

IN THE HIGH COURT OF FIJI
AT SUVA

Companies (Winding Up)
Action No. HBE 04 of 2017

IN THE MATTER of BLASTNG AND
WELDING ENGINEERS AND
CONSTRUCTION LIMITED c/- Aliz
Pacific, Level 8, BSP Life Centre, 2 Scott Street,
Suva.

A N D

IN THE MATTER of THE COMPANIES
ACT (2015)

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Nilesh Lajendra : for the Petitioner
: Ms. Jackson : for the Respondent

Date of Judgment: 08th March, 2018 @ 9 am

RULING

*[Preliminary Issue of non-compliance with the Rules in terms of
advertisements and publication pursuant to Rule 12 (1)
of the Companies (Winding Up) Rules 2015.]*

INTRODUCTION

1. The Respondent raised the following Preliminary objections on the 16th March, 2017-
 - i. *That due to the Applicant's non-compliance with Rule 12(1) of the Companies (Winding up) Rules 2015, this Honourable Court should strike out and dismiss the Applicant's application for Winding Up filed on 2nd February, 2017 on the basis that the Applicant has failed to comply with the Companies (Winding Up) Rules, 2015.*
 - ii. *Whether or not the Applicant's non-compliance with the Companies (Winding Up) Rules 2015 is fatal to its Application for Winding Up filed on 02nd February, 2017.*
2. The Preliminary Objections raised were strongly opposed and countered by the Applicant.
3. Both Counsels made submissions to the Court for the determination of the objection.

THE LAW

4. Rule 12 (1) of the Companies (Winding Up) Rules 2015 deals with Advertisement and publication of notice of application and provides as follows-

12-(1) Subject to rule 17(1), notice of an application for winding up must be advertised in a newspaper and published in the Gazette not less than 14 days before the hearing.

ANALYSIS AND DETERMINATION

5. Let's examine the Applicant's Winding Up application in terms of the Compliance with the *Companies (Winding Up) Rules, 2015* from the time of its lodgement with the High Court Civil Registry to the current when the matter ended up before the Master's Court on 16th March, 2017.

6. On 02nd February, 2017 the Application for Winding Up together with Affidavit Verifying Application for Winding Up (Statutory Affidavit) was filed.
7. The Registry assigned 16th March, 2017 @ 9 am as the returnable date when the Applicant will apply for the Winding up of the Respondent Company Blasting and Welding Engineers and Construction Limited and that a Liquidator be also appointed to conduct the winding up and for further or other orders as may be just.
8. Subsequently, on 24th February, 2017, the Affidavit of Service was filed confirming that the service of the Application for Winding Up and the Affidavit Verifying the Application has been effected on the Respondent Company.
9. Simultaneously, the Application was sent to the Chief Registrar and he assigned 28th February, 2017 @ 11 am as the returnable date before him for the purposes of compliance by the Applicant with *Rule 19 of the Companies (Winding Up) Rules 2015* and satisfy the Registrar that the following has been carried out:-
 - That the application has been advertised in a Newspaper and published in the *Gazette*;
 - That the statutory affidavit and the affidavit of service (if any) has been properly filed;
 - That the written consent of a liquidator has been filed; AND
 - That the applicant has properly complied with these Rules in relation to the application for a Winding Up order.
10. This Court notes that there was an objection raised with the Registrar by the Respondent's Solicitor that the advertisement in Form D4 was not published in the *Gazette* as per the requirements of *Rule 12 (1) (a) of the Companies (Winding Up) Rules, 2015* within the mandatory time frame of 14 days before the hearing. The Registrar decided not to issue any certificate of compliance by the applicant and remitted the matter to the Master of the High Court.
11. In absence of any Certificate of Compliance issued by the Registrar it became obvious that it was then for the Master of the High Court to deal with the objection raised by the Respondent Company in terms of the alleged non-compliance of the publication of the Notice of the Winding Up application in the *Gazette* on the returnable date of 16th March, 2017. Therefore, the Master's duty was to deal with this hurdle of alleged non-compliance of publication in the *Gazette* first and

subsequently hear and determine the substantive Winding Up application accordingly.

12. Therefore, the returnable date of 16th March, 2017 assigned before the Master of the High Court in this case could not be treated as the hearing date without first determining the objection raised herein.
13. However, upon the perusal of the application, it can be ascertained that the Application for Winding Up was advertised in the Fiji Times on 27th February, 2017 and in the Gazette on 03rd March, 2017 respectively. *It must be further noted that Rule 11 (4) requires that the application must be served not later than 2 days before it is advertised in the Newspaper or published in the Gazette. [The purpose of having this Rule in place ensures that the advertisement and /or publication will be done within the allocated time of 14 days]. Emphasis mine.*
14. Therefore, it can be confirmed that the application was advertised in the Fiji Times Newspaper 16 clear days and 13 clear days (1 day short according to the Rules) before the matter was listed before the Master on 16th March, 2017, when the Applicant would have proceeded to seek the winding up and appointment of liquidator orders accordingly.
15. I now make reference to three particular set of Rules (R. 3, R. 115 and R. 116 (1) respectively) within the *Companies (Winding Up) Rules, 2015* which provides as follows-
 - *Rule 3 of the Companies (Winding Up) Rules, 2015, deals with Dispensation from compliance with these Rules-*

3. The Court may dispense with compliance with all or any of the provisions of these Rules.
 - *Rule 115 deals with enlargement or abridgment of time-*

The Court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order for doing any act or taking any act or taking any proceeding.
 - *Rule 116 (1) deals with formal defect not to invalidate proceedings-*

No proceedings under the Act or these Rules are invalid by reason of any formal defect or any irregularity; unless the court before which any objection is made to the proceedings is of

the 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.

