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

Consolidated Civil Actions No. HBC 186 of 2017, Winding Up No. 11 of 2017 & HBC 121 of 2018

HBC 186 of 2017

BETWEEN : **SHAREEN LATA HANS** of Lot 17, The Links, Denarau, Nadi, Businesswoman

PLAINTIFF

A N D : **MAHENDRA DEO** of Flat No. 4, Lot 22, 66 Paul Sloan Street, Bay View Heights, Suva, Civil Engineer

DEFENDANT

WINDING UP NO. 11 of 2017

IN THE MATTER OF PACIFIC WEST BUILDERS LTD a limited liability company having its registered office at Lot 9, Bountiful Subdivision, Namaka Lane, Namaka, Nadi.

AND

IN THE MATTER OF A WINDING UP APPLICATON UNDER COMPANIES ACT 2015

AND

SHAREEN LATA DEO aka **SHAREEN LATA HANS** of Lot 17, The Links, Denarau Island, Nadi, Fiji Islands, Businesswoman.

AND

HBC 121 of 2018

BETWEEN : **MAHENDRA DEO** of Lot 27 Fairway Palms, Denarau Island, Nadi, Fiji, Engineer/Director/Businessman.

PLAINTIFF

A N D	:	**SHAREEN LATA HANS aka SHAREEN LATA DEO** of Lot 17, The Links, Denarau, Nadi, Businesswoman.
		DEFENDANT
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. I. R. Coleman S.C. for the plaintiff/Respondent/Defendant Mr. Ashnil Kumar Narayan with Ms. Shinaal Shayal Lata for the Defendant/Applicant/Plaintiff
Date of Ruling	:	3rd July 2020

RULING

Companies Act 2015 – oppressive conduct – ex-parte orders – material non-disclosure – setting aside ex-parte orders – likelihood of winding up –deadlock and impasse – danger to assets - appointment of provisional liquidator – damages – costs – purpose of costs – reprehensible conduct – indemnity costs.

01. A limited liability company by the name of **PACIFIC WEST BUILDERS LTD** (hereinafter referred to as **the company)** was formed by Mr. Mahendra Deo (hereinafter referred to as **Mr. Deo**), who is a civil engineer by profession on 26.06.2006. Mr. Mahendra Deo held 99 fully paid shares of the company and one Urmila Devi held the balance 1 share. Ms. Shareen Lata Hans (hereinafter referred to as **Ms. Hans**) did not hold any shares in the company, even though she was the wife of Mr. Mahendra Deo at the time of incorporation of the company. In fact, she witnessed the subscribers (Mr. Deo and Urmila Devi) to the Memorandum of Association of the company dated 05.06.2006. Mr. Deo was running the business of the company alone, with his experience and expertise and it was successful in its business. On 20.08.2009 Mr. Deo executed a Deed of Trust and declared that, he was holding 48 shares of his total 99 fully paid shares on trust for his wife, Ms. Hans, and also executed a Power of Attorney on the same day giving full authority to her to deal with those 48 shares in the company. In October 2015, transfer of shares took place in two phases, whereby Urmila Devi transferred her 1 share to Ms. Hans and Mr. Deo too transferred 49 shares to Ms. Hans. With this 50 shares transferred to Ms. Hans, both of them became the equal shareholders and directors of the company. Both Mr. Deo and Ms. Hans considered themselves as equal shareholders and directors of the company.

02. The company was successful in its business and it acquired major project of Mobil Oil Australia Pty Limited. However, the relationship between Mr. Mahendra Deo and Ms. Shareen Lata Hans as husband and wife, turned sour for the reasons best known to both of them. Their marriage has been on the rock for sometimes and it echoed in the affairs of the company as well. There were few applications by both for Domestic Violence Restraining Orders against the other. Finally, application for dissolution of marriage was filed, and by consent the divorce was granted. This was followed by the application for

distribution of matrimonial properties which is now pending in the Family Division of Magistrate Court of Nadi.

03. As Mr. Deo and Ms. Hans broke up, both found it difficult to manage the company and the struggle between them for supremacy in, and or control of the company increased. As the shareholders and directors of the company both could not mutually agree on the company affairs and they were consulting their solicitors in this regard. In this context, Ms. Hans took out the Originating Summons in the Action No. 186 of 2017 against Mr. Deo and invoked the jurisdiction of this court under section 176 of the Companies Act 2015. She sought the following interim reliefs supported by her affidavit filed on 31.08.2017.

a) **THAT** the Plaintiff shall be permitted to execute all payments vouchers, notes and memorandums authorizing just payments for and on behalf of Pacific West Builders.

b) **THAT** the Plaintiff be permitted to make and execute cheques and make payments as required for the operation of Pacific West Builders Limited.

c) **THAT** the Plaintiff shall be at liberty to provide and instruct Australia New Zealand Banking Corporation of Fiji, other commercial Banks, the suppliers, contractors and all statutory entities in all matters in relation to Pacific West Builders Limited.

d) **THAT** the Defendant (Mr. Deo) be restrained from acting in any manner adverse

e) **ANY** other ancillary as this Honourable Court may deem fit in the circumstances.

f) **COSTS**

04. The main allegation against Mr. Deo was that he instructed the bank to cancel the all the cheque books issued to the company and further directed not to issue any cheque book without his consent. The purpose of the above reliefs was to smoothly conduct the administration of the company and not to prevent or restrict the Mr. Deo in any manner whatsoever. This was clearly submitted by the counsel who supported those interim reliefs in that ex-parte application. The counsel said (at page 05 of the transcript):

> ....the orders that we are seeking sir is that, that the plaintiff be permitted to execute all times vouchers, notes, memorandum, authorizing, just

payments for the company on behalf of the company so we're not restricting the defendant at all, we're not getting an order or seeking an order that restricts the defendant in any manner whatsoever and executing cheques and so forth but we want the plaintiff she looks after the administration of the company and that is why we want that and that is why there is necessity for the particular order and the bank itself has informed they need something court order because I believe they worried about liability..

