

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBE 04 of 2022

IN THE MATTER OF International Shop Fitting (Fiji) Pte a limited liability company having its registered office at HLB Crosbie & Associates, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi, Fiji, P O Box 20973, Nadi Airport.

AND

IN THE MATTER OF THE COMPANIES ACT 2015

AND

IN THE MATTER OF an application for Winding Up by **Sigatoka Electric Pte Limited** a limited liability Company having its registered office Valley Road, Sigatoka, Fiji.

Appearances: Ms. Takali for the Petitioner
Mr. Singh for the Supporting Creditor for N. Shivam – C R Engineering and Datec
Mr. J. Sharma for the Respondent Company

Date of Hearing: 05 August 2022
Date of Ruling: 27 October 2022

R U L I N G

BACKGROUND

1. Sigatoka Electric Proprietary Limited (“**SEPL**”) alleges that International Shop Fittings (Fiji) Pte Limited (“**ISFPL**”) is indebted to it. On 17 January 2022, SEPL served on ISFPL a Statutory Demand requiring ISFPL to settle the sum of \$26, 746.08. The said Statutory Demand is worded as follows:

This Demand Notice is served in you by the Creditor SIGATOKA ELECTRIC PTE LTD a limited liability company having its registered office at Valley Road, Sigatoka, Fiji (hereinafter called “the Creditor”).

Debt: You owe the Creditor the sum of \$26,746.08in respect of the works carried out by the Creditor at the Nadi International Airport at your request.

Further, by this notice we claim costs in the sum of \$2,000.00... This makes the total sum of \$28,746.08.

2. ISFPL did not comply with the said Demand – nor did it file an application to set it aside. It is clear that ISFPL is disputing the debt. The reason why it did not apply to Court to set aside the statutory demand was because ISFPL’s accountants, namely *HLB Crosbie & Associates, Chartered Accountants*, whose office is also ISFPL’s registered office, had failed to forward to ISFPL the said statutory demand after it (HLB Crosbie) was served it on 17 January 2022 (as per affidavit of Anil Chandra sworn on 28 July 2022 filed for and on behalf of ISFPL).
3. Hence, on 09 March 2022, Siddiq Koya Lawyers filed the Application for Winding Up (“**Application**”) for and on behalf of SEPL against ISFPL – which is the substantive matter in this case.
4. The progress of the Application in Court appears to taken a rather unusual course. Both counsel appear to acknowledge this to some extent. This is evident from the two interlocutory applications they have filed which are before me at this time.

THE INTERLOCUTORY APPLICATIONS

5. There are two interlocutory applications before me at this time. These are further set out below. The first is a Summons by SEFL filed on 13 June 2022 seeking the following Orders:
 - (i) That leave be granted to the Applicant to file its Memorandum of Due Compliance
 - (ii) That the time for Service of this Summons be abridged
 - (iii) Costs in the cause
6. The second is a cross-Summons filed by ISFPL on 29 July 2022 pursuant to section 529 of the Companies Act 2015, the Companies (High Court) Rules 1988, Order 2 of the High Court Rules 1988 seeking the following Orders:
 - (a) that the Winding Up Petition filed by SEL on 09 March 2022 be struck out.
 - (b) that SEL pay ISFPL the costs of the application on a solicitor-client basis.
 - (c) in the alternative, that leave be granted to ISFPL to defend or oppose the Winding Up Petition.

APPROACHING THE ISSUES

7. Both counsel have filed substantive submissions. I combine the issues raised in both applications as follows:
 - (a) has ISFPL failed to comply with the Winding Up Rules? If so, how?
 - (b) whether or not ISFPL’s failure to comply with the rules should invalidate the substantive Winding Up Application filed by SEL on 09 March 2022 and whether, accordingly, the said Petition should be struck out?

HAS IFPSL FAILED TO COMPLY WITH THE RULES?

