

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

BANKRUPTCY AND WINDING UP CAUSE

No. 28 of 2014

IN THE MATTER of **FORTUNE 8 LIMITED** a
Limited liability company having its registered
office at Level 3, Aliz Center, Martintar, Nadi.

- A N D -

IN THE MATTER OF THE COMPANIES ACT

Mr. John Robert Connors for the Petitioning Creditor
Mr. Isireli Fa for the Respondent Debtor

Date of Hearing :- 03rd of March 2015
Date of Ruling :- 30th of April 2015

EX TEMPORE RULING

(A) INTRODUCTION

- (1) The Petitioning Creditor – “Sonaisali Island Resort Limited” (hereinafter called as the Petitioner) filed action, Winding-up cause 28 of 2014, moving court to Wind-up Fortune 8 Limited (Debtor Company) on the basis that it owes to the former an undisputed debt of \$229,408.69.
- (2) By summons dated 21st of January 2015, the Respondent Debtor – “Fortune 8 Limited” (hereinafter called as the Respondent) seeks a Stay Order “against all proceedings in Winding-Up cause 28 of 2014” and an order restraining the Petitioner from “interfering in the affairs of Fortune 08 Limited”.
- (3) The application is made pursuant to Section 224 of the Companies Act, Cap 247.
- (4) The application is supported by an affidavit of “Tracy McIver”, Company Director, deposed to on the 20th of January 2015.

- (5) The Petitioner opposes the Respondent's application and has filed an affidavit of "Janiece Christine McGrath", Company Director.
- (6) The Petitioner and the Respondent were heard on the Summons. They made oral submissions to court. In addition to oral submissions, they filed careful and comprehensive written submissions for which I am most grateful.

(B) FACTUAL BACKGROUND

- (1) The Petitioner's claim in the case of "Sonaisali Island Resort Limited v Fortune 8 Limited", Civil Action No:- 46 of 2013, arises from a claim in damages for breach of contract by the Respondent Company.
- (2) The matter was fixed for hearing on 06th August 2014, before Tuilevuka J.
- (3) On 06th August 2014, the Respondent Company did not appear and the matter proceeded in its absence and the court made the following orders;
 - ❖ That there be judgment for the Plaintiff in the sum of \$227,408.69.
 - ❖ That the Defendant pay the Plaintiff's cost of \$2000.00.
- (4) On the 29th of August 2014, the Respondent Company filed a summons to set aside the judgment of the court of the 06th of August 2014 pursuant to Order 35, r.2 of the High Court Rules, 1988. The application came before Master Ajmeer.
- (5) On the 3rd November 2014, the Master delivered his ruling finding that the application had been filed out of time and was therefore time barred. He then dismissed and struck out the application.
- (6) On the 24th November 2014, the Respondent appealed against the decision of the Master by filing Notice of Appeal.
- (7) On the 19th November 2014, the Petitioner filed a Winding-Up Petition pursuant to the judgment of the court on 06th of August 2014. The Affidavit verifying Petition was filed on the 21st of November 2014.

(C) THE LAW

- (1) The Respondent has filed its application pursuant to section 224 of the Companies Act, Cap 247.

Section 224 provides;

"At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may –

- (a) *where any suit or proceedings **against the company** is pending in the Supreme Court or the Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and*
- (b) *where any other suit or proceeding is **pending against the company**, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”*

(Emphasis added)

(D) ANALYSIS

- (1) The Respondent’s Summons to stay the Winding-up proceedings is made pursuant to section 224 of the Companies Act, and inherent jurisdiction of the Court.
- (2) At the beginning of the hearing of the matter, the Counsel for the Petitioner raised a preliminary point with regard to the Summons filed by the Respondent.
- (3) Counsel submitted that the **Summons is irregular** as section 224 of the Companies Act has no application to the current matter where the Respondent seeks to stay the Winding-up proceedings. In support of this proposition, the counsel invited the attention of the court to the decision in “**Petri v Dragons Seafood Company (Fiji) Ltd,**” (1996) FJHC 102.

Regrettably, the counsel for the Respondent did not respond to this preliminary issue. This was quite unsatisfactory.

Section 224 of the Companies’ Act provides;

“At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contribution, may –

- (a) ***where any suit or proceedings against the company** is pending in the Supreme Court or the Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and*
- (b) ***where any other suit or proceeding is pending against the company**, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding,*

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

When one looks at section 224 of the Companies Act, it is apparent that the court is given an unfettered discretion to stay or restrain “**any suit or proceedings pending against the Company**” at any time after the presentation of a Winding-up petition, and before a Winding-up order has been made.

