

THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBE 74 of 2019

**IN THE MATTER OF INSTANT
HOLDINGS PTE LIMITED** formerly
known as **INSTANT HOLDINGS
LIMITED**

AND

**IN THE MATTER OF THE COMPANIES
ACT 2015**

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. S. Devan for the Petitioner
Mr. S. Kumar for the Company

Date of Hearing : 26 October 2021

Date of Decision : 30 October 2023

5. Mr. Nand stated that the company filed action and sought an injunction against the petitioner in HBC 40 of 2020, as it was out of time in filing an affidavit in opposition in this proceeding. He said that his ex-wife forged his signature, while she was the company director, and obtained an increase in overdraft facilities without the company's authority. He said the petitioner was negligent in making enquiry before increasing overdraft facilities. He says he complained about the forgery of his signature to the petitioner by his letter dated 3 April 2019.
6. The company says the winding up action would adversely affect its contracts and cause it irreparable damage. Mr. Nand says the company is very much solvent and able to pay its debts, but disputed the debt demanded by the bank. His affidavit states that this proceeding is an abuse of the process of court as the company has the means to pay its debts.
7. The petitioner filed an affidavit in opposition through its supervisor recoveries, Sanjlesh Lal. This was in response to the company's affidavit filed on 17 February 2020, and opposed the applications for leave or extension of time.
8. The petitioner said that the company initially obtained an overdraft facility for \$65,000.00 along with other facilities. On or about 6 February 2015, the petitioner approved an additional \$35,000.00, increasing the overdraft to \$100,000.00. The petitioner said that the additional overdraft facility was offered to the company by letter dated 6 February 2015, which was addressed to the directors of Instant Holdings Ltd. The letter named the guarantors as Ravi Nand and Jyotika Lal and gave their addresses. The borrower's name is given as Instant Holdings Ltd. Ravi Nand and his wife, Jyotika Lal, signed as directors.
9. The affidavit stated that Ms. Lal's term deposit was pledged as security for her personal loan facility, which she repaid. The petitioner stated that by an oversight it released the term deposit to Ms. Lal on repayment of her loan, instead of retaining it as collateral for facilities given to the company.

10. The petitioner denied that Ms. Lal forged signatures on the petitioner's offer letter to increase the overdraft facility. The affidavit says that both directors executed the documentation in the presence of a bank officer and that the company's common seal was affixed to the document. The affidavit says that Mr. Nand as a joint director of the company at that time was aware of the increase in the overdraft facility.
11. The petitioner states that the company filed legal action against it and Ms. Lal on the basis of fraud, after winding up proceedings were issued. The petitioner states that loan account statements were sent to Mr. Nand, but no issues were raised based on fraud related to the overdraft facilities prior to 2020. The affidavit says that the company has not been able to meet its loan obligations since March 2019, and that no proof has been shown of its solvency.
12. Both applications were taken up for hearing. The company submitted that it disputed the existence of the debt as the petitioner released the company's term deposit to Ms. Lal without the consent of the company or of Mr. Nand. The company alleged fraud and collusion on the part of the bank's employee and Ms. Lal.
13. The company submitted that it could not take steps to set aside the statutory demand due to matters beyond its control, and that the company is solvent and able to pay its debts. However, the debt claimed by the petitioner is disputed as the director's signature was forged on bank documents. The company says the petitioner commenced winding up proceedings because it wrongfully released to his former wife, a term deposit given by the company as collateral.
14. The petitioner submitted that it issued a statutory demand on 4 October 2019. As there was no response, the petitioner proceeded to file a winding up application on 3 December 2019. The proposed winding up was advertised in the Fiji Sun and the Gazette on 20 December 2019.
15. The matter was set down for hearing before the master on 11 February 2020. The petitioner submitted that no steps were taken to set aside the winding up notice

or oppose the winding up application under regulation 15 of the Companies (Winding Up) Rules 2015.

16. The petitioner submitted that if the statutory demand is not set aside, a creditor can rely on the statutory presumption of insolvency under section 515 of the Act to wind up the company. The petitioner submitted that the court has no jurisdiction to extend time before or after the expiry of the 21 day period pursuant to section 674 (5) of the Act.

