

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 104 OF 2019
[Winding Up Action No. 42 of 2019]

BETWEEN : **ONEWORLD FLIGHT CENTRE LIMITED** *Appellant*

AND : **TELECOM FIJI LIMITED** *Respondent*

Coram : **Dr. Almeida Guneratne, P**
Basnayake, JA
Jameel, JA

Counsel : **Mr V. Filipe and Mr V. Rokodreu for the Appellant**
Ms P.L. Narayan for the Respondent

Date of Hearing : **13 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Almeida Guneratne, P

[1] This is an appeal against a “*winding up order*” (the Order) made by the Master of the High Court (the Master).

“The Order”

“_____ upon hearing the Creditor, I’m satisfied that the application is in order. There was a compliance certificate issued in this matter. There is no evidence that the debt has been paid off and no evidence to say that the company is solvent. Hence, I’m granting an Order on the application, the company is wound up. Official Receiver is appointed as provisional liquidator. Further the Applicant is awarded costs in the sum of \$1,000 to be paid in 14 days _____”
(vide: page 276 of the Copy Record).

[2] **The Grounds of Appeal**

(vide: pages 4 – 5 of the Copy Record)

- “1. *The Learned Master erred in law in determining by a letter: not via a Ruling or Judgment, though the Senior Court Officer that the 7 days within which the Appellant could file and serve Form D6 and Affidavit in Opposition pursuant to Rule 15(1)(b)(i) and (ii) had lapsed when the same was adjourned at the first hearing on 12th August 2019 and fixed for a new hearing on 7th November 2019.*
2. *The Learned Master erred in law and in fact in directing the High Court registry to refuse the filing by the Appellant of its Form D6 and Affidavit in Opposition which were filed on 30th October 2019; 9 days prior to the hearing on 7th November 2019.*
3. *The Learned Master erred in law and in fact in advising the Appellant through Senior Court Officer that the Appellant cannot oppose the application without leave of the court, yet dismissed and struck out the Summons and Affidavit in Support of the application for extension and leave of the Court to appear at the hearing by the Appellant which was fixed for first call on 11th November 2019 – a public holiday.*
4. *The Learned Master erred in law and in fact in dismissing and striking out the Summons and Affidavit in Support of the application for extension and leave of the Court to appear at the hearing by the Appellant which was fixed for first call on 11th November 2019 – a public holiday, on the ground that the law clerk of the counsel for the Appellant should have checked the date given by the Court registry 11th November 2019 – a public holiday.*
5. *The Learned Master erred in law and in fact in ordering that the Appellant be wound up and that the Official Receiver be appointed liquidator by her erroneous considerations hereinabove.*

6. *The Learned Judge erred in law and in fact in ordering costs against the Appellant in favour of the Respondent.*”

Some initial reflections on the grounds of appeal urged

[3] I break them into three parts viz:

1st part (the substantive “*winding up*” order – ground 5).

2nd part (the “*alleged procedural lapses*” complained of – grounds 1 to 4).

3rd part (the order made as to costs – ground 6).

[4] Taking first the 1st part, the winding up order made by the Master (*ante*, paragraph [1] *ex facie*, I could not find anything there to fault it.

[5] Indeed, in ground 5 urged and in the oral submissions made by Mr Filipe that appeared to stand vindicated, learned Counsel’s contentions being based on the 2nd part referred to in paragraph [3] *ante* (the procedural lapses). He contended that, if those procedural lapses were to be upheld by this Court, then the resulting “*winding up order*” would need to be set aside.

[6] Consequently this Court’s task was reduced to look at grounds 1 to 4 of appeal (the alleged procedural lapses).

[7] Having made those initial reflections I shall now give my mind to the proceedings on record (the evidence of witnesses), the relevant provisions of the Companies Act and the Rules made thereunder, the Master’s response thereto, before I make my determination on the grounds of appeal 1 to 4 urged and the submissions made by respective Counsel before this Court.

[8] I wish to say at this point that, I shall not be crowding this judgment by reproducing the relevant provisions of the Companies Act for the same stand manifest in the Master's response to the stances taken by respective Counsel before Her Ladyship.

