

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

HBE 30 of 2013

[Appeal of Acting Master's Judgment dated
27 October 2015 in Winding up Action No.
HBE 30 of 2013]

BETWEEN : **EXTREME BUSINESS SOLUTIONS [FIJI] LIMITED**

APPELLANT

AND : **FORMSCAFF [FIJI] LIMITED**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. P. Sharma for the Appellant

: Mr. P. Nand for the Defendant

Date of Hearing : 8 November 2022

Date of Judgment : 10 August 2023

JUDGMENT

WINDING UP

Demand of unpaid rent – Inability to pay debt — Debt disputed – Whether petitioner owed money to the company – Insufficiency of evidence in support of debt – Section 221 Companies Act 1985 (Cap 247)

1. U B Freight (Fiji) Limited filed a petition verified by an affidavit to wind up Extreme Business Solutions (Fiji) Limited on 20 May 2013. The petition stated that 21 days had lapsed since the petitioner served on the registered office of the company a notice of demand and notice of intention to wind up, requiring the company to pay a specified sum. The application was in terms of the Companies Act 1985 (Cap 247).
2. After notice of the petition was given, the respondent gave notice of intention to appear and support the petition. The respondent then filed a substituted winding up petition on 10 June 2014, verified by one of its directors, Farhan Saheb, stating that more than three weeks had lapsed since a demand was made for the payment of a sum of \$44,850.00, which was due and owing for services rendered at the company's request.
3. In his affidavit in opposition, filed on 14 July 2014, Yogendra Sharma, the company's managing director, denied that the company owed \$44,850.00 to the respondent, the substituted petitioner in the winding up action.
4. The company stated that the parties entered into a sale and purchase agreement to purchase a property for a consideration of \$690,000.00. The agreement concerned a property described in certificate of title number 8199 and situate at 47, Howell Road, Suva ("the property"). The company claimed that the full purchase price was never settled.
5. The respondent's director replied the affidavit in opposition by an affidavit filed on 4 December 2014. He stated that Formscuff (Fiji) Limited is the lessor of the subject property, and that the company was a tenant at the property. He stated

that the company failed to pay rent for the months of March and April 2013 at \$4,025.00 per month and from June 2013 to January 2014 at \$4,600.00 per month. The aggregate outstanding rent was \$44,850.00. He stated that a notice of distress was issued, but the outstanding sum could not be recovered.

6. The respondent's affidavit stated that the purchase price was financed by Westpac Banking Corporation for \$530,000.00 and a further sum of \$40,000.00 was paid by cheque through Neel Shivam Lawyers. The mortgage document and the cheque payment details were annexed to the affidavit. The affidavit stated that the respondent agreed with the company to settle a loan taken by the company from Auto Care (Fiji) Limited (Auto Care) as part of the purchase consideration for the property. The arrangement was to settle the loan directly to Auto Care. Letter dated 6 October 2014 was annexed to the affidavit in confirmation of this agreement.
7. The respondent stated that after the settlement of the property it was agreed that the company would continue to occupy space on the property and pay rent at \$3,500.00 plus VAT per month for two months and later to \$4,600.00 until it moved out. The affidavit stated that the respondent did not owe any money to the company.
8. On 27 October 2015 acting master Sharma (as he then was) made order that the substituted winding up petition filed by the respondent be granted, and for the official receiver to be constituted as the provisional liquidator of the appellant.
9. This appeal is against the decision of the acting master. Thereafter, the case proceeded to the Supreme Court before being referred to this court for hearing of the appeal against the decision of the acting master to wind up the appellant.
10. The appeal proceeded in this way. The appellant was granted leave to appeal out of time on 9 March 2016 and given time to file and serve the notice of appeal. Although the notice of appeal was filed on time, it was not served on the respondent. Therefore, on the application of the respondent, the High Court dismissed the appellant's notice of appeal with costs on 9 June 2016. The High

Court decision was appealed to the Court of Appeal, which dismissed the appeal by judgment dated 1 June 2018.

11. The appellant appealed to the Supreme Court, which allowed the appeal by its judgment of 26 April 2019 and set aside the orders made by the High Court and the Court of Appeal. The appellant was granted extension of time to serve the notice of appeal. The Supreme Court ordered the respondent to pay the plaintiff's costs of the appeal in the Court of Appeal in the sum of \$4,000 and a further sum of \$4,000 as costs of the appeal in the Supreme Court.

12. On 12 November 2019, the appellant filed a summons seeking *inter alia* the following orders:
 - (1) "Stay of Execution be granted against the Winding Up Order granted on 27 October 2015;
 - (2) That the Respondent pay the Appellant the \$8,000;00 Costs ordered by the Supreme Court in its Judgment dated 26th April 2019;
 - (3) That the Sale and Purchase Agreement dated 21st November 2012 form part of the Appeal Record;
 - (4) That the Variation of Sale and Purchase Agreement dated 21st January 2013 form part of the Appeal Record;
 - (5) That the Court direct whether on Appeal Record should be prepared and filed;
 - (6) That the Court set the hearing of the Appeal of the Judgment of the Acting Master delivered on 27th October 2015".

