

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Civil Action No. HBE 68 of 2021

IN THE MATTER of ECO LUMBER PACIFIC  
LIMITED

AND

IN THE MATTER of the Companies Act 2015

**BEFORE:** Hon. Mr. Justice Vishwa Datt Sharma

**COUNSEL:** Mr. Singh K. for the Applicant/Petitioner  
Ms. Kete I for the Respondent  
Mr. Nadan for Supporting Creditor

**DATE OF JUDGMENT:** 30<sup>th</sup> June 2022 @ 9.30 am.

**JUDGMENT**

*[Application seeking Winding Up pursuant to the Amended Companies Act 3 of 2015]*

## **INTRODUCTION**

- [1] This is a ***Winding up Application*** filed by the Applicant, Sharmila Narayan Sanehi seeking for a ***Winding up Order against the Respondent Company, Eco Lumber Pacific Limited***, as it alleges that the Respondent Company failed to pay the Applicant the outstanding rental in the total sum of \$175,502 inclusive of Interest of \$25,552.
- [2] The Applicant in its application sought for the following orders:-
- (i) *That Eco Lumber Pacific Pte Limited be wound up under the provision of the Companies Act 2015.*
  - (ii) *That a Liquidator be appointed to conduct the winding up, and*
  - (iii) *Such further or other orders as may be just.*
- [3] The Respondent Company failed in its bid to file and serve its '***Affidavit Opposing***' the winding up Application in terms of ***Section 15 of the Companies (Winding Up) Rules, 2015.***
- [4] However, on 24<sup>th</sup> February, 2022, the Respondent Company filed an ***Inter-Parte summons*** together with an Affidavit in Support deposed by Sione Fa and sought for the following orders in terms of ***Section 529 of the Companies Act, 2015-***
- (i) *That leave is granted to the debtor Company to extend the time to file this application opposing the winding up Application.*
  - (ii) *That leave is granted to the Debtor company to oppose the application for winding up on the grounds;*
    - (a) *That there is a Genuine Dispute between the Debtor Company and the Applicant about the existence and amount of the Debt to which the winding up relates;*
    - (b) *That the Debtor Company has an offsetting claim.*
  - (iii) *And any such further or other orders as this Honourable court deems just and fair.*
- [5] The ***Respondent Company disputed*** the applicant's claim of \$175,502 for the outstanding rental inclusive of interest as can be ascertained from the affidavit in support deposed by Sione Fa, filed on 24<sup>th</sup> February 2022. *It stated that the settlement was not reached and the Applicant proceeded to file its Winding up Application. The Respondent Company has an offsetting claim and that the justice of the case requires that this dispute be dealt with through the normal civil proceedings and not via Winding up Proceedings.*
- [6] ***Section 529 of the companies Act 2015*** provides as follows:-
- "(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 providing that the company is solvent."*

- [7] The Respondent Company in the affidavit of Sione Fa explains the reasons for not making an application seeking for **setting-aside the Statutory Demand** since the parties were talking of possible settlement options.
- [8] It will be noted that the Applicant did not file any Affidavit in response to the Respondent Companies' Affidavit. However, the Applicant consented to the orders sought on two grounds-
- To file and serve its Opposition Affidavit in 3 days; and
  - Respondent Company to pay \$300 cost.
- [9] On 28<sup>th</sup> February 2022, the two orders sought by the Respondent Company in its **Inter-Parte Summons** was holistically dealt with by this Court as stated hereunder:-
- By consent, Leave granted for the extension of time to the Respondent to file and serve his response affidavit (Affidavit in Opposition) within 7 days.
  - 7 days thereafter for the Applicant to file/serve any response affidavit at liberty.
  - Costs of \$300 by Respondent to Applicant before filing the Affidavit in Opposition
  - Hearing scheduled for 22<sup>nd</sup> April 2022 at 9.30am.
- [10] These orders obviously meant that the Respondent Company is at liberty to file and serve its **Opposing Affidavit** to the **Winding up Application on the grounds of Genuine Dispute** and the **Offsetting Claim**.
- [11] It is noted that even though the Respondent Company was granted further 7 days' time to file and serve its **Affidavit in Opposition**, it still failed to adhere to the court order of 28<sup>th</sup> February 2022 to file and serve its Affidavit in Opposition within 7 days granted in terms of **Section 529 of the Companies Winding up Act 2015**.

