

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. 15 OF 1990
(Civil Action No. 2 of 1990)

Between:

PRESIDENT HOTEL LTD.

Appellant

- and -

LAMI TOWN COUNCIL

Respondent

Mr. V. Parmanandam for the Appellant

Mr. S. Parshottam for the Respondent

Date of Hearing: 30th October, 1990

Delivery of Judgment: 8th November, 1990

JUDGMENT OF THE COURT

This is an appeal against the orders of Palmer J. substituting a creditor for a Petitioning Creditor and making an order winding up the Appellant Company.

The Record has proved to be most confusing partly because there was difficulty in deciphering the writing of the learned Judge, who is no longer in Fiji, but also because there were relevant facts which were not in the record at all.

With the assistance of Counsel from the bar table, and particularly from Mr. Parshottam who appeared before Palmer J., some of the gaps in our knowledge have been filled in.

Mr. Keil's firm, then acting for Leylands Limited, purported under section 220(e) of the Companies Act to issue and

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serve on the Appellant Company a notice complying with section 221(a) which is in the following terms :

"221. A company shall be deemed to be unable to pay its debts -

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor."

Section 220(e) which states : "the company is unable to pay its debts", is one of the seven cases in the section which vests in the High Court jurisdiction to wind up a Company. Section 221(a) is one of three situations where it is deemed that a company is "unable to pay its debts". That section requires a notice, complying with the section, to be served on a company by leaving a notice of demand at its registered office.

It is not in dispute that the notice was not left at the Company's then registered office.

When the Petition came before Palmer J. it was known that a notice in compliance with section 221(a) had not been brought to the notice of the Company. The Appellant Company had prior to the hearing day filed an affidavit sworn by its manager stating the service of the notice was defective and requesting dismissal of the Petition on the ground that it had not been served on the Company.

Mr. Keil at the hearing conceded that the notice had not been served on the registered office of the Company and he sought leave to withdraw his Petition.

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Mr. Parshottam was at the hearing primarily to represent the Lami Town Council which was also a Petitioning Creditor of the Appellant Company in Civil Action 52 of 1989. Mr. Parshottam did not intend seeking the hearing of his client's Petition because it had not been advertised as required by law. We gather it was not advertised because the Appellant Company had made a payment on account of the alleged debt.

Mr. Parshottam had, however, on behalf of his client Company given due notice under rule 29 of the Companies Rules of his intention to appear to support the Petition in the instant action. His client-council was also a creditor and entitled to be substituted as Petitioning Creditor in the instant action if the Petition was in order.

On Mr. Keil seeking to withdraw his Petition Mr. Parshottam then applied on behalf of the council for the council to be substituted as Petitioning Creditor under Rule 32.

It is not apparent from the learned Judge's notes whether he appreciated that the Respondent was seeking to be substituted as a Creditor that had given notice under Rule 29 or as a Petitioning Creditor by virtue of the Petition filed in Civil Action 52 of 1989. There are grounds for believing he purported to substitute the Respondent because of its independent action. In his judgment in the instant action he dismissed Action 52 of 1989. Had the Council not given notice under Rule 29 the order for substitution might well have been challenged for failure to comply with rule 29.

When Mr. Parshottam applied for the Council to be substituted as Petitioning Creditor, despite opposition by Mr. H.M. Patel who appeared for the appellant company, the learned Judge appears to have overlooked the serious defect in the petition before him. To compound the error he gave leave to

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Mr. Keil to withdraw the petition. The position then was that there was no Petition before the Court.

The learned Judge's notes indicates he did not appreciate the legal situation. He stated:

"As I see it in Chas the supporting Creditors had not served any Petition or under demand. Whereas here he has."

The reference to Chas is to the Judgment or Order of Cullinan J. in C.A. 49 of 1985 In the matter of Chaz Lumber Ltd.

The Council had in fact served a demand in Action 52 of 1989 and we believe the learned Judge had that demand in mind. His notes a little later indicate he dismissed that action. His notes read *"Dismiss other Petition 52/89"*.

Mr. Parshottam stated that that and other parts of the notes were not read to Counsel. We accept Mr. Parshottam's assurance. In his written Judgment, however, delivered a week later the learned judge stated *"Petition 52/89 will be dismissed as of the date of the winding up order"*. While we could dispose of this appeal without the need to enlarge on this judgment it is apparent that some judges or practitioners are uncertain as to how Rule 32 operates in practice.