Background

8. On or around July 2018, **ISFPL** was contracted by Airports Fiji Limited (“**AFL**”) to carry out some refurbishment work at the VIP Lounge at Nadi International Airport. The contract included some electrical works to be done. ISFPL subcontracted the said electrical works to **SEPL**.
9. Before ISFPL and SEPL entered into the sub-contract – ISFPL sent SEPL the *Project Refurbishment Plans and Specifications*. After perusing these, SEPL responded with a letter dated 22 August 2018 quoting the total price of \$23, 575 - 00 VEP. This quotation was later revised and increased to \$28,500-00 VIP following further talks between ISFPL and SEPL. It is not explained why the price was increased rather than reduced from the price quoted initially. One can only speculate that the scope of the work was broadened – but this is neither here nor there at this time.
10. As I have set out above, the statutory demand which SEPL served on ISFPL on 17 January 2022 was made to the debt of \$28,746.08 which includes \$2,000-00 in costs.
11. Clearly, the statutory demand was issued when ISFPL did not settle the debt. The Application for Winding Up, as I have said, was filed on 09 March 2022 by Siddiq Koya Lawyers when ISFPL did not take steps to file proceedings to set aside the said demand. The Application is supported by an affidavit of Francis Bali sworn on 08 February 2022. Bali is the Chief Auditor and Debt Collector for SEL. Bali deposes that ISFPL has been indebted to SEL since 09 November 2021. The sum owing is \$26,746.08 (twenty -six thousand seven hundred forty-six dollars and eight cents). This is on account of goods sold and services rendered by SEL to ISFPL.

Record of Proceedings in Court

12. On 08 April 2022, the matter was called before the Deputy Registrar Western. He noted that there was a letter from the Official Receiver dated 28 February 2022 consenting to be appointed as Provisional Liquidator. He noted that no Acknowledgement of Service had been filed. He also noted as follows:

Partial Compliance – Court Registry to issue Partial Compliance Certificate as per Rule 19(2)(b).

Matter is adjourned to 22/04/22 for Hearing before His Lordship Mr. Tuilevuka J.

13. Before me, on 22 April 2022, Ms. Takali appeared for SEL and Mr. Sharma, for ISFPL. Mr. Sharma said that ISFPL was opposing the application. The matter was then adjourned to three to four weeks for the relevant account to be made available.
14. On 23 May 2022 before me, Mr. Sharma submitted that the Applicant had not complied with Rule 19 of the Companies Winding Up Rules and that the only option is to dismiss the application. Ms. Takali responded that the parties had been in settlement mode before the Deputy Registrar. However, they failed to reach a resolution. Mr. Sharma then indicated that

he may file an application to strike out the application. The case was then adjourned to 06 June 2022 for mention.

15. On 03 June 2022, Ravneet Charan Lawyers filed a *Notice of Intention to Appear and Support an Application for Winding Up* on behalf of CR Engineering Pte Limited (“CREPL”). According to the said Notice, ISFPL is indebted to CREPL for the sum of \$39,932.95 for goods sold and delivered as per invoice numbers 00012983 and 00013169.
16. On 06 June 2022 before me, Mr. Sharma submitted *inter alia* as follows:
 - (a) that there had been a meeting between ISFPL and Koya and SEL. Certain things were agreed to between the parties at the said meeting.
 - (b) however, SEL has proceeded to advertise. The debt meanwhile is disputed.
 - (c) ISFPL cannot set aside the statutory demand as it is out of time.
 - (d) ISFPL is prepared to pay the whole amount into Court.
 - (e) meanwhile, ISFPL will apply to strike out and seek leave to defend
17. Ms. Takali is on record as having said that she had tried to file the Memorandum of Due Compliance for SEL but was directed by the Deputy Registrar to file a formal application for that.

