

IN THE HIGH COURT OF FIJI
AT SUVA

Winding Up Action No. HBE 61 of 2014

IN THE MATTER of CONSTRUCTION
(FIJI) LIMITED formerly called SUITE
INSPIRATIONS LIMITED a limited liability
company having its registered office at R P Singh
& Co, Unit 2, Level 2, Velop House, 371 Victoria
Parade, Suva.

AND

IN THE MATTER of the Companies Act
(Cap 247)

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Nilesh Lajendra : for the Petitioner,
Mr. Devanesh Sharma : for the Respondent,

Date of Judgment : 12th June, 2018

RULING

[Preliminary objection identified in the Supplementary Affidavit in terms of
Petition, Affidavit Verifying Petition and Memorandum of Due
Compliance pursuant to Companies Act 247]

INTRODUCTION

1. The Company **Construction (Fiji) Limited** formerly called Suite Inspirations Limited raised the preliminary objections akin to the usage and procedural compliance of following Forms and Documentations in terms of the *Companies (Winding Up) Rules, Cap 247-*

- (i) **Petition**
- (ii) **Affidavit Verifying Petition; and**
- (iii) **Memorandum of Due Compliance.**

2. The **Petitioner** opposed the preliminary objections seeking the same to be dismissed with costs awarded at the end of the determination of the substantive Winding up Action.

3. **RESPONDENT'S CONTENTION**

- [a] **Petition**

- [i] At paragraph 2 of the Petition it is a requirement under Form No .3 Companies (Winding Up) Rules that the registered postal address of the Company be specified. This has not been done in the Petition.
- [ii] At paragraph 3, it is a requirement that the paid up capital be specified. This has not been done.

- [b] **Affidavit Verifying Petition**

- [i] At paragraph 2 of the Affidavit Verifying Petition Mr Faiyaz Saheb says that that acts and deeds of the said Petition are true. This is not what Mr Saheb is supposed to verify in an Affidavit Verifying Petition since the verification needs to relate to the acts and deeds of the Petitioner. As such there is no proper Affidavit that verifies the acts and deeds of the Petitioner.

- [c] **Memorandum of Due Compliance**

- [i] The Memorandum states that the Petition was duly advertised in the newspaper and the Fiji Gazette on 7th November 2014. This is an incorrect representation because it was not the Petition that was advertised but an Advertisement of Petition for Winding up Order.
- [ii] The correct heading for such Advertisement is set out in Form 6 under the Companies (Winding Up) Rules.
- [iii] The heading in both the advertisement in the Newspaper and the Gazette is defective in terms of the heading.
- [iv] The Notice must state that the Petition will be heard by the Court. In this case the Notice states that it is to be heard before the Honourable Master Rajasinghe at the High Court of Fiji on 9th December 2014. This is contrary to Form 6.
- [v] Furthermore the Petition also contains the typed words that it is to be heard before the Master when the wording of Form 6 requires the words to be to be heard by the Court.
- [vi] It is noted that the Notice states specifically that the Petition was to be heard before Master Rajasinghe when in fact neither the Petition nor does Form No. 6 specify the name of a particular Judicial Officer. The Notice was thus misleading and filed contrary to Winding up Rules. The Notice was in fact contrary to the Petition because the Petition did not specify the name of a Judicial Officer at all.

[vii] The Notice requires a signature of the Petitioner or the Petitioner's Barrister and Solicitor. The newspaper advertisement contains only the typed words **sgd Nilesh Lajendra** whereas the advertisement in the Gazette does not even contain a signature. Form 6 states that the Advertisement must be signed by the Barrister and Solicitor.

4. **THAT** these are objections that are taken aside from the fact that we oppose the Petition on other substantial grounds.
5. **THAT I** verily believe that Petition should be stuck out for non-compliance with the Forms for Winding Up. I verily believe that there is no excuse for such ignorance of the law.

PETITIONER'S CONTENTION

Petition

6. Form No. 3 is a statutory form that requires the same to be completed and filed accordingly. The Petitioner has omitted to state the Company's registered postal address and submitted its omission did not mitigate the Petitioner's claim nor was the omission prejudicial to the Company.
7. The Petitioner referred to *Section 202(1) of the Companies (Winding Up) Rules* which states that

"Formal Defect not to invalidate proceedings."

202.-(1) No proceedings under the Act or these Rules shall be invalid by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(2)...

