

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Case No. HBE 12 of 2022

IN THE MATTER of **NATUA CIVIL CONTRACTORS**
PTE LIMITED a duly registered company having its
registered office at Bans Bahadur Singh Building, 12
Nanuku Street, Labasa, Vanualevu, Fiji Islands.

-AND-

IN THE MATTER of the Companies Act 2015

BETWEEN: **MY GROUP PTE LIMITED trading as WINSTONE AGGREGATES (Fiji) and**
METROMIX CONCRETE (Fiji)

APPLICANT

A N D: **NATUA CIVIL CONTRACTORS PTE LIMITED**

RESPONDENT

Appearance : (Ms) Khirti Manyukta for the Applicant
(Ms) Shahlaa Begum for the Respondent
(Mr) Sevuloni Ratumaiyale Valenitabua for the Interested Party

Date of Hearing : Monday, 16th May, 2022 at 9:00am

Date of Decision : Monday, 16th May, 2022 at 9:00am

DECISION

- [1]. On 04th April, 2022, the applicant [**MY GROUP**] applied to this court for an order for the Winding Up of the respondent, **NATUA CIVIL CONTRACTORS PTE LIMITED [NATUA]** on the ground of insolvency under Section 513(c) of the Companies Act, 2015.
- [2]. MY GROUP's Winding Up application relies on a Creditor's Statutory Demand dated 01.10.2021. MY GROUP claimed that NATUA was indebted to it in the sum of \$288,351.78.
- [3]. The statutory demand under Section 515 of the Companies Act 2015 was served on NATUA demanding the sum of \$288,351.78.
- [4]. NATUA did not comply with the demand by paying or securing or compounding the debt to MY GROUP's reasonable satisfaction within the period of three weeks after service of the demand.
- [5]. NATUA, on 25.10.2021 filed an application for stay of the Winding Up proceedings and to set aside the statutory demand dated 01.10.2021, **but the same was withdrawn by NATUA on 11.03.2022.**
- [6]. On 04.04.2022, MY GROUP applied to Wind Up NATUA relying on the failure by the NATUA to comply with the Statutory demand.
- [7]. The respondent, NATUA is deemed to be insolvent because:
 - (A) *It has failed to comply with the statutory demand dated 01.10.2021.*
 - (B) *There is no application on foot to set aside the statutory demand under Section 516(1) of the Companies Act 2015.*
- [8]. On the other hand, the applicant, My Group has obtained the Certificate of Compliance under Rule 19(2) (a) of the Companies (Winding Up) Rules 2015.
- [9]. When the winding up application came before me for hearing this morning, counsel for the respondent sought an enlargement of time to file the Affidavit in Opposition **stating that the company has the ability to pay its debts. It should be noted that this application was made from the bar table.**

- [10]. A company to which a statutory demand has been served must comply with such a demand within three weeks of the date of the notice¹. A Company may also apply to the court for an order setting aside a statutory demand within 21 days after the demand is served².
- [11]. The respondent failed to do so. Therefore, the respondent cannot oppose the winding up application except with the leave of the court, which will be granted only if the company can establish its **solvency**. This is contained in Section 529 of the Companies Act 2015 which provides;
- (1) In so far as an application for a company to be wound up in insolvency relies on the 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 relied on, but did not so rely on (whether it made such an application or not)*
- (2) That 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.
- [12]. In the matter of Pacific Collection House Ltd, HBE 28 of 2019, decision 09-10-2020, Mansoor J said in paragraph 14,15,18 and 19 of the judgment;
- (14) *Rule 15(1)³ 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.*
- (15) *A literal reading of rule 15 would suggest that leave will not be necessary if an affidavit opposing the winding up is filed 7 days prior to the hearing. An affidavit in reply to the affidavit in opposition must be filed within 3 days of the day of service on the applicant of the affidavit in opposition⁴. But, the question of leave under rule 15*

¹ Section 515(a) of the Companies Act, 2015

² Section 516 *ibid*

³ Companies (Winding Up) Rules 2015

⁴ Rule 15(2) *ibid*

must be read with section 529 of the Companies Act, which is examined below. The rules do not specify a timeline for the seeking of leave to oppose a winding up, and it is for the court to issue directions on the filing of affidavits if leave is sought.

- (18) *Thus, section 529⁵ 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. The applicant having failed to have complied with or taken steps to set aside the statutory demand, the master could not have allowed opposition to the winding up without considering the question of leave in the prescribed way.*
- (19) *The question of leave would have to be a distinct inquiry, and any affirmative decision can only be premised on satisfying court that the ground relied upon by the company is material to proving its solvency. If leave is sought, it behoves the court to inquire and decide whether or not it should grant leave to the applicant on the basis of section 529 of the Companies Act. If leave is granted, the company is entitled to all its defences at the winding up inquiry. However, once leave is denied, the enactment makes it clear that winding up cannot be opposed. In this matter, unfortunately, the court’s direction to the applicant on 3 June 2019 did not conform to either section 529 of the Act, or to rule 15 of the winding up rules.*

[13]. Since the respondent has failed to take steps under Section 516 of the Companies Act to set aside the statutory demand, it was necessary to file a formal application in terms of Section 529 of the Companies Act for “leave to oppose the Winding Up application”. This is plain from a reading of Section 529 of the Companies Act. 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. The respondent has failed to comply with the statutory demand. Furthermore, the respondent has failed to take steps to set aside the statutory demand in the prescribed way. Therefore, this court cannot allow opposition to the winding up without considering the question of leave prescribed in section 529 of the Companies Act.

[14]. There was no explanation by the respondent as to why it did not take steps timeously to set aside the statutory demand or did not file a formal application in terms of Section 529 of the Companies Act for “**leave to oppose**”. Section 529(2) provides that leave should not be

⁵ See in re RPA Group Ltd. [HBE 52.2019; 24 May 2020] for analysis of section 529.

granted unless the court is satisfied that the ground urged by the respondent is material to prove that it is solvent.

[15]. The absence of an explanation must likely means that there was no reasonable justification for the company's failure to:

(A) *Take steps to set aside the statutory demand.*

(B) *File a formal application in terms of Section 529 of the Companies Act for leave to oppose.*

[16]. Accordingly, I decline the respondent's application made from the bar table seeking an enlargement of time to file opposition.

[17]. Next, counsel for the respondent submitted that even though the respondent company has received and reviewed the winding up application, it was not served at the registered office and it had been served at the site office.

It would appear from the respondent's application filed on 25.10.2021 for stay of the Winding up Proceedings that no substantial injustice has been caused by the irregularity in the service.

ORDERS

1. The respondent company, Natua Civil Contractors Pte Limited is Wound Up.
2. The Official Receiver is appointed as the provisional liquidator

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Jude Nanayakkara
[Judge]

High Court - Suva
Monday, 16th May, 2022