Discussion

[9] Having gone through the proceedings and submissions taking them against the grounds of appeal referred to in paragraph [7] above, I shall deal with them under specific heads-as follows.

Seeking an adjournment of the hearing date re: the Winding-up application

- [10] (i) This lies at the root of the complaint.
- (ii) The Court had fixed the date of hearing as 7th November, 2019. However, the solicitor's copy bore the date 11th November. The Court noted that the "*Counsel's clerk should have cross-checked the dates before leaving the Registry*" (vide: page 266 of the Copy Record).
- [11] I also saw the condescending stance taken by Mr Valenitabua (for the Appellant) reflected at page 271 of the Copy Record viz:

"Mr. Valenitabua: _ _ _ to reply to the affidavit in answer by the company, no by the applicant, TFL. My application today is for this hearing to be vacated and the matter be adjourned before you, Master, on the 11th of November as we had served this Summons on my learned friend's office.

Ms. Master: 11th November, who is sitting on November? I don't know what to do with the Registry Staff. Even your Clerk when picking up the document didn't check what the date is, 11th November?

Mr. Valenitabua: Oh, it's Prophet Mohammed's birthday. I'm sorry, I sincerely apologise, we should have checked.

Ms. Master: In the first place the Registry should not have processed the application without my approval.

Mr. Valenitabua: I understand. Our calculation was that we were filing within time, the Affidavit in Opposition.

Ms. Master: When the matter was first listed for hearing that's the date you follow.

Mr. Valenitabua: Yes, very well. We accept _ _ _

Ms. Master: The only reason the last date was vacated was because of your Application for Stay.

Mr. Valenitabua: Yes

Ms. Master: There was no other reason for me to _ _ _

Mr. Valenitabua: Yes, I accept that Ma'am. But we sought guidance from the Registry and I believe they consulted you, Master. And their position was for us to file enlargement of time. So, we've done that and I'm asking if it could be re-dated to a date that's suitable to the Court and then we can re-serve my friend. I can ask for her copy back while she is still here."

[12] I myself wondered, if Counsel's mind had been left in some confusion or doubt as to the correct date, 11th November being a public holiday and therefore a "*dies non*", as to how he did appear in Court on 7th November, in as much as, in my assessment, there had not resulted any prejudice to him. No motion seeking an adjournment of the said date 7th November was filed. Appearing in Court on the said date of hearing and seeking an adjournment certainly would have been to the Respondent's prejudice, the Respondent's Counsel having come prepared for the hearing.

The other reasons given by the "the Master" in refusing an adjournment of the hearing date

[13] In the course of proceedings (on 7th November), the learned Master noted that:

“___ the Affidavit in Support filed with the Summon. There is no reason stated why the Company failed to comply with the rules and enter appearance as per Rule 15 of the Winding Up Rules.” (pages 267 of the Copy Record).

[14] Not stopping there, the learned Master in her judicial endeavour to see whether an adjournment of the hearing date ought to be allowed, posed the following question for her to answer which she did and made consequential orders thus:

“Even if I am to allow an adjournment will the company succeed with opposing the application by disputing the debt?”

Section 529 of the Act reads:

- 1. In so far as an application for a company to be wound up 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. The company relied on for the purpose if 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 satisfied that the ground is material to proving that the company is solvent.*

The Winding application is for failure to comply with a demand notice. The company did not make any application to set aside the Demand Notice.

Neither is there any application made for leave under Section 529 to oppose the Winding Up application.

I do not find the Opposition by the company will succeed and it would be futile activity to allow any adjournment of the hearing of the application.

Application for adjournment is refused. Application for Winding Up will be heard today as scheduled.

Ms. Pratap: We are creditor petitioner.

Court: Its applicant

Ms. Pratap: Applicant filed on ground. Respondent failed to pay the sum owing to client \$19k. Services provided to 2015 – 2017.

Applicant issued invoices to (paragraph 5 and 6). Statutory demand served Respondent unable to pay debt.

We filed application for Winding Up. All procedure following compliance Certificate issued on 24 July 2019. Form D5 filed.

Respondent owes over \$19l.

