IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

APPEAL ACTION NO. HBA 006 OF 2023

BANKRUPTCY CASE NO. 005 OF 2023

BETWEEN	:	**RIAZ ALI** **First Appellant (First Judgment Debtor)**
		AIYAZ ALI **Second Appellant (Second Judgment Debtor)**
AND	:	**WESTPAC BANKING CORPORATION LIMITED** **Respondent (Judgment Creditor)**
Counsel	:	**Mr S Nandan for Appellants** **Mr K Chang for Respondent**
Hearing	:	**22 February 2024**
Judgment	:	**11 March 2024**

JUDGMENT

[1] The Appellants, Messrs Riaz Ali and Aiyaz Ali, owe the Respondent, Westpac Banking Corporation Limited (hereinafter referred to as 'Westpac'), a substantial amount of money, $977,610.70 to be precise. There is no dispute between the parties that the money is owed. The dispute on appeal concerns the correct procedure that Westpac must employ in order to bankrupt the Appellants.

[2] Westpac have sought to recover its debt from the Appellants for about a decade. It has received no payments from the Appellants since 2019 and, thus, commenced bankruptcy proceedings against them in early 2023. On 7 July 2023, the learned Resident Magistrate, Ms. Seini Puamau, granted a Receiving Order against the Appellants.

[3] The Appellants have brought this appeal from the Receiving Order claiming that Westpac have abused and/or misused the statutory processes available to it.

Background

[4] The material facts are as follows:

[4.1] The Appellants became liable, as Guarantors, to repay a loan that was owed to Westpac. As the Appellants failed to pay the monies, Westpac brought proceedings against the Appellants in the Suva High Court, Civil Action No HBC 275 of 2014. The parties settled the claim and executed a Terms of Settlement on 14 March 2016 which was sealed by the High Court on 31 March 2016.[1]

[4.2] The Terms of Settlement identified the debt payable by the Appellants as $1,218,610.70 and set out how the debt was to be repaid. It was noted that the Appellants had already paid $100,000 on 8 May 2015 and that the remaining balance would be paid in monthly instalments of $25,000 beginning in March 2016.

[4.3] The Appellants made twelve payments of various amounts between April 2016 and December 2018, the total amount being $141,000.[2] By the end of 2018, the Appellants had paid $241,000 towards the debt. It appears they have not made any payment of the debt since.

[4.4] As such, Westpac filed a Judgment Debtor Summons in the Magistrates Court to recover the remaining amount owing, being $977.610.77.[3] A Means Test hearing was conducted on 5 January 2021. The learned Magistrate, Mr Asanga Bodaragama, issued a Ruling on 9 February 2021.[4] The Magistrate noted that Appellant's position at the hearing was that they were '*financially broke*'. However, the Magistrate was unconvinced in light of the incomplete financial information supplied by the Appellants, and, therefore, ordered that the Appellants make monthly instalments of $50,000. A suspended order of commitment for 6 weeks was also made, to be

[1] These documents are contained in the Record of the Magistrates Court at Suva (hereinafter referred to as the 'Magistrates Record'), annexed to the affidavit of Sujata Lodhia dated 20 March 2023; pgs 320-412.
[2] Pg 286 of the Magistrates Record.
[3] JDS Civil Action 122/2020.
[4] Pgs 376-378 of the Magistrates Record.

activated in the event the Appellants failed to comply with the payments order. The Magistrate's Order was sealed on 16 February 2021.[5]

[4.5] On 9 March 2021, the Appellants filed an intention to appeal the orders of 9 February and sought a stay. In a decision dated 12 October 2022, another Magistrate, Ms Puamau, declined the stay.[6] The learned Magistrate indicated in her Ruling that it was open for the Appellants to apply to the court to vary the amount of the monthly payments.[7] The Appellants have not done so and nor does it appear that they have prosecuted their appeal from the orders of 9 February 2021.[8] Indeed, nor have the Appellants made any payments to Westpac, thus being in breach of the orders of 9 February 2021.

