

In the High Court of Fiji at Suva

HBC No. 06 of 2017

Between

China Railway First Group (Fiji) Co. Ltd

Plaintiff

And

Sikeli Wise trading as Site-Safe Consultancy

Defendant

COUNSEL: Ms S. Devan for the plaintiff  
Mr V. Filipe for the defendant

Date of hearing: 27<sup>th</sup> March, 2017

Date of Judgment: 6<sup>th</sup> April, 2017

### **Ruling**

1. By inter-partes summons filed on 2<sup>nd</sup> February, 2017, order is sought to restrain the defendant from issuing and advertising a petition for winding up of the plaintiff company, until further order. The plaintiff had defaulted paying a sum of \$ 51,000.00 to the defendant, in terms of a Judgment obtained after formal proof in Magistrate Court case no.47 of 2016, as stated in the Statutory Winding Up Notice.
2. The affidavit in support of the summons states that by an agreement of 1<sup>st</sup> August, 2013, the defendant agreed to provide health and safety consultancy services to the plaintiff. Prior to the expiry of the agreement, the defendant abandoned his consultancy contract and left Fiji. The defendant issued a notice of demand on 13<sup>th</sup> November, 2015, to the plaintiff for reimbursement of costs in a sum of \$89,818.59. The plaintiff by letters of 13<sup>th</sup>, 20<sup>th</sup> and 23<sup>rd</sup> November, 2015, and 23 December, 2015, disputed liability. The defendant's writ was served at the plaintiff's office, but its company solicitor overlooked taking any steps. The plaintiff would have defended the action, if its management was made aware of the action .

3. The affidavit continues to state that the plaintiff has a good defence on merits. The defendant was fairly remunerated for his consultancy services. He did not claim reimbursement for additional tasks. The plaintiff disputes the following claims: a sum of \$75,396.30 for transportation costs, as clause 1.7 of the consultancy contract states that the defendant was required to meet his transportation costs; the claim for default interest, as the plaintiff has not defaulted in any payment of fees; liability for the deduction of the sum of \$5,213.09 on the basis that the defendant abandoned his contract and left for England. The consultancy contract specifically entitled the plaintiff to make deductions, if the defendant defaulted. On 10 January,2017, the plaintiff has filed application in the Magistrates Court to set aside the formal proof judgment.
4. The affidavit concludes that the plaintiff is engaged in numerous construction projects for the Govt of Fiji. If interim relief is not granted, the plaintiff will suffer prejudice as it currently employs more than 245 workers, all its projects will be seriously jeopardized and it will suffer financial ruin, as it has a debt exposure of more than \$5,000,000.00 with ANZ Bank.
5. The affidavit in answer of the defendant states the plaintiff's failure to defend the Magistrates Court case is unacceptable. The defendant accepts that he entered into an Occupational Health & Safety Consulting Agreement with the plaintiff on 1 August, 2013. He denies that he abandoned the consultancy and that the plaintiff has a substantial disputed debt. He concludes that a judgment of \$51,000.00 will not ruin a company that claims to have made a profit of about \$2,912,738.00 and has property, plant and equipment valued at \$23,160,709.00 for the year ending 2014.
6. The plaintiff, in the affidavit in reply filed on its behalf states the defendant was not entitled to make any claim for late payment, as all his invoices were paid. Two of the defendant's invoices have been concocted, another has been duplicated. He cannot submit a claim for travel expenses after more than a year. He has not provided relevant details of his travel expenses.

7. On 9<sup>th</sup> February, 2017, the defendant filed summons to strike out the action under Or 18, r 18(1)(a) on the ground that the statement of claim discloses no reasonable cause of action against the defendant and is an abuse of process .

***The determination***

8. The plaintiff seeks an order restraining the defendant from issuing and advertising a petition for winding up of the plaintiff company on the ground that it is improper and an abuse of process, as there is a substantial dispute as to the debt.
9. The defendant served a Statutory Winding Up Notice of 15 December, 2016, on the plaintiff company in terms of section 515 of the Companies Act,2015, for payment of the sum of \$51,000 in terms of a Judgment of 29<sup>th</sup> November, 2016, obtained after formal proof in Magistrate Court case no.47 of 2016.
10. Mr Filipe, counsel for the defendant in his written submissions has cited the judgment in *Aleem Investments Ltd v Khan Buses Ltd*, (Civil Appeal No. ABU0036 of 2009) which sets out when an injunction may be granted restraining the advertisement and issue of a petition for winding up.
11. Section 516 of the Companies Act provides that a company may apply to Court to set aside a Statutory Demand served on the company within 21 days after the demand is served.
12. The plaintiff disputes the debt. Section 517(1) (a) contemplates that situation and requires the Court to be satisfied that “*there is a genuine dispute.. about the existence or amount of a debt to which the demand relates*”, in an application to set aside a Statutory Demand.

13. Parker LJ in *R v Secretary of State for the Home Department, ex parte Swati*, [1986] 1 All ER 717 at pages 727-728 said

*Where, therefore, an appeal procedure exists, an applicant must, in my view, show not only an arguable case for relief, as must every applicant even if there is no appeal procedure: he must also show that there are special circumstances sufficient to render it arguable that there should be a departure from the normal rule. Unless he satisfies both limbs, he shows no arguable case for relief. It is impossible and would be legally wrong to define what are exceptional circumstances and what are not. Each case will depend on its own facts. It is of course clear that some circumstances are not even arguable sufficient, and that others equally plainly are. .(emphasis added)*

14. The plaintiff has not provided any reason nor were written submissions filed as ordered by Court, as to why it had not recourse to the statutory remedy provided under the Companies Act before seeking equitable relief in this summons.
15. It is open for the plaintiff to seek leave of court to oppose the application for winding up “on a ground ..relied on for the purposes of an application to set aside the demand”, as provided in section 529(1) (a).
16. The next question is whether the statement of claim discloses a cause of action.
17. Mr Filipe, in his written submissions has cited Lord Diplock in *Siskina v Distos SA*, (1979) AC 210 at page 256 as follows:

*Injunction.. presupposes the existence of a cause of action on which to found the action. A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right to the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. (emphasis mine)*

18. The substantive relief sought by the plaintiff is a declaratory order that it is not liable for any monies claimed by the defendant. That issue has to be decided by the Magistrates' Court.
19. In all the circumstances, I would not exercise my discretion to grant an order restraining the defendant from issuing and advertising a petition for winding up against the plaintiff.

*The striking out application*

20. The defendant contends that the statement of claim discloses no reasonable cause of action against the defendant and is an abuse of process.
21. In my judgment, the plaintiff has no cause of action for adjudication by this court, as I have found.

**22. Orders**

- (a) The application for a restraining order is declined.
- (b) The plaintiff's action is struck out
- (c) The plaintiff shall pay the defendant costs in a sum of \$ 1500 summarily assessed.



*A.L.B. Brito-Mutunayagam*  
A.L.B. Brito-Mutunayagam  
Judge  
6<sup>th</sup> April, 2017