

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 155 OF 2012

BETWEEN : **SUN INSURANCE COMPANY LIMITED** a limited liability company
having its registered office at Grnd & Level 1 Sun Insurance
Kaunikuila House, Laucala Bay, Suva, Private Mail Bag, Suva.

PLAINTIFF

AND : **GITA VIKASHNI REDDY** of Toko, Tavua, Domestic Duties in her
personal capacity and as the Administratrix of the Estate of
RAMENDRAN GANGAIYA late of Rarawai, Ba, Fiji, Sales Boy,
deceased.

DEFENDANT

Appearances : Mr A.K. Narayan for the plaintiff
: Mr A. Chand for the defendant
Date of Hearing : 10 June 2019
Date of Oral Judgment : 10 June 2019
Date of Written Reasons : 19 June 2019

JUDGMENT

[written reasons]

- [01] Upon hearing both counsel on the summons for judgment filed by the plaintiff. I announced that I would grant judgment in favour of the plaintiff for the reasons to be given at a later date. These are my written reasons for doing so.
- [02] Initially, the matter was handled by Justice Mackie (as he then was). Subsequently it was allocated to me for determination and disposal.
- [03] On 20 May 2015, the plaintiff filed a summons for judgment supported with an affidavit (*'the application'*) seeking the following relief:

- 1) *A declaration that the threatened Winding Up proceedings by the defendant against the plaintiff under the Companies Act is or would be an abuse of process of this Honourable Court.*
- 2) *A declaration that the plaintiff is not obliged to satisfy the judgment obtained in her favour in High Court Civil Action Number 216 of 2007.*
- 3) *Damages to be assessed.*
- 4) *Costs on a solicitor client full indemnity basis.*
- 5) *Such further or other reliefs as this Honourable Court deems just.*

[04] In support of the application, the plaintiff relies on the affidavit of Arvendra Kumar filed in support of the injunction application on 12 July 2012.

[05] The application is made under Order 18, Rule 7, Order 27, Rule 3 of the High Court Rules 1988, as amended ('HCR') and the inherent jurisdiction of the Court.

[06] It will be noted that the application is made on the ground that there is no statement of defence to the claim made by the plaintiff after the defence having been struck out on 12 February 2015. The defendant's statement of defence was struck out by the Court for the default of appearance by the defendant and/or her solicitor on 12 February 2015.

[07] After the plaintiff filed the application for judgment, the defendant filed an application for re-instatement of the statement of defence that was struck out on 12 February 2015. This application was struck with costs on 23 June 2017.

The background

[08] Sun Insurance Company Ltd (*the plaintiff*) brought an action against Gita Vikashni Reddy (*the defendant*) seeking among other things a declaration that the threatened winding up proceedings by the defendant against the plaintiff under the Companies Act is or would be an abuse of process of the Court and damages and compensation suffered as a result of the threatened winding up proceedings.

- [09] The defendant has through her solicitor had issued a statutory demand under section 221 of the Companies Act (old) in respect of a judgment in Civil Action No. HBC 216/2007 for the sum of \$97,133.95 in favour of the defendant delivered on 13 June 2012.
- [10] Thereafter, the defendant's solicitor issued a Winding-Up Notice under the provisions of the Companies Act on 25 June 2012 and served it on the plaintiff on the same day threatening to wind up the plaintiff.
- [11] Despite the plaintiff's explanation that it is a solvent insurance company having assets in this country worth of \$53,321,000.00 and made a net profit of \$2,439,000.00 for the year ended 2011 and has term deposits of \$3,500.00.00 as reserves, as required by Reserve Bank of Fiji ('RBF') to enable it to carry out its insurance business in Fiji.
- [12] As a result, the plaintiff brought the current proceedings seeking a declaration that the threatened Winding-Up proceeding is an abuse of process of the Court and for damages.
- [13] The defendant filed her statement of defence, which was struck out for default of appearance on 12 February 2015 and her application to re-instate the struck out statement of defence was also refused on 23 June 2017.
- [14] The plaintiff has now filed an application for judgment on the basis that there is no defence to the plaintiff's claim.

