SYED AHAMED ABDUL SALAM & ORS v. NAINA MOHAMED & SONS (PENANG) SDN BHD
HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
WINDING UP NO: 28-40-97
30 MARCH 1998
[1998] 3 CLJ SUPP 81; [1998] 3 BLJ 81

***COMPANY LAW**: Winding up - Petition - Duplicity of proceedings - First petition struck out - Filing of second petition based on similar grounds - Subsequent appeal against striking out of first petition still pending - Whether second petition amounts to duplicity of proceedings and an abuse of the process of the court*

***CIVIL PROCEDURE**: Striking out - Winding up petition - Mode of commencement - Whether application ought to be made by way of summonsin-chambers or by notice of motion*

***CIVIL PROCEDURE**: Affidavits - Affirmation of affidavit - Affidavit in support of notice of motion - Whether must be "sworn after and filed within four days after the petition is presented" - Companies (Winding Up) Rules 1972, r. 26*

This was an application by way of a notice of motion for an order to strike out a winding up petition. This application was grounded on both, O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') and the inherent jurisdiction of the court.

The material events leading to the present application are as follows. A winding up petition was filed to wind up the respondent company but this was successfully struck out on the grounds that the petition failed to comply with the Companies (Winding Up) Rules 1972 ('Winding Up Rules'). Subsequently, another petition to wind up the respondent company was filed. This second petition was based on the same grounds as the earlier winding up petition. After having filed the second petition, the petitioners appealed against the order striking out the first petition and this matter is still pending in the Court of Appeal.

This application to strike out the second winding up petition was objected to by the petitioners on the ground that the application should have been made by way of summons-in-chambers. Further and in the alternative, the petitioners also objected against the use of the affidavit in support of the notice of motion1 OF 6 on the ground that the affidavit was affirmed only one day prior to the date of the notice of motion. This, it was claimed, was against r. 26 of the Winding Up Rules.

Held:

[1] An application under O. 18 r. 19 of the RHC should be made by way of summons-in-chambers and heard in chambers. However, r. 5(1) of the Winding Up Rules stipulates matters which should be heard before the judge in open court. The present application was not included therein. Rule 7 of the Winding Up Rules, however, states that every application in court, other than a petition, shall be made by motion. As this was an application to court, other than a petition, the application was rightly made by way of notice of motion. In any

case, even if this was a defect or an irregularity, it was the type which was curable by r. 194(1) of the Winding Up Rules.

[2] Affidavits in support of a notice of motion need not comply with the requirement that they be "sworn after and filed within four days after the petition is presented" as provided for by r. 26 of the Winding Up Rules. Rule 26 applies to affidavits verifying petitions.

[3] The petitioners should not have appealed against the striking out of the first winding up petition subsequent to filing a second petition to wind up the respondent company based on the same grounds as the first petition. There was clearly a duplicity of proceedings and an abuse of the process of the court.

Case(s) referred to:

*Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 (**dist**)*

*City Audio Sdn Bhd v. Pengangkutan Udara Mas Sdn Bhd [1994] 1 AMR 8 (**dist**)*

*Lim Tok Chiow & Anor v. Dian Tong Credit & Development Sdn Bhd [1994] 4 CLJ 155 (**dist**)*

Legislation referred to:

Companies Act 1965, s. 218

Rules of the High Court 1980, O. 18 r. 19 , O. 32 r. 13(1)

Companies (Winding Up) Rules 1972, rr. 5(1), (2) , 7 , 26 , 194(1)

Counsel:

For the petitioner - Philip Adolphus; M/s Philips Adolphus & Co

For the respondent - Suppiah (Lim with him); M/s Presgrave & MatthewsReported by S Dharmendran

JUDGMENT

Abdul Hamid Mohamad J:

This is an application made by way of a notice of motion, basically, for an order that the winding-up petition be struck out pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('RHC 1980') and also under the inherent jurisdiction of the court.

Learned counsel for the petitioner (respondent in this application) did not dispute that the provisions of O. 18 r. 19 was applicable in a winding-up petition but raised an objection that the application should be made by way of summons-in-chambers.

There appears to be some confusion here. On the one hand, an application under O. 18 r. 19 of the RHC 1980 should be made by way of summons-inchambers and heard in chambers. Then there is the provision of r. 5(1) of the Companies (Winding Up) Rules 1972 which stipulates matters which should be heard before the judge in open court. The matters therein stipulated do not include this kind of application. Rule 5(2) goes on to say:

> (2) Subject to the provisions of the Act every other matter on application to the Court under the Act to which these Rules apply may be heard and determined in Chambers.

