

IN THE HIGH COURT OF FIJI AT LAUTOKA

APPELLATE 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**

Counsel : Mr John Connors for petitioner
: Mr I. Fa for respondent
Date of Hearing : 11 May 2016
Date of Judgment : 18 May 2017

J U D G M E N T

Introduction

[01] This is an appeal, with leave being granted by me, against the Master's decision of 30 April 2015 where the learned Master made the following 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 \$1,500.00 (summarily assessed) which is to be paid within 14 days from the date hereof.'

[02] At the appeal hearing, both parties advanced their oral argument and they also tendered their respective written submissions. In addition the Appellant has filed its outline submissions in reply.

Grounds of Appeal

[03] The appellant relies on six (6) grounds of appeal, which includes:

- i) *That the Master erred in law and in fact when he entitled his ruling as an "Extempore Ruling" when the hearing took place on 3rd March, 2015 and the ruling was delivered on 30th April, 2015.*
- ii) *That the Master erred in law when he held at paragraph 3 page 4 that Order 2 Rule 2 of the High Court Rules applied to a failure to comply with a legislative requirement.*
- iii) *That the Master erred in law and fact when having found [paragraph 3 page 4] that "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" he failed to dismiss the application.*
- iv) *That the Master erred in fact when he sated at paragraph 7 page 6 that no affidavit of service of the notice of demand sworn by Anwar Naseemud Dean is on file when it was filed on 9 April, 2015.*
- v) *That the Master erred in fact when he states "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.” When he refused to allow it to be filed in court and when it was filed on 9 April, 2015.

- vi) That the Master failed to take into considering relevant matters and took into account irrelevant matters when reaching his decision.*

The Facts

- [04] Andalusia Limited (formally called Sonaisali Island Resort Limited), the Appellant filed a Writ Action No.46 of 2013 against Fortune 8 Limited, the Respondent claiming damages for breach of contract by the Respondent Company. The matter came before the court for mention on 4 June 2014 when it was fixed for trial on 6 August 2014 before Tuilevuka J.
- [05] On 6 August 2014, the Respondent Company did not appear. As such the trial proceeded in its absence after the court being satisfied that the solicitor on the record for the Respondent Company was out of the country.
- [06] The Appellant (Plaintiff) gave evidence before Tuilevuka J. which included the tendering of 33 documents evidencing the contract, its breach and the damages that flowed there from. Tuilevuka J. found the Defendant's (Respondent's) defence had no merit and gave judgment in favour of the petitioner in the sum of \$229,408.69.
- [07] The Respondent sought to set aside the judgment obtained in its absence. The application to set aside came before me when sitting as a Master on 21 October 2014. I then heard a preliminary issue that the application be struck out as it was filed out of time. On 3 November 2014, I delivered my ruling striking out the application as it had been filed out of time and therefore time barred.
- [08] On 24 November 2014, the Respondent Company filed a Notice of Change of Solicitor and a Notice of Appeal. The Notice of Appeal

purported to be an appeal to the High Court from the decision of the Master dated 3 November 2014 (my decision).

[09] The Respondent Company did not cause the Notice of Appeal to be called before the High Court.

[10] In the interim, by summons dated 21 January 2015, the Respondent sought to stay the winding-up proceedings commenced by the Petitioner. This summons was heard by the Learned Master on 3 March 2015 and a Ruling issued on 30 April 2015.

[11] The Respondent Company subsequently sought an order from the court for enlargement of the time period to file and serve a Notice of Appeal against the decision of the Master (mine) of 3 November 2014. This application was heard by the Court on 10 April 2015 and judgment is reserved.

The Background to the Appeal

[12] On 19 November 2014, the Petitioner presented a petition for winding-up of the Respondent Company (the Fortune 8 Limited) on the ground that it is unable to pay its debts. The winding-up petition states that the Notice of Demand pursuant to section 221 of the Companies Act was served on the Respondent's registered office. The Petitioner filed its affidavit verifying petition on 21 November 2014 and a Memorandum of Due Compliance was filed and served on 2 March 2015.

[13] Affidavit of service of Anwar Naseemud Dean sworn on 4 December 2014 was filed on 8 December 2014.

