

LUNAR VENTURES SDN BHD v CITY ONE SDN BHD [2003] MLJU 84

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HIGH COURT (KUALA LUMPUR)

SELVENTHIRANATHAN J

COMPANIES WINDING-UP PETITION NO D7-28-787-2002


17 February 2003

Case Summary

Companies and Corporation — Winding up — Opposition to petition — Debt disputed by respondent — Debt subject to certification and approval by respondent's agent — Certification and approval of respondent's agent not provided as petitioner had not completed work — Whether petition used to oppress respondent into paying debt — Whether petition should be wound up — Companies Act 1965, s 218(1)(e)

Civil Procedure — Affidavits — Affidavit in reply — Extension of time to file — Winding up petition — Petitioner failed to file affidavit in reply within three days of being served with respondent's affidavits in opposition — Whether petition an abuse of process of court — Whether court should refuse to exercise discretion to enlarge time in favour of petitioner — Companies (Winding-up) Rules 1972, r 30(2)

D.Paramalingam (*Krish Maniam & Co*), Oommen Koshy (Mohamed Ismail & *Co*)


Grounds of Judgment

The petitioner presented the winding-up petition herein against the respondent for an ostensible debt of RM200,000.00 which was said to be due and owing to the petitioner "for works executed and materials delivered to the project site" of the petitioner "under Valuation No 7 from TL Associates Chartered Quantity Surveyor & Project Cost Management Consultant" [per paragraph 5 of [*2]

the petition at enclosure (1)]. The petitioner therefore prayed that the respondent should be wound up pursuant to section 218(1)(e) of the Companies Act 1965 ["the Act"] on the ground that it was unable to pay its debt after the service of a notice demanding payment

of the same. In the alternative, the petitioner contended that it was just and equitable to wind up the respondent pursuant to section 218(1)(i) of the Act.

At the scheduled hearing of the petition on the 1st November 2002, Encik D Paramalingam for the petitioner applied for an adjournment of the hearing as well as for an enlargement of time to file an affidavit in reply to the affidavits in opposition to the petition filed by the respondent *vide* enclosures (4) and (5).

Encik Oommen Koshy for the respondent strongly resisted the application on the ground of extreme hardship to the respondent which is a housing developer. I agreed with his reasons as recorded in the notes of proceedings and refused the oral application of the petitioner for an enlargement of time to file its affidavit in reply as well as for the adjournment of the hearing of the petition.

Proceeding to hear both counsel's arguments in respect of the petition, it became patently clear to me that the petitioner was using the petition as a vehicle of oppression to demand the ostensible debt which was hotly disputed as evidenced by the respondent's affidavits in opposition at enclosures (4) and (5), especially so since the petitioner had not obtained any judgment for the sum in [*3]

question. Yet it chose to chance running foul of the mandatory requirement of rule 30(2) of the Companies (Winding-up) Rules 1972["the Rules"] by failing to file its affidavit in reply within three days of being served with the respondent's affidavits in opposition at enclosures (4) and (5). Although the timeframes stipulated in rule 30 are mandatory in nature, they can be enlarged or abridged pursuant to rule 193 of the Rules.

In the circumstances prevailing, I saw it fit not to exercise the court's discretion to enlarge time in favour of the petitioner as the petition, to my mind, was an abuse of the process of the court. The copy of "Valuation No 7" exhibited as "LV-3" to the petition at enclosure (1) as proof of the ostensible undisputed debt had the following unequivocal footnote [without the correction of mistakes in grammar]:

"This VALUATION NO 7 for the amount of RM200,000.00 are for 1st disbursement of the agreed amount upon commencement of site clearance and mobilisation work and shall be subjected to certification and approval of Employer's Agent who shall satisfy himself as to the quality and completion of work done."

[Emphasis mine]

The above valuation therefore was subject to certification and approval by the respondent's agent who had to satisfy himself as to the quality and [*4]

completion of the work done. The certification and approval of the respondent's agent had not been provided because, according to the respondent, the petitioner had not in fact performed the work required. I accordingly dismissed the petition with costs as the petitioner had no answer on affidavit to the clear disputation, through enclosures (4) and (5), of the ostensible debt.

The petitioner proceeded to file its notice of appeal against my decision without first obtaining the leave of the Court of Appeal, contrary to paragraph (iv) of the Court of Appeal Practice Direction No 2 of 1996 [Arahan Amalan Mahkamah Rayuan Bil 2 Tahun 1996]. I have, however, proceeded to provide these grounds of judgment as the notice of appeal, *albeit* irregular, had been filed.

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