

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER: HBE 031 OF 2001L

IN THE MATTER OF VICTORY TOURS LIMITED

AND

IN THE MATTER OF COMPANIES ACT

Appearances: Mr. S. Lateef for the Petitioner.
Mr. G. P. Shankar for the Respondent.

Date/Place of Judgment: Monday 03 March 2014 at Suva.

JUDGMENT

Catchwords:

Winding up petition presented- respondent seeking order to restrain petitioner from advertising winding up- Petitioner has mortgage securities for the debt pursuant to which winding up is presented- allegations of inducement by the mortgagee to advance more monies-allegation that mortgagee promised to allow subdivision of mortgaged properties to allow mortgagor to obtain finance to pay debt- effect of existence of another winding up petition- affidavit verifying petition not sworn within 4 days of presentation of the petition as required by the rules- effect of non-compliance with rules.

Legislation:

The Companies Act ("CA"): ss.221; 222(1); 223(1); 224.

The Companies (Winding Up) Rules: Rules 25; 202(1).

The Cause

1. Habib Bank Limited presented a winding up petition against the company Victory Tours Limited on the grounds that the bank had advanced monies to the company at its request and the company has failed to repay the monies as contracted and that it now owes a sum of \$111,469.34 in respect of which a s.221 notice was served on the company on 17 May 2001 under the CA.
2. By an application of 30 August 2001, the company filed an application seeking that the bank be restrained from publishing or giving notice in news papers or Fiji Gazette or otherwise of the winding up petition against the company.
3. On 31 August, the Court granted an ex-parte interim injunction against publishing or giving notice in news papers or Fiji Gazette of winding up petition until 4 September 2001. The application was listed for hearing on 21 September 2001 on which day the application was heard inter-partes.

Grounds in Support

4. The grounds upon which the application for injunction is made are that the bank holds substantial securities as mortgagee for the loans and advances made to the company. It is highly oppressive for the bank to go ahead with the winding up. The bank should exhaust the rights as the mortgagee before seeking to wind up the company. It is difficult for the company to raise loans or to sell the property as the market is stagnant.
5. The company also contended that the bank induced the company to give securities to it and promised that after registering the securities, it would advance to the company further sums of loans in the sums of \$35,000 and \$70,000 but after requests for release of monies, it failed to do so. The further loans would have enhanced the business of the company and enabled it to pay the debt. The bank also failed to subdivide the mortgaged properties to raise the money to pay the loans.
6. The company stated that there is already another winding up petition before the Court against it.

7. The final ground was that the affidavit verifying the winding up petition was not sworn within 4 days of the presentation of the petition.

Grounds in Opposition

8. The petitioner says that it did not at any time promise or assure to lend further monies to the company. The company never made any such allegation before and has raised same now merely as an attempt to restrain the winding up action against it. The allegations are frivolous and unsubstantiated by evidence.
9. The petitioner further says that holding securities on the alleged debt is no bar to instigating winding up action against the company.
10. The fact that there is another winding up petition does not affect this matter. It only clarifies that the company has other debt which it is unable to pay. The company is insolvent. The company does not deny its debt and has not provided any substantial reason to restrain the action.

The Submissions

11. I have summarised the position of the parties from their respective affidavits so I do not consider it prudent to repeat their submissions.

The Law and Analysis

12. The powers to restrain proceedings against the company are found in s. 224 of the CA.
13. The company does not deny the debt but disputes that it is insolvent. The first ground for dispute is that the bank is holding mortgage over its properties and in that case it is inequitable that the company be allowed to be wound up. The bank should first realise the securities.
14. Section 223 (1) of the Companies Act states that:

“..., but the court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets”.

15. Arising from s. 223(1) I find that there is no legal basis to restrain a mortgagee from presenting a winding up petition on the ground that the assets of the company are mortgaged.
16. The company has also made allegations of inducement against the bank. These allegations are baseless. If the bank had given an offer to that effect it would be in writing. Representations cannot be made by any bank without ascertaining the financial strength of a debtor. Once the bank had given the loan to the company, it was under an obligation to first assess whether the debt was serviceable. If it was, then more often the banks do give further loans but in this case, having advanced certain monies, the bank could not make promises to give further loan. It was to first assess the serviceability of the debt and indeed the debt was not serviced. How could the bank then give more money to its detriment? All offers by banks are normally in writing. In this case the company has not provided any evidence of such undertaking from the bank and I cannot place any weight on the contention of the company.
17. The company says that the bank refused to allow it to subdivide its mortgaged properties to raise the monies. As the mortgagee, it is the bank's prerogative to decide how it was going to deal with the mortgaged properties. If it did not want to lose the securities, the Court cannot question that right. All creditors will want to tightly hold onto the securities so that they are able to realise the same in case where there is insolvency.
18. The company only raised this issue of inducement after the winding up was presented against it. If it was so aggrieved at the bank's conduct why did it not bring an action to set aside the mortgage for unconscionable conduct? I find that these allegations are concocted to find a ground for the application.
19. The company also states that there is another winding up petition against it. There is no evidence of this. The company could have at least given the winding up action number for the Court to ascertain the validity of such assertion. In any event, the existence of another petition is not a ground to restrain the bank from presenting another petition.

