THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 101 of 2020

(HBE 12 of 2020)

BETWEEN	:	**VITI LEVU CONSTRUCTION PTE (FIJI) LIMITED**
		Appellant
AND	:	**MOBILE CRANE HIRE SERVICES PTE LIMITED**
		Respondent
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Mr. D. Toganivalu for the Appellant**
	:	**Mr. K. Patel for the 1st Respondent**
	:	**Ms. S. Taukei and Ms. N. Ali for the 2nd Respondent (Official Receiver)**
Date of Hearing	:	**25th January, 2021**

1st Respondent's supplementary written submissions and Appellant's Additional submissions filed on 4th February and 9th February respectively.

Date of Ruling	:	**3rd March, 2021**

RULING

[1] This is an application for enlargement of time for leave to appeal and a stay order under the applicable provision of Section 20 (1) of the Court of Appeal Act (Cap 12) against a winding up order dated 10th July, 2020 made by the High Court sealed on 24th July, 2020.

The High Court Order

[2] *"**UPON READING** the application for Winding Up dated 11 June 2020 and Affidavit Verifying Application sworn on 18 March 2020 and both filed herein on 8 June 2020, and Affidavit in Opposition of Mohammed Nayeem sworn on 2 July 2020 and filed herein on 6 July 2020;*

***AND UPON HEARING MR. KRISHNIL PATEL** of Messrs Krishnil Patel Lawyers of Counsel appearing for the Applicant and there being no appearance by the Respondent and their Counsel;*

IT IS HEREBY ORDERED:

1. ***THAT** Viti Levu Construction Pte (Fiji) Limited is wound up on the basis that it is indebted to Mobile Crane Hire Services Pte Limited, and is insolvent and unable to pay its debts, and in the circumstances that it is just and equitable that the Company be wound up.*
2. ***THAT** the Official Receiver is appointed Provisional Liquidator of the Company.*
3. ***THAT** the Respondent is to pay costs of FJ$1,500.00 to the Applicant."*

[3] When this matter came up before me on 17th November, 2020 the 1st Respondent's Counsel consented to an interim order being granted and all Counsel having agreed to have the substantive stay application argued along with the application for leave for extension of time to appeal, the matter was taken for hearing in its entire conspectus on 25th January, 2021.

The arguments in Summary in the light of the Affidavits filed, the Written Submissions and the Oral Submissions made at the hearing

[4] I shall take them in tandem and assess under the relevant factors in the light of established legal principles.

The length of the delay

[5] This is admitted by the Appellant as being 76 days. (vide: paragraph 12 of the Appellant's written submissions filed on 21st January, 2021)

The reasons for the delay

[6] The Appellant has submitted the following reasons for the delay (viz :)

(a) The failure of the initial retained Counsel to have appeared at the Winding Up hearing that had resulted in the High Court making a Winding Up order;
(b) A motion to stay the Winding Up being dismissed by Court, the Appellant on fresh legal advice had submitted a payment proposal to pay a sum of $131,236.00 in five instalments as being the amount due as being "the debt" (vide: 'MN7');
(c) Dissatisfied with that advice, on the basis that, the Appellant (i) had disputed the debt and (ii) it was still solvent, the Appellant had once again changed lawyers who had filed the present application.

[7] As against the reasons adduced by the Appellant for the delay the 1st Respondent submitted that:

(a) In a much as, the Appellant's reasons for the delay are the default of appearance on the part of the initially retained lawyers and the improper advice given by the subsequently retained lawyers the same cannot be regarded as excusable reasons;
(b) The *cursus curiae* as reflected in the precedents shows that the reasons adduced by the Appellant cannot be accepted in which regard the Respondent cited the case of **Bank of Scotland .v. Pereira & Others** [2011] 3 AllER 392 and a series of rulings made by me. (vide: **Gregory Clark .v. Zip Fiji** [ABU 3 of 2014], 5th December, 2014**, Ghim Li Fashion (Fiji) Ltd .v. Ba Town Council** [2014] FJCA 192 and **Fiji Industries Ltd .v. National Union of Factory and Commercial**

Workers referred to by the Supreme Court in Appeal against my ruling in that case. [2017] FJSC 30.

Reflections and Assessment on the criterion of Reasons for the delay

[8] In the Fiji Industries Case (supra), the Supreme Court expressed a somewhat qualified view to the approach I had adopted in the Court of Appeal. (Per His Lordship, Keith, J.) However, it is to be noted that although the Supreme Court had granted special leave to appeal against my Ruling in the Court of Appeal, eventually dismissed the Appeal.

