

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Companies (Winding Up) Action No. HBE 20 of 2020

IN THE MATTER of **TOUCHWOOD SAWMILLER PTE LTD** a limited liability company having its registered office at 2 Kings Road, Navua.

AND

IN THE MATTER of the **COMPANIES ACT 2015**

BETWEEN

ALL FREIGHT LOGISTICS PTE LIMITED a limited liability company
having its business place at Lot 6 Jai Hanuman Road,
Vatuwaqa, Suva in the Central Division.

APPLICANT

AND

TOUCHWOOD SAWMILLER PTE LTD a limited liability company
having its registered office at 2 Kings Road, Navua, in the
Central Division.

RESPONDENT

Counsel : Ms. Jackson L. for the Applicant
Mr. Fa S. for the Respondent

Date of Hearing : 08th December 2020

Date of Judgment : 18th January 2021

JUDGMENT

- [1] This an application by All Freight Logistics Pte Limited (Applicant) pursuant to section 513(c) of the Companies Act 2015 (the Act) to wind up Touchwood Sawmiller Pte Ltd (Respondent) on the ground of insolvency.
- [2] The Applicant served a Statutory Demand on the Respondent claiming \$81,143.31.
- [3] Under section 516 of the Act provides that an application may be made to have the Statutory Demand set aside within 21 days from the date of service. In the matter it is a fact admitted by the respondent that it did not make an application to set aside the Statutory Demand. Therefore, the only ground that this court is entitled to consider is whether the respondent company is solvent.
- [4] Section 529 of the 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 leave of the Court, oppose the application on 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.

[5] In this matter the respondent company did not make an application seeking leave under the above provisions.

[6] The only matter for adjudication is whether the respondent company is solvent.

[7] Section 514 of the Act provides:

- (1) A Company or Foreign Company is Solvent if, and only if, it is able to pay all debts, as and when they become due and payable.
- (2) A Company or Foreign Company which is not Solvent is Insolvent.

Section 515 of the Act provides:

Unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be unable to pay its debts-

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$10,000 or such other prescribed amount then due, has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due ("statutory demand") and the company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the Creditor within 3 weeks of the date of the notice; or
- (b) if during or after the period of three months ending on the day on which the winding up application is made-
 - (i) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
 - (ii) a receiver or manager has been appointed, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or
 - (iii) it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court must take into account the contingent and prospective liabilities of the company.

[8] From the above provisions it is clear that the burden of proving solvency is on the debtor.

[9] In **Touchwood Pacific Pte Ltd, In re** [2019] FJHC 1083; HBE32.2018 (3 October 2019) the learned Acting Master of the High Court said:

Weinberg J. in **Ace Contactors & Staff Pty Limited v. Westgarth Developments Pty Limited** [1999] FCA 728 (1 June 1999) laid out the relevant legal principle which it thought it was established by authorities governing operation of Section 459 of the Australia Corporations Law:

- i. The Respondent is presumed to be insolvent and as such bears the onus of proving its solvency; *Elite Motor Campers Australia v. Leisureport PT4 Limited* (1996) 22 ACSR per Spender J;.....;
- ii. In order to discharge that onus the court should ordinarily be presented with the “fullest and best” evidence of the financial position of the respondent; *Begornia* [Supra].
- iii. Unaudited accounts and unverified claims of ownership or valuation were not ordinarily probate of solvency. Nor are bad assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared: *Commissioners Simionato Holdings Pty Ltd* [1997] FCA 125;.
- iv. There is a distinction between solvency and is a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company’s assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due must be considered in determining solvency: *Rees v. Bank of New South Wales* [1964] HCA 47; [1964] III CLR 210.....;
- v. The adoption of a cash how test for solvency does not mean that the extent of the company’s assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account: *Sandwell v. Porter* [1966] HCA 28; [1966] 115 CLR 666 at 671 per Barwick CJ.;

- vi. The question of solvency must be assessed at the date of the hearing. However this does not mean that future events are to be ignored: *Leslie v. Howship Holidays Pty Limited* [1997] 15 ACLL 459.;
- vii. It is not abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be an alternate means available to the applicant to vindicate its rights: *Elite Motor Campers Australia v. Leisureport Pty Limited* [Supra].

[11] In this instance the respondent company tendered an undated document from Qavio Consulting, signed by Napolioni Batimala, Chartered Accountant that they received the following information:

The following information has been received to assist to compiling the Annual accounts

1. BSP bank statement – 24th Oct 2019 to 29th Oct 2020 : Total Deposit \$965,817

The following information is to be provided by the management and verified for accounts purposes

1. Debtors listing of \$70,000
2. Land Title details at Kasavu, Nausori of \$350,000
3. Equipment Listing purchase of \$200,000
4. Stock Listing of \$200,000
5. Creditors \$30,000
6. Sales Summary
7. Expenses Summary

[12] It appears from the above that some of the details contained in the said document have been provided by the respondent company to Qavio Consulting and the other details were yet to be provided. This is not a report prepared by an auditor after taking into consideration all the necessary documents.


- [13] If the documents referred in the said letter were in the possession of the respondent company they could have tendered them to court to show that they are financially stable and have sufficient means to settle the loan but the respondent company sought not to tender any of the said documents.
- [14] In the circumstances the only conclusion the court can arrive at is that the respondent company has failed to prove that it is solvent.
- [15] The court accordingly, makes the following orders.

ORDERS

1. It is ordered that the respondent company be wound up.
2. The Official receiver is appointed as the provisional liquidator.
3. There will be no order for costs.



18th January 2021


Lyone Seneviratne

JUDGE