[4.6] In light of the Appellants' non-payment, Westpac decided on a different course. On 1 February 2023, Westpac filed a Bankruptcy Notice in the Magistrates Court and proceeded on 7 February 2023 to serve the same on the Appellants. The Notice demanded payment of the outstanding monies, being $977,610.70, within 7 days.

[4.7] The Appellants made no payment to Westpac. There followed the filing of an affidavit in support of a Bankruptcy Petition executed by Sujata Lodhia for Westpac dated 20 March 2023.

[4.8] The Appellants resisted the Bankruptcy Petition. They filed a Notice of Motion seeking a stay and filed affidavits in 2023 attesting to their ability to repay the debt. In their affidavit executed on 25 April 2023 they stated at paragraph 8 that they '*have the means to pay off our debts as we did in the past*'. They claimed that they had significant debts owed to them of about $1.5 million as well as ownership of a lease.[9]

[4.9] The petition was heard on 7 July 2023. The Appellants were then represented by Nand Lawyers. The learned Magistrate granted a Receiving Order.

---

[5] Pgs 379-380 of the Magistrates Record.
[6] Pgs 383-388 of the Magistrates Record.
[7] This avenue is available under Order 36 Rule 20 of the Magistrates Court Rules.
[8] Para 23 of Respondent's Submissions dated 12 February 2024.
[9] Pgs 135-166 of the Magistrates Record.

[4.10] The Appellants filed a Notice of Appeal on 2 August 2023 as well as sought a stay. By this time, the Appellants has instructed new solicitors, Reddy and Nandan Lawyers. Ms Puamau issued a decision on the stay application on 19 October 2023 refusing the same.

Notice of Appeal

[5] The Notice of Appeal identifies the following four grounds upon which this appeal has been brought:

1. *The Learned Magistrate erred in law and in fact and/or misdirected herself in law and in fact by failing to dismiss the Proceedings on the ground that the Proceedings were an abuse of process as the Respondent had also instituted the Suva Magistrates' Court Judgment Debtor Summons No 122 of 2020 against the Appellants (the JDS) and obtained orders against the appellants in the same, and had failed to withdraw the JDS and/or have the orders made in the JDS set aside before instituting the Proceedings.*

2. *The Learned Magistrate erred in law and in fact and or misdirected herself in law and in fact by striking out and/ or dismissing the JDS even though the JDS was not before her at that time.*

3. *The Learned Magistrate erred in law and in fact and or misdirected herself in law and in fact in failing to stay the Proceedings given all the circumstances of the matter.*

4. *The Learned Magistrate erred in law and in fact and or misdirected herself in law and in fact by failing to give proper consideration to the relevant considerations including but not limited to the fact that the Respondents were in the process of liquidating their assets which would have fully covered their debts and thus the Appellants were not insolvent.*

Parties Positions

[6] Mr Nandan made the following arguments for the Appellants:

i. The Appellants were abandoning grounds 2 and 4 and pursuing grounds 1 and 3 only.

ii. Mr Nandan referred to the orders in the Judgment Debtor Summons (hereinafter referred to as "JDS") by the Magistrates Court on 9 February 2021. Mr Nandan stated that Westpac has, while the JDS remains live, commenced separate and new proceedings against the same parties (being the Appellants) based on the same set of facts. Mr Nandan argued that there were two problems with these two separate and live proceedings; firstly, they offended the principle of judicial comity and, secondly, they were an abuse of process.

iii. In respect to judicial comity, Mr Nandan cited a number of authorities including *Haworth v Starwood Properties Limited* [2019] FJHC 1047 where the High Court refused to vary an order made by another High Court Judge in the same proceeding. Several of the decisions relied on by the Appellants had cited, with approval, the Federal Court of Australia decision of *Hicks v Minister for Immigration and Multi-Cultural and Indigenous Affairs* [2003] FCA 757.