[9] I also took noted of a recent judgment of the Full Court in the case of **I-Taukei Land Trust Board .v. Waqa** where it was said "Legal practitioners should be conversant with the law and rules in respect to any application and/or Appeals filed in Court" (per Kumar, J.A. (as His Lordship then was) (at paragraph 10 of the judgment), (ABU 0138 of 2016), 13th July, 2018.

[10] In a very recent Ruling of mine in **Maciu Vakaceguilomaloma Naivalu .v. Superior Roofing (Fiji) Pte Limited,** ABU 091 of 2020, 12th February, 2021, I took noted of that Full Court judgment in **I-TLTB .v.Waqa** (supra).

[11] Apart from all that I was compelled to take into consideration the following factors as well – viz:

(i) While the Fiji Industries Case (supra) involved the misapplication of a Practice Direction relating to time limits for appealing during the Court vacation, here is a matter concerned with "default of appearance", on the part of the Appellant's initial lawyers.

(ii) The Appellant then retains a second set of lawyers whom the Appellant complains gave improper advice.

(iii) There is also the fact that, after the winding up order, instead of filing an application under Order 35 Rule 2 of the High Court Rules, notice of motion and supporting affidavit had been filed to stay the winding up order together with a writ of summons and statement of claim.

[12] I also gave my mind to a recent ruling of mine where I extended the liberal view expressed by Keith , J. in the Fiji Industries Case (supra), where I found on the material placed by the Appellant (in that Ruling of mine) that there was a breakdown of communications between the lawyers and the party concerned. In contrast, in the present case, I found no such material to resolve the matter in the Appellant's favour. (See: the Ruling in **Jone Batinika v. I-Taukei Land Trust Board** [2020] FJCA130, 14th August, 2020) the blame is being put fairly and squarely on two sets of lawyers. Where was the Appellant (or any representative) on the day the winding up order was made?

[13] For the aforesaid reasons I am unable to hold that acceptable reasons have been adduced by the Appellant for the delay.

Criterion of Merits of the Case and prospects of success

[14] In summary the Appellant submitted that: -

(a) The affidavit in opposition to the application for winding up (that of, Mohammed Nayeem, the Manager of the Appellant Company) dated 2nd July, 2020 ought to have shown that there was a "genuine dispute" as to the existence of the amount of "the alleged debt."
(b) The Appellant had paid $62,445/47 worth of invoices and that the Respondent was still claiming a further $131,236/= (MNO2)
(c) The impugned judgment of the High Court does not clearly state that it had considered the said affidavit in opposition.
(d) The Court failed to consider that the Respondent was a subcontractor to the Appellant who was contracted to do work for the Public Rental Board (PRB) who had stopped the work of the Appellant and Respondent due to the poor workmanship of the Respondent and this was conveyed by the Appellant to the Respondent.
(e) The Appellant did not receive any statutory demand or notice.

(f) The Appellant was in a position to satisfy Court that it was solvent and consequently having regard to Section 513 of the Companies Act, No. 3 of 2015 (the Companies Act) which lays down the grounds upon which a winding up order may be made, the relevant ground in the instant case being "insolvency," there is nothing in the transcribed verbatim notes of the judge annexed as "SB_2" hereto to the affidavit in opposition of Suresh Bhai on behalf of the (1st) Respondent Company to suggest that, that aspect had been considered by the learned High Court Judge and that,

(g) Had the learned Judge given his mind to that aspects , His Lordship may well have formed a different view and exercised judicial discretion under Section 523 (1) of the Companies Act and not made the winding up order he made but some other appropriate order (the parenthetical interpolation is mine).

(h) The learned Judge should have adjourned the matter when Appellant's lawyers had failed to appear.

[15] Moving further, the Appellant drew my attention to "a Notice of intention to Appear on Application "dated 3rd July, 2020 filed in the High Court wherein the Appellant had filed opposing the application for winding up on the grounds that: -

"1. The debt is disputed; and

2. That the statutory demand was never served on the Company (i.e. the Appellant Company)"

[16] The Appellant then relying on the submission, that, the learned High Court Judge had not adequately considered the Affidavit of Opposition to the winding up application of the Manager of the Appellant Company (supra, paragraph [14] in this Ruling) concluded, that, it had sufficient grounds to sustain the application before this Court.

1st Respondent's submissions in Counter

[17] The 1st Respondent's submissions in essence may be summarised as follows – viz:

(a) As the order made by the learned Judge shows, "the affidavit in opposition" had been considered despite objection by the (Respondent's) Counsel.

