

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBE 14 of 2016

IN THE MATTER OF NATIONAL
COMPUTERS COMPANY LIMITED T/A 786
Supermarket, a limited liability company having its
registered office at Level 2, Nina house, Robertson
Road, Suva, Fiji.

AND

IN THE MATTER OF THE COMPANIES
ACT 2015

BEFORE: Justice Vishwa Datt Sharma

COUNSEL: For the Plaintiff: [Reddy & Nandan Lawyers]

For the Creditors: [Munro Leys]
[Sherani & Co.]
[Patel Sharma Lawyers]
[AG's Chambers]
[FNPF]

For Official Receiver: [Ms. Taukei]

DATE OF DECISION: 29th April, 2020 @ 9.30 am

RULING

[Motion for Stay of Winding Up Order pursuant to Section 553 of the Companies Act 3 of 2015]

- [1] The Judgment Debtor **National Computers Company Limited T/A 786 Supermarket** ("**The Company**") made this Application pursuant to Section 553 of the Companies Act 03 of 2015 seeking the following Order:
- i) **That the Winding up Order issued on the 13th October 2016 be stayed until further order of this court on such terms and conditions as the Court deems appropriate.**
- [2] This application is filed in support of an affidavit deposited by Mohammed Kannukarathi as one of the Contributories of the company sworn on 26th February 2019.
- [3] A couple of Affidavits were filed by some of the creditors mentioned in the current application who were represented by counsels either consented to the current application for Stay and/or complaint of unpaid debt after the order for Winding Up was made on 13th October 2016.
- [4] Some of the Creditors have filed Affidavits supporting the Contributories application. However other Creditors have not filed any affidavits but have indicated to the Court that they support the application.
- [5] Following are the Creditors in this matter:
- (i) Makan's Drugs & Pharmaceutical Supplies
 - (ii) Gurbachans Foodtown Limited
 - (iii) Power Electric Limited
 - (iv) United Containers Co. Ltd
 - (v) Lokia Shopping Centre
 - (vi) Fiji Times Limited
 - (vii) Goodman Fielder International (Fiji)
 - (viii) FNPF
 - (ix) FMF Foods Limited
 - (x) Fresher Produce Limited
- [6] According to the Judgment Debtor, a Winding up Notice was issued against National Computers Company Limited T/A 786 Supermarket, ("**The Company**") on 13th October 2016.
- [7] On 22nd June 2018, the Official Receiver filed an application in order for the Company's Director to be publicly examined.
- [8] The Company's solicitors have been liaising with various solicitors representing the Creditors together with the Companies, including the Fiji National Provident Fund seeking to Stay the Winding Up Order in order for the Company to resume operations and gradually clear the debt.
- [9] That Goodman Fielder International (Fiji) Limited is the largest Creditor of the Company making up more than 80% of the debt and has filed an Affidavit Supporting his Application to Stay the Winding Up Order.
- [10] That Gurbachan's Foodtown Limited and Makan's Drugs and Pharmaceutical Supplies have also filed Affidavits Supporting the Contributory's Application whilst the other Creditors have not filed but have indicated to the Court that they support the Application.

- [11] According to the Company, the proposal of the Applicant does not pose any risk to the Creditors. The Contributory has obtained Lease for the property from which the Company can trade and has updated the Bill of Sale payments on the Assets of the Company. This gets the Company ready in part to trade. The Official Receiver, the Creditors, the Contributories and the Company to be at liberty to apply to have the matter reinstated after six (6) months.
- [12] For the reasons stated above, the Applicant prays that the Winding up Order made against the company be Stayed for a period of six (6) months to allow the Company to enter into agreements with the Creditors to reduce its debts.
- [13] However, as far as the creditors represented by Messrs. Patel & Sharma was concerned, filed an Opposing Affidavit and had vigorously opposed the application for Stay of the Winding Up Order of 13th October 2016.
- [14] Counsel's contention was that the issue before this Court is whether the Winding Up Order made against the **Company** on 13th October 2016 in Winding Up Action No. HBE 14 of 2016 be stayed until further Order of this Court on such terms and conditions as the Court deems appropriate.
- [15] An application for Winding Up of **Company** was filed on behalf of Creditor Toa (Fiji) Limited on 30th August 2016 by solicitors firm of Messrs. Patel & Sharma.
- [16] On 18/5/2016, the Applicant (Toa Fiji Limited) served on the **Company** a Demand Notice for the recovery of debt of \$37,055.78 with interest.
- [17] **The Company** neither filed any Application to seek an Order for Setting Aside the Statutory Demand in terms of Section 516(1) of the Companies Act 3 of 2015 nor did the Company oppose the Winding Up Application and filed any Affidavit in Opposition in terms of the Companies Rules and the Act therein.
- [18] The **Company** was eventually wound-up by the Court on 13th October 2016.
- [19] Subsequent to the Grant of Winding Up Order of 13th October 2016, the Official Receiver filed an Application together with an Affidavit in Support on 22nd June 2018 for Public Examination of the Company's Director.
- [20] Official Receiver's above Application then prompted the Company to file the current Application seeking an Order for Stay of the Winding Up Order of 13th October 2016 until further Orders of this Court on such terms and conditions as this Court deems appropriate.
- [21] It is noted that the Company from the time of the Winding Up Order of this Court on 13th October 2016, failed to take any appropriate actions until after a lapse of almost two (2) years and four (4) months when the Official Receiver filed their respective Application for Public Examination of the Company's Director on 22nd June 2018.
- [22] The searches by the Official Receiver were carried out at the Registrar of Companies Office revealed that Mr. Mohammed Kannukarathi is the Director of the Company, National Computers Company Limited T/A 786 Supermarket.