Cullinan J. in the Chaz Lumber case did considerable research and produced a well considered judgment. Except where the learned judge was of the view that a supporting creditor wishing to prove under section 220(e) of the Act and relying on section 221(e) would need to serve a statutory demand on the Company, we agree with most of the learned judge's observations.

His view regarding serving of statutory demand is not correct. Provided the Petitioning Creditor has complied with section 221(a) and his petition is otherwise in order any other

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creditor who has given the required notice under Rule 29 can rely on the notice given by the Petitioning Creditor.

The effect of a notice given under section 221(a) continues so as to allow another creditor to become substituted for the original Petitioner. The reason is that the original Petition contains evidence that the Company is "unable to pay its debts". Needhan J. in De MONTFORT & Ors. v. Southern Cross Corporation NL 11ACLR 850 referred to this fact as regards the section 364 notice under the New South Wales Code which we understand is similar to our 221(a) notice.

It must be appreciated that if the notice is defective a supporting creditor can not rely on that notice. A fortiori he can not rely on a petition where not only is the notice defective but also where, as in the instant case, the Petition is not before the Court at all.

Rule 32 provides as follows:

"Substitution of creditor or contributory for withdrawing petitioner"

32.-(1) When a petitioner for an order that a company be wound up by the court or subject to the supervision of the court is not entitled to present a petition, or, whether so entitled or not, where he either -

- (a) fails to advertise his petition within the time prescribed by these Rules or such extended time as the registrar may allow; or*
- (b) consents to withdraw his petition, or to allow it to be dismissed or the hearing of it to be adjourned, or fails to appear in support of his petition when it is called in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned; or*

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(c) *if appearing, does not apply for an order in the terms of the prayer of his petition,*

the court may, upon such terms as it may think fit, substitute as petitioner any creditor or contributory who appears to the court to have a right to present a petition, and who is desirous of so doing.

(2) An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by these Rules, or consents to withdraw his petition, be made in chambers at any time."

The words "is not entitled to present" a petition must be interpreted as relating to not being entitled under the rules to present a petition. If the petition does not comply with the provisions of the Act a petitioning creditor can not lawfully present the petition and Rule 32 can have no application. The words "or to allow it to be dismissed" in (b) in the Rule taken in isolation appear to be ambiguous. It can not in our view mean that a supporting creditor can be substituted after the Petition is dismissed. It must mean that where the Petitioner consents or indicates his intention or wish to have the Petition dismissed a supporting creditor can be substituted before the Petition is dismissed.

That in our view accords with common sense.

When a Petitioner indicates he wants to withdraw the Petition and does not object to its dismissal a judge, if the Petition complies with the Act and he is minded to substitute a creditor, should forthwith make the substitution order and should not allow withdrawal or the dismissal of the Petition. The order should direct amendment of the petition verification of it by affidavit of the substituted petitioner. The hearing of the Petition should be adjourned. The amended petition should be served on the company.

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Service on the company and the adjournment enables the company to oppose the substituted Petition if necessary.

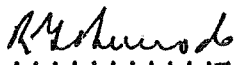
The learned judge was of the view that the Company had notice of the substituted Petition by virtue of the fact that it had been served with the petition in the other action and saw no reason why the amended petition should be served on the company.


We answer this by expressing our view that, had the Council not given notice under Rule 29, it could not legally have been substituted at all. There is nothing in the Rules which would entitle a petitioning creditor in another action being substituted in the instant action.

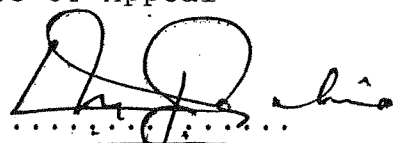
The learned judge compounded his error in our view by making an order winding up the Company to take effect immediately on the filing of the amended Petition.

The appeal is allowed and the order winding up the Company set aside.

The appellant is to have the costs of this appeal.


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Sir Ronald Kermode
Justice of Appeal


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Sir Moti Tikaram
Justice of Appeal


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L.M. Jayaratne
Justice of Appeal