

**IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION**

**Winding Up Action No. HBE 17 of 2024**

**IN THE MATTER of TANZ AUTO  
(FIJI) PTE LIMITED** a limited liability  
company having its office at 13-14 Toti  
Street, Wailada, Lami, Fiji Islands.

**AND**

**IN THE MATTER of the Companies Act  
2015.**

**BETWEEN**

**:**

**FIJI GAS PTE LIMITED** a limited  
liability company having its registered  
offices at the corner of Foster Road and  
Amra Street, Walu Bay, Suva, Fiji Islands.

**Respondent**

(Original Applicant)

**AND**

**:**

**TANZ AUTO (FIJI) PTE LIMITED** a  
limited liability company having its  
registered office at 13-14 Toti Street,  
Wailada, Lami, Fiji Islands.

**Applicant**

(Original Respondent)

**Representation**

**Applicant:** Mr T.V. Faktaufon (Vama Law)

**Respondent:** Mr T. Tuitoga (Haniff Tuitoga)

**Date of Hearing:** 29<sup>th</sup> July 2024.

**RULING**

**A. Introduction and Background**

[1] Tanz Auto (Fiji) PTE Limited (Applicant) on 3<sup>rd</sup> June 2024, filed summons seeking leave to file an affidavit in opposition to the application for winding up filed by Fiji Gas PTE Limited (Respondent) on 27<sup>th</sup> March 2024. Tanz Auto (Fiji) PTE Limited failed to

comply with the demand notice (dated 18<sup>th</sup> January 2024) issued under Section 515 of the Companies Act 2015 seeking payment of a sum of \$430,273.36 by Fiji Gas PTE Limited.

- [2] Tanz Auto (Fiji) PTE Limited upon service of the demand notice failed to file an application to set aside under Section 516 of the Companies Act. On 27<sup>th</sup> March 2024, Fiji Gas PTE Limited filed a winding up application against Tanz Auto. On 22<sup>nd</sup> May 2024 the Deputy Registrar certified that the Rules for winding up section 19 (1) were complied with and issued a “*Winding Up Rule 19 (2) Full Compliance Certificate*”.

**B. The Law**

- [3] The relevant law dealing with this application is **Section 529 of the Companies Act 2015** which is titled “*Company may not oppose application on certain grounds*”, which is 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 proving that the Company is Solvent.”*

**C. The Submissions**

- [4] I have considered all the submissions of the parties. I wish to briefly summarise the submissions of each party.

**(i) Applicant – Tanz Auto (Fiji) PTE Limited**

- [5] The position of the applicant (debtor) is that it does not dispute owing the creditor (Fiji Gas PTE Limited). It disputes the amount owed. It relates to the rebate for the period between August 2023 and April 2024. The applicant’s position is that the rebate should be \$108,476.21 as opposed to \$77,058.35. The Applicant further contend that the company is solvent and capable of paying off its debt to the creditor.

**(ii) Respondent – Fiji Gas PTE Limited**

- [6] The respondent in this application has sought that this Court consider the factors set out and considered by Justice Nanayakara in **Plumbing & Property Services Pte Ltd, In re [2022] FJHC 632; HBE26.2022 (6 October 2022)** which are: whether there is a serious

question to be tried on the ground sought to be raised; the sufficiency of any explanation as to why that ground was not raised in an application to set aside the creditor's statutory demand, involving an evaluation of the reasonableness of the debtor's conduct at the time when the application might have been made; and whether the court is satisfied that the relevant ground is material to proving whether the debtor is solvent. In going over each factor the position of creditor (Fiji Gas PTE Limited) is that there is no adequate or satisfactory explanation as to why no step was taken by the debtor to set aside the notice. It fails to explain why it did not file an application to set aside or the delay in filing the leave application.

**D. Analysis**

- [7] In dealing with this matter I have had the benefit of reading a recent Fiji Court of Appeal Judgment of Jitoko P, Morgan and Heath JA's in **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd [2024] FJCA 133; ABU014.2021 & ABU041.2021 (26 July 2024)**. It provides the practitioners and the High Court guidance on dealing with statutory demands and winding up petitions, and insolvency proceedings under the Companies Act 2015. While the issues that relate to the matter before me (Section 529 of the Companies Act 2015) are not covered in Biju (supra), the judgment provides useful insight and caution that "*...statutory demand is not a debt collection process. Its sole purpose is to create a rebuttal presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment and creditors who proceed in that way (and possibly, in a clear case its legal advisers) may be at risk of a substantial award of costs to mark the abuse of processes.*" – Per Morgan JA.
- [8] It is clear from the documents, the application and the submissions before me that the creditor (Fiji Gas PTE Limited) has acted in a timely manner. The same cannot be said of the debtor (Tanz Auto (Fiji) PTE Limited). Our Companies Act 2015 is analogous to the Corporations Act 2001 (Cth). Section 529 of the Fijian Companies Act 2015 is a replica of the Section 459S the Australian Corporations Act 2001. The Australian corporation's law cases are relied as authorities in our jurisdiction.
- [9] A recent decision of the New South Wales Supreme Court, **In the Matter of Garslev Holdings Pty [2023] NSWSC 609** has put into perspective applications to oppose winding up pursuant to Section 459S of the Corporations Act 2001 (Cth). Section 459S of the Corporations Act 2001 (Cth) and Section 529 of the Companies Act 2015 both state that a company cannot, without leave of the Court, oppose an application for its winding up proceeding on a ground that the company could have relied on, but did not rely on, in an application to set aside a statutory demand. Section 459S (2) of the Corporations Act 2001 (Cth) and Section 529 (2) of the Companies Act 2015 continues such that the Court cannot grant leave unless it is satisfied the ground relied on by the company is material to proving it is solvent. The section is rigid and emphasises the importance of a debtor to respond to a statutory demand in a timely manner, being before it lapses.