- [23] The Affidavit confirms that Mr. Mohammed Kannukarathi visited the Official Receiver's Office several times and promised to file the Company's Statement of Affairs with some payment but nothing has been filed or paid to date of this proceeding.
- [24] As can be ascertained from the Winding Up proceedings, the Judgment Debtor owed a total sum of \$846,505.72 to the various companies who are the Creditors in this proceeding.
- [25] The counsels representing the various Creditors and Companies had no objection to the Judgment Debtor's Application for the Stay of the Winding Up Order of 13th October 2016 with the exception of Messrs. Patel Sharma Lawyers representing Carpenters Fiji Limited T/A Morris Hedstrom who was owed a total debt sum of \$52,986.22.
- [26] The Judgment Debtor in his capacity as one of the Contributories of the Company gave evidence and stated that:
- "The Company National Computers was trading from Shop Number 3 on ground floor of Narhari Building in Toorak. Currently under three (3) years Lease Agreement from 1st September 2019 with 786 Hypermart Pte Ltd. 786 Hypermart Pte Ltd is controlled by my wife. If Winding Up Order be Stayed, then this wound-up Company will run from the same premises. It has sufficient space."
- [27] According to the **Company**, the Stay of Winding Up Order -
- [i] Would allow the **Company** to resume operations and gradually clear the debt.
 - [ii] All the Creditors herein have consented to the Stay Application with the exception of the Creditor Carpenters Fiji Limited represented by Messrs Patel Sharma Lawyers.
 - [iii] The proposal of the Applicant does not pose any risk to the Creditors.
 - [iv] That with the assistance and consent of the Creditor's the **Company** is likely to return to solvency since the **Company** has Goodwill in the market when it was operational.
 - [v] If Stay is granted, the **Company** will not have any difficulties in reviving its Goodwill in the market once again.
 - [vi] Further, the Suppliers have indicated that they will supply goods to the **Company** if it resumes operations.
 - [vii] The **Company** will clear its debts against all the Creditors once it's operational and would be in the best interests of the Creditors.
 - [viii] The **Company** has obtained Lease for the property which the **Company** can trade from and has updated the Bill of Sale payments on the assets of the **Company**.
 - [ix] To Stay the Winding Up Order for a period of six (6) months to allow the **Company** to enter into agreements with the Creditors to reduce its debts.
 - [x] This is not the Contributory's debt but the Company's debt. Entity as the Company. Contributory is a separate person. Not possible to get agreement from all Creditors.
- [28] The counsel representing the Creditor Carpenters Fiji Limited T/A Morris Hedstrom argued that the current matter before the Court is a discretionary matter.
- [29] The Applicant has to prove why the Company's Winding Up Order needs to be dissolved.
- [30] That the Lease document is a separate entity. Both, the Company and 786 Hypermart Pte Ltd were operating from the same premises.