The company's applications

17. The company filed two summons; the first one seeks an extension of time to file an affidavit opposing the winding up, while the other seeks the leave of court to set aside the statutory demand.
18. There is no provision for the extension of time if the statutory demand is not complied with or set aside within the prescribed period of 21 days. There is, however, provision under section 529 of the Act – to which the company makes no reference – to seek the leave of court. The court cannot grant leave except by following the solvency requirement imposed by the section.
19. Section 529 states:
- (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)

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. The company states that it is solvent and able to pay its debts. It has provided unaudited financial statements for the year ending 31 December 2019 along with

Mr. Nand's affidavit. The financial statements bearing the date 5 January 2020 show operating profits of 23,613.00 after income tax for the year 2019. The issued share capital is \$100.00. Total assets is shown as \$973,442.00 and total liabilities is stated at 777,774.00. The sum of 195,668.00 shown as net assets, comprises 195,568.00 of retained earnings, which includes profits for that year. The account suggest that retained earnings have been deployed in the financing of assets. When computed, a high debt to equity ratio is evident, revealing the debt heavy nature of the company's capital structure. Details are not available on the quality of current assets, and the potential to transform these into cash in the short term.

21. The unaudited financial statements do not give a clear indication of the company's solvency. The statutory demand is for \$37,386.73. The supporting creditor says the company is indebted in a sum of \$23,531.45. Together, their claim is well over sixty thousand dollars. This is in excess of the company's retained profits for the year. It is an indication that the company's ability to pay its debts is questionable. The company also provided some information of work in hand. While such information is useful, it does not shed much light on the company's solvency.
22. The company has not explained the reason for not providing audited financial statements. The court has to decide the question of leave having regard to the statutory requirement, and it cannot grant leave unless satisfied that the ground raised by the company i.e: dispute of the debt, is material to proving the company is solvent. Having considered the material tendered through affidavits, the court is not satisfied that the ground raised by the company is material to its solvency.
23. The dispute concerns the unauthorised use of overdraft facilities by a former director by forging the signature of the other director, to whom she was married. The company says it complained to the petitioner, but no action was taken. The petitioner says that the only complaint it received concerned a master card issued to the former director.

24. Mr. Nand says that he sent the petitioner a letter dated 1 April 2019 regarding the forgery. However, the letter does not appear to have been annexed with his affidavit. He has disclosed a letter that appears to have been sent to the petitioner on 25 March 2019. In it he makes reference to an officer of the bank. He made known his unhappiness with the bank's response to his several requests. The letter says that his former wife, Ms. Lal, left the business in 2016, but the petitioner instructed him to settle her outstanding master card dues.
25. The annexed letter made no reference to the allegation of forgery, or the bank officer's collusion in the matter. Email correspondence between the company and the petitioner from 22 to 26 March and 1 to 6 April are attached to Mr. Nand's affidavit. The emails refer to a complaint and the petitioner's investigation of the matter. However, the emails do not contain details. The action taken by the company and its director in regard to the alleged forgery is by way of the writ of summons filed on 3 February 2020. This was after the statutory demand dated 1 October 2019 was served on the company's registered office on 4 October 2019.
26. The offer letter issued by the petitioner contains what it says are the signatures of the company directors. The company's complaint is that a director's signature was forged by another director. The company's common seal has been affixed to the document, which was executed on 6 February 2015. A facility was made available to the company, and was drawn upon. Mr. Nand's letter shows that his wife left the company in 2016. The petitioner says bank statements of the facilities were regularly sent to the company. This included details of the overdraft facility that was enhanced in 2015. The overdraft related debt, however, does not seem to have been disputed until the statutory demand was sent.
27. The petitioner is entitled to recover monies lent to the company, which as a legal entity must perform its obligations. Payment did not ensue when demand was made. When a statutory demand is not complied with or set aside under section 516 of the Act, there are legal consequences. Section 515 of the Act provides that a company is deemed unable to pay its debts if it does not pay the sum stated in the statutory demand.

28. The company submitted that it opposes the winding up on the basis that collateral meant for finance facilities was released by the petitioner by an oversight. That omission does not take away the company's obligation to repay the loan. The term loan deposit given as collateral would merely have facilitated a set off towards settling the dues. That is not a dispute on which the winding up can be opposed.
29. The company has not raised a substantial dispute in regard to the debt or shown that the dispute is material to proving that the company is solvent. The summons filed by the company are declined.

ORDER

1. The summons filed by Instant Holdings Pte. Limited are struck out.
2. Instant Holdings Pte. Limited is to pay the Bank of South Pacific Limited costs summarily assessed in the sum of \$1,500.00.

Delivered at **Suva** this 30th day of **October, 2023**.



A handwritten signature in blue ink, which appears to read "M. Javed Mansoor".

M. Javed Mansoor
Judge