iv. Mr Nandan argued that the JDS proceedings and the bankruptcy proceeding could not be advanced at the same time. The premise for seeking relief under one proceeding undermined the premise for seeking relief under the other. For example, the JDS involved making orders for the debtor to make repayments based on their ability to repay the debt. However, bankruptcy proceedings could only succeed if the debtor was insolvent. In short, he argued that Westpac should have formally withdrawn the JDS before initiating bankruptcy proceedings.

v. Mr Nandan pointed out that there was, in fact, a separate statutory mechanism that Westpac should have used against the Appellants. He relied here on s 99 of the Bankruptcy Act which reads:

> *Where application is made by a judgment creditor to the court for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor and on payment by him or her of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of Bankruptcy at the time the order is made, and the provision of this Act, except Part 8, shall apply as if for references to the presentation of a petition by or against a person there were substituted references to the making of such a receiving order.*

[7] Mr Chang responded as follows for Westpac:

i. He noted that the issue as to whether a party could commence bankruptcy proceedings while a JDS was on foot had been raised as a preliminary issue before the learned Magistrate at the hearing on 7 July 2023 but had been abandoned at the time. Mr Chang referred to pages 451 to 453 of the Magistrate's Record.[10] The learned Magistrate had noted:[11]

> *Ms Ben [for Appellants]: Preliminary application is with court reduced ..... deals with bankruptcy and JDS after ....., Mr Nand [also for Appellants] says they don't wish to press the preliminary point.*[12]

[10] The typed record at pages 451-453 is based on the learned Magistrate's handwritten notes.
[11] At page 451 of the Magistrate's Record.
[12] It is difficult to glean from these notes the exact nature of the preliminary issue.

ii. Mr Chang further referred to page 452 of the Magistrate's Record, being the second page of the notes of the hearing on 7 July 2023, which read:

> *Emphasis: Debt has been agreed to, Act of bankruptcy agreed to Noncompliance of the same that has been agreed to in affidavit in response*

iii. Mr Chang submitted that judicial comity did not apply in the present circumstance because the principle only arises where a judge or magistrate has been asked to vary an order made in the same proceeding by a fellow judge or magistrate. Mr Chang argues that here the orders made by the Magistrate in February 2021 were in separate proceedings. Further, the learned Magistrate in the present bankruptcy proceedings has not varied the 2021 orders.

iv. Mr Chang stated that there was no abuse of process by Westpac in the insolvency proceedings. It has acted in good faith and is simply exhausting all avenues available to it to enforce its judgment debt.

v. With respect to s 99 of the Bankruptcy Act, Mr Chang argued that that provision only operates where the court is yet to make a committal order whereas here such an order had already been made in February 2021. Once made, Mr Chang argued it was too late to utilize s 99 and the judgment creditor had no option but to commence insolvency proceedings as Westpac has done.

vi. Mr Chang sought indemnity costs for Westpac for this appeal on the basis that the Appellant's conduct, frivolously resisting and delaying payment of the undisputed debt, justified such an award. In the alternative, Mr Chang sought '*hefty*' costs of $5,000 against the Appellants.

[8] In reply, Mr Nandan stated:

i. He was not present at the hearing in the Magistrates Court when the receiving order was granted (he was not acting for the Appellants then) and, therefore, was unable to say whether the 'preliminary application' recorded in the Magistrate's handwritten notes was the same issue advanced in the present appeal, namely that a party cannot initiate new insolvency proceedings while a JDS remains on foot. He further stated that it was not clear from the notes whether the Appellants abandoned the point or simply did not press the matter with additional argument.

ii. Mr Nandan submitted that the time for making an application under s 99 would, in fact, be at the time that a court is considering making a committal. In the present matter that would be when a Magistrate is considering activating the Appellants' suspended committal.

iii. In terms of costs, he submitted that the appeal was not frivolous, and that there were important jurisprudential and administrative issues that arise in this case. He resisted indemnity costs or larger than usual costs.[13]

Decision

[9] This appeal is brought under s 100(2) of the Bankruptcy Act 1944 and Order 55 of the High Court Rules 1988.