Application Seeking Leave to file Memorandum of Due Compliance

18. On 13 June 2022, Ms. Takali filed the Summons seeking leave to the following Orders: to file its Memorandum of Due Compliance The Summons is supported by an affidavit of Francis Bali sworn on 13 June 2022. He deposes *inter alia* as follows:
 - (a) the Application for Winding Up and Affidavit Verifying Application for Winding Up were served on ISFPL on 29 March 2022.
 - (b) upon being served, SEL’s director, one Anil Chandra, wrote to the Director of ISFPL on 07 April 2022 to seek that SEL retract the application.
 - (c) a copy of the said letter is annexed to the affidavit marked “B”.
 - (d) the following day, on 08 April 2022, the matter was called before the Deputy Registrar to check on compliance. The Deputy Registrar issued a Partial Compliance Certificate and then adjourned the matter to be called before this court on 22 April 2022.
 - (e) as I have said above, before me on 22 April 2022, there was no suggestion that the matter would be settled.
 - (f) SEL replied by letter which was emailed on 27 April 2022. By that letter, SEL advised that the Application will only be withdrawn upon settlement of the debt.
 - (g) on 14 April 2022, ISFPL’s solicitors wrote to SEL’s solicitors. This letter clarifies ISFL’s position *vis a vis* the alleged debt which is the subject of the SEL’s Application.
 - (h) on 09 May 2022, SEL wrote to ISFPL reiterating that unless the full sum of \$26,746.08 together with costs are settled, SEL will press on with the Winding Up application.
19. In paragraphs 24 to 33, Bali deposes that there was a meeting scheduled for 25 May 2022 between the parties to discuss the issues. On 25 May 2022, ISFPL was not in a position to discuss things and advised that it would respond by 4.00 p.m. on 26 May 2022. They actually responded by letter on 27 May 2022.

20. Meanwhile - SEL was adamant all along that unless the debt alleged is paid, there will be no retraction of the Application. Hence, when ISFPL did not settle the debt on 26 May 2022, SEL proceeded to advertise on 28 May 2022 in the Fiji Sun and in the Gazette on 03 June 2022.
21. SEL tried to file a Memorandum of Due Compliance on 03 June 2022. However, the Deputy Registrar directed that an application be filed seeking leave to file Memorandum of Due Compliance.
22. Meanwhile, on 15 June 2022, Neil Shivam Lawyers filed a Notice of Intention to Appear on Winding Up Application.

Application to Strike Out/Leave to Defend

23. On 29 July 2022, Janend Sharma Lawyers filed a Summons pursuant to section 529 of the Companies Act 2015, the Companies (High Court) Rules 1988, Order 2 of the High Court Rules 1988 seeking to strike out the Winding Up Petition, or, in the alternative, if not struck out, that leave be granted to ISFPL to defend or oppose the Winding Up Petition. The Summons is supported by an affidavit of Anil Chandra sworn on 28 July 2022. I summarize below the key points which Chandra deposes at paragraphs 6 to 56:
 - (a) SEPL issued the statutory demand in question and served it at ISF's registered office which is situated at its Accountant's – HLB Crosbie & Associates Office.
 - (b) HLB Crosbie & Associates however did not forward the statutory demand to ISF. Thus, ISF was unable to apply to set aside the statutory demand within the prescribed time.
 - (c) when the Winding Up Petition was issued by SEL and served at HLB Crosbie & Associates, it was forwarded to ISF by HLB Crosbie & Associates.
 - (d) SEPL knew all along that the debt was being disputed, and yet, had proceeded to initiate these Winding Up Proceedings.
 - (e) SEPL's Managing Director – Vijay Narayan had assured on 07 April 2022 that the Winding Up process would not be issued. Rather, a simple Demand Notice was all that would be issued.
 - (f) a letter was also written to Narayan on 07 April, 2022 to reiterate that there was a dispute and to request that SEPL withdraw the Winding Up proceedings. Narayan and Chandra did sit together to try and resolve the matter.
 - (g) ISFPL again wrote a letter to SEPL on 14 April 2022. This letter sets out clearly the grounds on which ISFPL disputes the alleged debt in question.
 - (h) however, SEPL has not addressed or responded to the dispute raised by ISFPL. Instead, SEPL simply wrote back on 09 May 2022 to say that the Winding Up application will be discontinued if ISFPL pays up the debt. ISFPL saw no point in responding to this letter as SEPL was totally sidestepping the genuine dispute raised by ISFPL.
 - (i) SEPL and ISFPL did try to hold negotiations over the said debt. While these were going on, SEPL made the decision to withhold advertising the Winding Up Application. However, although ISFPL was raising a bona fides dispute about the debt, SEPL remained steadfast in its position that unless the entire debt was paid, there would be no withdrawal of the Winding Up Application.
 - (j) SEPL is clearly abusing the process to force ISFPL to pay a genuinely disputed debt.

