

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0019 OF 1999
(Original Suva High Court Winding-Up No. 12 of 1999)

In Chambers

BETWEEN: GOSAI TRANSPORT LIMITED *Appellant*

AND: SHELL FIJI LIMITED *Respondent*

Mr Iqbal Khan for the Appellant
Mr R. Prasad for the Respondent

DECISION

On 14 May 1999 Pathik J. made a Winding-Up Order against the Appellant on a Petition presented to the High Court by the Respondent.

On 23 November 1999 Shameem J. ordered a stay of the winding-up proceedings on condition that the Appellant paid \$14,171.67 into Court, to be held until determination of the appeal. Her Ladyship ordered that the payment be made within 7 days of the Order.

The Appellant now applies to this Court for an Order that the condition imposed by Shameem J. on 23 November 1999 be stayed. In other words it seeks an unconditional stay pending the hearing and determination of the appeal by this Court.

Although the application dated 21 December 1999 says that it is made under Rule 25 Part II of the Court of Appeal Rules, (Cap 12), the fact of the matter is that that rule has now been repealed, and this is an application to a Judge alone pursuant to S.20(1)(c) of the Court of Appeal Act (Cap 12) as amended in 1998, which authorises the making of an interim order to prevent prejudice to the claims of any party pending an appeal. This therefore is an independent application and not an appeal or review of Her Ladyship's decision.

Counsel agreed that I should look at the written submissions they made in the High Court and all affidavits filed in the High Court in support and in opposition to the Winding-Up Petition in addition to material placed before me in arriving at a decision in the present application. This I have done.

The Respondent claimed in the Winding-Up Petition that the Appellant was indebted to the Respondent in the sum of \$14,171.67 as at 31 December 1998, for bulk fuel and oil purchases, that it had demanded payment in writing within 21 days of the date of service of the notice, and that the Appellant had neglected to pay or satisfy the said sum. The Petition also alleged that Appellant Company was insolvent and unable to pay its debts..

The Winding-Up Petition was verified by the affidavit of Isaac Yaya the Respondent's Credit Officer which is dated 22 February 1999 and was filed in Court on the same day.

On 28 March 1999 Parmendra Chandra Gosai the Managing Director of the Appellant Company filed his affidavit in opposition to the Petition. Two things emerge from Parmendra Chandra Gosai's affidavit. Firstly, the Appellant "vehemently" denied receiving a demand notice from the Respondent under Section 221 of the Company's Act. Secondly, it claimed that the alleged debt was not the Company's but was incurred by some other person or entity long before the Appellant Company was incorporated.

According to affidavit of Binesh Kumar filed in Court on 11 February 1999 the demand notice was sent to the Appellant Company by registered post in a prepaid

envelope. While the demand notice is addressed to the Appellant, annexure "B" to Binesh Kumar's affidavit which is called "advise of receipt" suggests that the demand notice was posted to one Abhay Sharma, c/o Gosai's Transport, P.O. Box 964, Nadi. There is nothing in the material before the Court, including the affidavit evidence both in support and in opposition to the Winding-Up Petition to explain who Abhay Sharma is, or how he is connected to the Appellant Company.

On 14 April 1999 Isaac Yaya filed a further affidavit in reply to Parmendra Chandra Gosai's affidavit.

In the second affidavit Isaac Yaya insists that the demand notice was sent by registered post to the Appellant at its correct postal address. However he does not explain why annexure "B" to Binesh Kumar's affidavit shows that the demand notice was posted to Abhay Sharma. It is also evident from Isaac Yaya's second affidavit that Atil Gosai (son of Jagdish Gosai) and Suresh Chandra Gosai (son of Ram Prasad Gosai) traded as 'Gosai's Transport' before the incorporation of the Appellant Company and that the Respondent had supplied "bulk oil and fuel purchases" to either one or other of those persons.