[10] Pursuant to s 100, an appeal lies from an order of the magistrate in a bankruptcy matter. The High Court may review, rescind or vary the Magistrates Court's order.[14] Order 55 Rule 3 provides that an appeal to the High Court is by way of a re-hearing.

[13] Both counsel indicated that the usual award of costs for these appeals is between $1,500 to 2,500.
[14] Section 100(1).

[11] The learned Magistrate provided the following reasons for granting the Receiving Order, being that she was:

> *...satisfied on the balance of probabilities with:*
>
> *(i) proof of the petitioning creditors debt;*
>
> *(ii) the act of bankruptcy pursuant to section 3(1)(g) of the Bankruptcy Act 1944; and*
>
> *(iii) not being satisfied on the balance of probabilities that the debtors are able to repay their debt because of the dearth of material provided to me – to be clear, because the material provided to me being insufficient on the face of it to satisfy me as to the debtors individual means to repay the debt; and*
>
> *(iv) not being satisfied on the balance of probabilities that there is other sufficient cause to dismiss the petition;*

[12] The Appellants do not challenge the learned Magistrate's findings in respect to (i), (ii) or (iii). The challenge is with (iv). The Appellants say that there was sufficient cause for the learned Magistrate to have dismissed the petition. The cause being, in terms of grounds 1 and 3 of the Notice of Appeal, that the process adopted by Westpac under the Bankruptcy Act is defective, offending the principle of judicial comity and amounting to an abuse of process.

[13] The narrow question that emerges from the Appellants' arguments is whether it is permissible for Westpac, being the judgment creditor, to commence the present bankruptcy proceedings whilst its JDS remains on foot.

[14] The Appellants advance three grounds to support their appeal, namely:

i. The bankruptcy proceedings offend the principle of judicial comity as Westpac are, in effect, seeking to have a magistrate vary its own previous order of 9 February 2021 in the JDS proceedings.

ii. The bankruptcy proceedings are an abuse of process because of the fact of the existing JDS proceedings.

iii. The correct statutory process that Westpac ought to have followed, if it wished to pursue bankruptcy proceedings, was to apply for a receiving order under s 99 of the Bankruptcy Act.

Judicial Comity

[15] The Appellants' state that the orders of 9 February 2021 and 7 July 2023 are both from magistrates, at the same level, and contradict each other, thus offending judicial comity.

[16] The Appellants rely on several authorities to support their case. These authorities are discussed below:

i. *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757. This Australian case is cited in several local decisions to both identify the principle of judicial comity and support the court's application of the principle. In *Hicks*, French J was considering the construction of a provision in Australia's Migration Act, ie s 501(7)(d). French J noted that after hearing argument and before making her decision, another judge from the same court, Ryan J, had issued a decision on the construction of the same provision. French J discussed at paragraphs 73 to 76 the weight to be placed on the construction by Ryan J. She acknowledged that she was not bound to adopt Ryan J's construction but that it was '*well established that a judge of this Court should follow an earlier decision of another judge unless of the view that it is plainly wrong*'. The principle of judicial comity, which had been raised by counsel for the Minister, was discussed. French J stated at 76:

> *The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges. And where questions of law, and statutory construction, are concerned the proposition that a judge who has taken one view of the law or a statute is 'clearly wrong' is one not lightly to be advanced having regard to the choices that so often confront the courts particularly in the area of statutory construction.*

Indeed, where a serious doubt arises on the part of one judge, about the correctness of the law as stated by another, in a matter of importance, it may be desirable for a case to be stated to the Full Court for early resolution of the question in contention.

ii. *Haworth v Starwood Properties Ltd* [2019] FJHC 1047, Nanayakkara J. Nanayakkara J expressly stated at (17) that he did not have to not make any determination on judicial comity as that case was decided on another point.

