

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC 303 of 2014**

**BETWEEN** : **AUTO ONE IMPORTERS & EXPORTERS COMPANY LIMITED** whose registered office is at 147 Ratu Mara Road, Samabula, Suva.

**Plaintiff**

**AND** : **SPARE PARTS ZONE PTE LIMITED** previously known as Soon Aik Auto Parts Trading Co Pte Limited of 14 Ang Mo Kio Street, 63 Singapore 569116.

**Defendant**

**BEFORE** : The Hon. Mr Justice David Alfred

**Counsel** : Ms. P Preetika for the Plaintiff  
Mr. J Savou for the Defendant

**Date of Hearing** : 8<sup>th</sup> May 2015  
**Date of Judgment** : 22<sup>nd</sup> May 2015

**JUDGMENT**

[1] This is an Application by way of an Inter Partes Summons by the Plaintiff seeking an Order restraining the Defendant from presenting, issuing and advertising a Winding-Up Petition and or relying on the Winding-Up notice against the Plaintiff. The Application is made pursuant to Order 29 of the Rules of the High Court.

[2] The matter came up for hearing before me on the 8<sup>th</sup> May 2015, in the presence of Counsels as above mentioned. At the outset, Counsel for the Defendant, confirmed that no Petition for Winding-Up had been filed as of that date.

[3] The Plaintiff's Counsel's submission was as follows:

- (i) The sum claimed is not a liquidated sum.*
- (ii) There is no sales agreement between the parties.*
- (iii) The Plaintiff did not pay the amount in the Winding-Up demand because it is disputed.*
- (iv) The Plaintiff's neglect to pay is not evidence of its inability to pay the debt.*
- (v) The Defendant was using the Winding-Up petition to intimidate the Plaintiff to pay.*

[4] Counsel concluded by saying she had not filed a Writ of Summons; that there was a serious issue to be tried; that the Plaintiff was entitled to an Injunction. She relied on the decision in Vo-Ko Industries Ltd v Fish Cannery (Fiji) Ltd. [2003] FJHC 295.

[5] Counsel for the Defendant then submitted, relying on the authorities he cited, that:

- (i) There was no basis for preventing the Winding-Up of the Plaintiff, as the Defendant is a Creditor.*
- (ii) The Plaintiff had not satisfied the burden of proof.*

He therefore asked for the summons to be dismissed with costs.

[6] At the conclusion of the hearing, I reserved Judgment to a date to be announced.

[7] In the course of preparing my Judgment, I have perused the following:

1. ***The three affidavits affirmed by Mohammed Rafiq for the Plaintiff.***
2. ***The affidavit affirmed by Neo Chin Aik for the Defendant.***
3. ***The Plaintiff's written submission.***
4. ***The Defendant's written submission.***
5. ***The Plaintiff's Bundle of Authorities.***
6. ***The Defendant's Bundle of Authorities.***

[8] I now proceed to deliver my Judgment. This is not a case where the Plaintiff is seeking an interlocutory injunction, as a holding operation, pending the determination of the main action.

[9] This is a case where as its Counsel has confirmed, the Plaintiff had not filed any Writ of Summons. It is therefore hardly tenable for her to submit there is a serious issue to be tried, when there is no existing suit in which this ostensibly serious issue can be canvassed in a full hearing. Therefore, I am of opinion that the principles laid down by Lord Diplock in the case of **American Cyanamid Co. v Ethicon Ltd** [1975] 1AER 504 in the House of Lords (now the Supreme Court of the United Kingdom) do not apply in the instant matter.

[10] This is also because the injunction sought by the Plaintiff is not an injunction to restrain a Defendant from violating a Plaintiff's legal right. This is an injunction to restrain the Defendant from exercising its legal right to present a petition. (see the judgment of the English Court of Appeal in **Bryanston Finance v De Vries** (No. 2) [1976] 1 Ch pg. 80).

[11] For me to grant the injunction, in these circumstances where no writ has been filed, would be in effect to give to the Plaintiff, on a platter, everything it desires without it having to ever file a Writ and proceeding to trial.

