

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBE 39 of 2018

IN THE MATTER OF WESTERN WRECKERS LIMITED a limited liability company
having its registered office at Belo Street, Samabula and P.O. Box 4096,
Samabula, Suva in the
Republic of Fiji.

AND

IN THE MATTER of the Companies Act 2015

Counsel : Ms Qioniwasa B. for the Appellant
Mr Nadan A for the Respondent

Date of Hearing : 25th November 2019

Date of Ruling : 31st January 2020

RULING

(On the application for stay pending appeal)

- [1] The respondent, Bank of South Pacific instituted these proceedings seeking to wind up the appellant company Western Wreckers Limited.
- [2] The Learned Master of the High Court on 16th October 2018 ordered that the appellant company be wound up.
- [3] The appellant appealed the said decision to this court on the following grounds:
 - i. The application for winding-up filed on 4th October 2018 had not been determined prior to 4th April 2019. The Acting Master of the High Court erred in law having not disposed the matter by on or before 4th April 2019 and in granting an extension beyond that date without application having been made and without any reason being given therefore acting in breach of the provisions of the Companies Act 2015, specifically section 528.
 - ii. The Acting Master of the High Court erred in law and in fact in failing to consider the preliminary objection raised by the petitioner, not only at the hearing but beforehand, on respect to the application of section 528 of the Companies Act 2015 relative to determination of petitions within 6 months without any reason being given and despite being on notice of a prior appeal involving the same.
 - iii. The Acting Master of the High court erred in law and in failing to give any written reasons for her decision and making extempore orders on the petition without due consideration.
- [4] The appellant on 24th July 2019 filed a Notice of Motion seeking an order for the stay of the execution of the order of the learned Master pending the determination of the appeal.
- [5] Order 59 rule 16 of the High Court Rules 1988 provides:

- (1) The filing of a notice of appeal or an application for leave to appeal shall not operate as a stay of execution or proceedings, or any step therein, unless the court so directs.
- (2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.

[6] In **Federal Commissioner of Taxation v Myer Emporium Ltd** (No. 1)(1986) 160 CLR 220; 4 April 1986 it was observed:

It is well established by authority that the discretion which it confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.

In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005) -

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 weigh all of the factors in the balance between the right of a successful litigant to have 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 page 87.

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from ***Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*** (1999) 13 PRNZ 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.”

Attorney General of Fiji v Dre [2011] FJCA 11; Misc.13.2010 (17 February 2011)

The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal.. That hurdle is higher than that of chance of success.

- [7] In my view, in considering whether an application for stay pending appeal is granted or not the discretion of the court is not limited to the factors set out in the above decision. There may be various other grounds for the court to consider, depending on the circumstances of each and every case.
- [8] I will first consider whether the appellant has sufficient grounds of appeal which warrant the stay of execution of the decision sought to be challenged in appeal.
- [9] First ground of appeal is that the learned Master of the High Court acted in breach of section 528 of the Companies Act 2015.
- [10] Section 528 of the Companies Act 2015 provides:
 - (1) An application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made.
 - (2) The Court may by order (on such conditions as it considers fit) extend the period within which an application must be determined, but only if—
 - (a) the Court is satisfied that special circumstances justify the extension; and
 - (b) the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires.

(3) An application is, because of this subsection, dismissed if it is not determined as required by this section.

[11] Appellant's position is that the learned Master of the High Court has extended the time without an application from the parties and she has failed to give reasons for the extension.

[12] Section 528 of the Companies Act 2015 imposes a duty on the court and the on the parties to conclude winding-up proceedings within six months. In this instance extending the time limit prescribed by the section 528 the learned Master made the following order:

Company to file / serve affidavit in opposition in 14 days. PC to file reply in 14 days. Thereafter parties to simultaneously file / serve submission in 28 days. Since hearing will be in April 2019 the 06 months period requirement under Companies Act is extended until the determination of the application. Hearing on 02/4/19 @ 10am.

[13] There is no requirement in section 528 for the court to have an application to extend the period of six month within which an application for winding-up should be determined. The court on its own accord can extend the said period of six months.

[14] The appellant in this regard relied on my judgment in HBE 24 of 2016, the previous application for winding-up between the same parties. In that case the learned Master of the High Court proceeded with the application for winding up and the order for extension of time was made in the final judgment. In the instant case the order for extension of time was made before the expiration of the period of six months prescribed by law. Therefore, the decision in HBE 24 of 2016 cannot be relied on by the appellant in this matter.

[15] The other ground of appeal is that the learned Master has given an ex-tempore judgment without reasons.

[16] On 04th July 2019 the learned Master of the High Court made the following order:

It is a brief order, however, on the face of it, I do not see any error in the orders of the learned Master. It appears from the order of the learned Master the appellant

did not file any opposition to the application for winding up and also it did not tender any evidence that it was in a position to pay the debt.

- [17] From the decision of the learned Master it appears that the appellant has not provided the court with any material opposing the application for winding up for its consideration.
- [18] However, the court will now consider whether there are special circumstances for the court to exercise its discretion in favour of the plaintiff.
- [19] Unlike in any other matter in this matter if the applicant company is wound up pending the hearing of the appeal its appeal would be rendered nugatory because if the applicant company is once wound up its corporate personality cannot be reinstated even if the applicant is successful in appeal and by staying the winding up proceedings for a short period until the appeal is heard the respondent would suffer no damage or it will not be injuriously affected.
- [20] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The execution of the winding up order is stayed until the determination of the appeal.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

31st January 2020