Respondent's summons to stay

[14] On 20 January 2015, the Respondent company filed a summons seeking a stay order against all the proceedings in Winding-up Cause and the Petitioner and/or his agents or servants be restrained from interfering in the affairs of Fortune 8 Limited (the

Respondent). The stay application was made in reliance upon section 224 of the Companies Act Cap 247. The Learned Master heard the stay application and reserved his ruling for 30 April 2015. Before the Learned Master delivering his ruling, the Petitioner on 9 April 2015 filed an affidavit of service of Anwar Naseemud Dean sworn on 3 October 2014 in which the Deponent states that he did personally serve at Level 3, Aliz Centre, Martintar, Nadi, the registered office of Fortune 8 Limited. The Learned Master pronounced his decision on 30 April 2015.

The Master's Decision

[15] The Learned Master concluded 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 Learned Master issued a stay on the winding-up proceedings brought by the Appellant.

[16] The Petitioner appeals the Master's decision to this court.

The Issue at Appeal

[17] The appeal concentrated on the issue that whether a statutory demand under section 221 of the Companies Act was served on the Respondent company before presenting the winding-up petition and was the debt alleged owed and that whether the Master had erred in determining these issues in his decision of 30 April 2015.

The Submissions

Appellant

[18] The Appellant's submission was that a notice under section 221 has been duly served and the prescribed period has elapsed. Payment has not been made. Notice under section 221 was served on the registered office of the company after judgment was obtained. There is no appeal filed challenging the judgment. The only appeal to the

High Court is against the ruling of the Master in determining that the application to set aside the judgment of Tuilevuka J. was filed out of time and was therefore dismissed and struck out.

Respondent

[19] The Respondent submits that clearly the proceedings in relation to the default judgment of 6 August 2014 are still before the court. The Court has yet to deliver a decision on the Company's application. It is highly inappropriate for the Appellant to seek the winding-up of the Company. It is an abuse of process and an attempt to render the pending decision of the Court to be nugatory and meaningless. The Petitioner cannot seek the winding-up of the Company based on a judgment that is still subject of the court proceedings as to whether or not it will stand. In these circumstances, the Appeal must be dismissed with an order for costs.

The Law

[20] Section 220 of the Companies Act 1983 (Now repealed) enunciates the circumstances under which a company may be wound up by the court:

'220. A company may be wound up by the court, if-

(a) the company has, by special resolution, resolved that the company be wound up by the court;

(b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting;

(c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced, in the case of a private company, below 2, or, in the case of any other company, below 7;

(e) the company is unable to pay its debts;

(f) the court is of opinion that it is just and equitable that the company should be wound up;

(g) in the case of a company incorporated outside Fiji and carrying on business in Fiji, winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business. (Emphasis provided)

[21] Section 221 defines 'inability to pay debts' as follows:

'221. A company shall be deemed to be unable to pay its debts-

(a) 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; or

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.' [Emphasis provided]

[22] The Respondent's stay application is made pursuant to section 224 of the Companies Act 1983, which spells out:

"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 proceeding against the company is pending in the High 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 be, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

The Decision

[23] The Petitioner brought winding-up proceedings under section 220 (e) of the Companies Act 1983 against the Respondent company on the ground that the Respondent company is unable to pay its debt. The Respondent filed a summons seeking a stay of the winding-up proceedings. By the decision of 30 April 2015 the Learned Master ordered staying all proceedings in Winding up Cause HBE No. 28 of 2014. The Petitioner appeals the stay order granted by the Learned Master in favour of the Respondent.

[24] The winding-up petition was presented on the basis that the Respondent Company has failed to pay the sum demanded by notice issued under section 221. The notice under section 221 was served on the registered office of the company after judgment was obtained in the sum of \$229,408.69.

[25] The winding-up application filed by the Appellant was listed before the Learned Master for hearing on 21 January 2015.

[26] On 20 January 2015, the Respondent filed the summons under section 224 of the Companies Act to stay all winding-up proceedings. Because of this application, the winding-up petition was not heard on 21 January 2015.

[27] Pursuant to section 224 of the Companies Act the court has power to stay or restrain proceedings against a company. Section 224 states:

*‘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 proceeding against the company is pending in the High 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 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]

[28] The stay application was argued before the Learned Master on 3 March 2015. He, at the conclusion of the hearing, reserved his decision and delivered the same on 30 April 2015, granting a stay of all winding-up proceedings.

[29] At para (D) (3) of the ruling, the Learned Master analysing the operation of section 224 concludes:

*‘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.***

...

