

IN THE COURT OF APPEAL, FIJI  
[APPELLATE JURISDICTION]

Civil Appeal No. ABU 0006 of 2018  
(HBC No. 02 of 2016)

BETWEEN : RAIVOTU LIMITED

Appellant

(Original Respondent)

AND : 1. PACELI GALE

(Original Petitioner/Deceased)

1A. NANISE TAVA aka NANISE GALE

(Substituted as per order of Court dated 2 November, 2018)

1<sup>st</sup> Respondent

2. Official Receiver

2<sup>nd</sup> Respondent

Coram : Almeida Guneratne, JA

Counsel : Mr. S. Koya for the Appellant  
: Mr. D. Toganivalu for the 1<sup>st</sup> (substituted) Respondent  
: Ms. S. Taukei for the 2<sup>nd</sup> Respondent

Date of Hearing : 24 August 2020

Date of Ruling : 18 September 2020

**RULING**

### Brief Background

- [1] This is an application (the Application) seeking leave to appeal and extension of time to appeal “the Master’s” decision dated 1 September, 2016 in making a “Winding up Order” (the order) against the Appellant on an application made by the Original petitioner (subsequently deceased and the above named 1<sup>st</sup> Respondent being substituted in his room) in the course of proceedings before this Court.
- [2] The “Official Receiver” (as provisional liquidator – hereafter referred to as the 2<sup>nd</sup> Respondent) having been added as a party has opposed the said application of the Appellant and to have it struck out as being an “abuse of process of Court”.
- [3] At the hearing before me all parties submitted that they will be relying on their respective written submissions after they made brief oral submissions.

### Appellant’s Submission

- [4] In its endeavor to seek leave to appeal and extension of time to appeal “the Master’s” said “winding up order” the Appellant has submitted thus, which I summarise as follows:-
  - (i) That, the said “winding up order” had been made on the Appellant’s Counsel failing to appear in Court, although an affidavit in opposition had been filed by the Appellant (and therefore was a matter of record and before the Master) Consequently, there was no order/ruling by “the Master” stating the reasons why the said “winding-up order” was made.
  - (ii) That, (being at pains to explain the delay and the reasons adduced therefor) there was only a delay of 16 months from when the “winding up order” had been made and 10 months from when an interim stay had been granted.

### Interim Reflections

- [5] I pause at this point to reflect on the length of the delay and the reasons for the said delay having given my mind to the well-established criteria laid down in the precedents. (Vide: NLTB v Ahmed Khan; CBV 02 of 2013, 15 March 2013 and Suva City Council v Setavana Saumatua; ABU 73 of 2017).
- [6] Even if the length of the delay was to be excused, I could not see any acceptable reason adduced by the Appellant for the said delay in as much as the “winding up order” was made for “non-compliance of the Appellant’s lawyers” and therefore not owing to “a mistake” on their part which might have been excused on the reasoning in the Supreme Court decision in Fiji Industries Ltd v. National Union of Factory and Commercial Workers (CBV 008/2016, 27 October, 2017).
- [7] Having said so, I looked at the Notice and Grounds of Appeal urged against the impugned winding – up order.

### Notice of Grounds of Appeal

- “1. The learned Master erred in fact and/or in law in holding that the Appellant Company was insolvent and not able pay its debts to the Respondent.*
- 2. The learned master erred in fact and/or in law in not taking into account the Appellant’s Affidavit in Opposition filed on the 9<sup>th</sup> day of June 2016.*
- 3. The learned Master erred in fact and/or in relying on a defective Demand Notice and failing to apply the Section 515 of Companies Act 2015.*
- 4. The learned Judge erred in fact and/or in law in allowing the Appellant Company to be wound up on the basis that the Solicitor in carriage failed to appear in Court.”*

- [8] The Appellant in its written submissions dated 16 May, 2018 have gone further in urging that:

“27. Ultimately it is for the Court to consider whether it is in the interests of justice, having regard to the irregularities in the Demand Notice, the Winding Up Petition and the Affidavit Verifying Debt.

28. We refer to paragraphs 7 to 13 of the Affidavit in Reply to Affidavit in Opposition of Summons for Leave to Appeal which states as follows:-

“7. There have been inconsistencies in the Winding Up Action. The Winding Up Action was given under Section 462 of the Companies Act 2015 in the sum of \$207, 405.00 (Two Hundred Seven Thousand Four Hundred and five Dollars).

