In the Matter of Global Investments and Business Corporation Limited and In the Matter of the Companies Act 1972
(1998) SLR 105

Ramniklal VALABHJI for the Applicant Company ("ZAKSAT")
France BONTE for the Respondent Company (GIBC)

Ruling delivered on 29 December 1998 by:

PERERA J: This is an application for the winding up of a company called Global Investments and Business Corporation Limited (GIBC) pursuant to section 205(d) of the Companies Act 1972, on the basis that the company is unable to pay its debts and that in such circumstances it is just and equitable that the said company be wound up. The Petitioner, Zaksat General Trading Company WLL (Zaksat) has filed this petition in the capacity of a "creditor" in terms of section 207(1)(b) of the Act. For the purposes of section 207 "a creditor" includes "any contingent or prospective creditor or creditors".

The petitioner in paragraph 5 of the petition avers that –

> 5. The company (Zaksat) is indebted to your petitioner in the sum of US$3,746,452 being the amount advanced by your petitioner to the company for the cable television project in Seychelles. The consideration for the said advance was the company's promise to assign the project to Global Direct Television (Seychelles) Limited; In addition compound interest at 8% per annum is due on said amount up to 25 October 1998 in an amount of US$295,435 to give a total debt of US$4,041,887.

The respondent company (GIBC) has filed a counter affidavit of one Mirza Masheed Ahmed Baig who holds the power of attorney from Mr Abdulla Ali Yousuf Al Shaibani raising in a plea in limine litis, the issue of locus standi of the petitioner company to institute winding up proceedings. It has also been raised in limine that the petitioner company had not been incorporated at the time those agreements were made. It is therefore being submitted that the petitioners inter alia, lacked privity of contract to sue the respondents.

Mr Valabhji, counsel for the petitioners, submits that questions of privity of contract and locus standi are irrelevant to the present proceedings. He further submits that the points raised in limine are based on evidence to be adduced and cannot be decided without hearing evidence. I agree with Mr Valabhji to the extent that on the basis of the various allegations, counter allegations and denial contained in the respective affidavits of the parties, this Court cannot make any determination purely on the basis of the pleadings. Such a submission however raises the question as to whether this Court can use its discretion under section 208 to order a winding up upon a disputed debt. The question of locus standi raised therefore necessitates a finding in limine as to whether the

petitioner as an alleged "creditor" has satisfied the provisions of the Companies Act 1972 relating to winding up.

For this Court to exercise its discretion to order a winding up there are three basic matters to be considered, namely –

(1) Is the Petitioner company a "creditor" within the meaning of section 207(1) (b) of the Act?

(2) Was there a demand by the petitioner from the respondent to pay a debt due as required by section 206(a) of the Act?

(3) Has the respondent company "neglected to pay" the sum so demanded?

Palmer on Company Law states that a "creditor" has the ordinary meaning of "any person to whom the company is owing money." He defines the "contingent or prospective creditors" in section 224 (section 207 (b) of our Act) as follows. "A contingent creditor means a creditor in respect of debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events".

In considering whether the petitioner is a creditor, it becomes necessary to consider the nature of the debt alleged to be owed by the respondent. In paragraph 5 of the petition, it has been averred that the petitioner advanced to the respondent a sum of US$3,746,452 in consideration of a promise to assign the cable television project in Seychelles to the company Global Direct Television (Seychelles) Limited and further to allot 75 % of the shares of that company to the petitioner. The amount alleged to have been advanced is verified by a supporting affidavit of one Mr HT Pareed, the Financial Manager of the petitioner company, and a Financial Report from KPMG Masoud, a firm of accountants in Kuwait. The accountants have certified that a sum of 1,142,667 Kuwait Dinars (equivalent to US$3,746,449), the amount of the debt in issue, has been transferred from the Al Ahli Bank of Kuwait account held by Global Direct Television and the Gulf Bank of Kuwait Account of Zaksat. The detailed statement shows that the payments were made to various companies in the USA for the purchase of equipment and materials, air freight to air cargo carriers, contract charges to a Chinese company for installation of cables, staff salaries and other miscellaneous charges such as immigration fees, travelling expenses, accommodation expenses etc. There is no direct evidence in this document that that money, or any part of it was paid to the respondent (GIBC). The respondent avers that the petitioner is relying on agreements to which they are mere strangers and that at the time they were entered into, the petitioner was not even incorporated. They further aver that in any event those agreements have now been terminated. They therefore aver that the petitioner has no locus standi to prosecute any claim against the respondent company on the basis of the agreements relied on by them, and that consequently there is no legally binding and enforceable obligation on the part of the respondent to pay any sums to the petitioner company.

The petitioner,on the other hand, admits that Zaksat was incorporated on 11 June 1997. The agreement they rely on is dated 1 May 1997. In that agreement it was agreed that "Zak", a different company, was to be entitled to 75 % of the shares and that “Zak” was to assign the agreement to Zaksat upon that companybeing formed under the laws of Kuwait. The petitioner challenges the authority of Monther Al Kazemi of "Zak" to cancel or terminate the original agreement of 1 May 1997 and alleges that those documents terminating the agreement are ante-dated frauds and therefore seeks an order of this Court to have confirmation from a qualified forensic scientist of the date of execution and the printing equipment used to prepare them.

Hence there is a substantial dispute as to the debt alleged to be owed by the respondent.

Buckley CJ stated thus in the case of *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241 at 243 –

> If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, that petition proceeds to a hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds, disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed

This principle was tersely stated by Ungoed -Thomas J in the case of *Mann v Goldstein* [1968] 2 All ER 769 at 775 thus –

> For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor, he is not entitled to present the petition and has no locus standi in the Companies Court, and that therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the Court.

In the instant petition, the petitioner claims to be a creditor not in the sense of someone who has money owing to them, but as an alleged party to an agreement whereby the respondent agreed to perform certain obligations in consideration of payment of a sum of money. In the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 the Court dismissed a petition based on an alleged loan which the company contended was a payment made by the petitioner so that it might purchase an investment on his behalf as his agent. In that case, the petitioner could not be classified

as a creditor to whom the respondent owed the sum of money advanced by him. Similarly, in the instant case, the respondent does not become a debtor, and the petitioner a creditor, unless and until the petitioner has successfully sued the respondent by an action. There is presently before this Court case CS 247/1998 wherein the petitioner is seeking a declaration that they are entitled to 75% of the shares in consideration of which they aver that a sum of US$ 3,746,449 was advanced.

The respondent denies any agreement with the petitioner (Zaksat), which they aver was not in existence at the time the agreement relied on by them was made and further deny any debt owed to them.

Buckley on the Companies Acts, 11th ed, states on pages 356-357 -

> A petition presented ostensibly for a winding up order, but really to exercise pressure, will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the court. Some years ago petitions funded on disputed debts were directed to stand over till the debt was established by action. If however, there was no reason to believe that the debt if established would not be paid, the petition was dismissed. The modem practice has been to dismiss such petitions.

In these circumstances the petitioner does not fall under the category of a creditor for the purposes of section 207(1)(b) of the Act, and therefore has no locus standi to present this petition.

Apart from the issue of locus standi the petition is otherwise incompetent procedurally.

Section 206(a) provides that –

> 206(a) A company shall be <u>deemed to be unable to pay its debts</u> -
>
> (a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand rupees then due, has served on the company, by leaving it at the registered office of the company, <u>demand under his hand requiring</u> the <u>company to pay the sum</u> so <u>due</u>, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

Section 206(a) requires the creditor to make "a demand under his hand requiring the company to pay the sum so due". R Pennington, the draftsman of the Companies Act of Seychelles, states in his book *Company Law* that

> The demand must specify the amount of the debt claimed, must require payment of it, and not merely state that it remains unpaid.

In the instant matter the petitioner served a mise en demeure dated 30 June 1998 on 20 July 1998 on one Prem Kumar representing the respondent in Seychelles at that time. In Seychelles a mise en demeure is made in terms of article 1139 of the Civil Code, which reads thus –

> A debtor shall be placed under notice of default by a summons or other equivalent legal act or by a term of the agreement providing that the debtor shall be in default without the need of a summons and at the mere expiry of the period for delivery.

The mise en demeure served on the respondent is a notice to perform certain obligations in an alleged agreement and not a demand for payment of money as envisaged in section 206 (a) of the Companies Act. The notice states that the respondent agreed to issue 75% of the shares of a company formed to take over the Cable Television Project in Seychelles and that in consideration thereof "has substantially funded the project in Seychelles alone and has provided all the expert manpower therefore to a total project cost equivalent to approximately US$3.15 million up to 31 May 1998 and continues to do so". The notice further alleges that there has been a breach of such agreement and that the respondent has allotted 99% of the shares to Mr Al Shaibani. As a further breach the petitioner in the said notice alleges that the operating licence has been taken in the name of the GIBC when the project has been wholly funded by the petitioner , except for US$300,000 paid by the GIBC to finalise a land option.

Section 206(a) of the Companies Act, contemplates a demand to pay the sum due, and article 1139 of the Civil Code is a notice of default which implied that the sum due was to be paid within the stated period for delivery. What purports to be a mise en demeure served by the petitioner requires the respondent to -

> Take notice, you GIBC and you Mr Al Shaibani that unless my clients are issued their legitimate shareholding in the project within seven days hereof, my clients will have no option but to apply to the Supreme Court of Seychelles for specific performance of the agreement and/or a refund of all the moneys expended by them on the project plus substantial damages and will provisionally seize all the funds and assets of GIBC in Seychelles.

This notice dated 30 June 1998 was not a demand for payment of a sum due within three weeks as envisaged in section 206(a) of the Act, but a notice of action to be filed at the expiry of seven days in the event the respondent failed to comply with an alleged obligation in an agreement to issue 75% of the shares in a company. In pursuance of this notice, the petitioner filed action no C.S 247/1998 on 11 August 1998. In paragraph 5 of the petition in that case, the petitioner Zaksat avers that -

> 5. By a notice in writing dated 30 June 1998, the first and second defendants (Mr Al Shaibani and the GIBC) were duly called upon to fulfil their obligations, but the defendants have failed to do so.

In that case, counsel for the defendants has requested for further and better particulars of the plaint and this Court has fixed the case for mention on 29 February 1999 for a reply to be filed by counsel for the petitioner. It is clear that the "debts" contemplated in sections 205(d) and 206(a) of the Act should be money debts. The petitioner's substantial claim in case no CS 247/1998 is for a declaration that the shares should be allocated in consideration of the payment of US$3,746,452 as averred in paragraph 5 of the petition. That is a matter to be decided in that case. The petitioner relies on the same mise en demeure served on the respondent company before filing case no CS 247/1998 to satisfy the requirement of the notice of demand to pay as envisaged in section 206 (a) of the Companies Act. This is misconceived, and accordingly I hold that there has been no proper notice to initiate the present proceedings.

Assuming that the notice was competent, has there been any neglect to pay by the respondent in the sense contemplated in section 206 (a). The respondent avers that the company is solvent and has and will continue to discharge all its debts contracted by itself. They however deny that any debt is due to the petitioner. In the case of *Re Capital Annuities Ltd* [1978] 3 All ER 704 it was held that -

> Mere evidence that a company has for the time being insufficient liquid assets to pay all its presently owing debts, whether or not repayment of such debts has been demanded, by itself does not prove inability to pay within sections 222 and 223 (that is sections 205 (c) and 206 (d) of our Act).

So also, where there is a bona fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory demand if the company contends that it is not liable to the creditor for the whole or the unpaid part of his claim, and can satisfy the court that it has a substantial and reasonable defence to plead, the court will hold that it is not in default, and will refuse to make a winding up order. (*Re a Company* (1984) 3 All ER 78). On the basis of the affidavits and the documentary evidence adduced in the case the Court is satisfied that the respondent has a substantial and reasonable defence which remains to be adjudicated in case no CS 247/1998. Hence the Court in the exercise of its discretion vested in section 208(1) of the Act hereby dismisses the petition, both on the ground of lack of locus standi, and on the ground that the petitioner has not satisfied the provisions of section 206 (a) to maintain this petition. The respondent will be entitled to costs.

Record: Civil Side No 229 of 1998