

**IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION**

Companies Action No. HBE 10 of 2023

IN THE MATTER of the **GREEN ACE VALLEY
SUPPIES & ELECTRICAL PTE LIMITED** a limited
liability company having its registered office at Tulalevu,
Sigatoka, Fiji

IN THE MATTER of an Application for leave to
oppose the winding up application pursuant to Section
529 (1) (b) Companies Act 2015

BETWEEN: **GREEN ACE VALLEY SUPPIES & ELECTRICAL PTE
LIMITED** a limited liability company having its registered office at
Tulalevu, Sigatoka, Fiji

DEBTOR

AND: **GOKAL INTERNATIONAL LTD** a limited liability company
having its registered office in Hong Kong.

CREDITOR

Counsel : Debtor: Ms Ben. S
: Creditor: Mr Patel. A
: Supporting Creditor: Ms Dutt S.
Date of Hearing : 11.08.2023
Date of Judgment : 23.08.2023

JUDGMENT

INTRODUCTION

1. The debtor Company (the Company) within a winding up action sought leave to oppose winding up. This was granted on 10.07.2023 and the parties were allowed to rely on the affidavits already filed for summons seeking leave to oppose, and also granted time to file additional material by way of supplementary affidavits if they wish. Neither party had submitted fresh evidence, other than what was already submitted for the summons for seeking leave to oppose. The Company

who were supposed to submit materials to substantiate that they have paid for the consignments it received, had failed to do so hence the order for winding up of the Company granted.

2. The Petitioner- Creditor (the Petitioner), filed a petition for winding up the Company for alleged arrears of payments of four specific invoices issued in 2019 for a total sum of USD 76,977. 30.11.2022 a statutory demand was issued by the solicitors for the Petitioner.
3. The facts material for 'solvency' of the Company in terms of Section 529 (2) of Companies Act 2015 is required to be submitted for the application for seeking leave. This is to prevent grounds, which were not material for solvency being relied to oppose an action for winding up, such as technical objections.
4. The grounds for opposing the winding up could not be dealt in detail at leave stage, as it was a matter for the hearing of the winding up. The Company was granted leave on the material provided at that stage.
5. Petitioner's alleged debt was disputed, by the Company. Petitioner had allegedly made errors in the said invoices dispatched in 2019 and stated that 'corrected' invoices were dispatched on or around 26.3.2021.
6. According to the Company by this time all outstanding payments relating to the said four invoices were fully settled and goods released from customs. The company produced applications of Telegraphic Transfers (TT) and Customs Declarations that shows payments made against specific invoices through TTs.
7. Though these were sufficient to grant leave to oppose, they were not proof of payment. Telegraphic Transfer Applications were shown without actual deduction of the amount transferred or actual transfer. Application for Telegraphic Transfer is no way evidence of actual transfer as the transferor can withdraw such an application before actual payment or transfer of the amounts as much as the Bank may also not transfer due to insufficiency of funds or any other reason such as foreign currency fluctuations and quoted rate could not be obtained etc.
8. So the actual payment can be proved through deductions for the equivalent amount in local currencies by the bank or confirmation of the transfer advice, with details as to the time and date of such transfer of funds to its advising bank. No such evidence produced despite denial of payment of any amount of money in the affidavit of the Petitioner and also confirming this position at the hearing for summons seeking leave to oppose.
9. By the same token Customs Declarations are not proof of payment as it was a

declaration by the Company to release the goods.

10. There cannot be an issue as to production of payments and documentations such as relevant vouchers and evidence of actual payment through bank details. The Company is deliberately avoiding such primary evidence being produced at the hearing.
11. The Petitioner, was unable to state why for more than two years kept silent about goods supplied and or how the official documents such as Customs Declarations were allowed to be used by the consignee if they were erroneous, but these facts became immaterial as the primary obligation was on the Company to prove that it had paid even to erroneous invoices issued for a lesser amount.
12. Petitioner contended the Company had not complied with the requirements contained in Rule 15 (1) (b) of Companies (Winding Up) Rules 2015, after the leave was granted by the court. This preliminary objection was overruled for the reasons given later.
13. The time period for determination of winding up, is six months in terms of section 528(1) of Companies Act 2015. Though the court can extend the said time period in my mind this is the last resort in special circumstances and not the order of the day. Accordingly, after granting the leave to oppose on 10.7.2023, parties were allowed to rely on the affidavits already filed and time granted to file supplementary affidavits and hearing of the winding up concluded on 11.8.2023 and the judgment on 23.8.2023.
14. The Petitioner relied on legal fiction as to 'unable to pay its debts' in terms of Section 515 (a) of Companies Act 2015 to institute winding up action. Insolvency is presumed from the inability to pay a debt over \$10,000. The central point is the existence of debt exceeding \$10,000, before the liability of the Company and its refusal. The Company accepts the receipt of the goods stated in the invoices, but there were no proof of payments at all. The invoices were corrected later for a higher value, but there were no proof of payment at all. The value of the invoices were above \$10,000 and the application for winding up of the Company is granted.

