

In the High Court of Fiji at Suva

Civil Jurisdiction

HBA no.19 of 2012

Between : Bernard R Evans and Vera Heritage Evans

Appellants

And : Makare Holdings Limited

Respondent

Appearances : Mr I. Fa for the appellant

Mr N. Lajendra for the respondent

Judgment

1. This is an appeal from a decision of the Master dismissing the winding up petition filed by the appellants for non-compliance with the Companies Winding Up Rules. The appellants seek that the order of the Master be set aside and a winding up order be made against the respondent company.

2. The grounds of appeal read:
 - (i) *That the Master erred in law and in fact in his decision of the 5th of June 2012 when he held that the Petitioning Creditors/Appellants had failed to fulfill the requirements of Rule 23 of the Winding Up Rules in that they failed to advertise their Amended Petition in the newspaper as well as in the gazette, without taking into account the following factors:-*
 - a) *That the original petitioner had advertised in the newspaper and the gazette that the company/respondent is to be wound up:*
 - b) *That pursuant to the advertisement by the Original Petitioner the Petitioning Creditors/Appellants filed the necessary documents in support of the Winding Up of the Company/Respondent.*

- c) That the Company/Respondent then paid the Original Petitioner.
 - d) That no payment was made to the Petitioning Creditors/Appellants.
 - e) That upon payment of the Original Petitioner, the Petitioning Creditors/Appellants were granted leave to be substituted in the same action being HBA 99 of 2010.
 - f) That as the advertisement of the Winding Up Petitioning against the Company/Respondent had been done in this action, no further advertisement was necessary and accordingly the provision of Rule 23 of the Winding Up Rules had been complied with.
- (ii) That the Master erred in law and in fact in his decision of the 5th of June 2012 when he held that the Petitioning Creditors/Appellants had failed to fulfill the requirements of Rule 23 of the Winding Up Rules in that they failed to advertise their Amended Petition in the newspaper as well as in the gazette, without taking into account the following factors:
- a) That the Proviso in Rule 23 of the Winding Up Rules makes it a mandatory requirement that the Registrar cancel the time and place that the Winding Up Petition is to be heard if the Winding Up Petition is not advertised.
 - b) That on the 18th of November 2011, the matter was called before the Master wherein a hearing date was scheduled for the 8th of December 2011.
 - c) That the Master's conduct in permitting the scheduling of the Hearing of the Winding Up Petition was a signal to the parties and to the Registrar that compliance of the Winding Up Rules had been effected.
 - d) That the Master's conduct in permitting the scheduling of the Hearing of the Winding Up Petition was an acceptance by the Master and the Registrar that the Original Petitioner's advertisement was in compliance of the Winding Up Rules.
 - e) That on the 8th of December 2011, the Hearing commenced before the Master but was not concluded hence the same was scheduled to the 16th of February 2012 for continuation of hearing.
 - f) That on the 16th day of February 2012, the hearing continued before the Master but was not concluded

- hence the same was scheduled to the 17th of May 2012 for continuation of hearing.
- g) That on the 17th of May 2012, the hearing continued before the Master and was concluded on this date.
- h) That the Master is now estopped from deciding that the Petitioning Creditors/Appellants had not been in compliance of the Winding Up Rules.
- (iii) That the Master acted harshly and unreasonably in his decision of the 5th of June 2012 when he struck off the Petitioning Creditors/Appellants' Winding Up Petition for failure to comply with the requirements of Rule 23 of the Winding Up Rules despite the fact that the Master had at no time during the course of the hearings, which covered a period of over 6 months, informed the parties that the hearing should be cancelled.
- (iv) That the Master erred in law as a presumption of bias subsisted in the Master's conduct of the proceedings by proceeding to hear Petitioning Creditors/Appellants' Winding Up on 3 separate occasions despite knowing that the Petitioning Creditors/Appellants had failed to advertise their Winding Up Petition.
- (v) That the Master erred in fact when he held that the Petitioning Creditors/Appellants had failed to comply with Rule 30 of the Winding Up Rules in that they had failed to prepare a list of the names and addresses of the persons who had given their intention to appear on the date of the hearing of the petition, when in fact the Petitioning Creditors/Appellants had provided the court with a copy of the same on the 8th of December 2011.

3. The determination

- a. The first ground of appeal takes issue with the Master's finding that the appellants had failed to fulfill the requirements of Rule 23, in not advertising their petition in the newspaper as well as in the gazette, since the original petitioner had advertised in the newspaper and the gazette. It is argued that no further advertisement was necessary.
- b. The original petitioner in these proceedings had withdrawn its petition for winding up the respondent company. The appellants were substituted as petitioners. An affidavit of service was filed by the appellants, but the appellants did not re-advertise their petition.
- c. The Master held that the appellants as substituted petitioners had failed to advertise the petition, as required by Rule 23 of the Companies Winding Up

Rules. The appellants could not rely on the advertisement and gazette of the original petitioner, as that was rejected by Court for non-compliance with the Winding up Rules.

d. Rule 23 of the Companies Winding Up Rules reads:

Every petition shall be advertised for at least 7 days before the hearing as follows:-

- a) *once in the Gazette and once at least in 1 newspaper published in Fiji and circulating in the district where the registered office or principal or last known principal place of business as the case may be, of the company is or was situate; and*
- b) *such advertisement shall state the date on which the petition was presented and the name and address of the petitioner and of his barrister ... (emphasis added)*

e. In terms of this rule, it is mandatory that the petition is advertised “at least 7 days before the hearing”.

f. In the present case, the original petitioner had advertised the petition in the Fiji Sun of 21st October, 2010, six days before the hearing on 27th October, 2010. It was published in the Gazette on 22nd October, 2010.

g. I agree with the ruling of the Master that the appellants, could not rely on the advertisement and the Gazette notice published by the original petitioner, as that was rejected by Court for non-compliance.

h. The second, third and fourth grounds contend that while the proviso to Rule 23 makes it a mandatory requirement that the Registrar cancel the hearing of the petition, if the winding up petition is not advertised, the Master scheduled the hearing for 8th December, 2011. It is argued that the Master is now estopped from deciding that the appellants had not complied with the Winding Up Rules.

i. The proviso to Rule 23 reads :

Provided that if the petitioner, or his barrister and solicitor does not within the time prescribed by these rules or within such extended time as the registrar may allow duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard shall be cancelled by the registrar and the file shall be closed unless a judge or the registrar shall otherwise direct. (emphasis added)

- j. The proviso requires the Registrar to cancel the hearing if the petition is not duly advertised, “*unless a judge or the registrar shall otherwise direct*”. It is clear that a Judge or Master is empowered to hear the matter.
- k. In my view, there is no merit in the second to fourth grounds of appeal.
- l. The Master also found that the appellants had failed to comply with the requirements under Rule 30 of the Companies Winding Up Rules.
- m. Rule 30 of the Companies Winding Up Rules state:

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; and
- n. The ultimate ground of appeal states that the appellant had complied with the above rule. However, there is no record of the list of the names and addresses of persons who have given notice of their intention to appear on the hearing.
- o. In my judgment, the appellant’s appeal fails.

4. Orders

- a. I dismiss the appeal of the appellants.
- b. The appellants shall pay the respondent company a sum of \$1500 as costs summarily assessed.

9th October, 2015



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge