

SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 63
MC 22/2020

In the matter of:

**HEDGE FUNDS INVESTMENT
MANAGEMENT LTD**
(rep. by Mr. Rouillon)

Petitioner

and

HEDGEINTRO INTERNATIONAL LTD
(rep. by Renaud))

Respondent

Neutral Citation: *Hedge Funds Investment Management Ltd v Hedgeintro International Ltd*
(MC 22/2020) [2021] SCSC 63 (17 March 2021)

Before: Burhan J

Summary: Compulsory winding up under the International Business Companies Act
2016 ((IBC Act)

Heard: 19th of June 2020, 16th September 2020, 7th October 2020 (written
submissions)

Delivered: 17 March 2021

ORDER

The following orders are made:

1. I make order for the compulsory winding up of Hedgeintro International Ltd,
 2. A date is given for the appointment of a liquidator.
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JUDGMENT

BURHAN J

- [1] This is a petition filed by Hedge Funds Investment Management Limited (HFIM) a company established in England and having its registered office at 30 Crown Place London EC2A 4EB, United Kingdom (company number 03591241) and represented by Mr. Tushar Patel, its Director as its duly authorised representative and electing domicile at the Chambers of Mr. Rouillon, Attorney at Law, 14 Kingsgate House, Victoria, Mahe, Seychelles, seeking a compulsory winding up of Hedgeintro International Limited (HIL), a company incorporated in the Republic of Seychelles as an International Business Company, registration number 58548, under the International Business Companies Act 2016 (IBC Act). This fact is affirmed by Annexure A – HIL Certificate of Incorporation.
- [2] It is averred in the affidavit of Mr. Tushar Patel that the registered office of the company is situated at the office of the registered agent International Law and Corporate Services (Pty) Ltd (ILCSL) 2nd floor Allied Building Complex, Francis Rachel Street, P.O Box 1137 Victoria, Mahe, Seychelles.
- [3] It is further averred in the affidavit that the petitioner is bringing this application as a creditor of the company (HIL) exercising its right under section 309 of the IBC Act. It is further explained that the petitioner HFIM becomes the creditor of HIL by virtue of a taxed bill of costs arising from the judgment dated 6th February 2017 in Hedge Funds Investment Management Ltd v Hedgeintro International Ltd case number CC 04/2012.
- [4] According to Annexure C, HIL is indebted to the petitioner HFIM in a sum of USD613,871.31 (six hundred and thirteen thousand eight hundred and seventy one dollars and cents thirty one) as per taxed bill of costs dated 26th May 2017.
- [5] Under section 309 of the IBC Act 2016, a creditor may apply to court for an IBC company to be compulsory wound up. The circumstances in which the Court may wind up an IBC are specified in section 310 and include circumstances where the company is insolvent within the meaning of section 299. The relevant provisions read as follows:

Application for compulsory winding up

309.(1) If any of the circumstances specified in section 310 apply to a company, an application may be made to the Court, by the company, by any director, member, creditor or liquidator thereof or by any other interested party, for the compulsory winding up of the company.

(2) An order made by the Court on an application under subsection (1) operates for the benefit of all the company's creditors in the same way as if the application had been presented by them.

- [6] It is further apparent from the affidavit evidence filed by Mr. Tushar Patel that applications for the stay of execution of the judgment have been dismissed by the Seychelles Supreme Court and the Seychelles Court of Appeal. The appeal in respect of judgment in case CC 04/2012 was deemed withdrawn on the 1st of October 2018 by ruling dated 3rd July 2018 due to the failure of HIL to pay the security of costs ruled in SCA MA28/2018. A petition MA 94/2018 to review the taxed bill of costs made by the registrar was filed. However, the failure of HIL to pay security of costs ordered in the said application also resulted in this matter being deemed to be withdrawn or dismissed.
- [7] It is further averred that repeated requests by the petitioner for HIL to honour its obligations has failed. A statutory demand letter dated 13th February 2019 has been delivered to HIL and delivery has been acknowledged (Annexure I).
- [8] Therefore, it is averred that the company HIL is unable to pay its debts and thus insolvent under section 299 of the IBC Act and therefore it is just and equitable that the company be wound up in accordance with section 310(e) of the IBC Act.

Section 310 of the IBC Act reads as follows:

310. A company may be wound up by the Court if –

- (a) the company has by special resolution resolved that the company be wound up by the Court;*
- (b) the company does not commence business within one year beginning on the date of its incorporation;*
- (c) the company suspends business for a whole year;*
- (d) the company has no members (other than the company itself where it holds its own shares as treasury shares);*
- (e) the company is insolvent within the meaning given in section 299;*

- (f) *the company has failed to comply with a direction of the Registrar under section 31 to change its name; or*
- (g) *the Court is of the opinion that it is just and equitable that the company should be wound up.*

Section 299 of the IBC Act reads as follows:

299. For the purposes of this Sub-Part and Sub-Part IV (Compulsory Winding Up by Court), a company is insolvent if –

- (a) the value of its liabilities exceeds, or will exceed, its assets; or*
- (b) it is, or will be, unable to pay its debts as they fall due.*

[9] Therefore, for the Court to be able to wind up a company for reasons of insolvency, it needs to be established that either the value of liabilities exceeds/will exceed assets OR that a company is or will be unable to pay its debt.