#### **Applicant's Submission**

- [12] Counsel representing submitted-
- Proceed with the Hearing. Section 15 Rules is clear that the Respondent did not file the Affidavit in Opposition.
  - Respondent Company indebted to Applicant in the sum of \$175,502. Demand served but no setting aside sought.
  - Compliance carried out and Rule 19 certificate issued.
  - Neel Shivam lawyers appeared as supporting creditor.
  - Respondent Company given 2 occasions to file and serve Opposition Affidavit but failed to do so.
  - No Documents and evidence to show that there is Genuine Dispute.
  - Interlocutory Documents does not form part of the Substantive winding up Application.
  - Court should not grant meagre costs.
  - Seek Winding up orders and \$3,000 costs.

#### **Respondent's Submission**

- [13] Counsel representing submitted-
- Oppose the Application.

- Court to take into account the Affidavit in Support deposited by Sione Fa on 24<sup>th</sup> February, 2022.
- On 24<sup>th</sup> February 2022, Fa & Company withdrew as Counsel representing and Law Solutions came on board.
- 2 Preliminary issues- Affidavit of Sione Fa to be considered as an Opposition Affidavit to substantive winding up Application.
- Genuine Dispute as to claim and offsetting.
- Rely on the written submissions.

### **Determination**

[14] The Issues for determination before this court are the following-

- (i) **Whether the Affidavit in Support deposited by Sione Fa should be taken into consideration as an 'Affidavit in Opposition' to the Winding up Application?**
- (ii) **Whether there is a genuine dispute between the Applicant and the Respondent in terms of the amount of the debt in Rent of \$175,502 which includes interest of \$25,552 to which the Respondent's demand relates? And/or**
- (ii) **Whether the Respondent Company has an offsetting claim?**
- (iii) **Whether this Court should grant and/or Dismiss the Winding up Application**

### **Affidavit of Sione Fa**

[15] Firstly, it is prudent to deal with the **First issue of 'whether Sione Fa's Affidavit should be taken into consideration as the Affidavit in Opposition to the substantive Winding up Application'?**

[16] At the hearing of the substantive Winding up Application on 02nd May 2022, the Respondent Company submitted that the Affidavit deposited by Sione Fa to be taken into account as the **Opposing Affidavit to the Substantive Winding up Application.**

[17] The Court upon hearing both the Counsels on the **First issue of the Respondent Company**, directed that this **Court will determine the first issue together with the Substantive Winding up Application in its final decision** that would be delivered on Notice.

[18] A thorough perusal and examination of the Respondent Company's affidavit in support deposited by Sione Fa filed on 24<sup>th</sup> February 2022 reveals that it served a **two-tier purpose**; that is:-

- (i) Affidavit material furnished to court in terms of the orders sought in the Respondent Company's Inter-Parte Summons filed on 24 February 2022, and
- (ii) Affidavit material disputing the alleged rental debt and interest of \$175,502 to the Applicant
- (iii) Respondent Companies Offsetting claim in terms of alleged payments made by the Respondent Company to the Applicant both by cash and by cheques.
- (iv) That the Respondent Company is solvent.
- (v) The Winding up proceedings to be dismissed.

- [19] The Respondent Company has quite categorically addressed on the subject matter of the substantive matter of the Winding up proceedings at paragraphs 24-28 (Inclusive) and paragraph 37 seeking dismissal of the winding up application.
- [20] For the aforesaid Rational, this Court finds that the '**Affidavit in Support**' deposed by Sione Fa on 24<sup>th</sup> February 2022 **details and addresses both Respondent Company's orders sought in the Inter-Parte Summons and opposes the Applicant's substantive winding up proceedings.**
- [21] Accordingly, this Court hereby allows and grants the usage and utilization of Sione Fa's Affidavit as the **Opposing Affidavit** for the purposes of opposing the substantive winding up application accordingly.