Basis on which ISFPL Disputes the Debt

24. Chandra sets out the basis on which ISFP disputes the debt as follows:
- (a) the parties had agreed that ISFPL was to supply the light fittings to SEPL.
 - (b) SEPL issued a first Progress Claim dated 11 December, 2018 for \$23,843.75.
 - (c) ISFPL assessed the work done on site by SEPL and noted that the first Progress Claim was for incomplete works and works which had not been authorized by ISFPL.
 - (d) ISFPL disputed the first Progress Claim. SEPL accepted the dispute on the first Progress Claim dated 11 December, 2018 and thereafter issued a Revised first Progress Claim vide Tax Invoice No. 32329 dated 07 February, 2019 for a reduced amount of \$6,798.17 VIP.
 - (e) ISFPL thereafter approved payment of \$6,798.17 VIP to SEPL and made payment to SEPL.
 - (f) SEPL then issued a second Progress Claim on 29 March, 2019 for \$18,286.00 VEP.
 - (g) SEPL then issued a Revised Second Progress Claim on 25 November, 2019 for \$25,000.00 VEP.
 - (h) SEPL has not issued Invoices to ISFPL for the second Progress Claim or the revised second Progress Claim. SEPL has not issued any Completion Certificate to ISFPL either.
 - (i) SEPL's second Progress Claim and Revised second Progress Claim are both grossly exaggerated and over inflated.
 - (j) ISFPL's client, AFL, had reduced the scope of works by reducing the amount of lights that were to be installed. This resulted in SEPL's scope of works being reduced significantly. This meant that there was also a significant reduction in the scope of works that SEPL was required to do. Accordingly, their charges were to be reduced as well. However, SEPL was demanding ISF to pay for work not done or for the works not authorized to be done by SEPL.
 - (k) SEPL has not provided a breakdown of its claims to ISFPL and has not justified these.

Parties Tried to Talk Whilst Matter Proceeding in Court

25. As I have noted above, the Winding Up Application was called before the Deputy Registrar on 08 April 2022 – and thereafter before me on 22 April 2022, 23 May 2022, 03 June 2022 and 06 June 2022.
26. While Court proceedings were in progress, the parties were also talking out of court through their respective solicitors.
27. Chandra deposes in his affidavit that a meeting between ISFPL and SEPL with their respective counsel (namely Mr. Janend Sharma and Mr. Siddiq F. Koya) was arranged to happen on Monday 23 May 2022 by Mr. Harun of HLB Crosbie & Associates. Following the meeting, both counsel later spoke by phone on the same day where Mr. Sharma asked Mr. Koya for the first time not to advertise the Petition until the settlement talks were exhausted. Up to that point, SEPL had not advertised. According to Chandra, SEPL had already missed the advertising deadline required by the Winding Up Rules. This was the first time SEPL had been asked on behalf of ISFPL not to advertise the Winding Up Petition.
28. Two days later, on 25 May 2022, SEPL and ISFPL met at Siddiq F. Koya's Office where Chandra made an offer on behalf of ISFPL to resolve the matter.
29. According to Chandra, SEPL accepted the offer in principle and Mr. Koya was to call Mr. Sharma on 26 May 2022 to confirm settlement. Mr. Sharma again asked Mr. Koya not to advertise the

petition until the settlement talks were exhausted since SEL had not advertised it at the time and had already missed the advertising deadline required by the Winding Up Rules.

