

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 14 of 2020

IN THE MATTER of **MAXTREME BUILDERS**
PTE LIMITED a company limited by shares having its
registered office at ground and 1st Floor, 1 Valetia Street,
Lautoka, in the Republic of Fiji

AND

IN THE MATTER of the Companies Act 2015

Counsel : **Substituted Petitioner: Mr Padarath & Ms Naco. M**
: **The Company: Mr Uludole. J**
Date of Hearing : **22,24,25th February, 2021**
Date of Judgment : **26.02.2021**

JUDGMENT

INTRODUCTION

1. This action for winding up was instituted on 4.3.2020. Due to the pandemic Covid 19 and related issues usual time period for conclusion of such an action, was extended to facilitate all the parties, upon request. The party who instituted this winding up (Petitioner) and the first substituted Petitioner's debts were satisfied. Due to such conduct and circumstances, the time period for conclusion of winding up, was extended on 18.9.2020 until final determination in terms of Section 528(2)(a) of Companies Act 2015. The present substituted Petitioner (Substituted Petitioner) was a supporting creditor and it was substituted on 22.9.2020. The hearing could not proceed due to proposed settlement with all the creditors and several adjournments were granted for that, but this could not finalize and the matter was fixed for hearing on 22.2.2021. On that date there was no affidavit in opposition filed, even without an affidavit in opposition being filed I allowed counsel for the Company to make submissions and considering the circumstances of case. The matter was adjourned for judgment for 24.2.2021 at 3pm. Counsel for Company on 24.2.21 at 8.18am filed a purported Motion in terms of Section 524(1) of Companies Act 2015. The Motion was listed for hearing, on the same day before delivery of judgment in order to conclude the matter. Since the

Company had failed to serve the said Motion even at the time of hearing I directed to serve it in open court and allowed the Company to make submissions and adjourned further submissions of substituted petitioner for 25.2.2021. Substituted Petitioner objected to the said Motion and filed written submissions. The Company which failed to file an affidavit in opposition to the substituted Petitioner's affidavit in support, hence precluded from disputing debt of the substituted Petitioner. Hence the counsel for the Company was misconceived to file the purported Motion in terms of Section 524 of Companies Act 2015, within this winding up to stay the same. This is not only procedurally wrong, but also legally incorrect. Section 524 of Companies Act 2015 grants a creditor or the Company to make an application to **stay proceedings instituted against the Company**, to the court where action is pending or to this court. It is futile to make such an application when the hearing had concluded and date for judgment fixed. This provision is analogous to Section 224 of repealed Companies Act (cap 247). Section 524 of Companies Act 2015 cannot be used to satay of winding up, as contended by the Company. It would be illogical and superfluous for the statute to provide a provision to stay winding up, before hearing of winding up. At the hearing of winding up, the court is given widest discretion, to make *'any other order it think fit'*, to deal in terms of Section 523(1) (c) of Companies Act 2015, hence no need to have a provision for stay the same.

FACTS AND ANALYSIS

2. This is an action for winding up of the Company stated in the petition. The Petitioner had filed this action in terms of Section 513(c) of Companies Act 2015 on the basis that the Company was insolvent and deemed unable to pay its debt in terms of Section 515(a) of Companies Act 2015.
3. There were several entities that had filed their intention to support this winding up including present substituted Petitioner.
4. Before the hearing, Petitioner had indicated that since its debt was settled it was not seeking winding up.
5. Petitioner did not seek to wind up the Company in terms of Rule 16(1)(e) of Companies (Wining Up) Rules 2015. The Petitioner had filed a list of parties intending to appear at hearing.
6. Accordingly another supporting creditor was substituted in terms of Rule 16(2)(a) of Companies (Wining Up) Rules 2015.
7. The Court also made directions in terms of Rule 16(2)(d) Companies (Wining Up) Rules 2015 for the Company to file affidavit in opposition.
8. The Petitioner instituted winding up action after service of statutory demand and there was an opportunity for the Company to seek setting aside of the said statutory demand

in terms of Section 516 of Companies Act 2015. For this twenty one days granted, and if that window of opportunity was not exercised the Company could not oppose the winding up without seeking leave of the court in terms of Section 529 of Companies Act 2015.

9. So, the barrier that applied to the Company to oppose debt stated in the statutory demand cannot be applied to the debts of supporting creditors.
10. The leave for opposing winding up is contingent on the ability oppose statutory demand in terms of Section 516 of Companies Act 2015. This applies only to the initial Petitioner who served statutory demand relevant to the winding up action. There can only be one demand relevant to a particular winding up action.
11. Hence the Company did not have an opportunity to oppose the alleged debt of the parties who had filed their intention to support the winding up. When such a party is substituted as Petitioner the Company can deny or object to such debt.
12. Section 529 of Companies Act 2015 applies to party who had served statutory demand and not to substituted petitioners,

“529.—(1)In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court, oppose the application on a ground—

(a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or

(b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).

