

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 732 OF 1980

IN THE MATTER of RAZA SHIPPING
COMPANY LIMITED

AND

IN THE MATTER of the Companies
Ordinance Cap. 216.

Mr. R.W. Mitchell for the Petitioner.
Mr. V. Parmanandam for the Company.

DECISION

Mr. Parmanandam as a preliminary point has raised the issue that the affidavit verifying the petition has been sworn by Mr. Mitchell and not by the Petitioner as required by Rule 29 of the Companies (Winding Up) Rules 1929. Mr. Parmanandam has referred to paragraph 5 of the petition as an example of a fact which could not be within Mr. Mitchell's knowledge.

Mr. Parmanandam quoted the case of In re African Farms Ltd. (1906) 1 Ch. 640 and argues that in the instart case the affidavit is not acceptable.

Halsbury Laws of England 4th Edition paragraph 1022 states that an affidavit verifying petition "may in a proper case be made by the petitioner's solicitor or agent if he knows the facts". The African Farms Ltd. case is quoted as an authority for such statement.

The petition in this action is founded on non-compliance with a notice under section 168 of the Companies Ordinance.

The petitioner is resident in New Zealand and it is clear that he can have had no first hand knowledge of the service of such notice and non-compliance with the provision and terms of such notice. Mr. Mitchell's evidence on such facts is of more evidential value than that of the petitioner.

As regards the evidence as to the existence of the alleged debt Mr. Mitchell's affidavit indicates he has acquired knowledge of the facts from a perusal of the petitioner's papers and documents.

Warrington J. in the African Farms Ltd. case at p.642 stated as follows :

"I have looked into the practice, and have ascertained that there have been many cases, some of which are unreported, in which an affidavit other than that of the petitioner has been accepted. I have also spoken respecting the matter to Buckley J., to whom the company business has been assigned. He has pointed out to me, and I in turn now desire to point out, that r. 29 does not state what is to be the result of non-compliance with its provisions. The rule does not say that the petition is in that case to fail. The rule is merely directory as to the kind of affidavit to be accepted as evidence. That leaves it open to the Court, in a proper case, to accept an affidavit which in an ordinary case coming before the Court would be accepted as sufficient evidence."

The most important facts stated in the petition are those relating to the statutory notice requiring the company to pay the alleged debt, service on the company and failure by the company to pay that debt within three weeks after service of such notice.

On these facts the evidence of Mr. Mitchell is of more value than that of the petitioner.

I accept the affidavit as a sufficient compliance with rule 29.

I would also point out that strict compliance with

rule 29 which requires the affidavit verifying petition to be sworn and filed within four days after the petition is filed presents practical difficulties even in these days of jet travel if an overseas petitioner is required to personally swear the affidavit. In 1929 when the rules were made it would have been even more difficult if not impossible.

Rule 29 also provides that the affidavit is prima facie evidence of the statements in the petition and it is open to the company to refute the statements. In the instant case the defendant has filed an affidavit in opposition to the petition and the facts will now have to be established by evidence.

I overrule the preliminary objection.

R. G. Kermodé
(R.G. KERMODE)
J U D G E

SUVA,

27 FEBRUARY, 1981.