[10] Hammerschlag CJ in *Garslev* (Supra) was of the view that historically, Judges have commented that the Section 459S (Fijian Section 529) serves as a presumption of caution that Courts should apply when considering applications to oppose a winding up, and that onus is placed on the debtor company to bring a timely opposition to a statutory demand. Hammerschlag CJ determined that the approach in previous authorities was incorrect. The Court held it is not incumbent upon the defendant in these proceedings to displace any presumption of caution or reluctance and that the opposition of an application should be considered on the merits of each case. His Lordship stated that:

“ 13 *An approach which commences with an assumption that the court must approach the application with a degree of caution (or any reluctance) greater than that with which it would approach the exercise of any other discretion within a particular statutory context, where the court must be satisfied that appropriate circumstances exist for the making of an order, imposes upon the applicant a standard higher than that which the section requires and would reflect an unwarranted confinement of the discretion.*

14 *The discretion is at large, and there is no warrant “to cut down ... that discretion ... or ... to confine it within a straight jacket”, to use the words of the English Court of Appeal in Re Atlantic Computer Systems PLC [1992] Ch 505 at 541, which considered a statutory analogue to s 440D, which provides that during the administration of a company, a proceeding in a court against the company, or in relation to any of its property, cannot be begun or proceeded with except with the leave of the court and in accordance with such terms (if any) as the court imposes: see Larkden Pty Limited v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305 at [35]; (2011) 285 ALR 207.”*

[11] The commentary of his Lordship serves as a reminder that the Court’s wielding of discretion is to be exercised on a case-by-case basis, and not have blanket application. Each application must be carefully scrutinised. However, scrutiny is not equivalent to caution or reluctance. In considering this application I have not considered it incumbent upon the debtor to displace any presumption of caution or reluctance.

[12] In considering the grant of leave, the first question to be considered is whether Tanz Auto (Fiji) PTE Limited (Debtor) has established a serious issue to be tried. On the material before me I do not find that the debt is the subject of a genuine dispute between the parties. What Tanz Auto (Fiji) PTE Limited is basically doing is disputing part of the debt and refusing the entire debt in the statutory demand. Out of the debt of \$430,273.36 they are having an issue over \$31,417.86. The simple question is why they are not paying \$398,855.50 which is not in dispute. The debt which is the subject of the demand exists and is due.

[13] Since 18<sup>th</sup> January 2024, Tanz Auto (Fiji) PTE Limited been served the demand notice. During that period (December 2023 to March 2024) they state they were relocating their office. They did not give priority to the demand notice. The stance of the debtor, Tanz Auto (Fiji) PTE Limited shows that despite the knowledge of the demand and the debt, they gave no priority to it. They simply chose to ignore owing over \$400,000.00 to Fiji Gas PTE Limited. No satisfactory explanation is given by Tanz (Auto) PTE Limited as to why steps were not taken by them to set aside the demand notice on or before 8<sup>th</sup> February 2024. They do not explain why they delayed between 8<sup>th</sup> February 2024 and 20<sup>th</sup> May 2024. The time they attempted file the affidavit in opposition without leave of this Court.

[14] The onus is on Tanz (Fiji) PTE Limited to prove that it is solvent. It is the one seeking leave under Section 529 of the Companies Act 2015. They have not demonstrated their ability to meet their financial obligations as they come due. They needed to provide evidence that they can pay their debts and have a healthy financial position. Tanz Auto (Fiji) PTE Limited has not provided any audited accounts, financial statements, cash flow statements, balance sheets, list and valuation of assets, and any other relevant financial documents to establish its financial position. The presumption of solvency has not been rebutted.

[15] I decline leave pursuant to Section 529 (2) of the Companies Act 2015.

**E. Court Orders**

(a) I decline leave pursuant to Section 529 (2) of the Companies Act 2015.

(b) I set the matter relating to the winding up of 'Tanz Auto (Fiji) PTE Limited for hearing on 22<sup>nd</sup> August 2024 @ 10am.

(c) The Debtor (Tanz Auto (Fiji) PTE Limited) is to pay the Creditor (Fiji Gas PTE Limited) \$3000.00 as costs, within 21 days. The costs have been summarily assessed.

.....  
Chaitanya S.C.A. Lakshman

**Puisne Judge**  
8<sup>th</sup> August 2024