8. That no substantial injustice has been caused by the Petitioner's omission to provide details of the Company's registered postal address. Further the Company has failed to show it has suffered substantial injustice as a result of the Petitioner's failure to outline the Company's registered postal address.
9. The Rules require that all service in relation to Winding Up leading from service of Winding up Notice to the Affidavit Verifying Petition be served at the registered office of the Company. The registered office of the company in this case as in most cases is a physical location/address. The registered office of the Company is at R.P. Singh & Co., Unit 2, Level 2, Velop House, 371 Victoria Parade, Suva. All the documents under the Winding Up Rules which required service at the registered office of the Company has been duly served at the registered office of the Company.
10. The Petitioner has duly complied with the critical requirement of service of all the documents required to be served at the registered office.
11. There is no document under the Winding up Rules which requires service of documents at its registered postal address. On that basis for the purposes of Winding up Rules, the key address is the physical registered office of a company rather than its registered postal address.

12. The omission to state the registered postal address of the Company has not caused any substantial injustice to the Company.
13. The Company from the time of service of Winding up Notice to the service of the Affidavit Verifying Petition has not complained that it has not been duly served in accordance with the Winding up Rules and has been aware of the Petitioner's action to proceed with winding up proceedings.
14. It has not in any manner or form put any matter before the Court to show as a result of the omission by the Petitioner to state the registered postal address on the Petition has caused substantial injustice to the Company.
15. Therefore the preliminary objection identified at paragraph 5[a][i] and [ii] be dismissed.

AFFIDAVIT VERIFYING PETITION

16. The Company's objection to the issued raised herein is that instead of stating these are acts and deeds of the **Petitioner**, Mr Faiyaz Saheb referred to the acts and deeds of the **Petition**.
17. The Petitioner states it is a typographical error i.e. rather than referring to the acts and deeds of the Petitioner it states Petition. The Petitioner respectfully submits this typographical error does not invalidate the Affidavit.
18. Referred and reiterated *Section 202 (1) of the Companies (Winding Up) Rules* quoted at paragraph 7 above.
19. That no substantial injustice has been caused to the Company by the error. Further the Company has failed to show it has suffered substantial injustice as a result of the Petitioner's use of the word "Petition" and not "Petitioner".
20. The Petitioner prays the Court dismiss the Company's objection to the Affidavit Verifying Petition.

MEMORANDUM OF DUE COMPLIANCE

21. In reply to the **Respondent's objection** with regards to **advertisement** and others, the Petitioner agrees that the **Form 6 heading** states: "**Advertisement of Petition**", and there is no substantial defect to the advertisement caused by this error and referred court to *Section 202 (1) of the Companies (Winding Up) Rules* quoted at paragraph 7 above.
22. The Petitioner submits no substantial injustice has been caused by this error and the Company has failed to show it has suffered substantial injustice as a result of the said error in the Memorandum of Due Compliance.

Correct Newspaper and Gazette Heading for Advertisement:

23. The correct heading for such **Advertisement** is set out in **Form 6** under the Companies (Winding Up) Rules.
24. In reply to this objection, the Petitioner agrees the **Form 6** is the applicable form. However the Petitioner submits there is no substantial defect to the advertisement caused by this error and relied on Section 202 (1) of the Companies (Winding Up) Rules as quoted at paragraph 8 above.
25. In reply to the above objection the Petitioner agrees the **Form 6** heading states: **Advertisement of Petition**. The Petitioner submits there is no substantial defect to the advertisement caused by this error and relied on Section 202 (1) of the Companies (Winding Up) Rules.
26. That no substantial injustice has been caused by the error and the Company has failed to show it has suffered substantial injustice as a result of the error.

Notice must state that the Petition will be heard by the Court.

27. The Petitioner submits it has entered additional information in Form 6. Further the said information is true.
28. There is no substantial defect to the advertisement caused by this additional information and relies on Section 202(1) of the Companies (Winding Up) Rules.
29. No substantial injustice has been caused by the additional information. Further the Company has failed to show it has suffered substantial injustice as a result of the additional information in the advertisement provided by the Petitioner.

Notice requires a signature of the Petitioner or the Petitioners Barrister and Solicitor.

30. To this objection the Petitioner submits "sgd Nilesh Lajendra" is a signature by the Petitioner's Barrister & Solicitor and agrees there is no signature on the advertisement in the Gazette. The Petitioner states there is no prejudice to the Company as a result of this omission.
31. The purpose of the Gazette is to inform the general public about the winding up that has been commenced so that if any party desirous of supporting the Petition can do so. The fact that in the strict sense the signature is not contained in the advertisements caused does not in any way result in any injustice caused to the Company. Right from the commencement it was fully aware that the Petitioner was serious in proceeding with its winding up action.
32. The Company was also aware who the solicitors of the Petitioner are. Through its solicitors the Company has written several letters to the solicitors of the Petitioner.
33. This objection is without merit and should be dismissed given the Company has failed to state what injustice it has suffered through this.
34. Further the Petitioner relies on Section 202(1) of the Companies (Winding Up) Rules.