Legal framework

- [15] The HCR, O 27, R 3 provides that:

Judgment on admissions (O 27, R 3)

3 Where admissions of fact or of part of a case are made by a party to a cause or matter either by his or her pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those

admissions he or she may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment or make such order on the application as it thinks just.

[16] The Insurance Act 1998, as amended (*'the Act'*), section 104 states:

[INS 104] Winding-up by court

104 (1) *Subject to this Division, the winding-up of a licensed person is to be conducted in accordance with the Companies Act 2015.*

(2) For the purposes of Parts 38 and 39 of the Companies Act 2015, an insurer is deemed to be unable to pay its debts if at any time the margin of solvency specified in section 31 is not maintained. (My emphasis)

(3) For the purposes of proceedings under the Companies Act 2015 for the winding-up of the affairs of an insurer, evidence that the insurer was insolvent at the close of the period to which the accounts and other statements last prepared under section 60(1) relate is evidence that the insurer continues to be unable to pay its debts, unless the contrary is proved.

[17] Section 31 of the Act sets out that:

[INS 31] Minimum capital and solvency requirements

31 (1) *An insurer licensed to carry on any class of life insurance business must maintain at all times-*

(a) if the insurer has a share capital, paid-up capital of not less than \$1 million;

(b) a surplus of assets in Fiji over liabilities in Fiji of not less than-

(i) \$1 million; or

(ii) the sum of 5% of the amount of net liabilities under life policies in Fiji up to net liabilities of \$100 million plus 2.5% of the amount of net liabilities under life policies in Fiji that exceed \$100 million ,

whichever is the greater;

(c) if the insurer is incorporated in Fiji, a surplus of assets over liabilities of-

(i) \$1 million; or

(ii) the sum of 5% of the amount of net liabilities under life policies up to net liabilities of \$100 million plus 2.5% of the amount of net liabilities under life policies in Fiji that exceed \$100 million,

whichever is the greater.

(2) An insurer licensed to carry on any class of general insurance business must maintain at all times-

(a) if the insurer has a share capital, paid-up capital of not less than \$1 million;

(b) a surplus of assets in Fiji over liabilities in Fiji of not less than-

(i) \$1 million;

(ii) 20% of net premium income derived in Fiji during the last 12 months; or

(iii) 15% of net claims outstanding provision in respect of policies in Fiji, whichever is the greatest;

(c) if the insurer is incorporated in Fiji, a surplus of assets over liabilities of

(i) \$1 million;

(ii) 20% of net premium income derived during the last 12 months; or

(iii) 15% of net claims outstanding provision,

whichever is the greatest. [Emphasis added]

Evidence

[18] The plaintiff relies on the affidavit evidence of Arvendra Kumar filed on 12 July 2012, in support of the injunction application. Precisely, the affidavit evidence is that the plaintiff is not an ordinary company but is a well-established local

company with assets worth \$53,321,000.00 and made a net profit of \$2,439,000.00 for the year ended 2011 and is well secured and also has deposit of \$3,500,000.00 as required by the Reserve Bank of Fiji to enable its insurance business in Fiji.

Discussion

- [19] The plaintiff applies for judgment against the defendant because the statement of defence filed by the defendant was struck out for want of appearance on 12 February 2015.
- [20] Basically, the plaintiff seeks a declaration that the threatened Winding Up proceedings by the defendant against the plaintiff is an abuse of process of the Court and damages suffered as a result of the threatened Winding Up proceedings.
- [21] Ms Chand of counsel appearing for the defendant only submits that the plaintiff cannot seek a relief which was not sought in the claim by way of summons for judgment in that she submits that the relief that a declaration the plaintiff is not obliged to satisfy the judgment obtained in her favour in the High Court Civil Action No. 216 of 2007 was not sought in the statement of claim and therefore the plaintiff is not entitled to such relief.
- [22] In response, Mr Narayan of counsel appearing for the plaintiff submits that he was not pressing that relief and submits the plaintiff would only seek the relief prayed for in the plaintiff's statement of claim.