Rule 6 provides:

> 6. Subject to the provisions of the Act and these Rules -
>
> > (a) any matter or application before the Registrar may at any time be adjourned by him to be heard before the Judge either in Chambers or in Court;

Rule 7 provides that every application in court, other than a petition, shall be made by motion. It goes without saying that a motion is heard in open court.

In the circumstances, I do not think I can fault the applicant for making this application by way of a notice of motion because this is an application to court, other than a petition and, therefore, should fall under r. 7. Even an application made in chambers may be adjourned to open court and *vice versa* Furthermore, even if it is a defect or an irregularity, it of the type curable by r. 194(1) :

> 194(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the unjustice cannot be remedied by any order of the Court3 OF 6.

Secondly, learned counsel for the respondent (petitioner) objected to the use of the affidavit in support of the notice of motion. The ground is that the affidavit was affirmed one day prior to the date of the notice of motion. He cited *Chin Yoon Timber Co v. Overseas Lumber Bhd* [1978] 2 MLJ 173 and *Lim Tok Chiow & Anor v. Dian Tong Credit & Development Sdn Bhd [1994] 2 MLJ 345*.

But those are cases on affidavits verifying petitions which are required by r. 26 to be "sworn after and filed within four days after the petition is presented." We are now concerned with an affidavit in support of the notice of motion. Clearly the provisions of r. 26 and the cases cited by the learned counsel are not applicable.

Next he objected to the use of other affidavits filed earlier in the same petition because no notice of such intention was given to him. He cited the provision of O. 32 r. 13(1) of the RHC 1980.

Again, with respect, I do not think there is any merit in this objection. The applicant (respondent in the petition) clearly said in his affidavit in support of the notice of motion, para. 4:

> 4. I crave leave of the Honourable Court to refer to my affidavit affirmed on 11th November 1997 and adopt the whole of the contents as part of this Affidavit.

I do not think there is a better notice than that.

Before considering the merits of this application I will narrate the chronology of events which had led to this application.

On 29 April 1997 the first petitioner in the present petition filed an Originating Petition No. 26-7-97 pursuant to s. 218 of the Companies Act 1965. This will be referred to as the "oppression petition".

On 9 June 1997, the first petitioner applied by summons-in-chambers (first SIC) to injunct the emergency general meeting (EGM) of the company.

On 20 June 1997, a consent order was entered regarding the oppression petition and the summons-in-chambers.

The EGM was held on 23 June 1997. All resolutions as agreed under the terms of the consent order were passed unanimously.

On 18 July 1997 the first petitioner filed a summons-in-chambers (second SIC) to set aside para. 2 of the consent order.4 OF 6

On 9 August 1997 the petitioners filed a winding-up petition to wind up the respondent company (first winding-up petition). On 6 October 1997 this petition was struck out on an application by the respondent company on the ground that it failed to comply with the Companies Winding-Up Rules.

Four days later, on 11 October 1997, the petitioner filed the present petition to wind-up the respondent company.

Then, only 25 October 1997 the petitioners filed an appeal against the order of 6 October 1997. That appeal is still pending in the Court of Appeal.

On 13 November 1997 the second SIC in the oppression petition (to set aside para. 2 of the consent order) was dismissed.

I bear in mind that this is an application under O. 18 r. 19 of the RHC 1980. I will not go into the minute details of the facts found in almost 1,000 pages of documents filed by the applicant (respondent company). I bear in mind that only in clear-cut cases that an application should be allowed.

In spite of the voluminous documents filed it is clear to me that this one such case.

This petition is clearly an abuse of the process of the court. The present winding-up petition

was filed on the same grounds as the first winding-up petition, even though the petitioner in the first petition is now joined by two other petitioners. Appeal against the order striking out that first petition is still pending.

I asked learned counsel for the petitioner what if he succeeds in his appeal. He replied, in that case he will withdraw one. I asked him why he filed this petition even before he filed the notice of appeal in the first petition. He said he wanted to avoid the hassle of going through the process of appeal. If that is the case he should not have appealed.

Learned counsel for the petitioner referred to my own judgment in *City Audio Sdn Bhd v. Pengangkutan Udara Mas Sdn Bhd* [1994] 1 AMR 8, 446, to support his argument that an appeal is no bar to the filing of a petition. Unfortunately he missed the point. The appeal referred to in that case was an appeal against the **judgment** on which the petition was based. Here the appeal is against the order striking out an earlier winding-up petition.

There is clearly a duplicity of proceeding and on abuse of the process of the court5 OF 6.

On this ground alone I allowed the respondent's application [prayer (1) and (4)] with costs. But I made it clear that I did not decide on other grounds like estoppel (which I do not think will apply) so that if, in case, the petitioner's appeal in the first petition is dismissed or withdraw, the petitioners may file afresh.