Court: Upon hearing Mr. Pratap am satisfied application in order.

*Compliance Certificate issued by DR
No evidence debt is paid off. No evidence company is solvent.*

Official Receiver appointed as provision liquidator.

Appellant awarded cost summarily assessed as \$1,000 to be paid in 14 days.”

Submissions made by respective Counsel at the hearing before this Court

[15] Elaborating on grounds 1, 2, 3 and 4 of appeal urged and the written submissions filed on the date of the hearing, Mr Filipe for the Appellant made a valiant effort to assail the Master’s observations and the inferences and/or conclusions drawn therefrom as recounted by me above.

[16] Learned Counsel adverted to what is reflected at page 86 of the Copy Record, the contents of the letter (communication by the Registry) on the 7 days time limit contemplated in Rule 15(1) of the Companies Act leading upto the date the hearing commenced (7th November), wherein, drawing this Court’s attention to pages 271 to 274 of the Copy Record, Counsel finally submitted that he had in fact submitted the “D6 form” (vide: page 87 of the Copy Record).

[17] Ms Narayan on behalf of the Respondent in counter submitted (following her written submissions) that:-

- (a) the Appellant has failed to comply with the mandatory requirements of Rule 15(1) and Section 529 of the Companies Act;
- (b) the statutory mandated time limits contemplated therein not having being complied with in the first instance, the Appellant was required to seek leave of this Court, notwithstanding that lapse if the Appellant was to proceed any further which the Appellant failed to do;
- (c) winding up proceedings being required to be concluded within 6 months, the Appellants lapses have resulted in the Court not being able to achieve that.
- (d) Thus, Ms Narayan submitted there is no merit in the said grounds 1, 2, 3, and 4 of the appeal urged by the Appellant.

Assessment of the respective submissions of Counsel

[18] Having given my mind to the rival submissions against the background of the learned Master's observations and the inferences/conclusions drawn therefrom (recounted in paragraphs [10] to [14] above), I was unable to find any error, misdirection or non-direction contained therein.

[19] Consequently, I reject the grounds 1, 2, 3, and 4 urged in the Appellant's Notice of Appeal.

Re: Ground 5 of the Appeal

[20] In that regard I hark back to what I have articulated at paragraph [5] above and, in conjunction with what I have held in regard to grounds 1 to 4 of the appeal urged in the Appellant's Notice of Appeal, consequentially, I reject the said ground.

Re: Ground 6 of the Appeal

[21] In view of the fact that the 1st to 5th grounds of appeal urged by the Appellant in the notice of appeal have been rejected this ground does not arise for consideration and therefore, *ipso facto*, it is rejected.

Determination

[22] On the basis of the forgoing reasons, I dismiss the present appeal.

[23] Not taking anything away from that determination, yet, I put to Ms Narayan, (Counsel for the Respondent), although the “*demand notice*” for winding up had not been complied with (no doubt, falling foul of Rule 15(1) and Section 529 of the Companies Act), given the fact that, the Appellant has paid the debt due subsequently (not disputed), as to whether the parties could agree to resolve the matter in a bid to save the Appellant Company being struck off from the Companies Register.

[24] Ms Narayan’s response to my suggestion was that, the debt subsequently paid is in the hands of the “*the Official Receiver*” and therefore she could not consent to any order based on the suggestion made by Court.

[25] I could not fault Ms Narayan’s said response.

[26] *Proposed Orders:*

- 1) *The appeal to stand dismissed.*
- 2) *No costs in the circumstances of the case.*

Basnayake, JA

[27] I agree that this appeal should be dismissed with costs of \$5,000.00 to be payable by the Appellant to the Respondent within 21 days from the date of this judgment.

Jameel, JA

[28] I agree with the judgment of Basnayake, JA, that the appeal must be dismissed with costs of \$5,000.00 in favour of the Respondent.

Orders of Court:

- 1) *The appeal is dismissed.*
- 2) *(By majority) The Appellant is ordered to pay to the Respondent a sum of \$5,000.00 as costs within 21 days of this judgment.*



.....
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

Solicitors

Valenitabua & Associates for the Appellant

Prem Narayan Legal Practitioner for the Respondent