FACTS

Preliminary Objection

15. Counsel for the Petitioner raised a preliminary objection that the Company had not complied with Rule 15(1)(b) of Companies (Winding up) Rules 2015, hence the Company's affidavit in opposition should be struck off and an order for winding up made.

16. Rule 15 of Companies (Winding up) Rules 2015 states

“15.—(1) 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 2 of the grounds on which the person opposes the application; and

(ii) a copy of the affidavit.

(2) An affidavit in reply to an affidavit Filed in opposition to an application (including a further affidavit in support of any of the facts alleged in the statutory affidavit) must be filed within 3 days of the day of service on the applicant of the affidavit in opposition.

(3) A copy of the affidavit in reply must, after it is filed, be served as soon as practicable on the person by whom the affidavit in opposition was Filed or the person’s solicitor.”(emphasis added)

17. Winding up petition was filed on 28.2.2023 in terms of Section 513 (c) of Companies Act 2015 relying on the legal fiction as to ‘insolvency’ when there is a debt more than \$10,000 and refusal to pay by the Company. So Rule 15 of Companies (Winding up) Rules 2015 can be applied, but this is not so for the reasons given later.

18. The plain reading of Rule 15 of Companies (Winding up) Rules 2015 indicates that a party opposing ‘without the leave of the Court’ must comply with the requirements, therein. So this provision has no application to the Company who already obtained leave from this court. Said Rule 15(1) laid down what a party opposing needs to do, when it had not obtained leave of the court to oppose. This has no application to the Company who had already obtained leave and the court had made directions.

19. Without prejudice to above Rule 15(1) of Companies (Winding up) Rules 2015 cannot be applied for the Company in terms of Section 529 of Companies Act 2015.

20. Plain reading of Rule 15(1) of Companies (Winding up) Rules 2015 indicates that a debtor company could without seeking leave of the court, may comply with the requirements therein and file an affidavit in opposing, but this cannot be done as obtaining leave is mandatory in terms of Section 529 of Companies Act 2015, when the winding up was due to insolvency as in this instance.

21. It is mandatory to obtain leave of the court in terms of Section 529 of Companies Act 2015, which reads,

“Company may not oppose application on certain grounds

529.—(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 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 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.”(emphasis added)

22. In terms of Section 25 (b) of Interpretation Act 1967, no subsidiary legislation ‘be inconsistent’ with a statutory provision.

23. Section 25 of Interpretation Act 1967 states

“General provisions with respect to power to make subsidiary legislation

25. Where an Act confers power on any person or authority to make or issue subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of such subsidiary legislation-

(a) when any subsidiary legislation purports to be made or issued in exercise of a particular power or powers, it shall be deemed also to be made or issued in exercise of all other powers thereunto enabling;

(b) no subsidiary legislation shall be inconsistent with the provisions of any Act;

.....”

24. Section 713 (1) of the Companies Act 2015 also reiterates any Rules made under it cannot override the provisions contained in the statute.

25. Accordingly, preliminary objection is overruled for following grounds.

- a. Rule 15(1) of Companies (winding up) Rules 2015, has no application to the Company as leave was granted by this court and directions were also made as to conduct of the hearing.
- b. Under Section 529 of Companies Act 2015 leave is mandatory for a party opposing winding up based on insolvency of the Company, and subsidiary legislation cannot override this. So it is clear that the requirements contained in Rule 15(1) of Companies Winding Up Rules 2015 are not mandatory for the Company to oppose this application.