### **Substantive Winding up**

- [22] **Section 515 of the Companies Act 2015** provides the following:

#### *Definition of inability to pay debts*

*Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be unable to pay its debts—*

*(a) if a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due ("Statutory Demand") and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or*

*(b) if during or after a period of 3 months ending on the day on which the winding up application is made—*

*(i) ....*

*(ii) ....*

*(iii) it is proved to the satisfaction of the Court that the Company is unable to pay its debts, and, in determining whether a Company is unable to pay its debts, the Court must take into account the contingent and prospective liabilities of the Company.*

- [23] **Section 517 of the Companies Act of 03 of 2015** stipulates the "Determination of an application where there is a **Dispute or Offsetting claim**".
- [24] **Section 513(a)** of the Act provides the **Circumstances in which a Company may be wound up.**
- [25] The current substantive winding up application in particular is made pursuant to **Section 513(c) of the Act "whether the Respondent Company, Eco Lumber Pacific Limited may be wound up if the Company is insolvent?"**
- [26] The Applicant submitted that the Respondent Company has the **inability to pay the debt and there being no dispute as to the debt, the Respondent Company should be wound up.**
- [27] However, the substantive question then arises is "**whether the Applicant has satisfied the requirements of Section 515 of the Companies Act** as enumerated and paraphrased at paragraph 22 of my Judgment hereinabove."
- [28] Further, whether the Respondent Company is capable of paying off the debt amounting to \$175,502 inclusive of interest of \$25,552?

### ***Genuine Dispute***

- [29] According to the Respondent Company, it disputes the amount of Rental claimed by the Applicant. It had provided rental by cheque payments of \$25,000 and cash payments of over \$30,000. Cash payments were paid by the staff personally to the Applicant but not receipted. The Applicant has totally disregarded these payments. It is unclear how the applicant has deemed that the Respondent Company is indebted to her in the sum of \$175,502 inclusive of interests.
- [30] At paragraphs 24 to 27 (inclusive) of Sione Fa's Affidavit, the Respondent Company addresses the Applicant's claim against the Respondent Company owing a sum of \$175,502 in rental inclusive of \$25,552 in terms of interest.
- [31] The Respondent Company adds that it is unclear how the Petitioner has deemed that the Respondent Company is indebted to the Applicant in the total sum of \$175,502.

### ***Offsetting Claim***

- [32] At paragraphs 29 - 37 (inclusive) of Sione Fa's Affidavit, the Respondent Company addresses the Applicant's debt in the sum of \$217,000 to the Respondent Company and the issue of ***Solvency***. The Respondent Company stated that the Applicant's debt to the Respondents Company is well in excess of what the Applicant has claimed in his winding up proceedings and therefore the Respondent Company has an offsetting claim.
- [33] At paragraph 36 the Respondent Company states that ***Company is solvent and is able to meet its debt*** as and when they fall due. That, it is the Applicant who is indebted to the Respondent Company.
- [34] At paragraph 37 the Respondent Company sought orders in terms of the Inter-Parte Summons filed on 24 February 2022 and the Winding up proceedings to be dismissed.
- [35] Affidavit evidence further reveals that the Respondent and the Applicant had entered into an ***Agreement to Lease*** on 01st September, 2016 for a term of three years. The Respondent paid a security deposit of \$5,000 together with first monthly rental of \$5,450.
- [36] The Respondent is contending that the Applicant had verbally agreed for the renovation work to be carried out on the premises. In or about July 2018, the Respondent Company undertook major renovations to the premises and spent over \$200,000. This included the construction of a new Warehouse building covering the entire area outside of the Premises and the cementing of the area. It was verbally agreed upon between the parties that in the event the respondent Company was to move out in the future, that the applicant would refund the Respondent Company what the Respondent had spent.
- [37] The Respondent further deposes that during the term of the Agreement of Lease from 01<sup>st</sup> September 2016 to the 31<sup>st</sup> August 2019 that the Respondent Company did not pay its rent when it should have at the beginning of each month. However, despite the irregular method of rental payment, all rent owing during the term of the Agreement to Lease from 01<sup>st</sup> September 2016 to 31<sup>st</sup> August 2019 had been paid to the applicant.
- [38] I make reference to ***Part 6 of the Companies (Winding Up) Rules 2015*** which deals with "***Proof of Debt***", with particular reference to Sections 39, 40 and 42 respectively.

[39] ***In a Winding up by the court, every creditor must, subject to this Part, prove his or her debt, unless the court in any particular winding up gives directions that any creditor or class of creditors must be admitted without proof.***

[40] ***A debt may be proved in any winding up by delivering or sending through the post an affidavit verifying the debt.***

[41] ***An affidavit proving a debt must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers, if any, by which the same can be substantiated.***

[42] I have perused the Applicant's Affidavit Verifying Application for Winding Up, I find that the Applicant has not disclosed anything about the 'Agreement to Lease' as has been raised by the Respondent. The Rental debt claimed does not show the time period or breakdown of non-payment, rather shows that \$175,502 rent including \$25,552 as interest only.