(2)The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is Solvent.”
13. Any substituted party in place of original Petitioner, does not need leave in terms of Section 529 of Companies Act 2015 as it cannot be applied to them.
14. When a party is substituted in place of Petitioner Rule 16 (2)(d) of Companies (Winding Up) Rules 2015 the Court is required to regulate the winding up action. In the absence of any specific provision, directions were made to file an affidavit, relating to the alleged debt of the Company.
15. Considering the rules of natural justice the Company was granted time to file any opposition by way of an affidavit.

16. Substituted Petitioner had served it affidavit verifying debt, but the Company did not file any objection to the same. So the debt of \$32,596.30 which was the debt of substituted Petitioner, was not disputed in this winding up action by the Company at hearing which was concluded on 22.2.2021. Considering the circumstances of this case I adjourned judgment for 24.2.2021 at 3pm.
17. On 24.2.2021 the Company purportedly filed a Motion in terms of Section 524(1) of Companies Act 2015 seeking stay of this winding up.
18. The purported Motion was listed prior to judgment on 24.2.2021 and adjourned further hearing to 25.2.2021 as the substituted Petitioner requested it.

Section 524 of Companies Act 2015 states

Power to stay or restrain proceedings against Company

“524.—(1) At any time after the making of a winding up application, and before a winding up order has been made, the Company, or any creditor or contributory, may—

(a) where any suit or proceeding against the Company is pending in the Court or the Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings; and

(b) where any other suit or proceeding is pending against the Company, apply to the Court having jurisdiction to wind up the Company to restrain further proceedings in the suit or proceeding,

and the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

19. Substituted Petitioner submitted the decision of *RPA Group (Fiji) Ltd v Pacific Marine & Civil Solutions Pte Ltd* [2020] FJHC 266; HBE52.2019 (24 April 2020) and I agree with the findings of that judgment, though the circumstances were different, in that case.
20. The purported Motion of the Company filed on 24.2.2021 is misconceived on several grounds.
21. Firstly, Section 524 (1)(b) of Companies Act 2015 an application can be made to the court having jurisdiction to wind up, does not mean that it can be **made within winding up application**. It is a separate application which can be made to the same court.
22. Winding up action is a creature of statute and what type of applications are allowed within action are stated in the Companies Act 2015 and Companies (Winding Up) Rules 2015. So there is no provision to complicate and drag winding up. It needs to be concluded within six months, subject to extension of the time by court. If the time was

not extended it is considered as dismissed in terms of Section 528(1)(3) of Companies Act 2015. This is to prevent abuse of winding up process by any party including the Company. So, no motion can be filed within winding up in terms of Section 524 of Companies Act 2015.

23. Secondly, in order to make such application in terms of Section 524(1) of Companies Act 2015, there should be an action against the Company pending in court. I do not have any evidence of such an action, though the Company had instituted two actions against parties in the High Court at Lautoka.
24. In terms of Section 524(1)(a) of Companies Act 2015, applies when there are actions against the Company in the same jurisdiction or in Court of Appeal. The application should be made to that court (i.e High Court situated at Lautoka), but in this instance as there were no actions against the Company such actions cannot be stayed in terms of Section 524(1)(a) of Companies Act 2015.
25. The stay is only till the determination of winding up. All other actions against the Company can be stayed, as it would be futile to continue the same if winding up is granted due to insolvency of the Company. It would be worthless to obtain a judgment against a Company if it was already insolvent. This is the rationale under Section 524 of Companies Act 2015. So this provision cannot be used to stay the winding up.
26. Thirdly, when an application is made under Section 524(1) of Companies Act 2015, the stay is granted **not** for winding up, but the other proceeding, pending. The logical reason being that it would be futile to obtain paper judgment spending money and time, if the company is insolvent to satisfy the judgment. So, this provision allows parties to seek stay of such pending action, before judgment of winding up action is pronounced. The reason why such an application needs to be made before judgment of the winding up is self-evident.
27. In contrary, there is no need to stay any action instituted by the Company. This is a matter to liquidator to continue with the proceeding where the Company is Plaintiff, in order to recover all receivables for the Company. These are issues that arise after winding up is ordered, not before that. Section 524 of Companies Act 2015 applies before making a determination of winding up action.
28. Fourthly, Section 524 (1) of Companies Act 2015, is not a provision where the Company can seek stay of winding up action, when the hearing had concluded and judgment was fixed.
29. The utility of Section 524 is very limited, as the winding up actions are required to be concluded within six months in terms of Section 528(1) of Companies Act 2015 and extension of that is restricted in terms of Section 528(2) of Companies Act 2015. Section 528 (3) of Companies Act 2015 makes it imperative to conclude winding up

action or to grant extension and failure to that is fatal. So there will not be a need to stay cases against the Company, unless in limited instances.

CONCLUSION

30. The debt of substituted petitioner is not disputed. Having allowed to file affidavit in opposition, the Company failed to file such opposition. The purported Motion in terms of Section 524(1) of Companies Act 2015, is misconceived and struck off in *limine*, for reasons given. The order for winding up is allowed.

FINAL ORDERS

a. Winding up order is made in terms of section 523 of Companies Act 2015.

Dated at Suva this 26th day of February, 2021.



.....
Justice Deepthi Amaratunga
High Court, Suva