

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Cause No. 67 of 2012.

IN THE MATTER of **LAU SHIPPING COMPANY LIMITED**: a limited liability company having its Office at Narain Wharf, Walu Bay, Suva

AND

IN THE MATTER of the Companies Act 1983.

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Ms. Whippy K.** for the Applicant
Mr. Rayawa K. for the Defendant

Date of Hearing : **21st March, 2013**

Date of Judgment : **11th July, 2013**

JUDGMENT

1. The Petitioner had filed the winding up action against the Respondent for alleged debt. There are no details of the said debt, but the Respondent did not reply to the demand in terms of Section 221 of the Companies Act and also did not file an affidavit in opposition and or no appearance was made on behalf of the Respondent on first date of hearing but on the first Date of hearing the Petitioner had not complied with the winding up rules, and more specifically the advertisement of the winding up notice and further time was granted to comply with the provisions and the hearing was adjourned to 18th February, 2013. On the day of hearing a counsel appeared on behalf of the Respondent and sought an adjournment of hearing on the basis that they could settle the issues between the parties and another adjournment was granted and the hearing was fixed on 21st March, 2013. On this date another counsel appeared for Respondent, and sought an adjournment and also extension of time to file an affidavit in opposition. This application for further adjournment was

vehemently opposed by the counsel for the Petitioner and since I have already granted two adjournments of the winding up hearing and considering the date of petition and the delay incurred due to two adjournments I rejected the request for further adjournment of the hearing and also for extension of time to file affidavit in opposition. The Respondents were given ample opportunity to oppose the alleged debt from the date of notice of winding up but had not done so and even on the first date of hearing no appearance was made on behalf of the Respondent and the matter was adjourned due to the defective advertisement in terms of the winding up rules and on the subsequent hearing day the matter was adjourned for settlement upon the request of the Respondent which was also concurred by the Petitioner.

2. On the second date of adjourned hearing though a counsel appeared on behalf of the Respondent, no affidavit in opposition was filed and no application for the extension of the time for the filing of the affidavit in opposition was made. The application on the 18th February, 2013 was that the matter being adjourned for settlement between the parties and with the concurrence of the Petitioner I allowed another adjournment of the hearing to 21st March, 2013. On this date again an another counsel appeared on behalf of the Respondent and sought another adjournment of the hearing and also extension of time to file an affidavit in opposition. Since the service of winding up notice in terms of Section 221 for the first time the Respondent is seeking to dispute the debt and considering the objections by the Plaintiff and also the past conduct I refused the application for adjournment and proceeded with the hearing.
3. The counsel for the Respondent then sought the Petitioner to be called as a witness to prove the debt. He said that there is no proof of debt and sought the Petitioner to prove the debt! There is no such procedure contained in the winding up rules and the relevant sections in the Companies Act. So, I indicated this to the counsel who appeared on behalf of the Respondent, but he insisted calling the Petitioner as a witness by the Petitioner's lawyer! When I informed that there is no such procedure of proof of debt, when he had failed to file an affidavit in opposition to the winding up, he was not convinced and insisted a written ruling on that and I indicated that would do so in my judgment.

4. **Re Travel and Holdings Clubs Ltd [1967] 2 ALLER 602**, Pennycuick J held that:

“The Court **may not in the exercise of jurisdiction, be satisfied with prima facie evidence** but would require the Petitioner to substantiate his case more fully, **then in such cases** it would **require where practicable, the evidence of witnesses with direct knowledge of matters** on which **they were testifying, and on which they could be cross-examined**, and which **conformed to the ordinary rules of evidence..**” (emphasis added)

5. This is a discretion of the court and the Respondent cannot seek to compel the Petitioner to be present in court for the proof of the debt. This is a misconceived idea that winding up proceeding can be converted to a full blown trial, incurring delay. This request for proof of debt can be considered another method for postponed where the counsel unsuccessfully tried to obtain an adjournment of the hearing and now seeks to obtain an adjournment without even filing and affidavit in opposition. I do not think that nothing is needed to say more on that as the Respondent is precluded from even making such a request when there was no affidavit in opposition and when there was no evidence of dispute as to the debt. How can the court exercise its discretion to call witnesses, in such a situation needs no reasoning.
6. Then the counsel for the Respondent stated that the Petition in support of the winding up was defective and should be struck off. He pointed out that there was no date of the petition, and had stated in the petition the notice in terms of Section 221 of the Companies act as follows

‘Your attention is drawn to the fact that if your Company fails to pay the said sum within three (3) weeks from the date of receipt of this Notice of Demand, **the said company will be entitled to regard that your Company is unable to pay its debt** and for this purpose it may rely on Section 221 of the Companies Act, 1983.’ (emphasis added)

7. The petitioner is a natural person and the petition refers to a debt to a company, which obviously create confusion to the Respondent. Section 221 notice is the notice that gives to the company (Respondent) the necessary description of the debt and if that is confusing the winding up proceeding should be struck off. This cannot be considered as a thing that would fall to Companies Winding Up Rule 202(1). If so the Petitioner could disregard any provision in the Companies Act as well as winding up rules and to seek refuge in winding up rule 201(1) and that would not be the intention and purpose of the said rule. Though that provision can be resorted for a slip, or a defect this cannot be panacea for numerous defects or irregularities of the Petitioner starting from the winding up notice being defective.
8. First, the Petitioner was negligent in the advertisements of the winding up and the court granted an adjournment to rectify the same but it seems that the Petitioner is continuing with its irregular conduct unabated.
9. Secondly, the Petitioner had totally disregarded winding up rule 30 The winding up rule 30 states as follows

