

RE HITSON LIMITED

A [COURT OF APPEAL (MARSACK, J.A., HENRY, J.A., SPRING, J.A.) 23, 27 November 1981]

Company Law—Affidavit verifying petition need not be served on judgment debtor in winding up proceedings—better practice is to do so

B *Mrs Hoffman* for Appellant
R. Chauhan for the Petitioner

Appeal by Hitson Limited against an order for winding up made in the Supreme Court on 6 January, 1981. The original petition, filed on 20 September 1980, was based on the grounds that a judgment of \$535.95 was entered against the appellant. On 14 May, 1980 the sum had remained unpaid; further, that the appellant was unable to pay its debts, the ground provided by Companies Ordinance Cap. 216 (the Ordinance) s. 167(e).

D The petition for winding up was on 9 December, 1980—advertised in the *Gazette* on 7 October, 1980 and "*Fiji Times*" on 9 October, 1980. Other creditors indicated an intention to appear and support the petition.

The affidavit verifying the petition was filed on 8 October, 1980 but not served. On 6 January, 1981 the Order sought was made.

E The appellant argued one ground only at this hearing viz. that the affidavit verifying the petition had not been served on judgment debtor.

In *Parlmer's Company Precedents 15th Edit Part II* at p. 90 it was noted that notice of the affidavit need not be given to the company.

F *Held:* S.352 of the Ordinance provided that until the Chief Justice made the rules therein mentioned, certain specified rules of the Imperial Parliament were declared to be in force as part of the Ordinance.

No Rules having been made by the Chief Justice, the Imperial Winding Up Rules were in force in Fiji. Rule 29 provided for the said affidavit yet did not require service.

G The better practice would be to serve a copy of the affidavit. But no legal obligation rested on the respondent company to do so.

Appeal dismissed.

Case referred to:

H *New Weighing Machine Co.* (1896) W.N. 48

MARSACK, Judge of Appeal:

Judgment of the Court

This is an appeal against an order for the winding up of the appellant company made in the Supreme Court at Suva on 6th January 1981. The original petition, filed on the 26th September 1980, was based on the grounds that a judgment against the company entered on the 14th May 1980 for \$535.95 had remained unpaid; and further that the company was unable to pay its debts.

The petition for winding up was advertised in the *Fiji Royal Gazette* on the 9th October 1980 and in *Fiji Times* on 7th October 1980. Seven other creditors with claims totalling \$17101.58, gave notice that they would appear or be represented at the hearing, and that they supported the petition for winding up. The order was made as prayed on 6th January 1981. On 4th February 1981 the appellant company filed notice of appeal.

Two grounds of appeal were set out in the notice, but one was abandoned at the hearing. The only ground argued before this Court was in these terms:

"The learned trial Judge erred in law in making the Order for Winding Up the Company when the Petitioner failed to serve the affidavit verifying Petition on the appellant company thus depriving the Appellant of filing an affidavit in opposition. Hence there has been a miscarriage of justice."

As, under section 167(e) of the Companies Ordinance Cap. 216 (1967 Edition) a company may be wound up by the Court if it is unable to pay its debts, the question for determination by this Court is this: Is the petitioning party legally bound to serve a copy of the verifying affidavit on the respondent debtor? Section 352(1) of the Companies Ordinance Cap. 216 reads as follows:

"352(1) Unless and until the Chief Justice shall make rules under the powers conferred by section 289 of this Ordinance, the Companies (Winding Up) Rules, 1929, as amended by the Companies (Winding Up) Amendment Rules 1929, and the Companies (Winding Up) Amendment Rules, 1933, made under the Companies Act, 1929, of the Imperial Parliament, and the scale of winding up fees prescribed under the said Act, are declared to be in force in Fiji and shall read with and considered part of this Ordinance."

As no rules have yet been made by the Chief Justice, the Imperial Winding Up Rules 1929 are in force in Fiji. Rule 29 of these reads:

"29. Every petition for the winding up of a Company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition."

In the present case the verifying affidavit was filed in the Court on 1st October 1980, but no copy of the affidavit was served on the company. It is to be noted that in Rule 29 no provision is made for service of the affidavit on the respondent company. This matter is referred to in Palmer's Company Precedents 15th Ed. Part II at page 90:

A "Notice of the filing of this affidavit need not necessarily be given to the company (*New Weighing Machine Co. W.N. (1896) 48.*)"

It is true that in the case cited by the learned author it is stated in the judgment that though there is no legal obligation to serve a copy of the affidavit on the company, the better practice is to do so. But in the present case we are concerned with the legal responsibility of the petitioning creditor. It is clear that no legal obligation rests on the petitioning creditor to serve a copy of the affidavit on the respondent company.

B Counsel for the appellant submitted that the appellant company is thereby deprived of the right or the opportunity of filing an affidavit in opposition. But that right or opportunity is in no way affected by the lack of service of the affidavit verifying the petition. Full information was given in the petition itself which was served on the company in due form. If then it was desired on behalf of the company to file an affidavit countering some allegation or allegations in the petition the way was open to do so.

C For these reasons we are unable to hold that there has been any miscarriage of justice as is submitted in the notice of appeal.

Accordingly the appeal is dismissed with costs to be taxed if not agreed by the parties.

D *Appeal dismissed.*