

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBE 8 of 2022

IN THE MATTER OF MAKANJI BROS, PTE LTD a limited liability company having its registered office at 72 Naviti Street, Lautoka
AND

IN THE MATTER of S. 513(d) of the COMPANIES ACT 2015

BETWEEN : **JAGDISH RATILAL** formerly of Lautoka, Fiji, now of 49 Rush Creek Drive, Westgate 0614, Auckland, New Zealand, Company Director
APPLICANT.

AND : **UMESH CHANDRA** of 63 Drasa Avenue, Lautoka, currently of Melbourne, Australia, Company Director.
1ST RESPONDENT

AND : **MAKANJI BROS PTE LTD** a limited liability company having its registered office at 72 Naviti Street, Lautoka
2ND RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. C. Young, for the Plaintiff
Ms. K. Singh, for the 1st Defendant

HEARING ON- : 11th August 2022.

DECIDED On : 19th September, 2022.

RULING

Introduction:

1. The applicant, namely, **Jagadish Ratilal**, through his Solicitors Messrs. Young & Associates, filed the application in hand on 19th April 2022, seeking for reliefs, *inter-alia*, to have the Company named **MAKANJI BROS PTE LTD** wound up under the provisions of Section 513 (d) of the Companies Act 2015.
2. The application was supported by the verifying Affidavit sworn by the applicant on 7th April 2022 and filed with the annexures marked as JR-1 to JR-4.
3. The application was, reportedly, served on the 1st and 2nd respondents on 28th April 2022 and on 3rd May 2022 respectively.

4. Subsequently, the rule 19 of the Companies (Winding up) Rules 2015 also being complied with by the applicant, as per the Registrar's Report dated 20th May 2022, it was also, reportedly, served on the respondents on 20th May 2022.
5. The respondents, on 30th of May 2022, filed their Notice of Intention to Appear, along with the Affidavit in Opposition, sworn by the 1st respondent, Umesh Chandra on 27th May 2022, along with annexures thereto marked as "UC-1" to "UC-5".
6. When the matter came up on 03rd June 2022 for the first time, as per the application for Winding Up and the Notice of the Winding up Application, the learned Counsel for the applicant raised an objection to the Notice of Intention to Appear and the Affidavit in Opposition on the ground that since those had been served and filed within less than 7 days prior to the date of hearing, the respondents cannot oppose the application, unless the leave is obtained in terms of Rule 15(1) of the Companies (Winding Up) Rules 2015.
7. Accordingly, with the consent of the applicant's Counsel, 7 days' time was granted for the respondents to file an application seeking leave and the respondents subsequently filed their Summons dated 9th June, 2022, supported by the Affidavit sworn by the 1st respondent **Umesh Chandra**.
8. At the hearing held before me on 11th August 2022 in respect of the above summons seeking for leave, both the learned Counsel made oral submissions and additionally, the Counsel for the applicant filed his written submissions as well.

Law:

9. The substantial application by the applicant is made under section 513 (d) of the Companies Act 2015, which reads as follows;

Section 513.

"A company (which where applicable in this part includes a Foreign Company) may be wound up by the Court, if

- a. ..
- b. ..
- c. ...
- d. ***The Court is of opinion that it is just and equitable that the Company should be wound up.*** (Emphasize mine)

10. Rule 12 sub rule (3) to (7) of the Companies (Winding Up) Rules 2015 states as follows.

(3) A person who intends to appear on the hearing of an application must serve on the applicant or the applicant's solicitor a notice that—

- (a) is headed with the name of the Court in which the application is being heard;*
- (b) specifies whether the person who intends to appear is—*
 - (i) a creditor of the Company, and if so, the amount of money owed by the Company to the person; or*