05. The court granted interim reliefs, though the sealed order is not headed as 'Interim', in respect of paragraphs (a), (b) and (c) of that ex-parted summons and adjourned the matter for 14.09.2017. However, Mr. Deo, felt to have been left out in cold in relation to the affairs of the company after those ex-parte orders. He brought an application for winding up the company (Winding up No. 11 of 2017). He sought some interim reliefs in an ex-parte summons pursuant to Order 4 Rule 2 and Order 29 of the High Court Rules, sections 176, 177, 178, 183 and 676 of the Companies Act, rules 17, 26, 115, 116 and 117 of the Companies (Winding Up) Rules 2015 and the Inherent Jurisdiction of this Court. Following are the interim reliefs he sought in his ex-parte summons:

1. That the *inter-parte* hearing of this application and the *inter-parte* hearing of the Plaintiff's *ex-parte* Summons filed on 31st August, 2017 in Lautoka High Court Civil Action No. HBC 186 of 2017 and /or that this action and the Lautoka High court Civil Action No. HBC 186 of 2017 be consolidated and heard together;

2. That the orders granted by this Honourable Court on 31st August, 2017 in Civil Action No. HBC 186 f 2017 be stayed and/or set aside;

3. That the Official Receiver be appointed as provisional liquidator to conduct the affairs of the company until final determination of the winding up application, and specifically:

   [i] To issue payments to all suppliers and utility service providers as and when necessary;

   [ii] To prepare, lodge and pay monthly VAT returns and other tax related statutory obligations in consultation with the company's external accountants;

   [iii] To issue payments for all staff and other employees' salaries and wages as and when necessary including director's fees;

   [iv] To issue and provide instructions to any commercial bank affiliated with the company;

[v] To receive money on behalf of the company;

[vi] To manage the books and accounts of the company.

4. That Shareen Lata Deo aka Shareen Lata Hans as be restrained from entering the company's principle place of business at Lot 9, Bountiful Subdivision, Namaka Lane, Namaka, Nadi and by herself, her servants, agents or otherwise and howsoever from dealing with, withdrawing, assigning, utilizing, charging and/or encumbering any bank account with any financial institution within Fiji until the final determination of this application or further order of this Honourable Court;

5. That Shareen Lata Deo aka Shareen Lata Hans be restrained by herself, her servants, agents or otherwise and howsoever from transferring, assigning, disposing, charging, or encumbering any of the company's assets, or reconstructing, restructuring, amalgamating, transferring, charging or assigning any shares in the company until the final determination this application or further order of this Honorable Court;

6. That Shareen Lata Deo aka Shareen Lata Hans be ordered to immediately allow uninterrupted access to all company internet banking facilities and emails to the Applicant;

7. That the provisional liquidator be directed to pay all wages/fees due to the Applicant from period 17th August, 2017 till the determination of the winding up application;

8. That the time for service of all notices and applications be enlarged;

9. That all applications, pleadings and orders filed in this action be served on Shareen Lata Deo aka Shareen Lata Hans, the company and the office of the Official Receiver within 14 days from the date hereof;

10. That the matter be adjourned to 20th October, 2017 for further directions.

11. Such further or other orders and reliefs that this Honourable Court may deem just, fit, expeditious and necessary.

06. The court did not grant ex-parte orders in that winding application as it would contradict the ex-parte orders already granted in 186 of 2017. Therefore, that ex-parte summons was made inter-parte. Both parties then filed their affidavits for and against that summons. Whilst these two cases were pending in this court, Ms. Hans, on 05.02.2018 transferred 48 shares, which the Mr. Deo declared in the Deed of Trust dated 20.08.2009 to have

held on trust for her, to her name using the Power of Attorney executed by him on the same day (2008.2009). By that transfer, she unilaterally increased her shares in the company from 50 to 98 fully paid shares. This raised another cause of action to Mr. Deo to bring another action (121 of 2018) to nullify the said transfer. Mr. Deo was able to obtain an injunction against Ms. Hans in that case which was heard by a judge restraining her from uttering the purported transfer to any third party, entities, contractors, suppliers, employees, clients and statutory bodies including Registrar of Companies. Ms. Hans appealed the injunction to Fiji Court of Appeal and also filed an application under Order 18 rule 18 of High Court Rules to strike out that action on the basis there is no reasonable cause of action. The parties then filed affidavits in that application too.

07. Accordingly, three applications were fixed for hearing. They are (a) application by Mr. Deo for consolidation of all three actions (186 of 2017, 11 of 2017 and 121 of 2018), (b) application by Mr. Deo for setting aside ex-parte orders made on 31.08.2017 and to appoint provisional liquidator, and (c) striking out application filed by Ms. Hans in 121 of 2017. At the hearing of all the applications in all three matters, the counsel for Ms. Hans, after long deliberation, informed the court that his client Ms. Hans had consented for the application filed by Mr. Mahendra Deo for consolidation of all three matters and she did not intend to proceed with her application for striking out of Action No. 121 of 2018 filed by Mr. Mahandra Deo for nullifying the purported transfer of 48 shares of Mr. Mahendra Deo. By consent, the court consolidated all three matters and allowed withdrawal of striking out application. The counsels for both parties then submitted to the court that, the issue of costs in those two applications could be determined based on their written submissions. Thereafter, they made their oral submission on the remaining issues and filed their written submission too. It must also be noted that, some reliefs sought by Mr. Deo in his summons filed on 21.09.2017 were granted by consent. Accordingly, the following issues to be finally determined in all three matters:

1. Whether ex-parte orders made in Action No. 186 of 2017 should be set aside or not?

2. Whether the Official Receiver should be appointed as the provisional liquidator to conduct the affairs of the company until final determination of all three matters as prayed for in paragraph 3 of the summons filed by Mr. Deo on 21.09.2017?

3. Whether Ms. Hans should be restrained as prayed for in paragraphs 4 and 5 of the same summons?

4. Whether the provisional liquidator should be directed to pay all wages/fees due to Mr. Deo from period 17th August, 2017 till the determination of the winding up application?

5. Whether any party is entitled to costs in any of the three matter, and if so, on what basis?

08. The counsel for Mr. Deo urged several grounds for setting aside ex-parte orders made on 31.08.2017. Among them are that, those orders were made for indefinite time and they are ambiguous. However, the facts urged by counsel for Ms. Hans before the court on that date and the directions given by the court after granting those are evident that they were granted for certain period until the permanent orders were made pending determination of the originating summons filed on 31.08.2017 by Ms. Hans. It is also evident that those orders were made for specific purpose, even though those orders were abused by Ms. Hans through her 'post-order conducts' that will be discussed later. The record itself is evident that, the court directed Mr. Deo to file his affidavit in opposition for those orders and thereafter Ms. Hans to file her affidavit in reply to fix hearing to decide whether to make them permanent or to set aside. However, the hearing could not proceed swiftly for several reasons which are set out in the record itself. Furthermore, Mr. Deo brought the winding up proceedings and sought interim orders as mentioned above and all the applications had to be heard together given the nature of inter-connected facts and evidence in these matters. For only reason that those orders have no heading as 'Interim Orders' it cannot be considered as they were made for an indefinite time.