SEPL Advertisement!

30. SEPL proceeded to advertise the Winding Up Petition against ISFPL in the Fiji Sun issue of Saturday 28 May 2022.

SEPL – Was it Acting in Bad Faith Throughout Negotiations?

31. According to Chandra, SEPL acted in bad faith all the time while dealing with ISPL. The settlement negotiations and meetings between the representatives of the two companies were a farce as far as SEPL was concerned. Chandra deposes:

I am aware that for Fiji Sun to accept an advertisement for Saturday edition of the newspaper, the advertisement must be given to Fiji Sun by 2.30pm on Friday (1 day prior). Therefore SEL and/or its Counsel would have instructed Fiji Sun by 2.30pm on Friday 27 May 2022 to publish the Winding Up Petition in the Saturday 28 May 2022 edition of the Fiji Sun.

32. The above is highlighted because – at the time when SEPL purportedly instructed the Fiji Sun to publish the advertisement – SEPL and ISFPL were still engaged in talks.

ISFPL'S SOLVENCY ASSERTED

33. Chandra asserts ISFPL's solvency by annexing to his affidavit a letter dated 30 May 2022 from from HLB Mann Judd, ISF's Accountants and a copy of ISFPL's Financial Statements for the year ended 31 December 2020.
34. Chandra also asserts that ISFPL is also able to deposit the sum of \$26,746.08 into Court.
35. He further deposes:
- (a) ISFPL has 53 employees who are reliant upon ISFPL for their livelihood. Many of these are the sole breadwinners for their families. ISFPL has been paying all its employees regularly and has also been paying its just undisputed debtors.
 - (b) ISFPL is also currently undertaking various lucrative works and potential upcoming projects. HE annexes a copy of the List of Projects for the year 2022.
 - (c) should a Winding Up Order be made against ISFPL, then ISFPL employees will lose their jobs.

SHOULD THE WINDING UP PETITION BE STRUCK OUT?

36. Mr. Sharma submits as follows:

- (a) Rule 12 (1) of the Companies Winding Up Rules 2015 provides that, subject to Rule 17(1) – Notice of an Application for Winding Up must be advertised in a newspaper and published in the Gazette not less than 14 days before the hearing.
- (b) Rule 12(1) requires that the Application be advertised and gazette not less than fourteen days before the hearing.
- (c) SEL filed the Application on 09 March 2022.
- (d) Rule 19 required SEL to appear before the Deputy Registrar for Compliance Hearing on a day to be appointed by the Deputy Registrar.
- (e) the Deputy Registrar did appoint 08 April 2022 for the purpose of Rule 19.
- (f) on the said date, the Deputy Registrar did appoint 22 April 2022 at 10.30 a.m. for hearing of the Application for Winding Up.
- (g) SEL therefore was required to advertise the Notice of an Application for Winding Up and gazette it by 07 April 2022.
- (h) SEL did not comply with the Rule 19 requirement to advertise and gazette by 07 April 2022.
- (i) there was no appearance by SEL or its lawyers before the Deputy Registrar on 08 April 2022.
- (j) SEL has not applied to Court seeking an Order for enlargement of time to comply with the requirement for advertisement.
- (k) instead, SEL has filed the rather misconceived application seeking leave to file Memorandum of Due Compliance.
- (l) the above application is misconceived because the rules do not specify a specific timeline for the filing of the Memorandum of Due Compliance. Therefore, the Summons should be dismissed and the Winding Up Petition struck out for want of compliance with the rules pertaining to advertising and publication in the gazette.
- (m) the rules are meant to be complied with (**Ratman v Coomaraswamy and Anor** [1964] 3 All ER 933 at 935; **Venkatamma v Ferrier Watson** [1995] FJSC 7; [1995] 41 FLR 258 (24 November 1995).
- (n) while Rule 3 of the Companies (Winding Up) Rules 2015 gives the Court some discretion to dispense with compliance with all or any of the provisions of the Rules, and Rule 115 gives the Court discretion to extend or abridge time appointed by the Rules or fixed by any Order of the Court for doing any act or taking any proceeding – the Court should not exercise its discretion in favor of SEL as SEL has not provided any cogent reason for its non-compliance with rule 12(1).
- (o) in the event the Court is inclined to grant SEL leave to file Memorandum of Due Compliance, the Court should also then grant ISFPL leave under section 529(1)(a) of the Companies Act to defend the Application on the ground that there is a genuine dispute about the debt.