16. The Respondent's Solicitor submitted that the Applicant will no doubt rely on *Rule 3 and Rule 116(1)* of the *Companies (Winding Up) Rules 2015* as the material provisions upon which the Applicant will attempt to cure the defects in its proceedings against the Respondent. However, the Respondent submitted that if a Company or individual is to bring an application seeking a winding up order against another Company, this Honourable Court must require strict compliance with the mandatory *Companies (Winding Up) Rules 2015* unless there is good reason proffered by the Applicant as to why it has not complied with the Rules.
17. The Applicant's Solicitors in its written submissions at paragraph 7.0 states that "*Our application was advertised in the Gazette on 03^d March, 2017. To our understanding, we believed the hearing date is assigned by the Registry on the Application as 16th March, 2017. Hence, under this presumption we advised the Chief Registrar that we would meet the 14 days by 17th March, 2017.*"
18. This court has taken into consideration both parties submissions coupled with the applicable relevant *Rules 3, 12(1) and 116(1) of the Companies (Winding Up) Rules 2015*. It has also considered the fact that the advertisement in the Newspaper was in compliance with *Rule 12(1) of the Companies (Winding Up) Rules, 2015*. However, this court is also aware that the Applicant failed in its bid to ensure strict compliance with *Rule 12(1)* when he failed to also publish the notice of the application in the Gazette not less than 14 days before the hearing. The date assigned by the Court Registry of this application before the Master on 16th March, 2017 prima facie is treated or taken as the hearing date of the Winding Up application since the Application says that the Applicant '*will apply to the High Court of Fiji on 16th March, 2017 at 9 am for the following orders for the Winding Up...and Appointment of the Liquidator.*'
19. If I may add that there exists a provision at *Rule 20 (1) of the Companies (Winding Up) Rules 2015* that "*an application to wind up a Company must not be adjourned (whether by consent or otherwise) for a period longer than one month at a time*". At least this Rule gives discretion to the Court to exercise in terms of any adjournment.


20. Therefore the intention of this particular provision or *Rule 20(1)* can also be interpreted to say that in the current case, the assigned date of 16th March, 2017 before the court at the discretion of the court could be treated either as a hearing date and/or a returnable date for further directions since the Court controls and manages its own cases by reference to availability of dates in its own diary and assigns suitable hearing dates before them accordingly.
21. It cannot be denied that the Applicant's published the Notice of the Winding Up application in the *Gazette* one (1) day short of the 14 days requirement and it was therefore not in compliance with *Rule 12 (1)*. Further, the fact cannot also be denied that at least the Notice of the Application to Wind up appeared in both, the *Fiji Times Newspaper* as well as the *Gazette*. The formal defect and/or irregularity in terms of publication in the *Gazette* is very minor in the sense that it was published 1 day short of the required 14 days and therefore cannot just invalidate this proceedings. *Rule 116(1)* refers.
22. In light of the aforesaid reasoning and explanation, this Court now invokes the *provisions of Rules 3 and 116 of the Companies (Winding Up) Rules 2015* and accordingly dispenses with the compliance by the Applicant of the provision of the *Rules 12(1) of the Companies (Winding Up) Rules 2015* and validates the Winding Up proceedings in terms of the *Publication in the Gazette [Rule 116 (1)]*.
23. This Court's decision to grant the dispensation of the publication of the *Gazette* together with validation of the Winding Up proceedings is sufficient and takes care of the issuance of the Certificate of Compliance henceforth rather than remitting the file to the Chief Registrar for its forma issuance of the Certificate of Compliance [*Rule 19(1)* refers]. This Court's ruling and order herein overrides the Certification of Compliance to be issued by the Chief Registrar since it will tantamount to the duplicity of certification accordingly.
24. In light of the nature of this proceedings seeking Winding Up of the Respondent's Company whereby the Applicant alleges certain debt being owed by the Respondent which is denied by the Respondent, this court needs to determine the same at a full hearing and therefore I find that it is only appropriate in the circumstances and therefore the Respondent cannot be seen to be prejudiced.
25. The **Preliminary objection** raised by the Respondent Company herein is overruled for the rational shown hereinabove.

26. In terms of the **costs** issue. Although this matter was taken up for hearing by the Court to determine the Preliminary issue in terms of the non-compliance of Rule 12(1), this court is of the finding that for the reasons shown by this court hereinabove, it is only appropriate that I order each party to bear their own costs at the discretion of this court.
27. In Conclusion, I proceed to make the following Final Orders-

FINAL ORDERS

- (i) Preliminary objection raised by the Respondent Company is hereby dismissed.
- (ii) Dispensation of the publication of the Notice of the Winding Up application in the Gazette is hereby granted.
- (iii) The Winding Up proceedings is hereby validated in terms of the Companies (Winding Up) Rules, 2015.
- (iv) Certificate of Compliance in terms of Rule 19(1) is taken care of by this Ruling.
- (v) Each party to bear their own costs.
- (vi) This matter is adjourned to 09th March for further directions of the substantive matter.

DATED AT SUVA ON 08TH MARCH, 2018


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VISHWA DATT SHARMA
Master of the High Court
Suva

cc: *Lajendra Lawyers, Suva.*
Faktaufon & Bale Lawyers, Suva.