(b) Having failed to set aside the statutory demand, the Appellant was required to seek leave of Court in order to dispute the debt. (vide: Sections 513, 529 read with Rules 4 (3), 15 and 115)

(c) The Appellant had failed to provide information in its affidavit in opposition to show solvency (MN03) which was noted by the learned Judge. The Accountant's report (MN08) showed the Company's liabilities were greater than the assets and that it could not meet its short term commitments. This was at the hearing of the stay application which was also noted by the learned Judge, vide: Annexure SB5 to the Affidavit in Opposition) Apart from that, the solvency report was not signed. Appellant needed to produce audited financial accounts.

(d) The Appellant after the winding up, accepted and agreed to pay the debt to the official receiver (MN7).

(e) Sections 516 and 529 of the Companies Act are mandatory provisions which the Appellant had failed to comply with. (vide: **SkyGlory Pte Ltd v. Ben** [2020] FJCA 168, 8th September, 2020).

Reflections and Assessment on the Criterion of Merits/Prospects of Success

[18] I shall break up the issues that need to be addressed under the following heads:-

(a) Affidavit in opposition filed in the High Court to the application for winding up

[19] I cannot agree with the Appellant's submission that, the High Court did not consider the affidavit in opposition. In **Raivotu Ltd v. Gale** [2020] FJCA 173, I gave leave on my finding

that the Court in that case had failed to consider the affidavit. Thus, I agree with the 1st Respondent's submission that the case is clearly distinguishable from the instant case.

The "disputed debt"

[20] In that regard, the 1st Respondent, adverting to "MN7" where the "alleged debt" of $136, 236/= had been acknowledged, argued that, the Appellant was not entitled to resile from that.

[21] While I found that, that argument no doubt warrants merit, nevertheless I took account of the fact that, that was the reason why the Appellant had to change its lawyers for a second time, although that reason *per se* as an excuse for the delay I was not prepared to accept.

[22] Consequently, I addressed my mind to the "issue of solvency" of the Appellant Company.

Issue of Solvency

[23] In that regard, I looked at the affidavit of Alim Begg dated 10th August, 2020 and the Notice of Intention to oppose the application for winding up on the basis that:

1. The debt is disputed absolutely, and
2. The statutory demand was never served on the Company. (in the light of Mohammed Nayeem's affidavit dated 2nd July, 2020).

Matters that arose for consideration in that light

[24] In so far as the Appellant's contention that the debt is disputed absolutely, I had to take into consideration the 1st Respondent's contention as to whether the Appellant could resile from the proposed settlement contained in 'MN7'.

[25] However, the Appellant's contention that, the statutory demand was never served on the Appellant's Company struck me as a legal issue that goes to the root of the matter (though raised at the stay proceedings had before the High Court).

[26] It is to be borne in mind that, the 1st Respondent's main contentions being based on the Appellant's lapses and/or its lawyers to comply with the mandatory provisions of the Companies Act, in my view, going back to that requirement of serving the statutory demand, I could not find any reference to that in the winding up order of the High Court.

[27] Consequently, I found it necessary to examine the statutory provisions impacting thereon.

The Impacting Statutory Provisions

[28] I began by looking at Section 513 of the Companies Act (2015) which lays down the circumstances in which a company may be wound up by Court.

[29] The relevant provisions being Section 513 (c) and (d) of the Companies Act (hereafter referred to as "the Act") I reproduce then as follows:

> *"513 (c) the Company is insolvent."*
> *513 (d) the Court is of opinion that it is just and equitable that the Company should be wound up."*

[30] I pause here to reflect on the impugned High Court Order of 10th July, 2020 in the light of the said statutory provisions.

[31] The High Court in its order determined that on the application of both those provisions that:

> *"the Appellant Company was indebted to the 1st Respondent Company and is insolvent and unable to pay its debts and in the circumstances that it is just and equitable that the Company be wound up." (vide: Paragraph (2) of this Ruling supra.)*

[32] Then there arose for consideration Section 514 of the Act which decrees that:

> *"514 (1) A Company……is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable."*

[33] That provision is followed by Section 515 of the Act which provides thus:

> *"**515** Unless the contrary can be proven to the satisfaction of the Court, a company must be deemed to be unable to pay its debts –*
>
> *(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding $10,000 or such other prescribed amount then due, has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due ("statutory demand") and the company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of notice; or*
>
> *(b) if during or after a period of 3 months ending on the day on which the winding up application is made –*
>
> *(i) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;*
>
> *(ii) a receiver or manager has been appointed, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or*
>
> *(iii) it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court must take into account the contingent and prospective liabilities of the company."*

[34] Having given my mind to the said provisions, though, the High Court had made the winding up order on the occasion of "default of appearance" of the Appellant's lawyers at the time, I could not see any material evidence before the Court, in making that order (*ex parte*). And I do not hesitate in saying that, even where there had been "default of appearance", nevertheless, the Court was obliged to satisfy itself on the criteria to make order for "winding up of a company."