- (ii) a contributory of the Company, and if so, the number of Shares held by the person;
 - (c) specifies the person's intention to appear on the hearing of the application;
 - (d) specifies the date of the hearing of the application;
 - (e) specifies the place of the hearing of the application;
 - (f) Specifies whether the person intends to object to the application or support the application;
 - (g) is signed by the person or the person's solicitor; and
 - (h) Specifies the address of the person signing it.
- (4) If the notice described in sub rule (3) is served by post, service must be effected not later than 4.00 pm on the Business Day immediately before the day appointed for the hearing.
- (5) A person who fails to comply with sub rules (3) and (4) must not appear on the hearing of the application or any adjournment of the application without the leave of the Court.
- (6) **Sub rule (3) does not require service of the notice by—**
- (a) the applicant; or
 - (b) a person who is served with the application.
- (7) Notice of intention to appear need not be given in relation to an adjourned hearing of the application. [Emphasis added]

11. Rule 15(1) of the Companies (Winding Up) Rules Provides:

"On the hearing of an application under section 513 of the 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 –

- (a) Filed an affidavit in opposition to the application; and
- (b) Served on the applicant or the applicant's solicitor –
 - (i) a notice in the form of Form D6 in Schedule of the grounds on which the person opposes the application; and
 - (ii) a copy of the affidavit.

Submissions:

12. The learned Counsel for the respondents , while making submissions in support of the summons for leave, argued that, after filing the Notice of Intention to Appear and the Affidavit in Opposition on 30th May 2022, essentially, the parties came to Court on 3rd June 2022, treating the said first date **not** as a hearing date 'per se'. Counsel submitted further that, however, the court has the discretion or power to adjourn the hearing either conditionally or unconditionally.

The learned Counsel for the Respondent also made submissions to the effect that since the Affidavit in opposition and the Notice of intention to appear in form D-6 were duly accepted by the Registry, it has to be treated as proper filing and the respondents should be given an audience at the hearing.

13. The learned counsel for the applicant in his submissions in response, while alleging that the respondents have observed the relevant rules in breach, cited the decision in ***Ratman v Coomaraswamy and Another [1064] 3 All ER 933 at 935***, where it was held:

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure required to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation”.

Counsel for the applicant further submitted that the Affidavit of the 1st respondent, Umesh Chandra, sworn on 10th June 2022 and filed in support of the Summons seeking for leave, is devoid of any reason for the delay occurred on the part of the 1st respondent in serving and filing the Notice of Intention to Appear and the Affidavit of Opposition.

Thus, the counsel maintained the position that since the Notice of Intention to Appear and the Affidavit in Opposition were served and filed only on 30th May 2022 within a period less than 7 days' time prior to the said hearing date, the Respondents could not take part and oppose the application at the hearing in the absence of leave to do so.

Counsel for the Applicant also drew my attention to a decided case of ***McCaig V Manu [2012] FJSC 18: CBV 0002.2012 (27 August 2012)***, wherein His Lordship Hon. A. Gates-J had disallowed an application for extension of time to bring a petition for special leave on the ground of inadequate and/or unsatisfactory reason adduced for the delay.

Discussion:

14. At the outset, I must say, that that I am not in agreement with the learned counsel for the respondents on her submissions that the acceptance of the Notice and the Affidavit in opposition by the Registry has to be treated as proper filing. The acceptance of the papers by the Registry is only a mere administrative act performed subject to any objection by the opposing party and the decision of the Court on it. This argument, in my view, will not hold water.
15. However, on perusal of the further submissions made and the relevant rules, I am of the view that what needs to be adjudicated for the time being is, whether the 3rd June 2022, as per the Application for Winding Up and the Notice of Winding Up, was a date for hearing 'per se'.
16. It is undisputed that the said Notice and the Affidavit in opposition were served and filed on the 30th May 2022, while the hearing of the applicant's Application for winding up, as per the Notice of Winding Up, was around the corner fixed for 3rd June 2022.
17. The discretion conferred upon the court under the Rule 3 of the Companies (Winding Up) Rules 2015 is very wide. The Rule 3 provides:

“The Court may dispense with compliance with all or any of the provisions of these Rules”.

However, the court must have a valid ground to disregard these rules.