8. Annexed hereto and marked with the letter “A” is copy of the Winding Up Notice dated 22<sup>nd</sup> day of January 2016.

9. I have been advised by the Appellant’s Solicitors that the Winding Up Notice was given under the wrong Section of the Companies Act 2015 and thus is defective.

10. The Winding Up Petition filed on the 3<sup>rd</sup> of May 2016, shows that the amount due and owing is in the sum of FJS\$212,405 (Two Hundred Twelve Thousand Four Hundred and Five Dollars).

11. Further the second page of the Winding Up Petition, the Winding Up Notice appears to be under Section 221 of the former Companies Act and the amount stated therein does not match the amount in the Winding Up Notice dated 22<sup>nd</sup> January 2016.

12. Annexed hereto and marked with the letter “B” is copy of the Winding Up Petition filed on the 3<sup>rd</sup> day of May 2016.

13. The Respondent filed Affidavit Verifying Debt on the 24<sup>th</sup> January 2017, which states a totally different sum owed compared to the Winding Up Notice and Winding Up Petition. The sum stated in the Affidavit Verifying Debt is \$186,402.00(One Hundred Eighty-Six Thousand Four Hundred Two Dollars).”

29. The Master of the High Court when making the Winding Up Order failed to see the irregularities of the amounts stated.”

[9] Before I proceed to make a determination on the Appellant’s application, I looked at the 2<sup>nd</sup> Respondent’s submissions and the 1<sup>st</sup> Respondent’s (now substituted) submissions as well.

2<sup>nd</sup> Respondent's (Official Receiver's) submissions dated 6 August, 2020

[10] The 2<sup>nd</sup> Respondent's submissions focusing as they do on Sections 531 and 543 (1) of the Company's Act, 2015 (the Act) I could see no merit in meeting the Appellant's case as a Company whose interests have been affected by a winding up order as I have re-capped at paragraphs [7] and [8] above.

[11] The said submissions state thus:-

*"3.8. In this case, the Official Receiver submits that since the Winding Up Order has been issued, the Company no longer has powers to carry on with or continue with any proceedings since the control of the Company's affairs now vests with the Official Receiver as the Provisional Liquidator. Accordingly, the Company does not have any locus to bring this action before this Honourable Court. The Defendants submit that the Appellant's application be struck out as being an abuse of the process of this Honourable Court".*

[12] For my part, I could not find logic and reason in that submission.

1<sup>st</sup> Respondent's (now substituted) submissions dated 6 July, 2018

[13] For the most part, the said submissions focus on procedural matters and I regret that the said submissions do not meet the grounds of appeal urged by the Appellant on "the merits criterion" as laid down in the NLTB Case (supra).

[14] The overriding issue being as to whether the Master of the High Court could have made a winding up order in the context of the several provisions of the Companies Act for "default of appearance of lawyers" *per se* failing to consider the affidavit in opposition of Niten Singh, the Appellant's Company Director, is in my view, a matter that goes to the root of the Matter (apart from the other grounds of appeal urged).

Determination

- [15] For the aforesaid reasons, I have no hesitation in granting the Appellant's application for there are sufficient reasons in granting the same so that the full Court may look into and settle the law (subject of course to appeal to the Supreme Court).
- [16] For the said reasons I also grant a stay of any further proceedings in the High Court on a consideration of the relevant case law.
- [17] Accordingly, I proceed to make my Orders as follows.

Orders of Court:

1. *The application of the Appellant for leave to appeal and extension of time to appeal is allowed.*
2. *The proceedings of the High Court are hereby stayed pending the hearing and determination of the Appeal by the Full Court.*
3. *The Appellant is required to take steps according to law as prescribed by the relevant Rules of Court and practice directions to prosecute the Appeal.*
4. *The Registrar is directed to call this matter on a convenient date to fix the matter for argument/hearing before the Full Court.*
5. *There shall be no order for costs in this application and the same shall be in the final cause.*



*Idelf Guncratne*

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**Almeida Guncratne**  
**JUSTICE OF APPEAL**