The clear “mischief” sought to overcome by section 224 is that which is likely to arise from a multiplicity of proceedings being commenced or prosecuted (possibly before different courts and by different parties) against a company whose continued existence and commercial viability is the subject matter of a Winding-up Petition. (**Petri v Dragon Seafood, supra**).

In the present case, the application is that of the company seeking to stay the Winding-up proceedings pursuant to section 224 of the Companies Act. It is my considered view that such an application is not a suit or action “**Pending against the company before different courts and by different parties**” as per the clear wording of Section 224 of the Companies Act.

Therefore, it is manifest that the Respondent Company does not have legal standing under section 224 of the Companies Act for a stay of Winding-up proceedings.

Given the above, I certainly agree with the sentiments which are expressed inferentially in the Petitioner’s submissions.

In any event the Petitioner’s point must fail because of the delay involved.

Order 2, rule 2 provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. Since the application is not made within a reasonable time, the application will not be allowed. If the Petitioner had considered that the Summons was in an irregularity, it could have moved under Order 2, rule 2 before it took another step. If any proceedings are to be set aside on the grounds of an irregularity, Order 2, rule 2 is applicable. An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion. The Petitioning Creditor did not do so. It is now too late to raise such an argument even if it had any validity.

- (4) Be that as it may, the Respondent Company seeks to stay the Winding-up proceedings on two grounds. They are;
- (i) That the Respondent has not been served with a Demand Notice under section 221 of the Companies Act and
 - (ii) That the Respondent disputes that it is indebted to the Petitioner at all as it is seeking to set aside the default judgment entered against it on the 6th of August 2014, by appealing against the decision of the Master of the 3rd of November 2014.

In adverso, the Counsel for the Petitioner submitted that both the grounds lack any merit as such ought to be struck out.

The issues are distinct and independent of each other.

The Petitioner's Winding up Petition against the Respondent is based on section 220 (e) and section 221 (a) of the Companies Act. It is necessary to set out the relevant provisions.

Section 220 (e) reads; *"A company may be wound up by the court – (e) if the company is unable to pay its debts."*

Section 221 (a) reads: "A company shall be deemed to be unable to pay its debt – if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 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 3 weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor."

A company is deemed to be unable to pay its debts for the purpose of section 220 (e) by its failure to meet the statutory demand. **The prime purpose of statutory demand is to act as a foundation for Winding-up a Company's affairs.**

If I find that the Respondent Company has not been served with a statutory demand, the Petition must fail. Therefore, I need not delve into the second issue.

- (5) The court has discretionary powers to make a winding-up order. In exercising this discretion the court pays particular attention to whether the creditor who applies has established that the Company is insolvent. A failure to meet the statutory demand under section 221 is a simple method by which a creditor can establish a ground of insolvency under section 220 (e) of the Companies Act. The fact that a Winding-up application has been filed becomes public knowledge before the court makes its decision. Winding-up has serious consequences for the Company, its members and creditors. The mere filing of an application can cause irreparable damage to the Company. For example, a Company may be refused credit which could cause a liquidity crisis. Because application for the Winding-up of a Company can have serious consequences for it, the courts require strict compliance with section 221 of the Companies Act.

To comply with that section, a statutory demand must be served by leaving it at the registered office of the Company. An affidavit of service should be filed with the Winding-up petition. If the statutory demand is not served, the Winding-up petition will be dismissed unless other evidence of insolvency is established. Even it is complied with the court still has discretionary powers to refuse the application.

- (6) **With all of the above in my mind**, the question I ask myself is whether the demand for payment as required by section 221 of the Companies Act has been served upon the registered office of the Company?

Further, whether the petitioning creditor has satisfied the Registrar under section 28 that this requirement has been fulfilled?

- (7) In the affidavit "Tracy McIver" on behalf of the Respondent deposed to on the 20th of January 2015, at paragraphs 14-18 she sets out the circumstances in which the

Respondent became aware that a Winding up Petition had in fact been taken out against the Respondent. At paragraphs 15-17 of her affidavit she sets out that the Respondent had not been served with a Demand Notice under section 221 of the Companies Act.

Tracy deposes;

- (14) ***THAT*** on or about 25 November 2014, I received a call from my former Accountant, Mr Zarin from Aliz Partners who advised me that a Winding-Up Petition had been served on his office against Fortune 8 Limited.
- (15) ***THAT*** I immediately uplifted the document and sent it to my Solicitors Messrs Fa & Company, who inquired with me whether a Section 221 Demand Notice had been served on the Company by Sonaisali Island Resort Limited for the payment of the sum of \$227,408.69 (Two Hundred and Twenty Seven Thousand, Four Hundred and Eight Dollars and Sixty Nine Cents). I advised him that no such Demand Notice was served on the Company.
- (16) ***THAT*** I inquired with my former Accountants whether they had received the Demand. They advised that no such demand was served on them.
- (17) ***NOW*** shown to me and marked as Annexure "B" is a true copy of the correspondence from Aliz to this effect.
- (18) ***THAT*** on 28 November 2014 my Solicitors, Messrs Fa & Company, wrote to Messrs Krishna & Company Solicitors for the Petitioner advising them of the lack of Service of the Demand Notice dated 16 September 2014, requesting them to refrain from proceeding with their Petition. Now shown to me and marked as Annexure "C" is a true copy of the correspondence.