Winding Up Application

26. The application seeking leave was filed on 14.4.2023 and it was heard on 15.6.2023 and leave to oppose was granted and there was no requirement to comply with Order 15 of Companies (Winding up) Rules 2015 by the Company. So the merits are considered on the materials submitted to court.
27. Petitioner has indicated four invoices issued during July to September, 2019 and the total sum due from said invoices were USD 76,977.91 for the goods supplied by the Petitioner.
28. The Company does not deny the purchase of items from the Petitioner for commercial purposes, but state that all of them were settled and evidence of that were presented in following manner,
 - a. Invoice No 16335 dated 9.7.2019, according to the statutory demand was for \$30,176.56.
According to the Company, Custom Declaration, dated 13.8.2019, the payment was from TT and the sum paid was USD 16,416.18.(Annexed as 6 to affidavit in support of summons) Invoice 16335 annexed SK5
There was only application for TT produced, this was shown to the Company at hearing but they were unable to produce any evidence to show such payment.
 - b. Invoice 16345 dated 3.8.2019 is for a sum of USD 27,505.65 in terms of the statutory demand.
Annexed as SK 7 and SK8 are invoice no 16345 issued by Petitioner dated 3.8.2019 and a customs declaration dated 17.9.2019 respectively. According to customs declaration, payment of USD 17,049.62 was paid through TT.
There was no evidence of any deduction of its account and or transfer advice from the bank to its advising bank or any other confirmation as to payment was made from the account of the Company.
An application for payment and actual payment are not the same as, due

to insufficiency of funds or some other factor transfer can be withheld or refused.

So a requisition of TT or statement in customs declarations are not proof for the payments or transfer of the funds from the Company.

The Company was granted time to submit additional material after granting leave, but it had not done so. This shows the Company was unable to prove the payments despite granting an opportunity to do so. It had admitted the receipt of the goods stated in invoice, but failed to pay.

Petitioner stated that the corrected invoice was dispatched indicating there was an error on the invoice, but this corrected invoice is for higher value. The Company had not paid even the lessor sum stated in the invoice relied on by it to oppose this application.

- c. Invoice No 1651 dated 20.8.2019 was for USD 9,738.70 according to the statutory demand.

Annexed SK3 is the invoice for the same number and date but amount stated therein is \$7,424.50 and for the proof of the total remittance is found in SK4 for the same amount, according to the Company but again SK4 was only an application for TT and there was no evidence of actual transfer of funds from the Company's account or advice that TT was executed for USD 7,424.50

Petitioner stated that corrected invoice was dispatched, but the dispute as to the amount is immaterial as payment for lessor amount was not proved. The Company being the consignee there was no dispute as to receipt of the items and or quality of the items. It had simply failed to pay for the goods received.

- d. Invoice No 16362 is for USD 9,557.00 and dated 4.9.2019, according to the statutory demand.

The Company in the affidavit in support of summons had annexed SK 9, an even numbered invoice issued by the Petitioner for a sum of 7,526.40 on 4.9.2019 and the proof the payment annexed as SK 10, of the consignment through a TT for USD 7,526.40 on 28.11.2019. This is again an application for TT and not actual payment.

SK 10 filed by the Company stated "Not to be treated as the actual transmission of funds". So the document speaks for itself that it is only a Requisition of TT only. So the request for transfer and actual payment are not the same and the Company had failed to submit the same. According to Petitioner the correct invoice was for USD \$9,557.00, but again the Company had failed to pay even the lessor sum.

29. The Company cannot raise the issue of service of the statutory demand as it does not show, it is solvent and the grounds for leave to oppose in terms of

Section 529 of Companies Act 2015 is confined to 'solvency' or in other words that the said debt was less than \$10,000 or non-existent.