- [31] That the Company owes around \$52,000 to Morris Hedstrom.
- [32] The Winding Up Order was made on 13th October 2016. Subsequent to the Winding Up Order nothing was done by the Contributory and three (3) years' timeframe has lapsed until the Official Receiver filed the application for Public Examination.
- [33] The **Company** is insolvent although the **Company** can say they can operate but the Court needs to see the substantial debt owed by the Company and whether the **Company** is solvent.
- [34] There are no reasons shown to the Court as to why a Stay of the Winding Up Order should be granted.
- [35] The **Company** suggested as per Annexure "D" of Affidavit filed on 24th May 2019 that the **Company** will pay monthly instalments of \$2,000, but no payments were received and the outstanding amount is due and payable.
- [36] If the Contributory and/or **Company** was genuine enough, then The **Company** would have made efforts to pay at least some debt.
- [37] The application for Stay is opposed and the Creditor is expecting the debt owed to be paid. However, The **Company** will not pay the debt since The **Company** is insolvent.
- [38] The **Company** has failed to discharge a clear onus to make out a positive case seeking for the Stay of Winding Up Order made on 13th October 2016.
- [39] *Section 553 of the Companies Act 3 of 2015* deals with "the power to stay Winding Up" and provides as follows-

"553 - 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 any 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."

- [40] *Section 531 of the Companies Act 2015* (the Act) provides:
- (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. (Underline for deliberation)
 - (2) On any application under this section, the Court may, before making an order, require the Official Receiver to furnish to the Court a report with respect to any fact or matter which are in his or her opinion relevant to the application.
 - (3) A copy of every order made under this section must be forwarded by the Company, or otherwise as may be prescribed by regulations made under this Act, to the Registrar, using the Prescribed Form, for registration.

- [41] **Section 531(1)** of *the Act* confers discretion on the Court to Stay a Winding up Order upon proof to the satisfaction of the Court that the Winding up Order ought to be stayed. In the instant case, the burden of satisfying this Court is on the Contributory, National Computers Company Limited T/A 786 Supermarket. Further, any consent given by any of the Creditors in this matter in deciding whether to stay the operations of the Winding up Order of 13th October 2016 or not, I reiterate is a matter for the discretion of this Court.
- [42] There is no evidence before this Court to substantiate that the **Company** has made any effort to discharge any of the Creditors' debt from the time of the Grant of the Winding up Order of 13th October 2016.
- [43] Further there is no demonstration of any evidence or proof of any trading position and/or general solvency of the **Company** as it is important when Stay of a Winding up Order is sought.
- [44] Further, there is no explanation and/or any evidence shown as to the general background and circumstances which led to the Grant of the initial Winding up Order of 13th October 2016.
- [45] The Court has taken note of the fact that the Fiji National Provident Fund Board had initiated a High court Civil Action No. HBC 251 of 2018 against the Director of National Computers Company Limited T/A 786 Supermarket and another, claiming for Judgment in the sum of \$21,910.35 with interest. A Default Judgment was entered against the Defendants on 1st February 2019 accordingly. The pendency and the entry of Default Judgment against the Defendants was not brought to the Court's attention when the current order before this Court for setting Aside of the Winding Up Order was sought by the counsel. It was rather important that this ought to have been taken into consideration in making a decision of the pending order sought herein.
- [46] I have also taken into consideration the Affidavit filed in Support of the Official Receiver's Motion seeking for Public Examination deposed by the Acting Official Receiver on 21st June 2018 where he stated at paragraphs 8, 9 and 10 the following-
- "That upon inspecting the Company's premises at Toorak, we found that another Company namely 786 Hypermart Pte Limited is operating from the same premises. That Ms. Regina Puthiya Maliyakkal, the wife of Mr Kannukarathi is the sole shareholder and Director of the Company namely 786 Hypermart Pte Limited. It is believed that Mr Kannukarathi is behind the operations of this newly formed Company and this Company was formed to defraud the Creditors and avoid paying the debts".
- [47] The allegations of fraud within the Acting Official Receiver's seeking for Public Examination of the Company's Director is yet to be heard and impending determination by this Court.
- [48] It is only appropriate in the circumstances and for the aforementioned rationale that the current Application of the Judgment Debtor and or the Contributory seeking an Order for Stay of the Winding Up Order made on 13th October 2016 be accordingly dismissed.
- [49] This Court now needs to expedite the hearing and determination of the Official Receiver's pending Application seeking for Public Examination of the Company's Director.
- [50] **In the result**, I make the following Orders:

ORDERS

1. The Notice of Motion seeking for Stay of Winding Up Order issued on 13th October 2016 is accordingly dismissed.
2. There will be no Order made as to the costs since none of the Counsels representing the Creditors sought for costs and that the Company has been accordingly Wound Up on 13th October 2016.
3. The Official Receiver's pending application seeking for an Order for Public Examination of the Company's Director to be assigned a Hearing date.
4. Orders accordingly.

Dated at Suva this 29th Day of April, 2020



Vishwa Datt Sharma
Judge