09. In nutshell, it was urged on 31.08.2017 on behalf of the Ms. Hans that, Mr. Deo being the shareholder and director oppressed her from managing the company, as director and equal shareholder. The originating summons in Case No. 186 of 2017 was filed pursuant Sections 176, 177,183, 676 (1), (2) of the Companies Act 2015 and Order 29 Rule 1 and Rule 1(2) of the High Court Rules 1988 and under inherent Jurisdiction of the Court. The counsel highlighted some of the oppressive conducts of Mr. Deo and submitted that, Mr. Deo instructed the bank to cancel the cheque book; he did not declare the dividend and claims to be holding 99% of the shares of the company whereas Ms. Hans is the equal shareholder, having 50 fully paid shares; he prevented the salary being paid to the staff who were nearly 25 full time employees; he did not declare the dividend of $ 1.9 million (Exhibit 20 of Ms. Hans' affidavit filed on 31.08.2007). The counsel further submitted that. Mr. Deo is advised by his solicitors to wind up the company though the company was lucrative and had acquired goodwill and reputation. Below are some of the submissions made by the counsel on that day and it will give the background of giving orders in that nature to Ms. Hans.

At page 4 of the transcript dated 31.08.2017 the counsel said:

> Exhibit 12 is a letter that was written to the bank it says further to my emails please cancel all cheque books issued to Pacific West Builders Ltd also in future please do not issue any new cheque books without my consent. So basically a director in my opinion is not able to do that one director if there only 2 directors the plaintiff and the defendant are the only 2 directors so you can't really do that because that's not in the best interest of the company because the company becomes a limited liability

company in totally different personality and they all they both are equal shareholders so he owes a duty to the lady because she's a shareholder and he can't do anything that'll affect the interest of the lady. As director and also as a shareholder so it becomes sort of oppressive

At page 12 of the transcript dated 31.08.2017, he further stated:

> So all in all sir and the contract a lucrative contract ah we say that she has means to pay and in fact she has to pay wages today I believe I won't be able to give her an order so she'll pay from her own source funds to pay the salary of the staff which is end of the month and they've got 25 full time employees and they would need to be paid. So she's already made arrangements to take out money from her personal account and pay the workers and I have also attached there certain things I need to take your attention to so that I don't be accused when they come to set aside for misleading.

At page 13 of the transcript dated 31.08.2017:

> Their son who is 23 years old is in university in Australia. He's studying civil engineering; he was groomed to take over the business and what now the solicitors for the defendant are saying that they should now voluntary wind up the company. They have got instructions to voluntary wind up.

10. Accordingly, the court was satisfied on the application made by Ms. Hans that the conducts of the company was contrary to her interests as a whole and or oppressive to, unfairly prejudicial to, or unfairly discriminatory against her as the equal shareholder of the company. As a result the court granted wider powers to regulate the conduct of the company's affairs and with the view to prevent from being wound up as it had lucrative business. However, the court did not grant the Order she sought in paragraph (d) of the summons which was intended to exclude Mr. Deo from acting in his capacity as the equal shareholder of the company. The intention of the court was to ensure that, none of the shareholders oppresses the other in the affairs of the company and to allow the company, which was lucrative in its business, to continue its operation. Though the above orders might have appeared more liberal and unrestrictive when she abused them, they were warranted as per the application made and circumstances that were urged by the counsel at the ex-parte hearing. They were not meant to allow Ms. Hans to conduct the affairs of the company according to her whims and fancies. The clear intention of the court when granting those orders was to protect Ms. Hans's interest in the company and to allow both shareholders to conduct the affairs of the company without oppressing the other. The context, in which those orders were granted, should be considered before labelling them as wider or ambiguous. Therefore, I am unable to agree with the above two grounds urged by the counsel for Mr. Deo.

11. One of the most important grounds urged by the counsel for Mr. Deo is the material non-disclosure by Ms. Hans when obtaining those ex-parte orders. A duty casted on an applicant for an ex-parte order to make full and fair disclosure of all material facts to the court. This duty is important since the injunction is granted without notice to the defendant and court therefore does not have an opportunity to hear the defendant, but purely relies on the material submitted by the applicant.

12. RALPH GIBSON LJ in **Brink's-Mat Ltd v Elcombe and Others** [1988] 1 W.L.R 1350; [1988] 3 All ER 188 at pages 192 and 193 expounded the principle on material non-disclosure in getting ex-parte injunction and held that:

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ.
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> (2) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *The Kensington Income Tax Commissioners* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J.
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> (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
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> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at 92-93 per Slade LJ.
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> (5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full

disclosure is deprived of any advantage he may have derived by that breach of duty ... ': see *Bank Mellat v Nikpour* (at 91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Commissioner's* case.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> 'when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed' per Glidewell LJ in *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc.*

13. As mentioned above, the main ground that was urged by the counsel for Ms. Hans to obtain the ex-parte orders on 31.08.2017 was that, Mr. Deo instructed ANZ bank to cancel the cheque book issued to the company. Ms. Hans annexed the copy of the letter sent by Mr. Deo, marked as Exhibit 12. It was dated as 28.08.2017 and addressed to one Sanjay of ANZ Bank. Mr. Deo by that letter had clearly instructed the Bank to cancel all cheque books issued to the company and not to issue any new cheque book in future without his consent. The counsel for Ms. Hans submitted that due to this letter, his client was unable to make the payments necessary for the operation of the company and she had to arrange the payments from her personal account. It was shown that, this was the main oppressive conduct by Mr. Deo. However, as alluded by the counsel for Mr. Deo it was Ms. Hans who first instructed the same person of ANZ Bank by her letter dated 25.08.2017 and written on the letterhead of the company to cancel certain cheques mentioned in that latter. This letter is marked as "MD 15" and annexed with the affidavit of Mr. Deo filed on 21.09.2017 in his Winding up Application No. 11 of 2017. However, Ms. Hans never disclosed this document to the court when she alleged Mr. Deo of cancelling the cheques by his letter dated 28.08.2017.