35. No substantial injustice has been caused by the omission of the signature. Further the Company has failed to show it has suffered substantial injustice as a result of the omitted signature.
36. It is respectfully submitted that the aim of the Company is that through these technical objections it hopes to delay the determination of the substantive winding up action.
37. If the Company was really serious and genuine about its preliminary objections then it would have proceeded to provide the Court with evidence of substantial injustice that it has suffered as a result of the matters it thought are defects and irregularities contained in the various winding up documents.
38. It has failed to state any injustice that it has suffered. It is the respectful submission of the Petitioner that the Company has only unnecessarily taken up these preliminary objections with the hope of somehow delaying the determination of the substantive matter so that it can stroll the proceedings in this fashion and buy more time.
39. All the preliminary objections should be dismissed and the costs of the same should be taken into account by the Court when ultimately awarding costs at the end of determination of the substantive winding up action.

ANALYSIS AND DETERMINATION

40. This Court needs to determine the **Preliminary Issues** raised by the **Respondent Company** [Construction (Fiji) Limited formerly called Suite Inspirations Limited] **identified** under the following **headings**-
 - a. **Petition**
 - b. **Affidavit Verifying Petition and**
 - c. **Memorandum of Due Compliance.**
41. Petition
Proceedings for Winding Up is required to be commenced by way of a Petition as designed in terms of Statutory Form No. 3. [Form No. 3- General form -Rule 21].
42. **Rule 21 of the Companies (Winding Up) Rules Cap 247** requires that every petition should be in the Form 3, 4 or 5 with such **variations** as **circumstances** may require.
43. The Petitioner herein **admits omitting** to state the Respondent Companies' **registered postal address**, but stated further that the omission did not **prejudice** the Respondent Company nor has it caused any **substantive injustice** to the Respondent Company.
44. In terms of **Rule 24 (1) of the Companies (Winding Up) Rules, Cap 247**, it requires that every Petition shall unless presented by the Company, be served upon the Company at its **Registered office**, if any, and, if there is no registered office, at the principal or last known place of business thereof, by leaving a copy of the Petition with any member....."

45. Therefore, *Rule 24 (1)* sets out the various manner of service and that it requires that the service in relation to *Winding Up proceedings* be effected and/or served at the Registered office of the Company.
46. In the current case, all the documents under the *Winding Up Rules* which required service on the Respondent Company was served at its **registered office** at R.P. Singh & Co., Unit 2, Level 2, Velop House, 371 Victoria Parade, Suva.
47. The *Companies (Winding Up) Rules* does not state anywhere that it is a requirement that all documents under *the Winding Up proceedings should be served at its registered postal address rather Rule 24 (1)* clearly states that it should be served at its **Registered office**, if any, and, if there is no registered office, at the principal or last known place of business.
48. I make reference to *Section 202 (1) of the Companies (Winding Up) Rules* which states that-
- "No proceedings instituted by Petitioner under the Act or these Rules shall not be invalid by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court".*
49. The Respondent Company has failed to show and/or establish any substantial injustice that has been caused to the Respondent Company one way or the other in particular clearly stating what the substantial injustice was as a result of the omissions of the Registered Postal Address for the office by the Petitioner.
- Affidavit Verifying Petition
50. *Section 25 of the Companies (Winding Up) Rules, Cap 247*, requires 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 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.*
51. The Respondent Companies objection herein is that "instead of stating these are acts and deeds of the Petitioner, Mr Faiyaz Saheb referred to the acts and deed of the Petition."
52. The **Petitioner** submitted that it was a typographical error that did not invalidate the affidavit and made reference to *Section 202(1) of the Companies (Winding Up) Rules* as mentioned hereinabove.
53. Mr Faiyaz Khan is the Director of the Petitioning Company and deposes the Affidavit wherein he is verifying the Petition for the Petitioning Company, Formscaff (Fiji) Limited. If the contents of the Affidavit Verifying Petition is read in its entirety, then, obviously it is understood that the "acts and deed" referred to implies to the Petition of the Petitioner.

54. I find that the error is both **formal and inadvertent** and does not in any way **invalidate** the contents of the *Winding Up proceedings*.

I reiterate *Section 202 (1) of the Companies (Winding Up) Rules* which states - "*No proceedings instituted by Petitioner under the Act or these Rules shall not be invalid by reason of any formal defect or any irregularity.....*"

55. Further, there is no **injustice** caused and suffered by the Respondent Company since the Company has failed in its bid to **satisfy** this court of any particular **injustice caused and suffered** by the **Respondent Company**.