In *adverso*, in the affidavit in opposition, **Janice Christine McGrath** on behalf of the Petitioning creditor deposes with breathtaking disingenuousness,

"As to paragraphs 18-21 inclusive I rely on the affidavit of "Anwar Naseemud Dean" sworn on the 3rd October, 2014 deposing that service of the demand was effected on the 19th September, 2014".

The affidavit of "Anwar Naseemud Dean" deposing the service of the statutory demand is not provided. It is a matter of curiosity. To make matters worse, the affidavit of service of the statutory demand Notice is not filed, with the Winding-up Petition. There is simply no document or affidavit on file to prove that the demand for payment as required by section 221 of the Companies Act has been served upon the registered office of the Company. Further, the Petitioning creditor has not satisfied the Registrar under section 28 of the Companies Act that this requirement has been fulfilled.

I am curious as to why the Petitioning creditor is refusing to provide the affidavit of service of the statutory demand Notice and the affidavit of “Anwar Naseemud Dean” deposing the service of the statutory demand. I am inclined to accept the evidence of deponent “Tracy McIver” in *toto*. In doing so, I am fortified in my view by the Court of Appeal judgment in “**Jay Prakash v Savita Chandra**” Civil Appeal No: **ABU 0037/1985**. It was held;

*“Of course he did have to respond in our view the cause of events have taken and the consequences, if did not respond, rendered it as matter of prudence that he should reply if indeed he had a reply. **And in the circumstances of the case in the absence of a reply, we hold the inference inescapable what the respondent had said to be true.**”*

(Emphasis added)

The Petitioning creditor’s failure to establish that it had a good reason for;

- ❖ Not filing the affidavit of service of statutory demand with the Winding-up Petition.
- ❖ Not providing the affidavit of “Anwar Naseemud Dean” deposing the service of the statutory demand does not leave a good impression.

On the strength of this, I conclude that;

- ❖ The demand for payment as required by section 221 of the Companies Act has not been served upon the registered office of the Company.
- ❖ The Petitioning creditor has not satisfied the Registrar under section 28 that the requirement under section 221 has been fulfilled.

The answer for non-compliance provided in Rule 28, is that “no orders in the Petition be made”.

For the sake of completeness, Rule 28 is reproduced below in full;

28-(1) After a petition has been presented, the petitioner or his barrister and solicitor shall, on a day to be appointed by the registrar, attend before him to satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the contents thereof and the affidavit of service, if any, have been duly filed and that the provisions of these Rules have been duly complied with the petitioner.

(2) No order shall be made on the petition of any petitioner who has not, before the hearing of the petition, attended before the registrar, at the time appointed, and satisfied him in the manner required by this rule.

(Emphasis added)

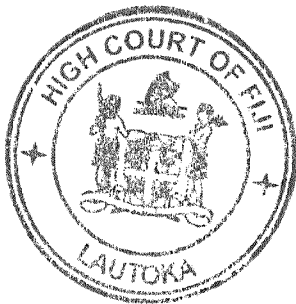
In the circumstances, the Petition must fail. Given the above, I certainly agree with the sentiments which are expressed inferentially in the Respondent's submissions.

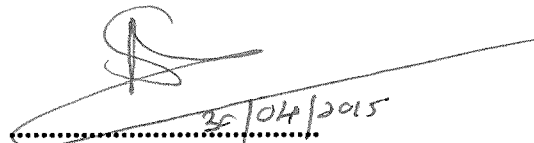
(E) CONCLUSION

- (1) After considering the facts of this case and the submissions made to court, I conclude that the demand for payment as required by section 221 of the Companies Act has not been served upon the registered office of the Company.
- (2) Thus in my judgment the Respondent must succeed in its application.

(F) FINAL ORDERS

- (1) I grant a stay against all proceedings in Winding Up cause 28 of 2014.
- (2) I award costs against the Petitioning creditor in the sum of \$1500.00 (summarily assessed) which is to be paid within 14 days from the date hereof.




26/04/2015

Jude Nanayakkara
Acting Master of the High Court

At Lautoka
30th of April 2015