14. As expounded by RALPH GIBSON LJ in **Brink's-Mat Ltd v Elcombe and Others** (supra) the materiality to be decided by the court and not by the assessment of the applicant or his legal advisor. The court granted ex-parte orders allowing Ms. Hans to make payment on behalf of the company as it was satisfied that, Mr. Deo prevented her from making necessary payments. The Exhibit 12 in her affidavit was crucial in arriving to such conclusion. If her letter dated 25.08.2017 was available before the court at that time, she would not have been able to satisfy the court on the alleged oppression. In fact, it was she who oppressed Mr. Deo in relation to company affairs. When Mr. Deo suggested for both of them to sign the cheque instead of either of them, Ms. Hans objected it and disputed saying that, he cannot decide it without consulting her. This is evident from her Exhibit 8 annexed with her affidavit filed on 31.08.2017. However, she unilaterally instructed the bank to cancel the certain cheques and deliberately suppressed that letter which is material to this action. What is important is that, Ms. Hans did not deny sending such letter to the bank. Ms. Hans was not only guilty of material non-disclosure, but also lacked morality to complain about Mr. Deo of oppression, which she first initiated. Therefore, I agree with the submission of the counsel for Mr. Deo that, there was material non-disclosure by Ms. Hans when she sought the ex-parte orders granted on 31.08.2017.

15. The material non-disclosure in obtaining the ex-parte orders will deprive the person who obtained such orders of any advantage he may have already obtained by means of such order and if it is established the court will be swift to discharge it. **Warrington LJ** in **Rex v. Kensington Income Tax Commissioners** [1917] 1 K.B. 486 held at page 509 that:

> It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.

16. A fortiori the ex-parte orders made on 31.08.2017 should immediately be discharged on this ground alone. Further, the conducts of Ms. Hans after obtaining those ex-parte orders also proved that, she abused those order and acted contrary to what she deposed in her affidavit and what she urged the court through her solicitor. She deposed in paragraph 46 and 49 of her affidavit filed on 31.08.2017 as follows:

> **46.** **THAT** as an interim relief I believe in the interest of the company, the parties, the creditors, the company employees and statutory bodies payments due to them ought to be made on the dates that they fall due, majority of it is today, therefore I am seeking that I be allowed to execute all cheques to pay the creditors, for wages to

employees, making payment to clear statutory debts and all other relevant expenses of the company until this matter is finally decided.

49. **THAT** I further undertake that no monies will be paid out where such payment is not required for the benefit and advancement of the company.

17. She annexed a schedule of payments needed for every month as "Exhibit 14" with her affidavit filed on 31.08.2017. In addition, her counsel at hearing on that day informed to the court that, there were certain payments and majority of them was wages. He submitted as follows: (page 12 of the transcript dated 31.08.2017)

> We have attached a schedule of payments that need to be made now in the schedule we have attached for the whole month and it covers say for certain roof we've got a net for July, what payments need to be usually make but majority of those payments have been made only the wages and so forth is it's not I'm not saying that its two hundred thousand and we not saying that two hundred thousand needs to be paid. Its, its far lesser amount that needs to be paid hence the urgency

18. However, as clearly pointed out by the counsel for Mr. Deo and his averments and documents annexed, Ms. Hans made several payments from the company's fund. This includes the payment for credit cards of both of them, payments made to their children, bonus payment of $ 5,000 to the housemaid whose weekly wages was just $ 100.00. None of these payments were included in the schedule annexed with her affidavit marked as "Exhibit 14". The shocking revelation is that, she purchased two expensive vehicles; one for their son who is in Australia and the other for her de-facto partner. She has spent a considerable amount over $ 300,000.00 for this purpose. Neither their son, nor her partner is shareholders of the company. I do not see any justification for these expenses and this is blatant abuse of the orders granted ex-parte on 31.08.2017. She not only misled the court on the alleged oppression by Mr. Deo and obtained those orders, but also abused them and acted against the interest of the company and other shareholder – Mr. Deo. In fact, she could be prosecuted for the criminal offence under section 115 (1) of the Company's Act 2015 for breaching her duty as the director of the company.

19. Ms. Hans neither disputed, nor did she deny any of these allegations in relation to material non-disclosure before obtaining those orders and her obnoxious conducts after obtaining them. Her counsel did not directly respond any of the grounds urged by the counsel for Mr. Deo. Conversely, he urged some other grounds in support of those orders made ex-parte on 31.08.2017. Firstly, he submitted that, the respective affidavits of alleged breach of those orders were filed back in 2018 and there was no evidence as at the date of hearing of this matter. Further he said that, there was no committal by Justice Mackie, but Ms. Hans was acquitted from the alleged breach of orders. Secondly, Justice Mackie had given some additional orders and some of the issues, such as internet banking (email access) have been sorted out; both parties still remain as directors and

shareholders; neither of them is now restricted from accessing the books and records of the company and they have their rights over the company as per the Company's Act. Finally, there is no appeal pending in the Fiji Court of Appeal against the additional orders granted by Justice Mackie. Therefore, the counsel for Ms. Hans submitted that, those orders made ex-parte on 31.08.2017 should remain until determination of all three consolidated matters.

20. Generally, in applications that are summarily decided, the affidavits are first filed in support and against such applications, and thereafter they are heard on a later date. Sometimes, the hearings are not taken up immediately after filling all the affidavits due to various reasons and sometimes, the hearings are also vacated at request of either or both parties. In such a situation, the parties are not required to file fresh evidence by way of affidavit; rather the parties and the court rely on the evidence already submitted by each party. Therefore, the argument of the counsel for Ms. Hans that there was no evidence as at the date of hearing cannot stand. Further, the fact that Ms. Hans was not committed for breach of order by Justice Mackie or acquitted by him is not relevant in deciding whether to set aside those orders or not. The evidence might have fallen short of proving the offence to the standard required by law. However, it does not mean that, this court which is required to consider a different standard of proof should ignore those evidences. After all, Ms. Hans did not deny any of her alleged conducts after obtaining those ex-parte orders.

21. In fact, Justice Mackie who heard the committal proceeding made some additional orders considering the interest of company and other shareholder and director – Mr. Deo. He made those orders exercising his inherent jurisdiction. He neither exercised appellate nor the revisionary jurisdiction over those orders made ex-parte on by this court on 31.08.2017. Therefore, the additional orders Justice Mackie made, could not be considered as a bar to the power of this court to determine either to set aside those orders or not. Finally and most importantly, it has been established that, Ms. Hans had breached the duty of disclosing material facts to the court when she applied for the ex-parte orders. Therefore, the ex-parte orders made on 31.08.2017 in the Civil Action No. 186 of 2017 should immediately be set aside.

22. The next issue is whether the Official Receiver should be appointed as the provisional liquidator to conduct the affairs of the company until final determination of the winding up application filed by Mr. Deo. The court has discretionary power to appoint the Official Receiver to be the liquidator provisionally at any time after presentation of a winding up application and before making of a winding up order. In addition, the court in its discretion can limit and restrict the power of such liquidator. This power is provided in section 537 of the Companies Act 2015 and it reads:

> Appointment and powers of interim liquidator
>
> **537.** (1) The Court may appoint the Official Receiver to be the liquidator provisionally at any time after the presentation of a winding up application and before the making of a winding up order.