‘List of names and addresses of persons who appear on the petition

30(1) The petitioner or his barrister and solicitor shall prepare a list of the names and addresses of the persons who have given notice of their intention to appear on the hearing of the petition, and of their respective barrister and solicitor such list shall be in Form No 14

(2) On the day appointed for hearing the petition, a fair copy of the list, or, if no notice of intention to appear has been given, a statement in writing to that effect, shall be filed by the petitioner or his barrister and solicitor in court before the hearing of the petition.’

10. The Petitioner failed to comply with this provision and filed the purported list in terms of the above winding up rule, on 4th January, 2013 indicating that no

party was supporting the petition, when already an intention to support was filed by Merchant Finance and Investment Company Limited through its solicitor on 31st December, 2012. So, again the Petitioner's lawyer has not been diligent had not complied with the winding up rules.

11. This happened despite the Petitioner had not advertised the winding up in terms of the winding up rules and the first date of hearing of the winding up was adjourned and the Petitioner was granted further time to comply and the hearing was re-fixed.
12. Thirdly, the Petitioner failed to file a list of all supporting parties when the hearing of the winding up was adjourned due to defective advertisement. The Petitioner was required to file a fresh list of names of persons who are supporting the petition as this would be the correct procedure as the earlier notice in news paper and gazette was done in contravention of the winding up rules. When the earlier list did not include the party that was supporting the winding up that cannot be considered a list in terms of rule 30. It is noteworthy that the first hearing was fixed on 14th January, 2013 and by that date there were two parties who had filed their intension of supporting the petition and should have been included in a the list of parties supporting the petition in terms of the winding up rule 30. It is pertinent that the filing of list of parties supporting long before the hearing date does not serve any purpose as this has to be done on the date of hearing as the rule 29 of the winding up rule allows a party intending to appear on the hearing of the petition time till 4 p.m on the day before the winding up hearing. So, if the list of parties supporting the petition is filed several days prior to the hearing of the winding up as done in this case that may not include all the parties who were supporting the petition.
13. Winding up rule 29 state as follows

Notice by persons who intend to appear

29(1) Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his barrister and solicitor, at the address stated in the advertisement of the petition, notice of his intention to do so.

(2) Such notice shall contain the address of such person, and shall be signed by him or by his barrister and solicitor, **and shall be served in time to reach the address not later than 4 o'clock in the afternoon of the day before the day appointed for the hearing of the petition**, or if such day is a Monday, not later than 4 o'clock in the afternoon of the Friday before such day; the notice shall be in Form 13 with such variations as circumstances may require.

(3) Any person who fails to comply with the provision of this rule shall not without the special leave of the court, be allowed to appear on the hearing of the petition.' (emphasis added)

14. In the interpretation of rule 30, consideration has to be made with rule 29 and this makes it obvious that the Petitioner cannot file any list days prior to the winding up hearing, as done in this case, since the parties are given time to serve the notice by 4 p.m of the day prior to the hearing of the winding up. The day prior to the winding up will include any subsequent adjournments as well and it may be that no party had served notice of its intension in terms of rule 29 during the adjournment and in such a situation the earlier list which indicated the proper list may be used as compliance of rule 30.
15. In this winding up the Petitioner not only failed to correctly mention the parties prior to the first date of hearing , but when the hearing was adjourned due to its own defective advertisement failed to file a proper list in terms of rule 30. The Petitioner should not have filed a list of parties supporting on 4th of January, 2013 when the matter was fixed for hearing on 14th January, 2013 since any party had time till the 13th January, 2013 4 p.m. Even the list prepared on 4th January, 2013 and filed on 7th January, 2013 did not include the party that had filed its intention by that date. In any event before the first date of hearing another party had also indicated its intention on the 11th January, 2013 and by the first hearing date there were two parties who had filed their desire to support the petition but the Petitioner's List dated 4th January, 2013 did not indicate any such party.

16. In any event when the adjournment of the hearing was granted to comply with the defective notice the Petitioner should have filed another list of parties before the adjourned hearing day but failed to do so. The petitioner had made plethora of errors beginning from of the winding up notice which continued through the proceedings and now seeks to refuge in the rule 202 (1) and this should not be allowed as this would make all the provisions in the winding up rules redundant. If the petitioner is allowed to disregard winding up rules in this manner there will hardly be any compliance. The continuing conduct that disregarded the winding up rules cannot be condoned and I will struck off the winding up petition for non compliance of winding up rule 30 as well as wrong description of the Petitioner and other defects which I discussed in this ruling. Parties to bear their own costs.

A. FINAL ORDERS

- a. The winding up petition is struck off.
- b. No Costs.

Dated at **Suva** this **11th day of July, 2013.**

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Justice Deepthi Amaratunga
High Court, Suva