13. When the case was mentioned in court to fix a hearing into the summons, both counsel submitted that the matter is before the Supreme Court. Counsel for the respondent submitted that his client has sought a review of the Supreme Court judgment dated 26 April 2019. The review was declined by the Supreme Court on 8 April 2022. This appeal was thereafter fixed for hearing. The summons dated 12 November 2019 was not pursued.

Grounds of appeal

14. The appellant's grounds of appeal are reproduced below:

- i.* "The Learned Master erred in fact and law in holding that the Respondent/ Original Petitioner had fully accounted for the payments of the purchase price of \$690,000 VIP (six hundred and ninety thousand dollars) for the property contained in Certificate of Title No.8199 on Lot 47 on DP 1944 situated at 47 Howell Road, Suva to the Appellant/ Original Respondent.
- ii.* The Learned Master erred in fact and law by failing to hold that the sum of \$44,850.00 (forty four thousand eight hundred and fifty dollars) was bone fide disputed by the Appellant/ Original Respondent on substantial and /or reasonable grounds which therefore ought to have been tried and /or dealt with in a separate action.
- iii.* That the Leaned Master erred in law in holding that the law required the Appellant/ Original respondent to pay the sum of \$44,850.00 (Forty Four Thousand Eight Hundred and Fifty Dollars) within three (3) weeks of the Respondent / Original petitioner's statutory demand.
- iv.* The Learned Master erred in fact in holding that the Appellant/ Original Respondent "neglected" to pay the sum of \$44,850.00 (Forty Four Thousand Eight Hundred and Fifty Dollars) to the Respondent/ Original Petitioner within three (3) weeks of the Respondent/ Original Petitioner's statutory demand.
- v.* That the Learned Master erred in fact in concluding that the evidence clearly indicated that the Appellant/ Original Respondent owed a debt to the Respondent/ Original Petitioner.
- vi.* The Learned Master erred in law in holding that due to the Appellant/ Original Respondent failing to pay the Respondent/ Original Petitioner's statutory demand notice within three (3) weeks Appellant/ Original Respondent is insolvent and unable to pay its debts".

The property transaction

15. The respondent's application for winding up relates to unpaid rent for occupation of the property. The appellant's resistance to the claim is that it owes no money to the respondent, and that it is the respondent that has not settled a

substantial part of the purchase price of the property. Transactions related to the property, therefore, are central to the dispute raised by the appellant.

16. The appellant and the respondent entered into a sale and purchase agreement on 21 November 2012 to purchase the property. Subsequently, the contract was varied by agreement dated 21 January 2013 and the parties agreed upon the new purchase price of \$690,000.00.
17. Settlement was to be made within 30 days in terms of the original agreement. In terms of the variation, the respondent was to pay \$530,000.00 at the time of settlement and the balance \$160,000.00 inclusive of Value Added Tax (VAT) on or before 26 January 2013.
18. The sale and purchase agreement provided for the appellant to give vacant possession of the property 60 days after the date of settlement. The agreement specifically provided that vacant possession would not be given on the date of settlement. The company agreed to pay \$7,000.00 as rent to the purchaser for occupation of the property for a period of sixty days.
19. At the appeal hearing, both parties agreed that the purchase consideration was to be settled by payment to the appellant as well as by settling a loan taken by the appellant from Auto Care.
20. The company submitted that it borrowed a sum of \$100,000.00 from Auto Care pursuant to a loan agreement dated 26 November 2012. The loan was to be repaid within two months from the date of execution of the agreement together with interest in the sum of \$10,000.00. The respondent agreed to settle the loan as part of the purchase consideration.
21. The appellant submitted that the appellant was required to pay the claimed sum of \$44,850.00 only if it was an undisputed debt, and that the acting master erred in granting a winding up order on the respondent's petition. The appellant says

the respondent could not have charged the appellant a rental until payment of the purchase price, which was due by 26 March 2013.

22. The appellant submitted that it has not received the purchase price for the property transaction except for a sum of \$40,000.00. It was submitted that the sum of \$530,000.00 financed through a mortgage of property to Westpac Bank by the respondent was not paid to the appellant. It was contended that there is no evidence to show that such a payment was made to the appellant.
23. The respondent submitted that the acting master analysed the evidence and concluded that the respondent had fully accounted for the payment of the purchase price through (a) payments by Westpac Banking Corporation in the sum of \$530,000.00 (b) payment of \$40,000.00 to Neel Shivam Lawyers and (c) the settlement of the appellant's loan to Auto Care in the sum of \$120,000.00.
24. The respondent claims that it settled the full purchase price of the property by February 2013, and that, therefore, the appellant was liable to pay rent from March 2013 onwards. As the appellant failed to pay the demanded debt, the respondent submitted, there is a presumption that the appellant is insolvent and unable to pay its debts.