(2) Where a liquidator is appointed by the Court, the Court may limit and restrict his or her powers by the order appointing the liquidator.

23. The Rule 26 in Part 3 of the Companies (Winding Up) Rules 2015 provides for the procedure for the court to exercise its discretionary power. The Rule 26 reads that:

Order appointing Provisional Liquidator

26. (1) At any time after the Filing of an application for a winding up order, the Court may appoint a Provisional Liquidator on—

(a) the application of the Registrar or a creditor or contributory of the Company; and

(b) proof by affidavit of sufficient grounds for the appointment of a Provisional Liquidator.

(2) The appointment may be made on the terms that the Court thinks just or necessary.

(3) The application for appointment of a Provisional Liquidator must be served on the Company before it is heard unless it appears that there are circumstances making it impracticable to serve the Company, before the application is heard.

24. King CJ (with whom Cox and Olsson JJ agreed) in **Zempilas and Others v J N Taylor Holdings Limited and Others** (1990) 3 ACSR 518 (SCSA), stressed at page 522 that, "the appointment of a provisional liquidator pending adjudication upon the petition for winding up, is a drastic intrusion into the affairs of the company and is not to be contemplated if other measures would be adequate to preserve the status quo." Hence, the purpose of appointing provisional liquidator is to preserve the status quo to prevent the harm to all concerned parties. Tamberlin J whilst listing six principles concerning the appointment of a provisional liquidator, in **Australian Securities Commission v Solomon** (1996) 19 ACSR 73 stated at page 80 that:

> The provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all concerned and to enable the court to decide, after a further examination, whether the company should be wound up: *Re Carapark Industries Pty Ltd (in liq)* (1966) 9 FLR 297; 86 WN (Pt 1)(NSW) 165 at 171.

25. The Rule 26 of the Companies (Winding Up) Rules 2015 requires the proof by affidavit of sufficient grounds for the appointment of a Provisional Liquidator. Thus, it is important as to how the court should exercise its wide discretion and how to approach the task of deciding whether to appoint a provisional liquidator or not. Kirby J (P) in

Costantinidis and Ors v Jgl Nos. Ca 40193/95; Ed 1828/95 Companies [1995] NSWSC 141, followed the principles summarized by Master Lee (as Lee J then was) in **Re McLennan Holdings Pty Limited** (1983) 1 ACLC 786 (SCQ) decided on 8th November 1995. In that case Master Lee stated that:

> Whilst the ultimate fate of the petition must be left to the Court finally hearing the matter, a provisional liquidator will not usually be appointed unless it appears in the material that a winding-up order is likely ..... This presupposes that there should be adequate evidence adduced on an application for appointment of a provisional liquidator to show that a winding-up is, in the absence of material to the contrary, likely.

26. Brereton J observed in **Grace v Grace** (2007) 25 ACLC 141; [2007] NSWSC 6, that, the appointment of provisional liquidator involves 'the taking of a serious step and requires the exercise of very great care' in exercising the 'wide discretion' the court has. He then went to say at paragraph 29 that:

> Thus, while the circumstances in which a provisional liquidator will be appointed are infinite and there is a wide discretion, such an appointment involves the taking of a serious step and requires the exercise of very great care, and the decision whether the court should take the serious step of awarding a judicial remedy of a wholly extraordinary nature by way of drastic intrusion into the affairs of the defendants, is usually approached -- in a manner broadly analogous to that applicable to other forms of interim preservation, such as an application for the appointment of an interim receiver or an interlocutory injunction - by reference to two main questions: first, whether there are good prospects of the plaintiff obtaining a winding up order; and, secondly, whether, having regard to the whole of the circumstances and in particular the measures already in place, the assets of the company are in jeopardy such that they need to be put under the protection of a provisional liquidator pending trial [*Natural Extracts Pty Ltd v Stotter* (unreported, FCA, 18 December 1998, Hely J); *Triulcio v Chase Property Investments Pty Ltd* [2003] NSWSC 861, [23]-[26] (Barrett J); *Lubavitch Mazal v Yeshiva Properties*, [106]].

27. Barrett J in **Nikolaidis v Camden Retail Pty Ltd** [2010] NSWSC 977 (31 August 2010) stated in paragraph 32 that:

> That question was traditionally approached on the footing that, since the application is an interlocutory application in winding up proceedings, the main question is whether it is necessary to appoint a provisional liquidator to preserve the *status quo* pending the final hearing. More recently, I think, the question has become a more general one concerning the need for stable governance until the final hearing. There must be, in general terms, "some good reason" for the appointment of a provisional liquidator, for example "urgency, or unusual circumstances such as danger to assets, lack

of control, deadlock, or some public interest element for his appointment": *Re Brylyn No 2 Pty Ltd* (1987) 12 ACLR 697 at 707.

28. The above authorities suggest that, the court must exercise its wide discretion with great care. The very appointment of a provisional liquidator can have a drastic effect on the company's business, perhaps even leading to its commercial death (Austin J in **Roumanus v Orchard Holdings** [2007] NSWSC 1480 at paragraph 9). The court should consider whether there are good prospects of the plaintiff obtaining a winding up order; and whether, having regard to the whole of the circumstances and in particular the measures already in place, the assets of the company are in jeopardy such that they need to be put under the protection of a provisional liquidator pending trial. There must be "some good reason" for appointment of a provisional liquidator, like "urgency, or unusual circumstances such as danger to assets, lack of control, deadlock or impasse or some public interest element for such appointment. However, the court should direct its judicial mind to the fact that, the power to appoint the provisional liquidator is unlimited and the circumstances under which the provisional liquidators are appointed are infinite [**Re Club Mediterranean Pty Limited** (1975) 11 WR 481, 484; **Re McLennan Holdings Pty Limited** (supra) ; **Costantinidis and Ors v Jgl Nos** (supra)].

29. The counsel for Mr. Deo articulated several reasons based on the numerous affidavits filed by the parties in all three matters in support of appointing provisional liquidator in this case. He submitted that, the evidence in these consolidated cases is compelling to support the appointment of provisional liquidator and it is most reasonable and logical order to grant, pending determination of the winding up application and other two consolidated matters. Conversely, the counsel for Ms. Hans submitted that such appointment would be inappropriate for following reasons:

a. The evidence does not establish a reasonable prospect that a winding up order will be made;

b. The evidence establishes that, the other measures would be sufficient to preserve the status quo;

c. There is no 'good reason' such as danger to assets, public policy, urgency for making the order; and

d. The company is not being conducted in a manner prejudicial or oppressive to a shareholder.

