

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

**IN THE CENTRAL DIVISION**

**CIVIL JURISDICTION**

**Companies (Winding Up) HBE 21 of 2024**

**IN THE MATTER OF NANDS PHARMACY  
PTE LIMITED** having its registered office at  
Level 2, Nands Shopping Mall, 550 Ratu Mara  
Road, Nabua, Suva.

**IN THE MATTER of COMPANIES ACT 2015**

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**Date of Hearing** : **16 July 2024**  
**For the Plaintiff** : **Mr Nagin H.**  
**For all the Defendants** : **Ms Choo N.**  
**Date of Decision** : **30 October 2024**  
**Before** : **Waqainabete - Levaci, S.L.T.T, Puisne Judge**

**R U L I N G**

***(PRELIMINARY ISSUE – JURISDICTION FOR STAY)***

**PART A - BACKGROUND**

1. There is a pending winding up proceedings by Hyperchem Pharmacy Pte Limited t/a Ray Pharmaceuticals against their creditor, Nands Pharmacy Pte Ltd.

2. The Defendant/Applicant filed an application for Stay against the winding up proceedings.
3. The parties made further legal submissions on the preliminary issue as to whether the High Court, had jurisdiction to grant Stay.

## **PART B: SUBMISSIONS AND LAW**

4. The parties, in their submissions, refer to two sections of the Companies Act which empowers the Court regarding winding up.
5. Section 524 of the Companies Act empowers the Court to determine whether or not stay should be granted after making winding up application and before a winding up order is made.

*“Power to stay or restrain proceedings against Company*

**524.**—(1)At any time after the making of a winding up application, and before a winding up order has been made, the Company, or any creditor or contributory, may—

(a) where any suit or proceeding against the Company is pending in the Court or the Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings; and

(b) where any other suit or proceeding is pending against the Company, apply to the Court having jurisdiction to wind up the Company to restrain further proceedings in the suit or proceeding,

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

6. The Defendant/Applicant submits there is a pending corresponding civil action against the Directors. The stay application is for the current pending winding up application disputing the debt and enabling the current civil action to proceed and be determined.

7. In the case of RPA Group Fiji Limited -v- Pacific Marine and Civil Solution Pte Limited HBE 52 of 2019 Mansoor J explained his understanding of Section 524 (1) and (2) as follows:

“My understanding that any suit or proceedings against the company must be taken to mean any proceeding instituted against the company and pending in the High Court or Court of Appeal. In such case, the company or creditor or contributory may apply to the High Court or Court of Appeal for a stay of proceedings in terms of section 524 (1) (a) of the Act.

Section 524 (1) (b) provides that where any other suit or proceeding is pending against the company, such company or creditor or contributory may apply to the court having jurisdiction for winding up the company to restrain further proceedings in the suit or proceedings; the enactments language suggests that these are proceedings in courts other than the court in which the winding up proceeding is heard.

Such provisions are not out of place in insolvency legislation, and their likely object is to protect the company, which may be on its last legs, from incurring further liability and expenditure through litigation, so that creditors would have an even chance of recovering their debts from the company.”

8. Furthermore section 553 of the Companies Act<sup>1</sup> empowers the Court to consider a stay application made by a liquidator, official receiver, creditor or contributor after winding up orders have been made.
9. In the matter of Re: HoneyDew Farms Pte Ltd HBE 59 of 2020 Amratunga J discussed the application under section 553 of the Companies Act and stated:

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<sup>1</sup> Power to stay winding up

553.—(1)The Court may, at any time after an order for winding up, on the application either of the liquidator or the Official Receiver or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

(2)On any application under this section, the Court may, before making an order, require the Official Receiver to furnish to the Court a report with respect to any fact or matter which are in his or her opinion relevant to the application.

(3)A copy of every order made under this section must be forwarded by the Company, or otherwise as may be prescribed by regulations made under this Act, to the Registrar, using the Prescribed Form, for registration.

“What is required to exercise wide discretion of the court is to approach the application and its bona fides in holistic, manner including all internal as well as external factors and the conduct of the Company since the order for winding up made. 32. In my mind a report of all assets and liabilities of a company will not show its potential to collect revenue and pay off all its outstanding debts, as heavily leverage companies are much solvent due to steady cash flow and other factors. If the court is not satisfied to lift the winding up order permanently, it may lift it for a period and request a report during such time period. 34. In this case as all the debtors who submitted statements to prove their debts had withdrawn them. Another factor is change of external economic activities, which has an impact on recycling business in an area dependent on tourism. This is holistic consideration in the exercise of discretion in terms of section 553(1) of Companies Act 2015.<sup>2</sup>

10. The Petitioner argues that the application by the Defendant/Applicant is an abuse of process as the Defendant/Applicant failed to take steps to set aside the statutory demand nor file for an Affidavit in Opposition within the requisite 21 days or sort for leave to file its Affidavit in Opposition. In the case of Green Ace Valley & Electrical Valley -v- Gokal International Ltd [2024] FJHC 140; HBC 10 of 2023 (5 March 2024) Amratunga J stated that:

“29] It is clear that legislature had prevented debtors abusing the process of winding up and prolonging an application for winding up more than six months. The court is granted power to extend that time period beyond six months, but again the window of opportunity is limited without granting general discretion to court.

