

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

**COMPANIES JURISDICTION**

**Winding Up**

Cause HBF 20 of 2009

**IN THE MATTER of VIMAL INVESTMENTS  
(FIJI) LIMITED**

a limited liability company having its registered office at 17, Namoli Avenue, Lautoka.

**AND**

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

Counsel : Pillai Naidu & Associates for the Petitioner  
Faiz Khan Lawyers for the Company

# **DIRECTIONS**

**INTRODUCTION**

- [1]. Before me is a petition filed by Sigatoka Electric Limited (“SEL”) to wind up Vimals Investments (Fiji) Limited (“VIFL”). The petition alleges that VIFL owes SEL an undisputed debt of \$4,385.00 plus interest of 13.5% from 13 June 2008 till 15 November 2010 in the sum of \$1,402.90 plus daily interest at the rate of 13.5% till the date of repayment. The debt is alleged to be due and owing in respect of goods and services provided by SEL to VIFL.
- [2]. An affidavit verifying petition is duly filed. No issue is raised regarding this.
- [3]. The petition has been duly advertised in a local daily as evident in the Memorandum of Due compliance filed.

**DEBT NOT DISPUTED**

- [4]. The debt in question is not disputed. This is what I gather from the affidavit of Sanjani Lata, a law clerk of Pillai Naidu & Associates, which law firm acts for SEL. The debt is also acknowledged by one Ravinesh Ameet Prakash, an Accountant in the employ of VIFL.

## **FAILED SETTLEMENT**

- [5]. VIFL had offered to settle the debt by three post dated cheques of equal instalments vide a letter dated 02 February 2011 by Faiz Khan Lawyers. That offer was accepted by Pillai Naidu & Associates for SEL vide letter dated 15 February 2011. However, SEL's acceptance was conditional upon the payment of costs and interest.
- [6]. Notably, at the time of the parties were attempting settlement, the debt had been outstanding for some 3 years or so.
- [7]. VIFL was not amenable to having to pay interest and costs. While the company does not dispute and is willing to settle the principal debt, it disputes whether or not the petitioner is entitled to wind up the company on account of unpaid interests and costs alleged.

## **OBSERVATIONS**

- [8]. I observe that there is nothing in this case to suggest that VIFL is insolvent in the sense of being unable to pay its debt as they fall due. I say that because VIFL has filed an affidavit acknowledging the debt and has offered to settle the principal sum owing. SEL however is insisting that the company pay both the principal sum as well as costs and interests.

## **ISSUES**

- [9]. It is an abuse of process to use the winding up proceedings to enforce a debt which is being disputed on substantial grounds<sup>1</sup>. It is also true that the concern of this court when presented with a petition to wind up the company is whether or not the company is insolvent in the sense of being unable to pay its debt as they fall due. In light of these, the question is, whether interest, claimed on an admitted debt, and costs, can be entertained by this court as a ground to maintain the current proceedings?

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<sup>1</sup> see Re Lympne Investments [1972] 2 All ER 385.

## DISCUSSION

[10]. Generally, costs and interest are both awarded at the discretion of the court. But does a companies court seized with a winding up matter have the same discretion?

[11]. Rule 263 of the Companies (Winding Up) Rules envisages the awarding of costs.

*Power to order costs of winding-up to be paid out of assets*

**263.** The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding-up in such order of priority as the court thinks just.

[12]. Rule 90 provides that a creditor may prove for interest.

*Interest*

**90.** On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed, and which is overdue at the date of the commencement of the winding-up, the creditor may prove for interest at a rate not exceeding 6 per cent per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving notice that interest will be claimed from the date of the demand until the time of payment.

[13]. These provisions apply in a post winding up order where the company has gone into liquidation and the creditors have lodged their claims and are having to prove their debts before the liquidator or official receiver.


[14]. But, if costs and interest can be considered at that stage of the winding up of an insolvent company, where assets are being applied and distributed to satisfy liabilities, it would seem unfair to say that costs and interest cannot be considered in the case of a solvent company which has simply not bothered to settle a rather small debt until two years after the presentation of the petition and three years after the debt became due. In fact, it would encourage debtors to avoid or hold off payment until a winding up petition has been presented in court, knowing that they will not have to pay costs and interest, and knowing that, if it is a rather small amount of debt as is the case here, it would most likely not be followed by a civil action to recover interest and costs.

[15]. The unfairness in that argument is also obvious in this: if a winding up order had been made in this case by reason of VIFL's inability to pay debts as they become

due, costs would have to be payable pursuant to Rule 263 and interest also pursuant to Rule 90 (for further reading on the subject, an Article by Lee Eng Beng T Claims for Interest in Winding Up and Bankruptcy 9 S.Ac.L.J<sup>2</sup> is insightful).

- [16]. Also, the unfairness in the logic of VIFL's argument is that, if the petitioner were to mount a separate claim in the civil court for costs and interest, it would prove even more costly for the petitioner and that extra unnecessary cost (and interest) will have to be borne ultimately by the solvent VIFL.
- [17]. There has been no submission before me by either counsel on the validity or otherwise of the demand notice or the petition in this case. I am not inclined to entertain any further application on these in a case which could be resolved simply by common sense and I hope that good sense will prevail between the parties that they will settle this rather small claim.
- [18]. The argument that the winding up proceedings should not be used merely to decide a dispute regarding the interest for which a civil court is the proper forum, I agree with. But in this case, the dispute about interest is a bona fide one which has arisen in the course of argument and I think the best course to adopt is to use my discretion and encourage the parties to settle on this. I will now adjourn the case to **Wednesday 29 April 2015 at 10.30 a.m.**



  
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Anare Tuilevuka  
**JUDGE**  
24 April 2015

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<sup>2</sup> [http://www.sal.org.sg/digitalibrary/Lists/SAL%20Journal/Attachments/190/1997-9\(1\)-SAcLJ-051-Lee.pdf](http://www.sal.org.sg/digitalibrary/Lists/SAL%20Journal/Attachments/190/1997-9(1)-SAcLJ-051-Lee.pdf).