IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 139 of 2021

BETWEEN

SAMBHU LAL CONSTRUCTION PTE LTD a limited liability company having its registered office at Tavuloma, Savusavu in the Republic of Fiji.

PLAINTIFF

AND

TRADE AIR ENGINEERING PTE LTD a company incorporated in Fiji and having its registered office at 3 Tui Street, Marine Drive, Lautoka.

DEFENDANT

Counsel : Mr. Singh A.K. for the Plaintiff.
Defendant absent and unrepresented.

Date of Hearing : 28th July 2021

Date of Ruling : 02nd August 2021

RULING

(***On the application for an injunction***)

[1] The plaintiff instituted these proceedings seeking the following orders:

(a) Injunction restraining the defendants whether by its agents and or servants from proceeding with its winding up notice vide Lautoka HBE 22 of 2021 until the hearing and determination of this matter or until further orders of this Honourable Court.

(b) For an order that the defendant's application in the High Court of Lautoka HBE 22 of 2021 be stayed pending the hearing and determination of the plaintiff's application for setting aside the Statutory Demand vide Companies Action 23 of 2021.

(c) Judgment in the sum of $27128.00.

(d) Special damages in the sum of $15,000,000 (Fifteen Million Dollars).

(e) General Damages.

(f) Interest.

(g) Costs of the action against the defendant on indemnity basis.

[2] On 20th July 2021 the plaintiff filed ex-parte notice of motion which was made inter-partes by the court seeking the following orders:

(a) Injunction restraining the defendant whether by its agents and or servants from proceeding with its winding up notice vide Lautoka HBE 22 of 2021 until the hearing and determination of this matter or until further orders of this Honourable Court.

(b) For an order that the defendant's application in the High Court Lautoka HBE 22 of 2021 be stayed pending the hearing and determination of the plaintiff's application for setting aside the statutory demand vide Companies Action 23 of 2021.

(c) That the defendant pays cost of this action on indemnity basis.

(d) Any other order that this Honourable Court deems just.

[3] The orders (a) and (b) sought in this summons are identical to the orders (a) and (b) sought in the writ of summons.

[4] At the hearing of this present application the learned counsel for the plaintiff in his submissions referred to the plaintiff's Originating Summons seeking to have the statutory demand set aside. It is pertinent to refer to the orders sought in the said application. The orders sought are as follows:

1. An order that the respondent be restrained, whether by itself, or its Directors or its servants or agents or otherwise from presenting and or advertising Winding Up Petitions against the applicant company based on the statutory demand undated served on the applicant company on 26th March 2021 pending the hearing and determination of the action.
2. An order that the statutory demand issued by the respondent company is wholly set aside.
3. That the respondent pays the costs of and incidental to this application to the plaintiff.
4. Any other orders, declarations and reliefs as seems just and equitable by this Honourable Court.

[5] The plaintiff in the originating summons, is seeking to have set aside the undated statutory demand served on 26th March 2021. The said statutory demand is annexed to the affidavit in support of Hemant Kumar marked as "HK22" and in paragraph 33 of the said affidavit it is averred that the statutory demand was served on 1st April 2021. It is also pertinent to note that although the plaintiff complains that the statutory demand in undated, it is in fact dated 29th March 2021. Therefore, this statutory demand could not possibly have been served on 26th March 2021.

[6] The learned counsel for the plaintiff handed over to the court at the hearing written submissions in which he has discussed order 29 rule 1 of the High Court Rules 1988 and the law relating to interim injunctions.

[7] Injunction is an equitable remedy granted at the discretion of the court. The power which the court possesses to grant injunctions should be cautiously exercised only on clear and satisfactory grounds. An application for injunction is an appeal to an extraordinary power of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise.

[8] In **Hubbard & Another v Vosper & Another [**1972] 2 Q.B. 84 Lord Denning said:

> In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. .... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.
>
> Interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief. A party who has not sought any substantive relief has no right in law to seek an interim injunction, as it cannot be a relief by itself but is only a mechanism to assist and protect final relief.

In **American Cyanamid Co. v Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396 Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as the leading source of the law on interim injunctions. They are:

(i) Whether there is a **serious question to be tried** at the hearing of the substantive matter;

(ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be **adequately compensated by an award of damages** as a result of the defendant continuing to do what was sought to be enjoined; and

(iii) In whose favour the **balance of convenience** lie if the injunction is granted or refused.

Kerr LJ in **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523 at 534 said:

> It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket .... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

In the case of **Series 5 Software Ltd v Clerk and others** [1996] 1 All ER 853 the court after considering the decision in American Cyanamid and various other authorities on the subject held that;

In deciding whether to grant interlocutory relief, the court should bear the following matters in mind:

(1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.
(2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.
(3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt resolve complex issues of disputed facts or law.
(4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the

maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.

[9] The learned counsel for the plaintiff submitted that while the application for setting aside the statutory demand pending before this court the defendant instituted proceedings in the Lautoka High Court for winding up of the plaintiff company. In the affidavit of service filed by Ranga Swamy it is stated that he could not serve the originating summons of the defendant's solicitors since their office was closed. This may be due to the Covid 19 pandemic. However, the fact remains that the notice of the application for setting aside the statutory demand has not yet been served on the defendant.

