

IN THE HIGH COURT OF FIJI
COMPANIES JURISDICTION

WINDING UP NO. 07 OF 2017

IN THE MATTER of **VIVEK INVESTMENTS PTE LTD** a limited liability company having its registered office at C/- Palas Auto Service Ltd, Nakavu, Nadi, Fiji.

A N D

IN THE MATTER of the **COMPANIES ACT**

Counsel : Mr. Rupesh Singh, for the Petitioner instructed by Messrs PATEL & SHARMA, Barristers & Solicitors.
: Mr. Ashnil Narayan, for the for the Respondent - instructed by Messrs. A.K. Lawyers
Date of Hearing : 16th August, 2017.
Date of Ruling : 25th September, 2017.
Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

[On Stay Pending Appeal]

[A] **INTRODUCTION**

1. This is an application by way of summons filed on 21st July, 2017, by the Respondent Company, VIVEK INVESTMENTS PTE LTD, (Respondent) praying, *inter-alia*, for the following reliefs, in relation to the Order made by the learned Master on 4th July, 2017, in the above styled action, which is presently on appeal.

- a) A stay of any further proceedings, procedures, and steps to be taken pursuant to the winding up order pending the determination of the Appeal in Civil appeal No. ABU 0081 of 2017;
 - b) An interim stay until the determination of this application.
2. This summons for stay is supported by an Affidavit of Jitesh Pala sworn on 21st July, 2017. The Respondent , in addition to the above Affidavit, relies on following Affidavits too;
- A. The Affidavit in reply of Jiwam Ram aka Shiu Ram (Director of the Petitioner Company) sworn on 31st July,2017;
 - B. The Affidavit in response by Jitesh Pala sworn on 08th August , 2017;
 - C. The affidavit of Jitesh Pala sworn and filed on 16th June, 2017 in support of the summons to strike out the winding up application. (This affidavit is also titled as 'Affidavit in Opposition')
3. The application for stay being supported on 28th July, 2017, an interim stay was granted by me pending the hearing till 16th August, 2017, and same stands extended until today, pending this ruling.
4. The learned Counsel for the Petitioner Company strongly opposes the application for stay basing on the averments in the aforesaid reply affidavit of Jiwam Ram(aka) Shiu Ram, and the contents of the extensive written submissions tendered and oral submissions made at the hearing.

[B] BACKGROUND

5. The tussle between the parties , in relation to the issue in hand, commenced in this Court with a winding up application being filed by the Petitioner on 22nd May, 2017, moving to wind up the Respondent Company on account of an alleged debt in a sum of \$ 450,000.00 ,purportedly, being the Value Added Tax (VAT) in relation to the sale of the Petitioner's properties comprised in Certificate of Titles Numbers 37185 and 37803, unto the Respondent, which the Petitioner, subsequently, claimed as due and payable by the Respondent.

6. It is said that the Petitioner, having failed in its attempts to recover the same through various correspondences, issued a Statutory Demand dated 25th April, 2017, under Section 515 of the Companies Act and thereafter, same being not complied with by the Respondent, the Petitioner commenced winding up proceedings on 22nd May, 2017.
7. A Director of the Respondent Company, namely, one Jitesh Pala, filed an Affidavit dated 16th June, 2017, along with the Summons to strike out the winding up application, which he claims as an opposition to wind up too and denied the liability of \$ 450,000.00.
8. Jitesh Pala has revealed that the said sale and purchase took place pursuant to an agreement entered in to between the Petitioner and an entity called Pala Auto Services Ltd on 30th June 2016, for the sale of the lands owned by the Petitioner for a sum of \$ 5,000,000.00.
9. However, it is in record that the said properties were purchased by and sold to the Respondent Company and not to the said Pala Auto Services Ltd, which was the party to buy as per the Sale and Purchase agreement.
10. The Petitioner claims that the Directors and the registered office of the Respondent Company and those of the said Pala Auto services Ltd are the same. Though, the Respondent does not refute it, maintains a position that both are two different legal entities.
11. The sale and purchase formalities were duly over, by the execution of relevant Deeds on 19th August 2016, settlement of the balance sum of the agreed price of \$ 5,000,000.00 on 26th September, 2016 and on registration of relevant Deeds on 29th September, 2016.
12. It is said that around 6 months thereafter, the Director of Petitioner Company, namely, Shiu Ram contacted the Respondent and demanded the sum of \$450,000.00 claiming to be the VAT component of the said sale , but the Respondent had denied the liability, seemingly, relying on the relevant terms of the, purported, agreement to sale.
13. The Respondent relied on the affidavit of Jitesh Pala, sworn and filed on 16th June, 2016, along with the summons to strike out the winding up application and in opposition to winding up and same was to be mentioned on 4th July, 2017, being the

first date of call of the winding up application before the Master as already assigned by the Deputy Registrar.