30. The circumstances in which a company may be wound up by the court are provided in section 513 of the Companies Act 2015. The said section is as follows:

Circumstances in which Company may be wound up by the Court

513. A Company (which where applicable in this Part includes a Foreign Company) may be wound up by the Court, if—

(a) the Company has, by Special Resolution, resolved that the Company be wound up by the Court;

(b) the Company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(c) the Company is Insolvent;

(d) the Court is of opinion that it is just and equitable that the Company should be wound up;

(e) in the case of a Foreign Company and Carrying on Business in Fiji, winding up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business.

31. Mr. Deo filed the winding up application on the ground (d) of the above section that, it is just and equitable that the company should be wound up. It must be clearly stated here that, the solvency of the company is not an issue at all. The remedy sought under this ground is an equitable remedy and it is the circumstances of each and every case that determine whether it is just and equitable to wind up the company. Therefore, the term just and equitable should be applied in its generality without limiting it under certain categories or headings. Lord Wiberforce in **Ebrahimi v Westbourne Galleries Ltd and Others** [1973] AC 360, held at pages 374 and 375that:

> My Lords, the petition was brought under section 222 (f) of the Companies Act 1948, which enables a winding up order to be made it "the court is of the opinion that it is just and equitable that the company should be wound up". This power has existed in our company law in unaltered form since the first major Act, the Companies Act 1862. Indeed, it antedates that statute since it existed in the Joint Stock Companies Winding Up Act 1848. For some 50 years, following a pronouncement by Lord Cottenham L.C [*Ex parte Spackman* (1849) 1 Mac & G. 170, 174] in 1849, the words "just and equitable" were interpreted so as only to include matters ejusdem generis as the preceding clauses of the section, but there is now ample authority for discarding this limitation. There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances. Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor)

the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders. (Emphasis added).

32. Brereton J in **In the matter of Catombal Investments Pty Ltd** [2012] NSWSC 775 mentioned at paragraphs 19 and 20 some categories that falls under 'just and equitable' ground and also emphasized that term should remain in general. He said:

> 19. The Court may order that a company be wound up if it is of the opinion that it is just and equitable to do so [(Cth) Corporations Act 2001, s 461(1)(k)]. Although the concept "just and equitable" is a broad one incapable of exhaustive definition, conventionally the decided cases are recognised as falling into a number of classes, including in particular: (1) failure of the substratum of the company; (2) deadlock or disagreement in the management of the company's affairs; (3) fraud in the formation of the company; (4) misconduct by the directors of the company; (5) constitutional and administrative vacuum in the management of the company; and, (6) lack of confidence, fairness and public interest and commercial morality.
>
> 20. However, the Court is not restricted in exercising its discretion to particular factual categories [Re Straw Products Pty Ltd [1942] VicLawRp 52; [1942] VLR 222, 223]. And, the question whether it is just and equitable is a question of fact, in respect of which each case must depend on its own circumstances [Re Bleriot Manufacturing Aircraft Company Ltd (1916) 32 TLR 253, 255]. The words "just and equitable" are general words, which must remain general, and the applicant is entitled to rely on any circumstances of justice and equity that affect him or her in his or her relations with the company or shareholdings [Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 ("Ebrahimi"), 374], at least so long as those circumstances have a direct and immediate relationship to, or bearing upon, the management or administration of the affairs of the subject company, or the conduct of its business [Re Nestor Pty Ltd (1981) 6 ACLR 114, 119 (Powell J)].

33. As mentioned above, both Mr. Deo and Ms. Hans had been apart for sometimes and then dissolved their marriage. However, the acrimony continues between them. As a result, numerous actions between them are pending right from the Magistrate' Court up till the Fiji Court of Appeal. This includes the several Domestic Violence Restraining Order Applications between them, the matrimonial proceedings that is pending in the Nadi Magistrate's Court and these consolidated three matters together with the appeal pending in Fiji Court of Appeal against the injunctions granted in Civil Action 121 of 2018. As a

result they are not in talking terms. In **In re Yenidje Tobacco Co. Ltd** [1916] 2 Ch. 426, two separate tobacconists and cigarette manufacturers formed a company and profitably run the business. However, one to sued the other alleging fraudulent misrepresentation over a transaction. As a result, they became so hostile that neither of them would speak to other, communications having to be conveyed between them through the secretary of the company. One of them presented a petition alleging that a complete deadlock had arisen, that the substratum of the company was gone and that it was just and equitable that the company should be wound up. The English Court of Appeal upheld the decision to wind up the company and held at pages 431 and 432 that:

> Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue.
>
> At page 432:
>
> If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible.

34. The situation in the case before me is worse than the situation in **In re Yenidje Tobacco Co. Ltd** (supra). The reason being that, in that case the two shareholders were at least able to communicate with each other through the secretary. However, in the present case, the "Exhibit 8" (copy of some emails between them) annexed with the affidavit of Ms. Hans filed on 31.08.2017 is evident that, an attempt by Mr. Deo to communicate with Ms. Hans through an employee of the company in relation to company affairs proved abortive. Further, according to paragraph 23 of the affidavit sworn by Mr. Deo on 21.09.2017, neither Ms. Hans nor the employees of the company pay heed to Mr. Deo's instruction and or request regarding the company affairs. On the other hand, paragraph 11 of the affidavit sworn by Ms. Hans on 30.04.2018 is the proof of the fact that, Mr. Deo who tried to get some information over a cheque through the receptionist of the company had ended up in being reported to police by that receptionist.

35. Mr. Deo was ousted from the company and Ms. Hans hired another engineer in his place. He has been left out of the company and he is unable to engage in the affairs of the company. In **In re American Pioneer Leather Company Limited** [1918] 1Ch 556, owing to dissensions between the three shareholders, the affairs of the company were at a deadlock, and there were pending actions between the shareholders and the company. One shareholder offered his shares to others in accordance with article of association. However, both shareholders refused to buy them and the shareholder who offered his shares was left out. He presented the application for winding up on the ground of just and equitable. Neville J held at page 561 and 562 that:

> Having regard to the position into which the affairs of this company have drifted and the intention of the shareholders from the first that, in such circumstances the shareholder who was left in the cold should be entitled to put an end to the company, it seems to me only just and equitable to make an order for the compulsory winding up of this company.