Conclusion

25. The acting master held that the appellant was required to have paid the respondent \$44,850.00 within three weeks of the statutory demand.
26. The respondent contended that the winding up action is for rent owed by the company and that the sale and purchase of the property is a separate and distinct matter that has no relevance to the claim of unpaid rent. The acting master appears to have agreed with this position and stated that the payment of \$690,000.00 as consideration for the property was a separate issue from that of the unpaid rent.

27. However, the respective affidavits and submissions show that two other related transactions were embedded in the transaction for the sale of the property i.e: the loan transaction with Auto Care and a rental arrangement between the company and the respondent. The controversy between the parties in the winding up proceeding touches all three transactions. The respondent's take-over of the loan and the rental arrangement with the company can be described as collateral to the sale and purchase agreement, and those connected arrangements may not even have been in the contemplation of the parties if not for the contract to sell the property.
28. The company denies receiving the purchase consideration, except for a sum of \$40,000.00. The respondent submitted copies of the mortgage instrument, a payment receipt issued by the solicitors for the property transaction and a letter dated 6 October 2014 from Auto Care. These documents are considered below.
29. The mortgage – registered on 4 February 2013 – is upon the subject land. This is clear upon a perusal of the mortgage instrument, which states the certificate of title number of the property as 8199. It is described as lot 47 on DP 1944. The consideration is stated as \$530,000.00. This is in line with the respondent's claim that Westpac Bank granted a finance facility in a sum of \$530,000.00. However, the instrument does not disclose to whom the payment was made.
30. Faiyaz Saheb's affidavit disclosed a receipt dated 4 February 2013 issued by Neel Shivam Lawyers for the sum of \$20,000.00 paid by Formscaff (Fiji) Limited. The payment was towards the purchase of the property from the company, Extreme Business Solutions (Fiji) Limited. The payment was by Westpac Bank cheque, the details of which were provided.
31. Auto Care (Fiji) Limited by letter dated 6 October 2014, addressed to the solicitors for the respondent, Lajendra Law, confirmed that the, "Debt owed by Extreme Business Solutions (Fiji) Limited in the amount of \$120,000.00 was taken over by Formscaff Fiji Limited and arrangements to clear the debt directly with Auto Care (Fiji) Limited was made by Formscaff Fiji Limited". According to the

letter, the first payment was to be \$10,000.00 and thereafter monthly installments of \$5,000.00, and to be settled by February 2015 with a lump sum payment.

32. A document setting out the terms under which the respondent agreed to settle the loan taken by the company from Auto Care is not before this court. According to the company, the loan was to have been settled before payment of the balance sale price of the property. Auto Care's letter dated 6 October 2014 does not show when repayment was to commence. The letter gives timelines and the settlement date as February 2015. The loan agreement dated 26 November 2012 between Auto Care and the appellant states that the loan has to be settled within two months of the date of the loan agreement. In terms of that agreement, the appellant was required to settle by 26 January 2013. The obligation to settle the loan was taken over by the respondent. There is no evidence that this sum was settled at the time the respondent filed the substituted winding up petition on 10 June 2014.
33. The acting master made a finding that the rent from March 2013 to April 2013 was \$ 4,025.00, and rent from June 2013 to January 2014 the rent was \$4,600.00. There is no instrument in court in support of these sums. The respondent has not alluded to a tenancy agreement. These sums are stated in the affidavit of Faiyaz Saheb. The company denies that such sums are payable as rent. The only sums mentioned as rent are stated in the sale and purchase agreement.
34. In the circumstances set out above, the court is of the view that there is a dispute of substance that would render a winding up proceeding unsuited to resolve the respective claims. The company insists that it has not received the full purchase consideration for the sale of the property and denies that it owes the payment of rent to the respondent. The claims by the appellant and the respondent are closely connected to the sale of the property, in regard to which the registered certificate of title is not before court. In the event the respective claims are established by evidence, a set off could eventuate. However, a winding up petition is not the route to achieving such a result.
35. Therefore, the appeal will be allowed, and the winding up petition dismissed.

ORDER

- A. Appeal is allowed and the judgment of the acting master is set aside.
- B. Winding up application is dismissed.
- C. Respondent to pay costs of this proceeding summarily assessed in a sum of \$2,500.00 within 21 days of this judgment.

Delivered at **Suva** this **10th** day of **August, 2023**.



M. Javed Mansoor
Judge