[10] The injunction sought by the plaintiff is to restrain the defendant from proceeding with the winding up action. At the very outset I must say that no court has power to restrain a person from exercising his or her rights guaranteed by the Constitution or by any other statute.

[11] The learned counsel during the course of his submissions invited the court also to look at the application for setting aside the statutory demand. Since it is relevant to the present application for injunction I will briefly consider the provisions of the Companies Act 2015 (the Act) regarding applications for setting aside statutory demands.

[12] Section 516 the Act provides:

> (1) A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.
> (2) An application may only be made within 21 days after the demand is so served.
> (3) An application is made in accordance with this section only if, within those 21 days—
> (a) an affidavit supporting the application is filed with the Court; and
> (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.

[13] From the above provisions it is absolutely clear that an application for setting aside the statutory demand must be filed and served within 21 days from the date of service of the statutory demand.

[14] In this matter the plaintiff has filed the application for setting aside the statutory demand on the 21st day that is 21st April 2021. Therefore, it could not have in any way served the application on the defendant within 21days as required by section 516 of the Act and therefore, plaintiff is not entitled to find fault with the defendant for filing the application for winding up.

[15] The winding up procedure is very clearly set out in the Act. After serving the statutory demand on the debtor company it has 21 days to file and serve the application to have the statutory demand set aside. In my view no court will consider an application for winding up pending the determination of an application for setting aside the statutory demand.

[16] The learned counsel for the plaintiff referred to the paragraph G of the Court Operation Directions issued by His Lordship the Chief Justice on 26th April 2021 which provides:

> The period of lockdown of greater Lautoka, Nadi, Suva, Lami, Nasinu and Nausori arears, shall not be reckoned in the computation of any time prescribed by Supreme Court, Court of Appeal or High Court Rules or as Directed by any Judicial Officer, Chief Registrar, Deputy Registrars, Registrar and Assistant Registrar for amending delivery or filing on any Documents, Affidavits, Submissions or Pleadings.

[17] The above directives do not have the effect of extending the time prescribed by any statute such as Companies Act 2015. In this matter service of the application for setting aside the statutory demand was required to be done before 21st April 2021 whereas the above directives were issued on 26th April 2021.

[18] In this matter since the winding up petition has been filed in the Lautoka High Court all what the plaintiff should have done was to bring it to the notice of the

court that there is an application for setting aside the statutory demand pending in the Suva High Court.

[19] Even if the plaintiff is unsuccessful in its application for setting aside the statutory demand with the leave of the court it can rely on the same grounds to oppose the application for winding up. Section 529 of the Act provides:

> (1) In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court, oppose the application on a ground—
>
> (a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or
>
> (b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).
>
> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is Solvent.

[20] As I said earlier in this ruling injunction is a common law remedy. In this matter the remedies available to the plaintiff are found in the Act. The court cannot ignore the statutory provisions and make orders under the common law.

[21] From what I have stated above it is my view that guidelines set out in American Cyanamid case are not relevant to this matter. However, since the learned counsel for the plaintiff made submissions on these guidelines I will briefly consider the extent, if at all, to which these guidelines are applicable to the matter before this court.

[22] I will now consider with whom the balance of convenience lies if the injunction is granted or refused. The defendant is entitled in law to move for winding up of a company if such company is refusing or neglecting to pay a debt which is more that statutory minimum. The statutory minimum amount stated in section 515 of the Act is $10,000.00. This is a statutory right. At the same time the debtor company has the right to oppose the application for winding up. If the injunction sought by

the plaintiff is granted it will not only cause inconvenience to the defendant but also he will be prevented from proceeding with its application for winding up for a long period of time.

[23] Another issue is whether this court has the power to stay proceedings in another court of parallel jurisdiction. In my view the proper procedure the plaintiff should have been followed was to inform the Lautoka High Court about its application for setting aside the statutory demand pending in this court and to seek a stay of proceedings until the application for setting aside the statutory demand is determined.

[24] The learned counsel for the plaintiff cited the following paragraph from the decision in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 WLR 1405.

> It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order the defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits of the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding and injunction is more likely to produce just results.

[25] The plaintiff is seeking an injunction in this matter which in my view has no connection at all to the matter before the Lautoka High Court although both matters are between the same parties. In the application for winding up the court will decide whether the plaintiff company is solvent. In the statement of claim filed in this matter the plaintiff has in detail averred the matters relating to the contract it entered with the defendant and makes certain claims upon the said contract and for the work done under the contract. If he seeks the oppose the application for winding up he can take up all these grounds at the hearing of that application and prove that it is solvent and is in a position to pay the debt.

[26] The plaintiff alleges that that the defendant in breach of Rules 111 and (4) of the Companies (Winding Up) Rules 2015 failed to serve the application not later that two days before advertising it. The winding up application is in the Lautoka High Court and all these matter should have been taken up in that court.

[27] For the above reasons the court makes the following orders.

ORDERS

1. Orders sought in the Notice of Motion filed on 20th July 2021 are refused.
2. There will be no order for costs of this application

Lyone Seneviratne

JUDGE

02nd August 2021