

IN THE HIGH COURT OF FIJI
AT LAUTOKA
COMPANIES JURISDICTION

Companies Action HBE No. 04 of 2022

IN THE MATTER of International Shop Fitting (Fiji) Pte Limited 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 10973, 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 at Valley Road, Sigatoka, Fiji.

Appearances : Ms Radhia for the Petitioner
Mr. Janend Sharma for the Respondent
Date of Hearing : 26 January 2023
Date of Ruling : 10 August 2023

RULING

1. The full background to this case is set out in my Ruling dated 27 October 2022 (see **International Shop Fitting (Fiji) Pte Ltd, In re** [2022] FJHC 684; HBE04.2022 (27 October 2022)).
2. Around July 2018, International Shop Fitting (Fiji) Pte Limited (“ISFPL”) was contracted by Airports Fiji Limited to refurbish the VIP Lounge at Nadi International Airport. ISFPL had then subcontracted to Sigatoka Electric Proprietary Limited (“SEPL”) all the electrical works in the project.

3. On 17 January 2022, SEPL served a statutory demand on ISFPL.
4. The said statutory demand is based on SEPL's claim that ISFPL owes SEPL the sum of \$26,746.08. The said sum is alleged to comprise of unpaid monies owed for various electrical works carried out by SEPL pursuant to the subcontract with ISFPL.
5. For one reason or another, ISFPL did not apply to set aside SEPL's statutory demand within the time stipulated in the Companies Act.
6. ISFPL's failure to set aside the statutory demand within the twenty-one day stipulated time, then created a presumption of insolvency against ISFPL (section 513(c) read together with section 515(a) of the Companies Act).
7. SEPL then applied to this Court seeking an Order that ISFPL be wound up on account of the presumption of insolvency raised against ISFPL.
8. Under the Companies Act 2015, because there is a presumption of insolvency against a company which has failed to set aside a statutory demand, such a company is not entitled to resist the winding up application which is later brought against it, on the ground that it is insolvent or that there is a genuine dispute about the debt – unless the company has obtained the leave of the court.
9. On 27 October 2022, I did grant leave to ISFPL to defend SEPL's winding up petition on the ground that it is not insolvent and that there is a genuine dispute about the debt.
10. Because the presumption of insolvency subsists in every unsatisfied statutory demand, the granting of leave effectively shifts the onus and burden of proof to ISFPL to avoid the Winding Up Order sought by proving that (i) ISFPL is solvent and/or (ii) that there is a genuine dispute about the debt.
11. As the Australian High Court said in **Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)** (2011) 244 CLR 1; (2011) 83 ACSR 126; [2011] HCA 18 at [28]:

Where a demand has not been complied with, the statutory presumption of insolvency applies unless the demand is set aside in proceedings brought for that purpose prior to the hearing of the application for an order to wind up. Unless the demand is rendered ineffective, by an order setting it aside, the company is required to prove to the contrary of the presumption.
12. Has ISFPL established that it is solvent?
13. Under section 2 and section 514 of the Companies Act, solvency only arises where a company is able to pay its debt as and when they fall due. The question which then arises is –

what sort of evidence should be led by a company which is already presumed to be insolvent – in order to succeed in establishing that it is able to pay its debt as and when they fall due?

14. In Australia, where large companies are involved, it is generally the case that the Courts will require the company to tender financial records including a balance sheet and even the report of a forensic accounting firm to conduct an independent audit of the company's books and business records (see for example Barrett J in **TQM Design and Construct Pty Ltd v Golden plantation Pty Ltd** [2011]).
15. However, there is also a recognition that it may be oppressive to require such detailed scrutiny for a small and viable company.
16. White J in **Commonwealth Broadcasting Corporation Pty Ltd v Pacific Mobile Phones** [2008] 219 FLR 422; [2008] QSC 210 at [29] said that it would be oppressive if a small and viable company with no creditors was required to expend significant sums to employ an external accountant to analyse its books and records to rebut the presumption of insolvency.

On the hearing of a winding-up application based on insolvency the overall question of solvency of the company is critical.

Mr Boulos deposes to the solvency of the respondent. It is a small company. It employs three permanent part-time staff and other staff on an "as needs" basis. Mr Boulos exhibits the respondent's bank statements, profit and loss statement and balance sheet. The company uses the accounting software MYOB and employs a bookkeeper on a quarterly basis. The respondent has no creditors and is involved in no litigation apart from the dispute with the applicant. It made a net profit after wages last financial year of \$38,527.08. The balance sheet shows that it has net assets of approximately \$288,000. It has approximately \$87,000 in its bank account. There is nothing to suggest it cannot pay all its debts as and when they become due and payable.