18. Rule 15(1) does not say that the Respondent is not entitled to oppose the application for winding up, if he does not comply with sub rule (a) and (b) thereto in not less than 7 days before the time **appointed for the hearing**. If he does not comply with (a) and (b) within that period, then he needs to seek leave of the court to oppose the Application.
19. The relevant paragraph of the Notice of Winding up Application advertised in the Newspaper and published in the Gazette reads as follows:

“An application for the winding up of Makanji Bros. Pte Ltd was made by Jagadish Ratilal on 21st April 2022 and will be heard by the High Court of Fiji at Lautoka at 10.30 am on 3rd June 2022”.

20. Conversely, in the Application for winding up it is stated, ***“Will apply to the High court of Fiji at Lautoka on 03rd June 2022 at 10.30 am for the following orders:.....”.***
21. From the above it appears that the date 3rd June 2022 had not been appointed by the court for the hearing. It was the date fixed by the Registry In this matter.


In this regard , I am inclined to follow the judgment of Seneviratne- J in ***Touchwood Sawmiller Pte Ltd, In re [2020] FJHC 879; HBE20.2020 (23 October 2020)***

22. Further, it is observed that what the “Notice of Winding Up Application” at the last paragraph of it says is ***“Any person intending to appear at the hearing must serve a notice, in accordance with rules 12(3) to 12 (7) of the Companies (Winding up) Rules 2015 to reach the Solicitors at the address below no later than 4.00 pm on 2nd June 2022”***, which is the date prior to the said hearing date ie; 3rd June 2022.
23. The Creditors, Contributories and other Claimants are expected to serve the Notice under Rule 12(3) on the Applicant or his Solicitors not later than 4.00 pm on the preceding date, in order to appear on the date for the hearing as per the advertisement/ publication. The respondents, who are already named as parties and stand served with the copy of the application for Winding Up, in response to which Notice has been served by them, cannot be restrained from opposing the Application.
- It is to be observed that as per the sub Rule 12(6) of the Companies (Winding Up) Rules 2015, the adherence to the sub Rule 12(3) thereto is not required by a person who is served with the Application. Thus, the respondents, being the persons served with the Application, need not follow the sub Rule 12(3).
24. I do not understand the rationale behind in requiring the respondents to seek for leave to oppose the Application, when they have already been made parties and served with the copy of the Application by the Applicant.
25. It is only when a person fails to give Notice and file the Affidavit in opposition 7 clear days before the date **appointed** for hearing by the Court, such person will have to seek leave of the Court to appear and oppose the application.

26. The first call date as per the Application for winding up and the hearing date as per the Notice of Winding up need not necessarily be a date for hearing 'per se'. The Court can, acting in its discretion, adjourn the hearing reserving the right of the Contributories, Creditors and Claimants, if any, to give notice and file their Affidavits in opposition and the Affidavit in reply thereafter by the Applicant.
27. Thus, the question of the delay or the reason for the delay raised by the applicant's counsel need not be gone into.
28. Since the respondents hereof have already served and filed the Notice of Intention to Appear, together with their Affidavit in opposition, are entitled to take part at the hearing for which date is to be appointed by the Court, according to the convenience of the respective counsel for both the parties and that of the Court. The applicant should be at liberty to file his Affidavit in reply within the time period to be fixed by the Court.
29. For these reasons stated above the court makes the following orders.

Orders:

- a. The Respondents are granted leave to appear and oppose the application.
- b. The Notice and the Affidavit in opposition already served and file by the Respondents are accepted as parts of the record.
- c. The Applicant is granted 21 days from today to file Affidavit in reply.
- d. Further hearing date will be appointed by Court suitable to both the Counsel.
- e. No costs ordered and the parties shall bear their own costs.


A.M. Mohamed Mackie
Judge

At High Court Lautoka this 19th day of September, 2022.

SOLICITORS:

For the Plaintiff : Young & Associates, Solicitors, Lautoka
For the 1st Respondent: Neel Shivam, Barristers & Solicitors, Suva