Winding-up of insurance by court

- [23] Subject to s. 104 of the Insurance Act, an insurance company may be wound up under the Companies Act. For the purpose of winding up, an insurer is deemed to be unable to pay its debts if at any time the margin of solvency specified in section 31 is not maintained (see s.104 (2) of the Insurance Act).
- [24] The defendant has issued the winding-up notice and threatened the plaintiff that she will proceed with the winding-up unless the judgment sum was not paid.

- [25] An ordinary company will be deemed to be unable to pay its debts, unless the contrary can be proven to the satisfaction of the Court, if execution or other process issued on a judgment, Act or order of any Court in favour of a creditor of the Company is returned unsatisfied in whole or in part (see s.515 (b) (i) of the Companies Act 2015). This provision has no application in respect of a winding-up application to wind up an insurance company.
- [26] An insurance company will only be deemed to be unable to pay its debts if at any time the margin of solvency specified in section 31 is not maintained, and it is not sufficient to establish that execution or other process issued on a judgment (exceeding \$10,000.00) in favour of a creditor of the Company is returned unsatisfied, in whole or in part.
- [27] The plaintiff is an insurance company. There is no evidence whatsoever that the plaintiff has failed to maintain Minimum capital and solvency requirements as required by section 31 of the Insurance Act. On the contrary, there is unchallenged evidence before the court that the plaintiff has assets worth over \$53 million and made a net profit of approximately \$2.40 million for the year ended 2011 and that it is well secured and also has deposit of \$3.5 million as required by the Reserve Bank of Fiji to enable its insurance business in Fiji. I have no reason to reject the unchallenged affidavit evidence adduced on behalf of the plaintiff. I accept the evidence adduced on behalf of the plaintiff.
- [28] There is evidence before the court that the plaintiff has always maintained the margin of solvency specified in section 31 of the Insurance Act. It translates that the plaintiff is a solvent insurance company. As such, the statutory demand and the threatened winding-up notice issued against the plaintiff is an abuse of process of the court. I would, therefore, hold that the plaintiff is entitled to the declaration that the threatened Winding Up proceedings by the defendant against the plaintiff under the Companies Act is an abuse of process of the court.

Damages

- [29] It appears the defendant had issued statutory demand and the threatened winding-up notice without probable cause of action against the plaintiff. The winding-up of the plaintiff was not only remedy available to the defendant to enforce the judgment. There were a number of other avenues available to the plaintiff to enforce the judgment. The remedy of winding-up may be sought as a last resort if there is sufficient ground to do so.
- [30] The plaintiff is a substantial company. It had to operate its insurance business under the threatened winding-up notice. The plaintiff states that it suffered damages and which damages are continuing as a result of the threatened winding-up notice issued by the defendant.
- [31] During the course of the correspondences between the plaintiff's and the defendant's solicitors (annexure 'I' to 'L' to the affidavit of the plaintiff), relating to withdrawal of the winding-up notice, the defendant's solicitors had advised that they will proceed under the winding-up notice.
- [32] The winding-up notice was issued on the solvent insurance company, the plaintiff without sufficient ground for doing so.
- [33] Therefore, I accept the plaintiff suffered damages as a result of the winding-up notice issued by the defendant through her solicitor. As such, the plaintiff is entitled to damages suffered as a result of the threatened winding-up. The damages will be assessed before the Master.

Costs

- [34] As a winning party, the plaintiff is entitled to the costs of these proceedings, which is also to be assessed before the Master.

Conclusion

[35] For the reasons set out above, I conclude that the plaintiff is entitled to a declaration that the threatened winding-up proceedings by the defendant against the plaintiff under the Companies Act is an abuse of process of the court with damages and costs to be assessed before the Master.

The result

1. There shall be a declaration that the threatened winding-up proceedings by the defendant against the plaintiff under the Companies Act is an abuse of process of the court.
2. The plaintiff is entitled to damages and costs, which is to be assessed before the Master.



At Lautoka
19 June 2019

M.H. Mohamed Ajmeer
19/6/19
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M.H. Mohamed Ajmeer
JUDGE

Solicitors:

For the plaintiff: AK Narayans, Barristers & Solicitors

For the defendant: Anishini Chand, Barristers & Solicitors