14. When the matter came up before him on 4th July, 2017, the learned Master, having made some observations, made an Order to the following effect,

"I strike out the summons filed under 18/18 and make Order in terms of winding up application"

15. It is against this Order the Respondent has gone before the Court of Appeal and the matter is now said to be pending to be fixed for the argument.

16. In the meantime the Respondent has filed summons in this Court, supported by the Affidavit of Jitesh Pala, for the stay of proceedings and subsequent procedure of winding up. Shiu Ram has filed reply Affidavit dated 31st July, 2017 and Jitesh Pala has filed an Affidavit in response dated 8th August, 2017 as aforesaid.

[C] LAW ON STAY IN APPEL & JURISDICTION OF H.C :

17. Order 34 of the Court of Appeal Rules ('CAR') would be applicable to an application for stay of execution. That rules so far as material provide:

'34. (1) except so far as the court below or the Court of Appeal may otherwise direct'-

(a) An appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) No immediate act or proceeding shall be invalidated by an appeal.

18. High Court (Amendment) Rules 2006, under Order 59 Rule 2 confers jurisdiction on the Master to hear the winding up applications.

19. Section 572 of the Companies Act 2015 provides as follows;

Sec. 572- "subject to this Act an appeal must lie to the Court of Appeal from any decision or Order given or made by the Court in exercise of the jurisdiction conferred upon it by this part.

[D] GOVERNING PRINCIPLES :

20. The relevant questions to be asked when considering an application for stay include:

- (a) If a stay is refused, what are the risks of the appeal being stifled?
- (b) If a stay is granted and the appeal fails, what are the risks that the Applicant will face in enforcing the judgment?
- (c) If a stay is refused and the judgment is enforced and finally the appeal succeeds, what are the risks the Respondent will face in recovering the money back?

(Vide- *Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915, LTL 18/12/2001*)

21. The Fiji Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd (FAC Civil Appeal No. ABU 0011 of 2004S (18 March 2005 at page 3)* outlined the relevant principle on applications for stay pending appeal as follows:

"The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005)":

*"On a stay application the Court's task is "carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful". *Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.**

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNC 48, at p 50* and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:*

- (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). *See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (b) Whether the successful party will be injuriously affected by the stay.
- (c) The bona fides of the applicants as to the prosecution of the appeal.
- (d) The effect on third parties.
- (e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience and the status quo”

[E] **DISCUSSION:**

22. Before proceeding to discuss the substantial matter that lies for adjudication before me, I shall delve in to the first preliminary issue raised by the learned Counsel for the Petitioner in his Oral and written submissions, arguing that appeal from the Master should lie to a Judge of this Court and not to the Court of Appeal. He may, probably, have taken up this position to demonstrate that the Appeal is bound to fail and thus stay should not be granted.
23. In view of the clear provisions stated in paragraphs 18 and 19 above and the fact that the appeal has now been accepted by the Court of Appeal and pending to be fixed for argument, and particularly, bearing in mind that this is not a matter for this Court to decide, I avoid making any comment on it and decide to disregard same.
24. The next preliminary issue that the learned Counsel for the Petitioner argued was about the *Locus- Standi* of the Respondent Company to come before the Court, after a winding up order has been made, for which on the face of the Section 553 of the Companies Act 2015 has no provision. He argues the Companies Act does not permit the Company to make an application for stay, as the locus remains with the Liquidator, Official Receiver or any Creditor or Contributory. Section 553 reads as follows.

Division 9—General Powers of Court in case of Winding up by Court
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. (Underlining mine)

25. “A debtor company does not have locus- standi under the above provisions The underlying reason for this is explained in Pennycuick V.C.'s Practice Note (Winding Up Order: Rescission)(No. 2) [1971] 1 W.L.R. 757”.

“..... see Practice Note (Winding up Order: Rescission) [1971] 1. W.L.R. 4. Applications to rescind winding up orders will henceforward only be entertained if made (a) by a creditor, or (b) by a contributory, or (c) by the company jointly with a creditor or with a contributory. In the case of an unsuccessful application the costs of the petitioning creditor and of the supporting creditors will normally be ordered to be paid by the creditor or the contributory making or joining in the application. The reason for this direction is that if the costs of an unsuccessful application are made payable by the company, they fall unfairly on the general body of creditors. (My emphasis)

26. In my view, the new Companies Act does not totally prohibit the Company. There is no any absolute bar or hard and fast rule against the Company in coming before the Court when it is under winding up. In the light of the new provisions and the above practice notes, my understanding (subject to correction) for the reason behind in not entertaining the Company, while under liquidation, is the cost factor involved in the event the Company fails in its attempt to reverse the winding up order.
27. Further, in the case in hand the appeal has been preferred before the Liquidator or the Official Receiver comes in and the very decision of the Master is on hold. The Directors of the Company have made a declaration by “JP-10” undertaking not to dispose any properties and displayed Respondent’s financial stability, through “JP-6”, “JP-7” and “JP-8”, which stands without being adequately challenged.
28. The decision in *Re Union Accident Insurance Co Ltd [1972] 1 All ER* cited by the learned Counsel for the Respondent is persuasive on the question of *locus* of the Board of Directors after a winding up Order is made. In respect of the issue of *locus*, among other things, the Court held as follows.