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.’

[30] The rationale behind section 224 was considered in Petri’s case (above) where Fatiaki J said:

*'In this regard, there can be no doubting from the clear wording of Section 224 of the Companies Act 1983 that the **Court is given an unfettered discretion to stay or restrain** 'any suit or proceeding 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 be overcome by both provisions 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 or order by the Court'. (My emphasis)

[31] The court is given unfettered discretion by virtue of section 224 of the Companies Act to stay or restrain any suit or proceeding pending against the company at any time after the presentation of a winding-up petition, but before a winding-up order has been made. The issuance of stay or restraining order is intended to avoid a multiplicity of proceedings being commenced or prosecuted against a company whose continued existence and commercial viability is the subject matter of a winding-up petition or order of the Court.

[32] The second ground of appeal is that, ***the Master erred in law and fact when having found [paragraph 3 page 4] that "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" he failed to dismiss the application.***

[33] The Learned Master in his ruling said that the Respondent Company does not have legal standing under section 224 of the Companies Act for a stay of Winding-up proceedings. However, he did not dismiss the application for a stay. He further said in his ruling that:

'In any event the Petitioner's point must fail because of the delay involved.' [Emphasis added]

[34] Though, the Learned Master decided that the Respondent Company has no legal standing under section 224 for a stay of winding-up proceedings, he did not mind to dismiss the application filed by the

Respondent Company to stay because of the delay involved. The delay involved is that, the Petitioner failed to file affidavit of service in proof of service of the statutory demand notice ("section 221 notice") upon the registered office of the Respondent Company.

No Affidavit of Service of Notice of Demand

[35] I, now return to the grounds of appeal iv & v. I will consider both grounds together. The fourth ground is that ***the Master erred in fact when he stated at paragraph 7 page 6 that no affidavit of service of notice of demand sworn by Anwar Naseemud Dean is on file when it was filed on 9 April, 2015.***

[36] In regard to affidavit of service of section 221 notice, at page 6 of the ruling the Learned Master states:

"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."

[37] The Learned Master heard the stay of proceedings application on 3 March 2015, when counsel for the Petitioner attempted to file the Affidavit of Anwar Naseemud Dean deposing the service of the statutory demand. He, counsel for the Petitioner submits, refused to allow it to be filed in court and when it was filed on 9 April 2015, before the ruling was delivered on 30 April 2015.

[38] The Petitioner filed and served a Memorandum of Due Compliance on 2 March 2015. The affidavit of Aaron James McGrath sworn 21 November 2014 verifies and confirms the facts stated in the petition are true.

[39] The petition states that a demand was served on the registered office of the company. The notice of demand pursuant to section 221 of the Companies Act was served, according to the Petitioner,

on the registered office of the Respondent on 19 September 2014.
The affidavit of Anwar Naseemud Dean was filed on 9 April 2015.

[40] At para (D) (7), page 6 of the ruling, the Learned Master states:

“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 simple 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 Petitioner 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 statutory demand.”

[41] The affidavit of service of Anwar Naseemud Dean sworn on 3 October 2014 and filed on 9 April 2015 deposes that the statutory demand notice was personally served upon the registered office of Fortune 8 Limited on 19 September 2014. The copy of demand notice is annexed to the affidavit shows that Ms Vera Inia, the Manager had acknowledged service.

[42] Relying on Rule 28 of the Companies (Winding-Up) Rules the Learned Master at page 7 of the ruling states:

‘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 Petition be made”.

And then at page 8 he states:

In the circumstances, the Petition must fail. [Emphasis provided]

[43] At this stage, it is necessary to examine Rule 28. That provides:

- (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 he 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 by 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 manner required by this rule.***
[Emphasis provided]

[44] I note that there has been no date appointed by the registrar (in this instance the Deputy Registrar) for the Petitioner to attend before him to satisfy him that: (i) the petition has been duly advertised, (ii) the affidavit verifying the petition, (iii) affidavit of service have been filed and (iv) the provision of Rules 28 have been complied with by the Petitioner.

[45] The Petitioner presented the winding-up petition on 19 November 2014. The affidavit verifying petition was filed on 21 November 2014. The affidavit of service of Anwar Naseemud Dean sworn on 4

December 2014, deposing that true copies of winding-up petition and affidavit verifying petition were served upon the registered office of Fortune 8 Limited was filed on 26 November 2014. The Petitioner then files on 14 January 2015 a notice to inform the Respondent Company that the winding-up petition will be heard before the court at 8.30am on 21 January 2015.

