

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

COMPANIES JURISDICTION

WINDING UP CAUSE NO.
HBE 05 OF 2021

In the matter of Searoad Shipping Pte Limited – a limited liability Company having its registered office at 211 Ratu Sukuna Road, Suva.

A N D

In the matter of the Companies Act, 2015.

BETWEEN : **On Call Cranes (Fiji) Limited** – a limited liability company having its registered office at ¾ Leonidas Street, Lautoka, Fiji.

[APPLICANT]

A N D : **Searoad Shipping Pte Limited** – a limited liability Company having its registered office at 211 Ratu Sukuna Road, Suva, Fiji.

[RESPONDENT]

Appearance : **(Ms) Varanise Nettle for the applicant**
Mr Simone Valenitabua for the respondent

Hearing : **Wednesday, 24th March, 2021 at 9.00am**

Decision : **Thursday, 01st April, 2021 at 9.00am**

DECISION

Background

- (01) On 28th January, 2021 the applicant, On Call Cranes (Fiji) Ltd [OCC] applied to this court for an order for the winding up of the respondent, Searoad Shipping Pte Limited [SSL] on the ground of insolvency under Section 513 (c) of the Companies Act, 2015.

- (02) The OCC's winding up application relies on a creditor's statutory demand dated 07-08-2020. The demand stated that the SSL owed the OCC the amount of \$158,000.00 described as follows;

"The sum of \$158,000.00 [One Hundred and Fifty Eight Thousand Dollars] being the amount due and owing by Searoad Shipping Pte Ltd to On Call Cranes (Fiji) Ltd in respect to dishonoured cheque number 893907, 893905 and 893908 particulars of which are well known to Searoad Shipping Pte Ltd".

- (03) The creditor's statutory demand dated 07-08-2020 under section 515 of the Companies Act, 2015 was served on SSL.
- (04) By application filed on 28-08-2020, SSL sought to set aside the demand within 21 days of its service. The application was heard on 05th October, 2020 and this court on 11-12-2020 declined the SSL's application to set aside the creditors statutory demand.
- (05) Following the decision of this court, on 28-01-2021 OCC applied to this court for an order for the winding up of the SSL relying on the failure by SSL to comply with the statutory demand.
- (06) SSL was served with the application for winding up on 02-02-2021 and the matter came up before the Deputy Registrar of the High Court on 10/03/2021 for compliance with winding up rules and the Deputy Registrar on 10/03/2021 certified that section 19(1) of the winding up rules were complied with.
- (07) The winding up application came before this court on 24-03-2021 for hearing. On 19-03-2021, viz, five days prior to the winding up hearing, the respondent debtor, SSL filed a notice in the form of Form D6 in schedule 2 and a **direct affidavit in opposition** to the winding up application claiming that there is a genuine dispute between the company and the applicant creditor and that the company has an offsetting claim. The company says that it is solvent and prayed for the followings:-
- That SSL be allowed to appear and oppose the winding up application. SSL says that it has a genuine dispute and an offsetting claim against OCCL.
[SSL already relied on this when it made an application to set aside the statutory demand which was declined by this court 11-12-2020.]
 - That the winding up application be dismissed.

- That the winding up proceedings be stayed pending determination of the Civil Action No. HBC 71 of 2021, viz the statement of claim filed by the respondent against the applicant for the cause of action arising out of the subject matter of the applicant's statutory demand.

The applicable law

- (08) Rule 15(1)¹ states that on the hearing of an application under section 513 of the Companies Act, a person may not, without the leave of the court, oppose the application unless the person has, not less than 7 days before the time appointed for the hearing filed an affidavit in opposition to the application; and served on the applicant or the applicant's solicitor a notice in the prescribed form and a copy of the affidavit.
- (09) The question of leave under rule 15 must be read with section 529 of the Companies Act, which is examined below.
- (10) Section 529 of the Companies Act provides;
- (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 providing that the company is solvent.*
- (11) Thus, Section 529² can be said to qualify the court's discretion to grant leave in rule 15 of the winding up rules. On that reasoning, the court cannot grant leave under rule 15 of the winding up rules in disregard of section 529 of the Companies Act. Leave to oppose a winding up application becomes necessary on the basis set out in section 529 of the Companies Act.

¹ Companies (Winding Up) Rules 2015

² See in re RPA Group Ltd. [HBE 52.2019; 24 May 2020] for analysis of section 529

- (12) Section 529 makes it clear that whether the company made an application for the demand to be set aside or not, winding up cannot be opposed by direct filing of any affidavit without seeking leave. If the respondent is seeking leave to oppose the winding up, that matter must be considered prior to the winding up inquiry. The question of leave must be considered in the context of the company's solvency in the manner required by section 529 of the Companies Act.

No formal application for leave under section 529 filed before the winding up hearing

- (13) Counsel for the debtor company conceded that a formal application for leave under section 529 was not filed. The debtor company has not sought leave under section 529 prior to the winding up inquiry. Therefore, the court cannot allow direct filing of the affidavit in opposition of the debtor company. The affidavit in opposition of Trevor Patterson sworn on 17/03/2021 and filed on 22/03/2021 on behalf of the debtor company is hereby struck out and expunged.

Stay

- (14) Next, turning to stay application, section 524(1) of Companies Act, 2015 is not a provision where the debtor company can seek stay of winding up action. Section 524(1) applies when there are actions against the debtor company in the same jurisdiction or in the court of appeal. When an application is made under section 524(1) of the Companies Act, 2015, the stay is granted not for winding up proceedings, but for the **other proceedings pending against the debtor company.**

Conclusion

- (15) Therefore, the application for stay of winding up proceedings is declined.
- (16) No formal opposition was filed against the winding up application. The respondent debtor company SSL is therefore, wound up on the basis that it cannot pay its debts.

ORDERS:

- (01) Searoad Shipping Pte Ltd is wound up.
- (02) The Official Receiver is appointed as the provisional liquidator.



**High Court - Lautoka
Thursday, 01st April, 2021**


.....01/04/2021.
Jude Nanayakkara
[Judge]