“.....No doubt that is so, but it is common ground that notwithstanding the appointment of provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsels to oppose the current petition and, if a winding up order is made, to appeal against the order” (emphasis mine)

29. In light of the above, it is my considered view that the respondent Company's alleged insolvency need not be an absolute bar for it to come before the Court to play its Residuary role through its Directors in order to salvage the Company.

30. At this juncture, the role played by me from where I sit is a tiny one, but at the same time an important one too. The propriety of the decisions made by the Master on 4th July, 2017, will finally be decided by the Court of Appeal. However, I should strive to make this ruling to be compatible with the final decision to be arrived at by the Court of Appeal.
31. Counsel appearing for the Respondent Company Mr. A Narayan submits that the Appeal will be rendered nugatory, if a stay pending appeal is not granted and that the Petitioner will not be prejudiced by the stay and there is nothing to show that the Petitioner will be prejudiced by the stay. In this regard, I find that the following authorities, among others, are supportive of his argument. (1) *Lowing V Howell [2016] FJHC 664; HBC 154.2015 (21 July 2016)*, (2) *Praveen Lata v Sun Insurance Company Ltd – HBC 26 of 2016 (28.April 2017)*.
32. Mr. A. Narayan in addition to the submissions on the prospects on Appeal, referred to some fundamental errors committed in granting the Orders for winding up. He drew the attention of the Court to the Grounds of Appeal in annexure “JP-4” annexed to the Affidavit of Jitesh Pala sworn on 21st July, 2017.
33. Counsel for the Petitioner Mr. Rupesh Singh submitted that staying of a winding up order of the Court requires more to be considered than a normal stay application pending appeal, because of the nature of an order to wind up the Company. He cited the decision in a case of the Supreme Court of New South Wales - *Lal V Singh & Others [2015] NSWSC 1608 930 October 2015)*
34. Mr. Rupesh Singh heavily relied on his argument that that the Appeal is without merit and will invariably fail, purely as the Company failed to make an application to set aside the Statutory Demand and further failed to make an application for leave to oppose the winding up application as required under the Act. Mr. Singh while conceding that it is material to consider whether appeal is arguable, says that the intention of legislature is seeking to have the winding up proceedings dealt with in an expeditious manner. He further argues that the Company was deemed unable to pay the debt demanded when the Company failed to take appropriate action to set aside the Statutory Demand.
35. It is evident that the Respondent Company, well before the 1st mention date of the winding up application before the Master on 4th July, 2017, had on 16th June, 2017 filed a summons for striking out supported by a dual purpose Affidavit, namely, to strike out and in opposition to winding up.

36. Three main reliefs prayed for in the summons filed on 16th June 2017 are as follows;
- a. That the winding up petition filed herein be struck out;
 - b. Alternatively, this winding up petition be stayed;
 - c. That the winding up notice be set aside.
37. Admittedly, the Respondent had not taken steps to set aside the Statutory Demand within the stipulated time period. But as the Counsel for the Respondent argues, I see there is a point arguable in the appeal, as far as the reliefs prayed for in the summons are concerned, particularly, the relief of striking out.
38. Although, the relief of leave to oppose had not been, specifically, pleaded in the above ill-fated summons, learned Counsel argues to mean, that the reliefs prayed were sufficient enough for the Respondent to meet the case before the Master, had there been a hearing in to the summons. He further states that the worse what the Respondent could have been accused of was certain irregularity, which he argues could have been rectified. This point too I find arguable.
39. Another main ground of appeal taken up by the Counsel for the Respondent is the alleged breach of Natural Justice by not having a formal and proper hearing, failure to give reason or sufficient written reason for the dismissal of strike out summons and proceeding to order the winding up without fixing the matter for formal hearing.
40. When all the grounds of appeal shown in “JP-4” are carefully gone into, I find that they are persuasive enough for me to form my opinion as to the existence of an arguable appeal for the Respondent.
41. The most important consideration in deciding whether a stay of execution should be granted is to see whether there are strong grounds of appeal. That hurdle is higher than that of chances of success. In *Linotype-Hell Finance Ltd v Baker*, (1992) 4 All ER 887 Staughton LJ stated that where an unsuccessful defendant seeks a stay of execution, he must satisfy Court that his appeal has some prospect of success.
42. In *Wilson v. Church*, [1879] 12 Ch.D 454 it was held that where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court ordinarily, to stay the proceedings of the lower court, in order not to render the appeal, if successful, from being nugatory.

