

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)**

RAYUAN SIVIL NO. W-02-342-2006

ANTARA

THE AYER MOLEK RUBBER PERAYU
COMPANY BERHAD (1292-P)

DAN

MIRRA SDN BHD (153829-A) RESPONDEN

(In The High Court of Malaya at Kuala Lumpur
In the Federal Territory, Malaysia
Company Winding-up No: D2-28-14-2006)

In the Matter of Section 218 of the
Companies Act, 1965

And

In the Matter of the Ayer Molek Rubber
Company Berhad (1292-P)

And

Mirra Sdn Bhd
(153829-A) ... Petitioner

And

The Ayer Molek Rubber Company
Berhad (1292-P) ... Respondent)

Coram: **JAMES FONG CHENG YUEN, J.C.A**
ABDULL HAMID EMBONG, J.C.A
VINCENT NG KIM KHOAY, J.C.A

JUDGMENT OF THE COURT

1. The Appellant had appealed against the decision of the learned judge dated 13.4.2006 ordering that the Appellant be wound up.

2. Summary of facts
 - (i) Judgment in default was entered against the Appellant on 22.11.2005 and served on it on 30.11.2005.
 - (ii) On 08.12.2005 a notice pursuant to s. 218 Companies Act 1965 was issued to the Appellant.
 - (iii) On 4.1.2006 a winding-up petition, D2-28-14-2006 was filed against the Appellant. It was served at its registered office on 13.1.2006.
 - (iv) The Petition was fixed for hearing on 23.3.2006 but was adjourned to 13.4.2006 because the learned judge was on medical leave on the earlier date.
 - (v) On 23.3.2006 the Appellant filed an application to set aside the judgment in default which was fixed on 14.6.2006.

- (vi) On 5.4.2006 the Appellant filed a summons in chambers to stay proceedings of the winding up petition, pending the setting aside application.
- (vii) On 13.4.2006 the petition came up for hearing and the learned judge ordered that the Appellant be wound up.
- (viii) On 15.5.2006, the Appellant obtained a stay of the winding up order, pending its appeal and the Appellant deposited a sum of RM 2,097,315.62 into court for this purpose.

The sole issue:

3. Whether the learned judge was wrong in proceeding to dispose of the winding up petition when there was an application for a stay of that winding up petition (Petition) pending the application to set aside the judgment.
4. Learned counsel for the Appellant submitted that the application for setting aside the default judgment was before the court at the time of hearing the winding up petition. As such “the proper, just and fair exercise of the Court’s discretion under

s. 221 of the Companies Act required that the hearing of the Petition be adjourned until the application for stay had been disposed”. A passage from the case RE QUATROVISION PTY LTD. (IN LIQ) 39 ALR 146 was quoted to support this contention. It reads –

“ When a challenge is made to the judgment upon which a petition to wind up a company is based, the court would not on hearing such a petition go behind the judgment, but would adjourn the petition on the undertaking of the company or opponents to the petition to commence proceedings to have the judgment set aside ”

5. It was further contended that the learned judge in so acting to allow the Petition, had been in breach of natural justice in particular in not giving the Appellant “the right to be heard”. In support this passage from DR SOO FOOK MUN v FOO FIO NA & ANOR AND ANOTHER APPEAL [2001]2 MLJ 193, was quoted to us –

“Nothing is clearer in adjectival law than a litigant’s right to have his interlocutory applications heard and dealt with. In the present case, Dr Soo had a legitimate expectation to have his application for particulars heard and determined according to law. If he was unhappy with any decision made in respect of his application, he was entitled to appeal. The failure of the High Court to hear and determine Dr Soo’s application for particulars therefore occasioned a most serious and fundamental miscarriage of justice. It not only deprived him of his basic right to have his application heard but it also deprived him of the substantive and valuable right to appeal against any decision made against him. By refusing to determine his application the High Court effectively precluded him from going further: no decision and so no appeal. The way in which the case was handled by the trial judge was an extreme example of procedural unfairness and oppression.”

6. Learned counsel for the Respondent informed this court that at the date of the first hearing of the winding-up petition, i.e. 23.3.2006 no affidavit in opposition was filed. The only affidavit before the court was the one filed in support of the application for stay, at the subsequent hearing date, i.e. 13.4.2006. To this, learned counsel for the Appellant responded that the stay application itself was in essence an opposition to the Petition, to which my learned brother James Foong, JCA remarked that this submission would be considered in good light if the Appellant had filed an affidavit in opposition 7 days before the hearing of the Petition, as required under the Rules.

7. Rule 30(1) of the Companies (Winding-up) Rules 1972 clearly states the obligation cast upon the Appellant. It states –

“ 30. (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition. ”

It then opens the door to the Respondent to reply to that opposition, which together will form a basis for the winding-up court to make an appropriate order (see r. 30(2)).

8. The Appellant had ample time (over 2 months) when the Petition was served on it on 13.1.2006.
9. On 23.3.2006 when the Petition was first fixed for hearing, that affidavit in opposition was not filed. The Petition was adjourned to 13.4.2006. The Appellant was thus further opportuned to file its affidavit in opposition, which we may have considered to be in compliance with r. 30(1). However even by 13.4.2006, the Appellant failed to indicate its intention to oppose the Petition.
10. In the case of CROCUSES & DAFFODILS (M) SDN BHD v DEVELOPMENT & COMMERCIAL BANK (1997) 2 MLJ 756, the appellant company had filed an affidavit in opposition 3 days before the first hearing date of the Petition. Three other affidavits in opposition were subsequently filed. The trial judge refused to admit all the 4 affidavits as evidence. The

appellant's appeal was dismissed and the Court of Appeal held, inter alia, that –

“ Moreover, r 30(1) of the 1972 Rules is mandatory in nature and therefore the judge was correct when he refused to admit all four affidavits in opposition for non-compliance of r 30. The fact that the four affidavits were only relied upon on 24 November 1995 did not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other. ”

11. As for the court's discretion to allow an adjournment under s. 221 Companies Act 1965, the Court of Appeal in the above case, also made this finding –

“ (1) Section 221 of the Act empowers the court with the discretion to grant an adjournment, but in this case, the judge had refused to exercise his discretion and he had rightly done so for the

following reason, namely, that the four affidavits supporting the company's notice of intention to oppose the petition did not comply with r 30(1) of the 1972 Rules which states that such affidavits should be served on the petitioner or his solicitor at least seven days before the time appointed for hearing of the petition. ”

12. In this appeal we too could not disagree with the learned judge's exercise of her discretion in not adjourning the matter when it came up for hearing. Against the factual background of this instant case, that discretion had been properly exercised. In *GO PAK HOONG TRACTOR AND BUILDING CONSTRUCTION v SYARIKAT PASIR PERDANA* (1982) 1 MLJ 77, the Federal Court said –

“ The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed

13. We thus find no merit in the Appellant's complaint that it had been deprived of its right to be heard. The Appellant was entirely at fault here.

14. For these reasons, this appeal was dismissed with cost. The order of the High Court dated 13.4.2006 was affirmed.

Dated: 12th December 2007

(ABDULL HAMID EMBONG)
JUDGE COURT OF APPEAL
MALAYSIA

Counsel:

Encik K. Mohan with Encik Sudesh Singh for the appellant
(Solicitors: M/s Shook Lin & Bok)

Encik B. Thangaraj for the respondent
(Solicitors: M/s Thangaraj & Associates)