30. A company can be wound up, by court, if it is insolvent in terms of Section 513(c) of Companies Act 2015. This is application of legal fiction for the purpose of winding up application in terms of Section 515(a) of Companies Act 2015.
31. The word 'insolvent' is defined in Section 514 of Companies Act 2015. A 'Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable'¹.
32. By the same token, if it is unable to pay all its debts when they become **due and payable**, it is to be considered as insolvent.² In such a situation court cannot allow evidence to adduce that company is solvent, through financial accounts or any other manner. Once a legal fiction is created in law, that can only be rebutted by proving that the requirement for legal fiction, is absent or it is not applicable. If not an absurd situation can arise as legally 'deemed' fact, will be disputed through evidence making utility of 'deemed' provision a superfluous. Once something is 'deemed' that fact can be disputed by removal of pre conditions that applied to 'deemed'.
33. If there is no debt, or even if there is a debt, but it is neither due nor payable, such an instance cannot be considered as for deemed insolvency, and are examples where legal fiction cannot be applied. This is not the same as accepting a company deemed insolvent and there after allowing it to be refuted by, evidence. In any event solvency of an entity cannot be determined from annual accounts without further analysis, which is entirely not the scope of this proceeding. What the Company needs to establish is the elimination of deemed provision.
34. There is no need for a company to be always able to settle all its debts. As long as debt is manageable the company cannot be considered insolvent. This is very tall order for highly leveraged entities such as financial institutions and they will never be able to settle all or even fraction of its debts at a particular instance. What is important to note is that a company should be able to honour its debts when they are due and payable. So the emphasis is on ability to pay debt as and when they are due, in terms of law.
35. It is important that all the three requirements such as existence of debt, that it was due and it was payable, should be at the time of statutory demand was issued for winding up in terms of Companies Act 2015. Apart from the above, the debt should also be above the stipulated sum under the Act, for

¹ Section 514 (1) of Companies Act 2015

² Section 514(2) ibid

legal fiction to be applied. In this instance the Petitioner satisfied all such requirements.

36. Section 515(a) of Companies Act 2015, creates a legal fiction and according to that, a company is deemed unable to pay its debts if a creditor serves a notice of debt exceeding \$10,000 in terms of said provision and the company was unable to settle the debt, to the reasonable satisfaction of such creditor.
37. It is a misconception that any party can serve a company for an assumed debt of over \$10,000 and failure to honour such can lead to winding up of the company. If so, it can lead to abuse of process, in order to obtain money that due and payable, and or less than statutory minimum of debt which clearly against the principles of recovery of debt, from winding up or notice of winding up.³
38. The Petitioner cannot avail the legal fiction as to the 'insolvency' of the Company unless there existed a debt, exceeding \$10,000 and it was due and payable on demand.
39. When debts are disputed winding up is not a method to abandon the dispute through fear of winding up, using legal fiction of insolvency. At the same time fictitious or misleading facts cannot eliminate legal fiction of insolvency, but support it. An insolvent entity would resort to hoodwink another party as to payments due, to hide its liability or to create a false dispute. This applies to the Company as it had failed to prove any payment regarding goods it accepted and also sold and collected money.
40. What is important is not the value of demand exceeds \$10,000 but rather there was in law, a debt of \$10,000, due and payable at the time of demand notice was issued to the company. This 'debt' and failure to honour it to the satisfaction of creditor, is the crux of the deemed 'insolvency' of the Company.
41. Winding up in terms of Section 513 of Companies Act 2015 is a discretionary remedy of the court, but this is generally exercised in favour of Petitioner if the condition precedent to winding up are fulfilled.

CONCLUSION

42. Admittedly there were two invoices dispatched due to some error in previous invoices. Both parties were aware of this and no objection was raised at that

³ 'In practice, winding up proceedings are clearly used for debt collecting purposes although formally the courts criticize such purpose, and where the strategy is not successful a creditor can be hit with an adverse costs order' Law of Company Liquidation by McPherson & Key(4th Edition)(Sweet and Maxwell, 2018) p 83 (3-002)

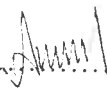
time. When the error was detected already goods were accepted by the consignee, the Company but had not paid for them. Later invoices were for higher value than previous, but the Company had not even paid the earlier invoices dispatched for lower value. So there is no merit in the opposition to this application. This application for winding up of Debtor Company Green Ace Valley Supplies and Electrical Pte Ltd is granted. The cost of this action is summarily assessed at \$5,000.

FINAL ORDERS

- a. The application to wind up Green Ace Valley Supplies & Electrical Pte Ltd is granted.
- b. Cost is summarily assessed at \$5,000.

Dated at Suva this 23rd day of August, 2023.




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Justice Deepthi Amaratunga
High Court, Suva