20. S. 222 (1) of the CA states that:

“An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately...”.

Underlining is mine for emphasis

The existence of another winding up petition is therefore not an excuse to restrain the petitioner.

21. The final argument of the company is that the affidavit verifying petition was not sworn within the time provided for by the rules. In its submissions the petitioner accepts that through oversight it has not strictly complied with the rules in that the affidavit verifying petition has been sworn before the petition was filed.

22. However the petitioner submits that it not be restrained from proceeding with the petition on this technical ground since the same will cause injustice to the petitioner taking into consideration the facts that the petition and the affidavit verifying the petition were filed together and the debt on which the petition is founded has not been denied at all.

23. Rule 25 of the Companies (Winding Up) Rules states that:

“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by 1 of the petitioners if more than 1, or, where the petition is presented by a corporation, by a director, secretary or y other principal officer thereof, and shall be sworn and filed within 4 days after the petition is presented and such affidavit shall be prima facie evidence of the contents of the petition”

24. The petition is dated 17 May 2001. The affidavit verifying the same was sworn on 6 August 2001. The petition and the affidavit verifying the petition were filed on 27 August 2001. If the rules were to be strictly complied with the affidavit verifying the petition ought to have been sworn and filed within 4 days of 27 August 2001. Although the affidavit was not sworn within 4 days of the presentation of the petition, it was filed simultaneously with the petition so the filing provision was complied with. Having said that, I must now state the purpose of the affidavit verifying petition. The affidavit verifying petition is prima facie

evidence of the matters contained in the petition like that the company has been issued with a s. 221 notice and has failed to comply with the demand and that the debt is due and owing. In this case the company does not dispute the contents of the petition. It does not dispute any matters raised in the petition, not even the fact that it owes the debt and has not been able to meet the demands for the payment of the same. In that regard, the non-compliance of the rules is not sufficient to restrain the petition from proceeding. S. 202(1) of the Companies (Winding Up) Rules states that *“no proceedings under the Act or these Rules shall be invalid by reason of any formal defect or irregularity, unless the court before which any objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court”*.

25. After the service of the s. 221 notice to pay the debt, the company has not paid the debt. The company is thus deemed unable to pay its debt and insolvent. In fact the company has given evidence that there is another winding up petition against it which makes me conclude that the company is not paying its creditors. It is insolvent.
26. The company contends that if injunction is not granted against publication of the winding up petition it will suffer substantial loss and harm. The company is deemed insolvent and in that regard it cannot contend that it will suffer substantial loss and harm.
27. The company has not given any undertaking as to damages in its affidavit in support of the application for injunction. There is already debt owed to the bank and any delay will be prejudicial to both parties. The bank will not get paid any monies and the company will increase its exposure. It already has other creditors chasing it for the money, if I were to accept that there is another winding up petition against the company. There is no undertaking that the damages the bank will suffer, which is, that the debt be increased, will be paid by the company. In fact, in light of its difficulty to service the debt, it cannot give any undertaking as to damages.
28. There is no substantial dispute as to the debt in this case. The objections affecting the validity of the petition are also unsustainable. In that regard, it is improper that the petitioner be restrained from progressing with the petition.

Final Orders

29. The application for injunction by the company is dismissed.
30. I award costs against the company in the sum of \$1000, summarily assessed.
31. The petitioner is at liberty to proceed with its petition if it so wishes. In the event that further proceedings are filed for the progress of the petition, the same must be listed before the Master in Lautoka High Court as he has jurisdiction to hear winding up cases.

Anjala Wati

Judge

03.03.2014

To:

1. *Mr. S. Lateef for the Petitioner.*
2. *Mr. G.P. Shankar for the Respondent.*
3. *File: HBE No.0031 of 2001L*