While Suresh Chandra Gosai (son of Ram Prasad Gosai) is said to be a director of the Appellant Company, Atil Gosai's relationship with the Appellant, if there is

one is not disclosed. Indeed, in 1996 the Respondent commenced Action in the Magistrates' Court (No. 1802 of 1996) against Atil Gosai for the subject debt but the writ was subsequently withdrawn because it was discovered that 'Gosai's Transport' was also registered by Suresh Chandra Gosai. In his second affidavit Isaac Yaya at paragraph 7 (vi) says that while fuel and petroleum products were supplied to 'Gosai's Transport' when it was operating 'as sole trader', liability incurred by that business was taken over by the Appellant Company together with all its assets. Apart from Isaac Yaya's bold assertion to that effect in his affidavit, there was really no evidence before the Court to suggest that the Appellant Company had, subsequent to its incorporation undertaken to pay the debts owing by either Atil Gosai or Suresh Chandra, trading as "Gosai's Transport". Nor was there any evidence that it had taken over the assets of "Gosai's Transport"

On 14 May 1999 when the Winding-Up Petition came before Pathik J., the Appellant asked that the Petition be adjourned, because Mr Iqbal Khan who represented the Appellant was not available to argue the matter. The Respondent agreed to the adjournment, but the Court refused to grant an adjournment, and asked Counsel for the Respondent to either proceed with the Petition or to withdraw it, whereupon Counsel for the Respondent asked for a Winding-Up Order, which the Court proceeded to make, without further argument.

There is no written decision of the Learned Judge. The notes on the file suggest that the Winding-Up Order was summarily made. He did not consider if a bona fide dispute existed between the Appellant and the Respondent as to the alleged debt. It is settled law that where there is a substantial dispute as to the existence of the debt, a Winding -Up Order should not be made, because the omission to pay does not amount to a neglect to comply with the statutory demand. See Re Lympne Investments Ltd [1972] 2 ALL ER 385. Furthermore when a petition is based on a debt which is disputed on substantial grounds the Petitioner is not a 'creditor' within the meaning of that word in Section 221 of the Companies Act (Cap 247). See Bateman Television Ltd v Coleridge Finance Co Ltd [1969] NZLR 794.

In my view the two matters raised by the Appellant in opposition to the Petition were not so trivial as to warrant summary rejection. The Appellant Company was entitled to have those issues dealt with and proper findings made, either in the proceedings before the Court or in other appropriate proceeding.

The Winding-Up Order was sealed on 14 May 1999. The Winding-Up Order taken at its face value suggests that the Learned Judge made the Order after hearing Counsel and reading the Petition and the affidavit of Isaac Yaya only. There is no reference in the Order to Parmendra Chandra Gosai's affidavit filed in opposition to the Petition. It is now obvious from the way in which the Petition was dealt with, that

matters raised in opposition to the Winding-Up Order were not considered by the Learned Judge.

As stated earlier Shameem J. granted a stay of the Winding-Up Order on 23 November 1999, but did so conditional upon the Appellant paying into Court the disputed sum of \$14,171.67 within 7 days of the order. In arriving at that decision she proceeded on the assumption that the Winding-Up Order was properly made, and as she says in her Judgment, without being able to assess the Appellant's chances on appeal in the absence of a written judgment.

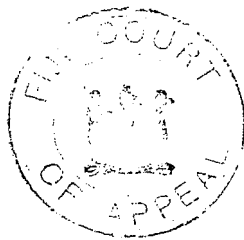
I consider that the Appellant Company has good prospects of succeeding in its appeal.

A suspect Winding-Up Order should not be the basis for requiring the Appellant to bring into Court the disputed amount as a condition for a stay of execution of that Order. For reasons I have set out above, and in the special circumstances of this case, I make the following Orders.

Orders

- (i) It is ordered that the Winding-Up Order made by Pathik J. on 14 May 1999 and all proceedings thereunder be stayed until the hearing and final determination of this appeal by this Court.
- (ii) The Order made by Shameem J. on the 23 November 1999 staying the Winding-Up Order made against the Appellant on condition that the Appellant pay into Court the sum of \$14,171.67 within 7 days of the Order is hereby set aside.
- (iii) That the Respondent pay the costs of this application, which I fix at \$150.00.

Dated at Suva this 14th day of April 2000.



A handwritten signature in black ink, appearing to read "Jai Ram Reddy".

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Jai Ram Reddy
President, Court of Appeal, Fiji