[46] The hearing of the petition did not take place on 21 January 2015 because of the stay application filed by the Respondent Company on 20 January 2015.

[47] After few adjournments, the Learned Master heard the stay application on 3 March 2015 and issued the impugned ruling on 30 April 2015.

[48] The Learned Master states in his ruling that 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**, and concludes that, *"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 Petition be made"*.

[49] After presenting a petition, the Petitioner must satisfy the Registrar that he has complied with Rule 28. Rule 28 (1) requires the Petitioner to attend before the Registrar at the appointed time and show 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 by the Petitioner.

[50] The Memorandum of Due Compliance with Rule 28 (1) of the Companies (Winding Up) Rules was filed on 10 February 2015. The Registrar has certified that it to be correct.

[51] Rule 28 (2) describes the consequence of non-compliance with provisions of Rule 28 (1). The Petitioner must comply with the provisions of Rule 28 (1) **before the hearing of the petition** (winding-up petition). If not, the court will not make order on the petition.

[52] In fact, the hearing of the petition did not take place on the day fixed for that purpose (21 January 2015). The hearing on 3 March 2015 was the hearing on the stay application, and not the hearing of the petition. The Learned Master applied Rule 28 (a) and concluded that the Petitioner failed to file affidavit of service before the hearing of the petition.

Unfettered Discretion to stay winding-up proceedings

[53] The Court is given an unfettered discretion to stay or restrain any suit or proceeding pending against the company at any time after the presentation of a winding-up petition, and before a winding-up order has been made.

[54] The Learned Master granted a stay on winding-up petition filed by the Petitioner before he makes a winding-up order. It is obvious that the Learned Master had exercised his unfettered discretion in granting the stay.

[55] The most important statement on the rule of an appellate court in a discretionary matter is that of Lord Diplock in *Hadmor Production Ltd v Hamilton* [1983]1 AC 191. His Lordship said, at p.220:

“Upon an appeal from the judge’s grant or refusal of an [interim] injunction the function of an appellate court, whether it be the Court of Appeal or our lordship’s House, is not to exercise an independent discretion of its own. It must defer to the judge’s exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge’s exercise of the discretion on the ground that it was based upon a misunderstanding of the law or of the evidence

before him or upon an interference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing [interim] injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own".

[56] In **Adomson v Halifax plc** [2002] EWCA Civ 1134, [2003] 1 WLR 60, the court observed:

"The discretionary decisions may be reversed on appeal where the judge below erred in principle in his approach, or left out of account or took into account some feature he should not have considered, or that his decision was wholly wrong because he failed to balance the various factors fairly in the scale."

The ground upon which the winding-up application was based is diminished

[57] I was just informed that the judgment entered in Civil Action HBC No 46 of 2013 against the Respondent in its absence upon which the winding-up petition was based is now set aside. Counsel appearing for the Appellant confirms this. As a result, the ground upon which the Appellant relied for winding-up of the Respondent Company is now extinguished. This means there is no ground for the Appellant to maintain the winding-up petition filed against the Respondent Company. The appeal could be dismissed on this ground alone. So I do.

Conclusion

[58] The learned Master has granted the stay on the winding-up petition exercising his unfettered discretion given to him under section 224 of the Companies Act (repealed Act). The discretionary decisions may be reversed on appeal where the judge below (in this instance the Master) erred in principle in his approach. In my view, the learned Master correctly applied the relevant law to the facts and balanced the various factors fairly in the scale. I am not convinced that the learned Master erred in principle in his approach. Therefore, the learned Master's decision to grant a stay on the winding-up proceedings should not be reversed on this appeal. Additionally, the Appellant has lost the ground for winding-up of the Respondent company as a result of the setting aside of the judgment which the Appellant relied upon. The winding-up application filed by the Appellant has become unsustainable. The appeal could be dismissed on this ground alone. I would, therefore, dismiss the appeal with costs of \$1,000.00, which is summarily assessed.

The Result

- 1) Appeal dismissed.
- 2) The Petitioner will pay costs of \$1,000.00 to the Respondent in 21 days.

M H Mohamed Ajmeer
18/5/17

M H Mohamed Ajmeer
JUDGE

At Lautoka

18 May 2017