36. Considering the circumstances of the company in this case before me in the light of above authorities, it seems to me that, it is more likely that, an order for the compulsory winding up of this company will be made.

37. As mentioned above, Ms. Hans used the ex-parte orders, which were made in Civil Action 186 of 2017 on 31.08.2017 for the purpose of balancing the equal rights of both shareholders, to totally control the company excluding Mr. Doe from the operation of the company, even though the court refused to restrain him from acting in his capacity as the shareholders. The conducts of Ms. Hans in relation to the affairs of the company after obtaining those ex-parte orders raised serious concern in terms of interest of the company, its assets and the other equal shareholder – Mr. Deo. Some of them are listed below:

[a] Paid for personal credit card expenses using the company funds;

[b] Made payments to Milan Deo and Sabrina Deo (children) from the company funds;

[c] Made a payment of $5,000 to the House made, Sangeeta Devi as bonus;

[d] Purchased two luxury vehicles from the company funds;

[e] Increased the Director's Fees;

[f] Stopped payment of weekly wages/fees to Mr. Deo and all his other entitlements;

[g] Cancelled Mr. Deo's Mobil Go Card and Carpenters Card;

[h] Stopped Mr. Deo's access to internet banking and company emails by changing the passwords;

[i] Broke two fixed term deposits totaling some FJ$1,500,000.00;

[j] Removed Mr. Deo as an Engineer of the company and appointed another without consulting him despite his reasonable request in writing through his solicitors; and

[k] Unilaterally taking over business decisions and instructing the company's bank, ANZ without Mr. Deo's approval and/or any company resolution.

38. She had manifestly acted against the interest of the company, its assets and the equal shareholder – Mr. Deo. The serious concern is that, she used the ex-parte orders as a 'tool' to achieve her targets, let alone her material non-disclosure to the court at the time of obtaining those orders. Further she allegedly the transferred 48 shares of Mr. Deo using a Power of Attorney which led to the institution of other Case No. 121 of 2018 by Mr. Deo to reverse such transfer on ground of fraud. Her conduct after obtaining those ex-parte orders brought multiple repercussions, such as danger to assets of the company, lack of control by the other equal shareholder- Mr. Deo and complete deadlock and impasse. In fact, these are some of the good reasons which warrant appointment of provisional liquidator (see: **Re Brylyn No 2 Pty Ltd** (1987) 12 ACLR 697 at 707).

39. Due to the current impasse in the management of the company there are several allegations by both against the other. The numerous and voluminous affidavits filed by both Mr. Deo and Ms. Hans in all three consolidated matters are evident that, there is loss of confidence between the parties in conduct and management of the company. The loss of confidence has been held to be a valid reason to wind up the company on the ground of 'just and equitable'. In **Lock and another v. John blackwood, limited** [1924] AC 783 the Privy Council held at page 788 that:

> It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the stature just and equitable that the company be wound up.

40. Considering the circumstances of the company in this case before me in the light of above authorities, it seems to me that, it is more likely that, an order for the compulsory winding up of this company will be made. However, the counsel for Ms. Hans submitted that, after variation of orders by Justice Mackie, Ms. Hans has not taken any adverse step and there is no necessity to appoint the provisional liquidator. The counsel cited **In re Matapo Ltd [2008] FJHC 298** in support of his submission. First of all that case cited by the counsel will not be helpful here as the ground of winding up in that case was not 'just and equitable. If there are some suitably stabilizing interim regime is in place the court will generally decline to appoint a provisional liquidator pending final determination of a winding up application: **Triulcio v Chase Property Investments Pty Ltd** [2003] NSWSC 861. However, due to serious matters of deadlock in the

management of the company, degree of acrimony between both of them, loss of confidence and danger to the assets of the company as described above, the winding up order is more likely in this matter.

41. For the reasons adumbrated above, I am satisfied that, there are good prospects of Mr. Deo obtaining a winding up order in this matter. Further having regard to the whole of the circumstances and in particular the interim measures already in place, I am also satisfied that the deadlock and impasse in the management and stewardship of the company, level of acrimony, and loss of confidence require an urgent need for the installation of an external official to take matters in hand pending determination of all three consolidated matters.

42. The next issue is whether the restraining orders should be made on Ms. Hans as prayed for in prayer 4 and 5 of the summons filed by Mr. Deo on 21.09.2017. The very purpose of appointing provisional liquidator is to prevent oppressive and or unfairly prejudicial and or unfairly discriminatory conducts of Ms. Hans against the equal shareholder Mr. Deo in the affairs of the company, and to regulate its affairs. The restraining orders sought that prayer 4 and 5 will, therefore, ordinarily follow the above decision of appointing the provisional liquidator. If not, very purpose of appointing the provisional liquidator will be futile. Thus, I decide to grant restraining orders sought in paragraphs 4 and 5 of the summons filed on 21.09.2017. Further, I am satisfied from the affidavit evidence adduced before me that, Ms. Hans had stopped the wages and some of the payment to which Mr. Deo was entitled in his capacity as the director and employee of the company and it needs to be reversed.

43. The final determination is the cost. The counsel for Mr. Deo sought the costs in all three consolidated matters on indemnity basis. He cited several authorities in support of his argument. On the other hand, the counsel for Ms. Hans submitted that, since all three applications were interlocutory, if any such cost to be ordered in these applications, it should be reserved until the court finally determines all three applications. Therefore, the issue is whether the costs to be ordered in these applications and if so, on what basis.

44. One panacea which heals every sore in litigation is the costs as observed by Lord Justice Bowen in **Cropper v Smith** (1884) 26 Ch. D. 700 (CA) at page 710. The general principle of awarding cost is that, 'the costs follow the event'. This means that the costs of an action are usually awarded to the successful litigant unless there are exceptional circumstances. Bowen LJ in **Forster v Farquhar and Others** [1893] 1 Q.B 564 stated at page 569 that:

> We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

45. In **Shirley v Wairarapa District Health Board** [2006] NZSC 63, [2006] 3 NZLR 523 the Supreme Court of New Zealand summarized the principle and said that 'the loser, and only the loser, pays' unless there are exceptional circumstances. However, awarding of costs is at the discretion of the Court and this discretion is recognized in Order 62 rule 3 (3) of the High Court Rules. The costs awarded may include fees, charges, disbursements, expenses and remuneration. The court must be mindful of the purpose of awarding cost when exercising its discretion.

