

IN THE HIGH COURT OF FIJI
AT SUVA,
(COMPANIES JURISDICTION)

Companies (Winding Up) Action No.
HBE 46 of 2015

IN THE MATTER OF AMERICAN
OUTLET LIMITED

AND

IN THE MATTER OF THE
COMPANIES ACT 1983, Section 221

CORAM : The Hon. Mr Justice David Alfred

Counsel : Mr. W. Pillay for the Applicant
Mr E Narayan for the Respondent

Date of Hearing : 10 November 2016

Date of Decision : 30 October 2018

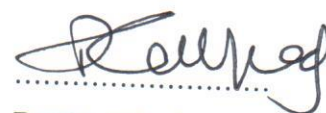
DECISION

1. Before me the Applicant is American Outlet Limited (AOL) while the Respondent is Fiji Rugby Union (FRU). Before the Master FRU was the Petitioner and AOL was the Respondent.
2. This is AOL's Summons applying for the following orders:
 - (1) That leave be granted to AOL to appeal the Ruling (Ruling) of the Master delivered on 9 August 2016, whereby he dismissed the preliminary objection raised by AOL
 - (2) That alternatively leave be granted to AOL to appeal the Ruling.
3. The Summons is supported by the affidavit of Eric Gan who deposed as followed:
 - (1) He is a director and shareholder of AOL.
 - (2) The Petition has died a natural death because FRU failed to apply to the Court for an Order for extension of the Petition.
 - (3) The submissions and issues raised by AOL's Counsel have not been properly considered by the Master.
4. The affidavit in opposition of FRU is deposed by John Masi O'Connor who deposed as follows:
 - (1) He is the C.E.O. of FRU.
 - (2) He is advised by his Counsel that:
 - (a) The Master's determination of the preliminary objection is correct.
 - (b) There are no merits in the application, no arguable points in appeal and no exceptional circumstances.
5. The hearing commenced with Mr Pillay submitting for AOL. He said Order 59 rule 11 of the High Court Rules (HCR) prescribed that any application for leave to appeal an interlocutory order or judgment shall be filed and served within 14 days of the delivery of the order or judgment. The Ruling was on 9 August 2016. The affidavit in support was filed and served on 19 August 2016. The Summons was filed on 19 August 2016 and served on 2 September 2016. The Application was filed on 23 September 2015 and the Petition expired on 23 March 2016.

6. Mr Narayan then submitted for FRU. He said exceptional circumstances were not provided nor the grounds of appeal.
7. Mr Pillay in his reply said the delay was brought about by the Registry and asked the Court to cure the defect. The affidavit shows the Applicant has a chance of success.
8. At the conclusion of the arguments I said I would take time for consideration.
9. The crux of the matter is the fact that while the affidavit was served within the requisite 14 days the summons was served outside that period. Order 54 rule 11 states the summons for leave and the supporting affidavit shall be filed and served within 14 days of the Ruling. Is this defect remediable?
10. I shall first look at O.3 r 4(1) and (2) HCR. Rule 4(2) says the Court may extend the period within which (AOL) is required to do any act, which in this case will be to allow the service of the summons outside the 14 days period. The operative word here is "may" while the operative word in O.59 r 11 is "shall".
11. So I must turn to the Concise Oxford English Dictionary, Twelveth Edition. This defines "may" as "expressing possibility" while "shall" is defined as "expressing an instruction or command".
12. Thus it is clear that while the Court may extend time under O.3 r 4(2) this is overridden by the requirement under O.59 r.11 that the summons also be served within 14 days. In other words the "shall" in the specific order must prevail over the "may" in the general provision. Further more, there was no affidavit by AOL to offer some explanation while the summons was not served within the requisite 14 days.. Submission by AOL's Counsel from the Bar Table will not suffice to make up for the deficiency.
13. To my mind the HCR requires that the summons and the affidavit are both filed and both served within 14 days. Where as here the summons was not served within that period it must mean that the application for leave to appeal is defective and consequently not before the Court

14. In the result I am constrained to dismiss the Summons for leave to appeal which I hereby do. However in the circumstances I shall order each party to bear its own costs.

Delivered at Suva this 30th day of October 2018.



David Alfred

JUDGE

High Court of Fiji