[30] In the light of the above, a stay of winding up application cannot be considered as a general stay of a judgment in terms of High Court Rules 1988. Another reason, is the change of status of the Company after an order for winding up was made. This makes difficult for the Company (in liquidation) to made an application to court as it had changed its status from its former status prior such an order was made.”

11. The Defendant/Applicant further states that if the Court does not exercise the powers provided for in sections 524 of the Companies Act, the Court still has

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<sup>2</sup> 1 <https://www.legislation.gov.uk/ukpga/1948/38/section/256/enacted> (17.2.2023) 7 33.

inherent jurisdiction to exercise its powers to stay proceedings where there is an abuse of court processes.

12. The Court refers to Charles Forte Investment Ltd -v- Amanda [1962] 2 ALL ER 1940-1951 –

“As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the learned judge's caution, which he quoted from the Annual Practice (Annual Practice, 1963 Edn., p. 577, note "Inherent Jurisdiction" to R.S.C., Ord. 25 r.4.) that this is a jurisdiction to be exercised with great circumspection.....We were...referred to several cases where the jurisdiction has been invoked in order to restrain the presentation or prosecution of a winding up petition. One case very much in point was Re A Company [1894] 2 Ch. At p.351, in which the petition had actually been presented, but an injunction was sought and obtained to restrain the advertisement of it. It was found in that case that the petition had been presented for the purpose of putting pressure on the company, and it was held that that was sufficient to justify an injunction restraining its advertisement. Vaughn Williams, J. Said:

In my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company.

I can conveniently re-quote the passage which the learned judge quoted from Sir George Jessel's judgment:

“The authorities stand thus: I find there is a case on this point, Merchant Banking Company of London –v- Hough [1874] W.N 230 not fully reported in which Hall, V.C in December 1874, upheld an injunction previously granted to restrain the defendants who had a claim against the plaintiffs company, from taking proceedings to wind up the company. Malins, V-C, a few days later, granted a similar injunction in the case of Cadiz waterworks Co –v- Barnett on the ground that it is the object of the Court to restrain the assertion of doubtful rights in a manor productive of irreparable damages.”

I think, be no doubt that the allegations in the proposed petition amount to a very grave attack on the directors of the plaintiff company, who are the same people as the directors of Forte's (Holdings) Lt. The publicizing of this attack could, therefore, have a damage effect on Forte's (Holdings) Ltd with the possibility of damage (possibly irreparable) to quite innocent shareholders of the company. In those circumstances, I do not doubt that this s a petition which is bound to fail and amounts in the circumstances to an abuse of the court process".

## **ANALYSIS**

13. In the case of RPA Group Fiji Limited -v- Pacific Marine and Civil Solution Pte Limited HBE 52 of 2019 Mansoor J explained his understanding of Section 524 (1) and (2) as follows:

“My understanding that any suit or proceedings against the company must be taken to mean any proceeding instituted against the company and pending in the High Court or Court of Appeal. In such case, the company or creditor or contributory may apply to the High Court or Court of Appeal for a stay of proceedings in terms of section 524 (1) (a) of the Act.

Section 524 (1) (b) provides that where any other suit or proceeding is pending against the company, such company or creditor or contributory may apply to the court having jurisdiction for winding up the company to restrain further proceedings in the suit or proceedings; the enactments language suggests that these are proceedings in courts other than the court in which the winding up proceeding is heard.

Such provisions are not out of place in insolvency legislation, and their likely object is to protect the company, which may be on its last legs, from incurring further liability and expenditure through litigation, so that creditors would have an even chance of recovering their debts from the company.”

14. I find that I do have powers under the Companies Act to grant a stay. Where the application is made prior to a winding up order, the application can be made under section 524 of the Companies Act.
15. The Applicants seeking Stay under section 524 of the Companies Act include the Company itself, the liquidators, official receiver and even the Creditors.

- 16. Whether or not the Applicant/Defendant has locus and if it does, how the Court should exercise their discretion will be determined in the merits of the application for stay under section 524 of the Companies Act.
  
- 17. In any event, if the Court finds that the winding up petition is an abuse of court process then the Court can usurp its inherent jurisdiction to impose an injunction to stay the winding up proceedings. All of this depends on whether there is sufficient evidence to show irreparable harm.

**PART D: ORDERS**

- 18. The Court Orders as follows:
  - (a) **The Court determines that it has powers to exercise its discretion to stay a winding up proceedings;**
  
  - (b) **That the matter will now proceed to Hearing of the Stay application;**
  
  - (c) **Costs in the cause.**



  
Justice Senileba Waqainabete-Levaci  
Puisne Judge  
30 October 2024