Memorandum of Due Compliance

56. Reference is made to *Section 23 of the Companies (Winding Up) Rules, Cap 247* which deals with the advertisement of the Petition for the Winding Up of a Company by the Court.
57. Upon citing "Form 3" of the *Companies (Winding Up) Rules*, I find that the heading states "*Advertisement of Petition.*"
58. *Section 23 of the Companies (Winding Up) Rules* state 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 and solicitor, and shall contain a note at the foot thereof stating that any person who intends to appear on the hearing of the petition, either to oppose or support it, must send notice of his intention to the petitioner, or to his barrister and solicitor, within the time and manner prescribed by rule 29, and an advertisement of a petition for the winding-up of a company by the court which does not contain such a note shall be deemed to be invalid:"

59. I have perused the **Memorandum of Due Compliance** filed herein and made a special reference both **advertisements** in the "The Fiji Times" and "Gazette". Both advertisements make particular references to the following-

- (i) "*Notice of the Winding up Petition,*
- (ii) *States the date on which the Petition was presented to the court, i.e. on 27th October, 2014,*
- (iii) *That it gives details of the name and address of the Petitioner [Formscaff (Fiji) Limited] and Barrister and Solicitor [Lajendra Law 30 Ratu Sukuna Road Nasese, P.O. Bo 2595 Government Buildings, Suva] and*
- (iv) *Contains a detailed notice or direction stating that any person who intends to appear on the hearing of the petition, either to oppose or support it, must send notice of his intention to the petitioner, or to his barrister and solicitor, within the time and manner prescribed by rule 29, and an advertisement of a petition for the winding-up of a company by the court which does not contain such a note shall be deemed to be invalid:*

60. Bearing in mind that the abovementioned details of the notice of the winding up Petition in both advertisements and upon the perusal of the requirements as per *section 23 of the Companies (Winding Up) Rules*, I find that the Petitioner has complied with the requirements of the Rules accordingly.
61. Further, the requirements as per "Form 6" heading "Advertisement of Petition", the Respondent Company has failed to show and/or establish and satisfy this court of any **substantial injustice** that was caused to the Respondent Company in the manner the **Petition was Advertised**.
62. I do not find any injustice substantial or otherwise that have been caused to the Respondent Company that would allow me to invalidate Advertisement of the Petitioner's Petition in the "The Fiji Times" and/or "Gazette."
63. The substance and/or contents of the Petition in terms of the requirements of *Section 23 (a) and (b) of the Companies (Winding Up) Rules*, has not been changed rather I find that it is only a **technicality** which has been raised by the Respondent Company/Counsel representing.
64. Further, I reiterate that *Section 202(1) of the Companies (Winding Up) Rules* which states in summary that "the Winding Up proceedings instituted by the Petitioner under the Act or these Rules, shall not be invalid by reason of any formal defects or any irregularity, unless the court where any objections is made [as in this case by the Respondent] is of the opinion that substantial injustice has been caused by the defect".
65. I find that the **defects** cited by the Respondent Company/Counsel representing in his oral and written submissions are not merely defects rather **technicalities** on the part of the Petitioner/Counsel representing the Petitioner. Further, the same has been rather **inadvertent** that would not **change the requirements of any of the documents** filed within the current Winding Up proceedings in terms of the *Companies (Winding Up) Rules* and/or the **Petition, Affidavit Verifying petition** nor the **Memorandum of Due Compliance** accordingly.
66. Taking into consideration the nature and the conduct of the proceedings before this court, I am inclined to order **costs** which is summarily assessed and fixed against the Respondent in the sum of **\$650.00** to be paid within 14 days to the Petitioner.
67. For the above rational, I now proceed to make the following Orders.

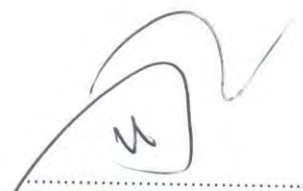
FINAL ORDERS

- (i) The Preliminary objections raised by the Respondent in terms of the "Petition, Affidavit Verifying Petition, and Memorandum of Due Compliance" are hereby accordingly Dismissed".
- (ii) The Respondent to pay a sum of \$650 summarily assessed costs to the Petitioner within 14 days timeframe.

- (iii) The Substantive Winding up Proceedings to be expedited with any further directions to be made.
- (iv) Matter stands adjourned to 12th June, 2018 @ 9 am.
- (v) Orders accordingly.

Dated at Suva this 12th Day of June, 2018.




Master
VISHWA DATT SHARMA

cc: Lajendra Law, Suva
R. Patel Lawyers, Suva