Section 67 elaborates on determination of whether company's assets is greater than the value of its liability:

67.(1) For the purposes of this Act, a company satisfies the solvency test if –

- (a) the company is able to pay its debts as they become due; and*
- (b) the value of the company's assets is greater than the value of its liabilities.*

(2) In determining whether the value of a company's assets is greater than the value of its liabilities, the directors –

(a) shall have regard to –

- (i) the most recent accounts of the company; and*
- (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of the company's liabilities; and*

(b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

(3) This section applies to cells and cores of protected cell companies as if references to companies were references to cells or cores, as the case may be, of protected cell companies.

[10] It is apparent that the respondent HIL in their reply affidavit have not taken any steps to prove their solvency under section 67 of the IBC Act but has objected to the petition on

the grounds that HFIM cannot proceed with this winding up application as it is a wholly owned subsidiary company of Alternative Investment Ltd (AIL) who have confirmed on request of the respondent HIL that HFIM has no authority and Mr. Tushar Patel has no authority to commence any litigation on behalf of HFIM. The respondent also refers to discrepancies in regard to the amount HFIM is claiming and the amount actually awarded and paid to HFIM.

[11] Mr. Tushar Patel in his affidavit dated 16th September 2020 in reply to the objections raised state that the issue concerning whether HFIM could conduct the litigation without the authorisation of AIS was discussed and at paragraph 22 of the Twomey CJ Judgment in *Hedge Funds Investment Management Ltd v Hedgeintro International Ltd & 2 Ors* (CC 4/2012) [2017] SCSC 88 (06 February 2017) on 6th February 2017. It was held that the Articles of the plaintiffs company (HFIM) clearly mandated the director or directors to engage in litigation on behalf of the company. This Court is therefore satisfied on perusal of paragraph 22 of the judgment concerned that HFIM has authority to conduct litigation without the authorisation of AIS. Further, I observe that it was also Mr. Tushar Patel who had filed an affidavit on behalf of the petitioner in *Hedge Funds Investment Management v HegdeIntro International Ltd* (MA186/2018) [2018] SCSC 1121 (03 December 2018) (Annexure B). The contents of the affidavit filed by him as director was considered by Court in its Order. Further in his affidavit dated 16th September 2020, he reiterates the fact that he is director of HFIM. For the aforementioned reasons, I am satisfied that Mr. Tushar Patel has the right to represents HFIM and file this winding up application on behalf of HFIM.

[12] He has also detailed out in the said affidavit at paragraph 8, the amounts owing. In respect of the discrepancies in the judgment in regard to the amount HFIM is claiming and the amount actually awarded to HFIM in the final judgment dated 6th February 2017 given by Twomey CJ, these are matters that should have been sorted in the main case CC 04/2012. The respondent has failed to tender any documentation to the effect that the entire judgment debt including the taxed bill of costs has been settled by the respondent though ample time has been given by this court.

- [13] In the respondent's submissions, he further states at paragraph 1.2.3 that HFIM has received the whole of the balance USD 498,264.00 (four hundred and ninety eight thousand two hundred and sixty four dollars), which was in HIL bank account and the whole of the suspended amount of USD3,166,314 (three million one hundred sixty six thousand and three hundred fourteen dollars). The Learned counsel in paragraph 1.2.3 of his submissions supports this fact by relying on a statement made in an AIS letter dated 4th June 2020, which states that, "*I believe that you are correct in relation to sums than have been received by HFIM and which you set out in paragraph 2,4 of your letters*". This court cannot rely on such statements to affirm the fact that the judgment debt including the taxed bill of costs have been fully paid. No other documentary proof had been tendered to confirm such payments. In the view of this court, sufficient time has been given to produce documentation of proof of payment. This court is therefore satisfied that the money owed to the petitioner as part of a judgment debt referred to in paragraph 4, herein still remains outstanding and therefore the respondent still owes money to the petitioner as set out in this application.
- [14] Having considered all the afore mentioned facts of this case and the provisions of the law as set out above, I am satisfied that the petitioner has established that the taxed bill of costs amounting to USD 613,871.31 (six hundred and thirteen thousand eight hundred and seventy one dollars and cents thirty one) as per taxed bill of costs dated 26th May 2017 (Annexure C to the petition) is due from the respondent to the petitioner as part of a judgement debt in CC 04/2012. The respondent HIL has failed to satisfy this court that the said sum of \$613,871.31 as per taxed bill of costs has been paid by him, though sufficient time has been given by this court for proof of such payment.
- [15] I am satisfied therefore that the company Hedgeintro International Ltd is unable to pay its debts as they fall due and could be considered insolvent under section 299 (b) of the IBC Act and hence a compulsory order for winding up of the said company could be given by this court.

[16] Learned Counsel for the petitioner further brought it to the notice of court that the respondent company had been struck off. At the request of court he tendered further submissions on this issue. Having given due consideration to his submissions and section 274 (1) (2) (3) of the IBC Act, I am satisfied that an order for winding up may be given against a company that has been struck off.

[17] I proceed to make the following Orders:

1. I make order for the compulsory winding up of Hedgeintro International Ltd.
2. A date is given for a liquidator to be appointed.

Signed, dated and delivered at Ile du Port on 17 of March 2021.

M Burhan J