43. If a stay is not granted in this matter, the Respondent would have to pay the alleged debt, which is highly disputed. In the event the appeal is successful, the Petitioner will have to repay the money. Despite the fact that the Petitioner received \$5,000,000.00 by the sale of the land in September, 2016, its Director Shiu Ram in paragraph 9 of his Affidavit sworn on 31st July, 2017, says that he has exhausted all the monies. This makes the Court to form an adverse opinion about his financial status to repay in case the Respondent succeeds in the appeal.
44. Mr. Shiu Ram has not demonstrated the financial soundness of the Petitioner, by way of any evidence in his Affidavits, to pay back in the event the Respondent succeeds in the Appeal.
45. In my judgment, the Respondent's appeal will be rendered nugatory, if a stay is not granted. On the other hand, the Petitioner being the successful party before the Master would not be injuriously affected by the stay. If the appeal is unsuccessful, the Petitioner will receive its, purported, debt together with interest and costs, for which the solvency of the Respondent has been, sufficiently, demonstrated as stated above.
46. The Petitioner has not submitted any evidence to show that the VAT in question has already been paid by him to the FIRCA or the FIRCA is now chasing behind him for him to pursue behind the Respondent.
47. What the FIRCA by its letter dated 18th May, 2017, addressed to the Petitioner with Copy to the Respondent (marked as "E" by the Petitioner and as "H" by the Respondent), has communicated to the Petitioner is that the VAT in question is payable by none other than the Petitioner, against which it is said that the Petitioner has already made an appeal and same is under consideration.
48. In view of the above there is no pressing need for the Petitioner to recover the Money from the Respondent by executing a judgment pending appeal, when the very judgment is under attack with substantial good grounds of appeal as observed above. Though, the Applicant is the successful party, it will not be affected by this stay, particularly, since there is no delay as the Appeal is to be fixed for argument in the near future.
49. The *bona fides* of the Respondent as to the prosecution of the appeal has not been questioned or subjected to any reproach by the Petitioner. Obviously, there had not been a protracted Court battle with the Petitioner in relation to this matter. No

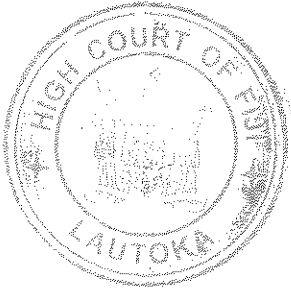
evidence of the existence of any other disputes between them. I am satisfied with the bona fides of the Respondent as to the prosecution of the appeal.

50. In my view, the grounds of appeal raise important questions and involve the interpretation of the statutory provisions, the rules and the law, particularly; the Company law is of significant importance to the Public, Corporate Sector and stake holders in Courts. We in Courts come across instances where the winding up provisions are said to be misused as a convenient way of debt recovery or to achieve some hidden objectives. Therefore, it is a matter of public interest and importance.
51. The effect on third parties also cannot be ruled out. As correctly pointed out by the learned Counsel for the Petitioner, staying of a winding up order of the Court requires more to be considered than a normal stay application pending appeal. The matter in hand is not an ordinary one between two individuals. The Respondent is a Company, under which, possibly, there can be employees earning their living and /or several other institutions engaged in legitimate commercial and financial dealings. The sudden winding up is bound to have adverse effect on third parties.
52. Under the test of balance of convenience, the court has to strike between the two conflicting interest, namely that a litigant is entitled to the fruits of the judgment forthwith and the obvious injustice in refusing a stay where such refusal will render the appeal nugatory or substantially nugatory. As observed in foregoing paragraphs in the event the stay is refused the Respondent will, undoubtedly, be placed in an utter disadvantage position.
53. In my view, the Respondent's appeal has strong prospects of success and the overall balance of convenience favours the grant of the stay and maintaining the interim stay order, until the determination of the appeal.

[F] **ORDERS:**

- a. The Respondents application dated 24th July, 2017 for stay pending appeal is allowed.
- b. Accordingly, any further proceedings, procedures and steps to be taken consequent to the winding up order dated 4th July, 2017 made by Master are stayed, pending the determination of the Appeal in Civil Appeal No ABU 0081 of 2017 by the Fiji Court of Appeal.

c. Costs shall be in the cause.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie". The signature is written in a cursive style and is positioned above a horizontal dotted line.

A.M.Mohammed Mackie
Judge

At Lautoka
25th September, 2017