[43] I further note and reiterate that the applicant chose not to file and serve any response to Sione Fa's detailed Affidavit initially filed seeking orders in terms of Section 529 of the Companies Act and responding to the Applicant's Winding up claim, seeking for the dismissal of the Winding up Application as well. However, orders by consent were accordingly granted on 28<sup>th</sup> February 2022.

[44] The Respondent Company all along has Disputed the alleged debt claimed by the Applicant and deposed in the Affidavit that the Rental owing during the term of the Agreement to Lease from 01<sup>st</sup> September 2016 to 31<sup>st</sup> August 2019 had been paid in full.

[45] ***In order for the Respondent Company to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds.'*** Where the debt is disputed, the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

*'The Company says that the debt alleged is disputed. To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds' Re Lympe Investments Ltd [1972] 2 All ER 385.'*

[46] **The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.** Justice Pathik had a similar view in *Vivress Development Ltd v Australia and New Zealand Banking Group Ltd*. Justice Pathik stated:

*'The question therefore is whether the debt is disputed on substantial grounds. If so, whether the Court ought to grant the relief sought by the plaintiffs.*

**It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs** (Palmer's Company Law Vol.3 15.214 and cases cited therein). In Palmer (ibid), on the principles involved it is further stated:

*'To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided.*

The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.'

- [47] The Applicant has **not satisfied** this court on the **sufficiency of evidence** that the Respondent Company ought to be wound up accordingly.
- [48] The challenge shown by the Respondent Company in not paying the debt is not because the Respondent Company is solvent but it details the facts that the applicant owes a Debt in excess of the claim, seeking for the offsetting of the claim and therefore the non-payment gives rise to *Genuine Dispute*.
- [49] I find that the Affidavit deposited by Sione Fa has **material substance and raises serious Dispute and question as to the alleged Debt on substantial grounds**. The Affidavit further discloses **triable issues** which can only be determined at a Trial by viva voce evidence. Both parties will have an opportunity to examine and cross examine the witnesses in order to ascertain the evidence appropriate in the conduct of their cases, accordingly
- [50] It is a general principle that an Application for **winding-up** of a Company with a view to enforcing the payment of a **disputed debt** is an **abuse of the process of the Court** and should be dismissed with costs (**Palmer's Company Law** Vol 3, 15.214 and cases cited therein).

**Palmer's** (ibid.) sets out the principles involved in considering disputes as to debt. It stated:

"To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. "Substantial" means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company "to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings." (Re Great Britain Mutual Life Assurance Society (1880) 16 Ch.D. 246, 253 Jessel M.R.)

- [51] In proceedings such as the current one, where the dispute is on substantial grounds raising disputed questions of fact, then it requires viva voce evidence, the dispute cannot be decided on the Application alone and one would keep in mind the following passage from the judgment of **MEGARRY J** in **IN re LYMPNE INVESTMENTS LTD** (No. 00250 of 1971) 1972 1 WLR 532 at 527:

*"Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. That practice, I may say, seems to stem from In re London and Paris Banking Corporation (1874) L.R. 19 Eq. 444. The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further, Mann v. Goldstein [1968] 1 W.L.R. 1091, cited with approval in the New Zealand Court of Appeal in Bateman Television Ltd. v. Coleridge Finance Co. Ltd. [1969] N.Z.L.R. 794, provides authority for saying that when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a "creditor" within section 224(1) of the Act of 1948 who has the locus standi requisite for the presentation of the petition, even if the company is in fact insolvent."*



[52] Bearing above in mind, it leaves this Court with no alternative but to dismiss the winding up application accordingly.

**COSTS**

[53] The matter proceeded to Hearing with the Respondent furnishing court with its written submissions.

[54] It is only appropriate that the Applicant in the circumstances pays the Respondent Company a sum of \$650 as summarily assessed costs.

**ORDERS**

[1] The Winding up Application is dismissed.

[2] The Applicant to pay the Respondent a sum of \$650 as summarily assessed costs.

Dated at Suva this 30<sup>th</sup> Day of JUNE 2022.



.....  
**Vishwa Datt Sharma**  
**JUDGE**

Cc. *K.S Law, Suva.*

*MIQ Lawyers, Nasinu.*