varney D. Cooper and Aura Liberia Mining Corporation, by and thru its President, Fabrizio Colombo, 39 LLR 485 (1999). On the basis of these cases and several more, we hold that the Petition for Prohibition filed by the Independent Newspaper, Inc., by and through the shareholder/incorporator, Sam O. Dean, is not in violation of law, and therefore not a proper reason for dismissal.

In view of all the contentions herein made, and the provisions of law cited, it is the considered opinion of this Court that the legal grounds stated and argued in support of the Motion to Dismiss being untenable both in law and practice, the said motion is hereby denied. IT IS HEREBY SO ORDERED.

Motion Denied.