[35] In my view, a winding up order of a Company, even in those circumstances, *prima facie*, perhaps could be said to have been justified, the Court was obliged to consider "the stay of winding up execution proceedings "subsequently initiated through the Appellant's newly retained lawyers (3rd set) even after resiling from the previous 2nd set lawyers advice to pay a sum of $131,236/=.

[36] That I say having regard to Section 516 of "the Act" where the Appellant Company had the right to apply for an order setting aside a statutory demand served on it.

[37] However, as the Appellant argued before this Court no such statutory demand had been served on it by the 1st Respondent Company (and indeed I could not find any material on record in that respect.)

[38] Consequently, there remained "a dispute" as to "the alleged debt", which brought to my mind the provisions of Section 517 of the Act as well into reckoning.

[39] Furthermore, in that background of the factual matrix, I have no hesitation in posing the question whether, the High Court in refusing "a stay" sought before it, had failed to address its mind to the provisions of Section 524 of "the Act."

[40] My task as a Single Judge of this Court is not to answer those questions but to leave for the Full Court to answer and I am convinced there is sufficient reason for doing so and accordingly I am inclined to grant leave to appeal notwithstanding the lapse of time.

[41] If there was no statutory demand, then even in *ex parte* proceedings, could the learned Judge have made a winding up order?

[42] Having said so, reverting back to the "issue of solvency", I took note of the numerous creditors who have supported the Appellant as to its credit worthiness (vide: A1 to A3 as marked by me in the Record supplied to me. Of course annexed as such in the proceedings before this Court.

[43] Those considerations brought me to consider the matter of "the stay" before me.

Re: The Matter of Stay Order

[44] In that regard I gave my mid to the principles laid down in **Natural Waters of Viti Ltd. v. Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA46; **Prasad v. Hamid** [2004] FJCA10; **New World Ltd v. Vanualevu Hardware (Fiji) Ltd** [2015] FJCA172; **Nath v. Narayan** [2020] FJCA67 and **Saheed Ahmed v. Manoj Kumar & Others** [2020] FJCA89.

[45] Having done so, I was inclined to grant "a stay" which had been sought, however, conditionally, also having taken into consideration the 1st Respondent's submissions on the criterion of Prejudice, where the 1st Respondent has contended that, the winding up order is awaiting execution as against the Appellant's counter thereto, that, should leave to appeal be granted, and a stay is not granted, the appeal will be rendered nugatory.

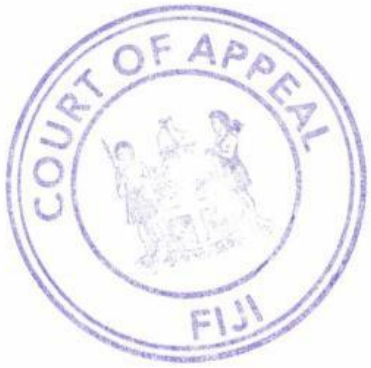
[46] Thus, having regard to the issues of law involved, the facts and circumstances of the case and the rival contentions I felt it would serve the interests of both parties to make an order maintaining the *Status Quante* until the appeal is heard and determined by the Full Court in which regard I was convinced that this is a fit case I should act in terms of the jurisdiction vested in me as a Single Judge under Section 20 (1) (k) of the Court of Appeal Act.

[47] "Section 20 (1) (k) "……..A judge of the Court may……generally hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."

[48] In pursuance of that provision, while I make order granting "the stay" sought by the Appellant, I direct that the Appellant shall not dispose of its assets until the final hearing and determination of the appeal by the Full Court.

Orders of Court

1. Leave to Appeal notwithstanding the lapse of time is allowed.
2. Execution of the winding up order issued by the High Court is stayed subject to the condition that the Appellant shall not dispose of its assets until the final hearing and determination of the Appeal by the Full Court.
3. In the overall facts of this case and having particular regard to Section 515 (a) of the Companies Act, I make no order as to costs.
4. The Registrar is directed to have this matter mentioned on the next call over date with notice to parties to make consequential orders.



.....

Almeida Guneratne

JUSTICE OF APPEAL