Mr Coulsen submitted that on the authority of *Expile Pty Ltd v Jabb's Excavations Pty Limited*, a decision of Barrett J, the respondent ought to have produced the "fullest and best evidence" and that unaudited accounts are not normally probative of solvency. *Expile* concerned a company with significant indebtedness, deficiencies in its accounts and lack of evidence of realistic borrowing capacity to refund repayments of short term liabilities. It would be oppressive if a small, viable company, with no creditors, in the circumstances in which this application has been brought, were required to expend significant sums to employ an external accountant to analyse its books and records to rebut the presumption of insolvency.

I am satisfied that the respondent is solvent.

17. That position was endorsed by the Federal Court of Australia in **Bank of Western Australia Limited v Scotia Downs Pty Ltd** (2011) 87 ACSR 42; [2011] FCA 1302 at [22].
18. In the affidavit of Anil Chandra sworn on 11 November 2022, he deposes as follows at paragraphs 49 to 57:

- [49]. ISF is a solvent Company. Annexed hereto marked “AC-16” is a letter dated 30th May 2022 from HLB Mann Judd, ISF’s Accountants supporting ISF’s Solvency. Also annexed hereto marked “AC-17” is a copy of ISF’s Financial Statements for the year 31 December 2020 which shows that ISF is a solvent Company.
- [50]. ISF’s Accountants are in the process of compiling its 2021 Financial Statement and Tax Return. Fiji Revenue and Customs Service has granted ISF an extension for lodging 2021 Returns.
- [51]. ISF is also able to deposit the sum of \$26,746.08 into Court.
- [52]. ISF has 53 employees who are reliant upon ISF for their livelihood. Many of the ISF employees are the sole breadwinners for their families. ISF has been paying all its employees regularly and has also been paying its just undisputed debtors.
- [53]. ISF is also currently undertaking various lucrative works and potential upcoming projects. Annexed herein and marked as letter “AC-18” is a copy of the Projects for the year 2022. A bundle of relevant Award Letters are Annexed hereto marked “AC-19”.
- [54]. Fiji National Provident Fund (“FNPF”) has just awarded ISF its first stage contract for \$243,382.51 VEP for Fit Out Works for Pension Center Office only. Annexed herein and marked as letter “AC-20” is a copy of the FNPF Award Letter dated 21st October 2022. Award for balance FNPF works worth about \$900,000 is pending.
- [55]. FNPF is aware of the current petition filed by SEL but it had the confidence in ISF to award the first stage Tender to ISF.
- [56]. That amid the Winding Up Application, SEL has quoted ISF for another project. Annexed herein and marked as letter “AC-21” is a copy of the Project Quote dated 2nd August 2022 by SEL.
- [57]. Should a Winding Up Order be made against ISF then ISF Employees will lose their jobs. ISF will not be able to complete its lucrative and pending projects.
19. I am satisfied that ISFPL is solvent. The fact that it is prepared to deposit into Court the sum claimed by SEL speaks volumes when considered with the report of its accountants and the fact that the company is engaged in a major substantive contract with the Fiji National Provident Fund.
20. I am also convinced that there is a genuine dispute about the debt for the following reasons:
- (a) SEL’s original quote based on the Refurbishment Plans and Specifications was revised twice or three times between 22 August to 25 August 2018 during negotiations. The parties did settle on the figure of \$28,500.

- (b) ISFPL then issued a Purchase Order to SEL based on the above on 25 August 2018.
- (c) On 11 December 2018, SEL issued a Progress Claim for \$23,843.75. On site inspection, ISSPL noted that this Progress Claim was for incomplete works, works not carried out and also unauthorized work.
- (d) The first Progress Claim of SEL was later reduced from \$23,843.75 to \$6,798.17 after ISFPL disputed the amount and raised the discrepancies. SEL was then paid the sum of \$6,798.17.
- (e) On 29 March 2019, SEL issued a Progress Claim to the sum of \$18,286. This was revised to \$25,000 plus \$2,250 VAT on 25 November 2019.
- (f) AFL had reduced the scope of work by reducing the number of light installations required. Logically, one would expect SEL would render a lesser bill accordingly. However, SEL's total Progress Claim had increased to \$34,048.17 from the original \$28,500.00.
- (g) ISFPL claims (unrefuted) that SEL has not invoiced ISFPL for the second Progress Claim.

21. I dismiss the petition. Costs to the Respondent which I summarily assess at \$1,500 – 00 (one thousand and five hundred dollars only).



Anare Tuilevuka
JUDGE
Lautoka

10 August 2023