[12] Further and conclusively militating against the Plaintiff's prospects of obtaining an injunction was the admission of its Director, Mohammed Rafiq in his

Affidavit sworn on the 23<sup>rd</sup> December 2014. In paragraph 16 thereof, he said in words which are as plain as a pikestaff:

***“THAT I admit that the Plaintiff owes money to the Defendant however disputes the sum due. The sum due to the Defendant is substantially lower than what has been shown in the Winding-Up notice.”***

[13] This admission has fatally compromised if not wrecked any prospects the Plaintiff might have had of obtaining an injunction. In this respect, I would refer to the decision of Madraiwiwi J in **Treasure Island Limited v Rups Industries Limited**. [2001] 1 FLR 64. The learned Judge adopted the headnote to Re a company [1993] BCLC 131 which states:

***“Held – Injunction refused. The presentation of a petition to wind up a company based on an undisputed debt is not an abuse of the process of the court. Such a petition was not presented for an improper purpose, for example, to put pressure on the company to pay a debt which was disputed, but was for a purpose which was entirely proper which was to put pressure on the company to pay a debt which was not disputed. The existence of a cross-claim that the company may have was relevant to the exercise of the court’s discretion on the hearing of the winding-up petition. Since the debt in this case was due and the existence of the cross-claim (which had not been established by litigation) did not afford a good reason for the company’s failure to pay the demand that had been properly made the court would not grant the order sought.”***

He stated:

***“The court must therefore conclude that what the Plaintiff seeks is to injunct the exercise of a statutory right by the Defendant in circumstances which do not amount to an abuse of process.”***

- [14] Before I spell out my decision, I desire to express here the strictures which I had articulated during the hearing. They arose in this way. Counsel for the Plaintiff said that the signature of the deponent on her copy of the Defendant’s Affidavit was, as she put it, a cut and paste job. *i.e* the signature was pasted onto the Affidavit at the place where a deponent normally signs before the attesting Notary Public or Commissioner for Oaths.
- [15] To this, the Defendant’s Counsel’s riposte was that his copy of the Plaintiff’s affidavit had “Sgd” where the signatures of the deponent and attesting Commissioner for Oaths should have appeared.
- [16] Whatever the rationale for these, these departures from correct practice are deprecated.
- [17] In conclusion, the following are the reasons for my decision which will follow:
- (i) The petition for winding up has to be presented by a creditor which the Defendant patently is.
  - (ii) The basis for such presentation has to be the Plaintiff’s deemed inability to pay its debt. The debt in question is the sum of Singapore dollars 72, 270.13 demanded in the Notice of Demand dated 3<sup>rd</sup> October 2014.
  - (iii) This debt, which is “a sum exceeding \$100 then due”, the Plaintiff had neglected to pay within the 3 weeks stipulated in Section 221 of the Companies Act (Cap 247) (the Act). This, consequently, had cleared the way for the Defendant (if it were minded to) to present a petition for

the Plaintiff to be wound up by the Court under Section 220 (e) of the Act.

- (iv) To prevent the Defendant from doing this, the Plaintiff has taken pre-emptive action in the form of these proceedings for an injunction to be issued. But the Plaintiff faces an obstacle in its attempt to do so, because it's own Director has in his sworn affidavit admitted the existence of the debt only contending that it is substantially lower than what is shown in the Winding Up notice, referred in (ii) above.

[18] The authorities show that a petition presented in the above circumstances is not an abuse of the process of court and is not presented for an improper purpose e.g. to intimidate the Plaintiff, as contended. And adopting the words of Buckley LJ in the Bryanston Finance appeal, moreover until the Defendant actually presents its petition no one can know precisely what it will contain.

[19] In the event, I hereby refuse to grant the orders sought in the Plaintiff's Inter-Partes Summons dated the 5<sup>th</sup> November 2014, which is hereby dismissed and order the Plaintiff to pay the Defendant costs which I summarily assess in the sum of \$1,500.00.

**Delivered at Suva, this 22<sup>nd</sup> day of May 2015.**



*David Alfred*

David Alfred  
**JUDGE**  
**High Court of Fiji**