46. The primary purpose of awarding cost is to compensate a successful party, and therefore, it is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from access to justice and seeking to enforce their rights through the courts. Edwards J in **Taylor v Roper** [2019] NZHC 16 (21 January 2019) discussed the purpose of awarding costs in paragraphs 6 and 7 and said:

> The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law.6 Costs are not ordered as punishment against the losing party, nor as a reward for the winner.7 An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.
>
> An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

47. Originally there were three applications that were taken up for hearing in this three consolidated matters. At hearing of all three applications, Ms. Hans consented for consolidation application of Mr. Deo and withdrew her application for striking out after much deliberation. Only the application for setting aside the ex-parte orders made on 31.08.2017 and to appoint provisional liquidator was heard. Mr. Deo is now successful in that application. The question is whether Mr. Deo is entitled for cost in other two applications, namely the consented consolidation application and withdrawn striking out application, if the rule that, the costs follow the event is applied?

48. A useful guidelines, that classify the circumstances into three categories, were laid down by Lord Neuberger in **R (M) v Mayor and Burgess of the London Borough of Croydon** [2012] EWCA Civ 595; [2012] 1 WLR 2607; [2012] 3 All E.R 1237. His Lordship held in that case that:

> The principles which applied in relation to costs in general civil litigation where cases were settled before trial also applied in the Administrative Court. Where a claimant obtained all the relief he sought, whether by consent or after a contested hearing, he was undoubtedly the successful party and was entitled to all his costs, unless there were a good reason to the contrary. Where a claimant obtained only some of the relief he sought, either by consent or after a contested hearing, the position on costs was more nuanced. There was a sharp difference between (i) a case where a claimant had been wholly successful, whether following a contested hearing or pursuant to a settlement, (ii) a case where he had only succeeded in part following a contested hearing or pursuant to a settlement, and (iii) a case where there had been some compromise which did not actually reflect the claimant's claims. In case (i) a claimant could say that he had been vindicated and, as the successful party, he should recover his costs. In case (ii), when deciding how to allocate liability for costs after a trial, the court would normally determine questions such as how reasonable the claimant had been in pursuing the unsuccessful claim, how it important it was compared with the successful claim, and how much the costs had been increased as a result of the claimant pursuing the unsuccessful claim. Where there had been a settlement, the court would normally be in a significantly worse position to make findings on such issues than when the case had been tried. In many such cases, the court would be able to form a view as to the appropriate order for costs. Where the parties had settled the claimant's substantive claims on the basis that he succeeded only in part, there was much to be said for concluding that here should be no order for costs. Where there was not a clear winner, it could help to consider who would have won, if the matter had proceeded to trial as, if that was tolerably clear, it could support or undermine the contention that one of the claims was stronger than the other. In case (iii), the court was often unable to gauge whether there was a successful party in any respect; in such cases there was an even more powerful argument that the default position should be no order for costs; it could well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it were clear, that could well strongly support the contention that the party who

would have won had done better out of the settlement and therefore did win.

49. Applying the above principle, I am of the view that, Mr. Deo is entitled for cost in all three applications, even though one was consented and the other was withdrawn. The next is, on what basis the cost to be allowed. The costs can be summarily assessed or granted either standard or indemnity basis. Jocelynne A. Scutt J in **Prasad v Divisional Engineer Northern (No 2)** [2008] FJHC 234; HBJ03.2007 (25 September 2008) cited number of cases that guide awarding costs. The principle that follows from the authorities is that, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party was reprehensible to a significant degree. In all three cases, the conducts of Ms. Hans deserve some moral condemnation for several reasons and some of them are listed below. Firstly, she deliberately suppressed material information to the court when she obtained ex-parte orders. Secondly, she deliberately prevented Mr. Deo from engaging in the affairs of the company, even though the court refused to grant order to that effect. Thirdly, she used the ex-parte order to curtail all banking authority of Mr. Deo even though it was not meant by those orders. Fourthly, judge who granted injunction in Civil Action 121 of 2018 pointed out there are triable issues in that matter; however, she filed the striking out application after that ruling, on the basis there is no reasonable cause of action in that matter. Fifthly, she made an abortive attempt to vary the additional orders granted by Judge Mackie in the Committal Proceedings, in order to shut out Mr. Deo from the operation of the company at all. Finally, knowing very well that, the issues in all three matters are interconnected and it is prudent to consolidate them, she dragged that application and consented only on the final date of hearing after much deliberation. For these reasons, I decide that, Ms. Hans should be ordered to pay indemnity costs to Mr. Deo in all three applications.

50. In result, I make the following orders;

a. The ex-parte orders made on 31.08.2017 in Civil Action No. 186 of 2017 are set aside forthwith,

b. The Official Receiver is hereby appointed as provisional liquidator and he or she to take control of the affairs of the company with immediate effect,

c. The Official Receiver in his or her capacity as the provisional liquidator is to conduct the affairs of the company as he or she is required by law until final determination of all three consolidated matters and specifically;

[i] To issue payments to all suppliers and utility service providers as and when necessary.

[ii] To prepare, lodge and pay monthly VAT returns and other tax related statutory obligations in consultation with the company's external accountants;

[iii] To issue payments for all staff and other employees' salaries and wages as and when necessary including director's fees;

[iv] To issue and provide instructions to any commercial bank affiliated with the company;

[v] To receive money on behalf of the company; and

[vi] To manage the books and accounts of the company.

d. The Official Receiver to pay Mr. Deo the all payments that were withheld by Ms. Hans from 31.08.2017 till to date if he is entitled to the same in his capacity as director and employee of the company,

e. Ms. Shareen Lata Deo aka Shareen Lata Hans be restrained from entering the company's principle place of business at Lot 9, Bountiful Subdivision, Namaka Lane, Namaka, Nadi and by herself, her servants, agents or otherwise and howsoever from dealing with, withdrawing, assigning, utilizing, charging and/or encumbering any bank account with any financial institution within Fiji until the final determination of all three consolidated matters,

f. Ms. Shareen Lata Deo aka Shareen Lata Hans be restrained by herself, her servants, agents or otherwise and howsoever from transferring, assigning, disposing, charging, or encumbering any of the company's assets, or reconstructing, restructuring, amalgamating, transferring, charging or assigning any shares in the company until the final determination of all three consolidated matters,

g. Ms. Hans should pay damages that might have caused to Mr. Deo by her conducts after obtaining the ex-parte orders, and it should be assessed if not agreed, and

h. Ms. Hans should pay indemnity cost in all three applications and it should be taxed if not agreed.

HIGH COURT OF FIJI
LAUTOKA

U. L. Mohamed Azhar
Master of the High Court

At Lautoka
03.07.2020