37. Ms. Takali submits as follows:

- (a) in addition to Rule 3 and Rule 115, SEL relies also on Rule 116(1) which provides that a formal defect shall not invalidate proceedings.
- (b) no prejudice will be caused to the Respondents if leave is granted to SEPL to file Memorandum of Due Compliance.

DECISION

38. Rule 19 sub-rule 1 and sub-rule 2 (a) and (b) provide:

- (1) Subject to rule 17 (1), after an application for a winding up order has been filed, the applicant or the applicant's solicitor must attend before the Court Registrar, on a day to be appointed by the Court Registrar, and satisfy the Court Registrar that –
 - a) the application has been advertised in a newspaper and published in the Gazette;
 - b) the statutory affidavit and the affidavit of service (if any) have been properly filed;
 - c) the written consent of a liquidator has been filed; and
 - d) the Applicant has properly complied with these Rules in relation to applications for a winding up order.
- (2) A certificate signed by the Court Registrar is evidence –
 - a) that this rule has been complied with; or
 - b) of the extent to which this rule has been complied with.

39. Rule 3 provides:

- (3) The court may dispense with compliance with all or any of the provisions of these Rules.

40. Rule 115 provides:

This court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.

41. Indeed, Rule 116 of the Companies Winding Up Rules provides:

- (1) No proceedings under the Act or these Rules are invalid by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.
- (2) No defect or irregularity in the appointment of the Official Receiver or of the appointment or election of a liquidator or member of a committee of inspection must invalidate any act done by him or her in good faith.

42. There has been no real submission before me by Mr. Sharma that substantial injustice will be caused to ISFPL by the failure to advertise within the time stipulated or if leave is granted to SEPL to file a Memorandum of Due Compliance.

43. I am inclined to grant leave to SEPL to file and serve Memorandum of Due Compliance. I am also inclined to overlook the fact that the Advertisement – as highlighted by Mr. Sharma – may have put up out of the time stipulated. In taking this position, I apply Rules 3, 115 and 116 of the Winding Up Rules (see above).
44. I am also inclined to grant leave to ISFPL under section 529(1)(a) of the Companies Act to oppose the winding up application on the ground that there is a genuine dispute about the debt alleged and that the company ISFPL is not insolvent. In granting this leave, I take into account:
- (a) that ISFPL was not able to challenge the statutory demand in question because HLB Crosbie did not forward the demand to ISFPL after service.
 - (b) that the affidavit of Chandra annexes financial statements and a report from the company's accountants which suggest that the company is not insolvent.
 - (c) all that Chandra has deposed in the affidavit to raise questions about the scope of work actually carried out by SEPL.

ORDERS

- (a) I grant leave to SEPL to file and serve Memorandum of Due Compliance in seven (7) days (that is, by **04 November 2022**). The matter is to be called before the **Deputy Registrar on 04 November 2022** for review.
- (b) I grant leave to ISFPL under section 529(1)(a) of the Companies Act to oppose the winding up application on the ground that there is a genuine dispute about the debt alleged and that the company ISFPL is not insolvent.
 - (i) ISFPL is to file and serve any affidavit to this effect (if need be) in 14 days (that is, by **11 November 2022**).
 - (ii) SEPL is to file a reply by **25 November 2022**.
- (c) Case adjourned to **30 November 2022** for hearing at **10.30 a.m.**
- (d) Parties to bear their own costs.



Anare Tuilevuka
JUDGE
Lautoka

27 October 2022