iii. *Chetty v Fiji Public Service Association* [2004] FJHC 359, Winter J. This concerned a decision by the High Court granting an injunction to the plaintiff on an ex-parte basis and subsequently refusing to dissolve the injunction on an inter-parties application. The defendant appealed to the Court of Appeal but also subsequently again applied to the High Court to vary the injunction. The High Court correctly pointed out that it could not consider the latest application because to do so would usurp the Court of Appeal's authority.

iv. *Reddy Construction Company Ltd v Pacific Gas Company Ltd* [1980] 26 FLR 121. This was a decision by the Court of Appeal on appeal from a decision by the High Court refusing leave to the plaintiff to amend its statement of claim. The decision in the High Court, that had been appealed, was explained by the Court of Appeal in the following terms:

...It is necessary to understand straight away that the matter complained of arose in a slightly unusual way for two judges dealt with the application on separate occasions. Williams J declined it on 6th July 1979 and for what appears to be a valid reason the matter was again raised on 31st August 1979 before Dyke J. and that learned judge confirmed the previous ruling.

Dyke J had expressed the view that he felt bound by the previous ruling by Williams J and that the plaintiff could appeal the earlier decision '*but cannot merely go to another judge and hope for a different ruling unless he can show that the circumstances have altered substantially*'. The plaintiff appealed from the decision of Dyke J and the Court of Appeal allowed the appeal, granting the plaintiff leave to amend its statement of

claim. The Court of Appeal noted that the circumstances subsequent to Williams J's decision had '*changed substantially*' justifying the grant of leave. This decision does not assist the Appellants in the present matter. While Dyke J refused to vary an earlier order made by Williams J in the same proceeding, both Dyke J and the Court of Appeal recognized that the Judge was entitled to vary the previous order where the circumstances had altered since the previous decision.

v. *Wati v SL Shankar Ltd* [2004] FJHC 392, Connors J. In this case the High Court was asked to determine a legal issue where the same legal issue had recently been determined by another judge in a separate proceeding. The High Court mentioned the principle of judicial comity and referred to *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* (supra). In line with *Hicks*, Connors J stated that he agreed with the earlier decision of the High Court.

[17] Judicial comity is simply the practice of a judge or magistrate following a decision by a fellow judge or magistrate on a legal point unless the judge/magistrate is of the view that the earlier decision is clearly wrong. The principle of judicial comity does not arise in the present case. In granting the Receiving Order the learned Magistrate was not determining a legal point that was at odds with a decision on that legal point by another magistrate. Further, it will be obvious from the background that this was the first occasion that a magistrate had been called upon to make a receiving order for Westpac against the Appellants.

Abuse of Process

[18] The Appellants' state that it is an abuse of process for Westpac to bring these bankruptcy proceedings because they are based on the same facts and seek similar relief to the JDS proceedings. The Appellants also state that Westpac should have withdrawn the JDS proceedings before initiating the bankruptcy proceedings and that the two proceedings are at odds with each; the orders in the JDS proceeding being premised on the Appellants having the means to repay the judgment debt whereas the bankruptcy proceedings are premised on the Appellant's inability to pay the same.

[19] I am satisfied that Westpac was permitted to file the present bankruptcy petition in 2023. The Appellants have not identified any provision in the rules or the Bankruptcy Act that

requires a judgment creditor to withdraw existing JDS proceedings before commencing bankruptcy proceedings. Nor have they identified a provision that precludes a party from having both proceedings on foot at the same time. Fundamentally, I see no problem with a judgment creditor having more than one enforcement action live at any one time against a debtor to recover their debt. The following remarks by Scott J in *Prasad v ANZ Banking Group Ltd* [1999] 45 FLR 101, as they pertain to a mortgagee, are consistent with this and in my view have equal application to a judgment creditor:

> *As is well understood a mortgagee, so long as part of the mortgage debt remains unpaid may pursue any or all of the remedies available to the mortgagee at the same time. Thus, the mortgagee may concurrently sue for payment on a covenant in the mortgage to pay principal and interest, for possession of the mortgaged property and for foreclosure.*
>
> *Doubtless being aware that this is the general position in law the Bank not only exercised its powers of sale but also sued for the amount owed. On 21 April 1998 Judgment in default of notice of intention to defend was obtained by the Bank against the Defendant for the sum due. The Judgment debt has not been satisfied.*
>
> *The Bank then went further: it commenced bankruptcy proceedings against the Plaintiff in the Suva Magistrates Court (Action No. 210 of 1998s). It relied on the unsatisfied judgment debt and a bankruptcy notice was issued on 9 June. On 20 July the petition was presented. A copy is Exhibit D to the Plaintiff's supporting affidavit filed on 1 March. On 11 September 1998 a receiving order was made.*

[20] Whether an enforcement action ought to be withdrawn, or an earlier order varied or revoked, before another enforcement action is commenced will depend on the facts and circumstances of each case. In the present case, it was not necessary for Westpac to withdraw the JDS or to seek to vary or revoke the Magistrate's orders of 9 February 2021. The JDS proceedings did not, in any manner, interfere with the bankruptcy proceedings – indeed, Ms Puamau could have stayed the JDS proceedings under s 11 of the Bankruptcy Act if she considered them an impediment to the bankruptcy petition. The Appellants had made no payments in

compliance with the 9 February 2021 order and Westpac had taken no steps to activate the suspended committal. In light of non-payment since 2019, together with the Appellants' advice in 2021 that they were financially broke, it was entirely reasonable for Westpac to pursue insolvency proceedings against the Appellants in early 2023 and, equally, reasonable for Westpac to park the JDS proceedings - in the event their application for a receiving order was refused because the Appellants were able to demonstrate that they were, in fact, able to pay the debt.

[21] As for the argument that the two proceedings are inconsistent and that the JDS orders and the Receiving Order cannot live side by side, this would have some force if the Appellants were ordered to pay $50,000 a month at the same time that a receiving order is made, and the JDS order was based on evidence that the debtor was able to make these payments. But here the orders were made two and a half years apart and the JDS orders of 9 February 2021 were made on the then presumption that the Appellants were deliberately concealing, and understating, their true financial circumstances.[15]

Section 99 of Bankruptcy Act

[22] The Appellants argue that Westpac should have sought a receiving order under s 99. I agree that this avenue was available to Westpac. It could have applied to the Magistrate to activate the suspended committal and at the hearing instead asked the court for a receiving order. This may have been a more expedient pathway for Westpac.

[23] Is this the only pathway that Westpac was permitted to employ to pursue bankruptcy proceedings against the Appellants? In my view, such a construction is not available on a plain reading of s 99. It is apparent that s 99 is intended to be applied where a judgment creditor is seeking to commit a debtor. The purpose of s 99 is to equip the court with another remedy other than a committal. The provision does not require a judgment creditor in every instance to follow this pathway to obtain a receiving order and I am not prepared to read this requirement into the wording or impose such a restriction on a judgment creditor in the absence of clear wording to this effect. Indeed, in my view there is no sensible reason to do so.

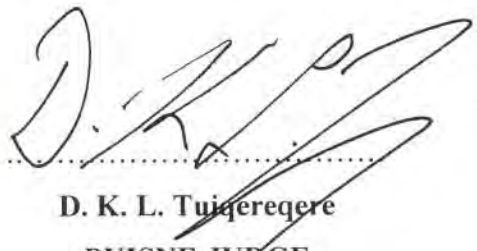
[15] Notably, the Appellants do not challenge Ms Puamau's finding that they were not able to repay the debt.

Orders

[24] Accordingly, I make the following orders:

i. The appeal is dismissed.

ii. The Appellants shall pay the Respondent's costs summarily assessed in the amount of $2,000.00.



D. K. L. Tuiqereqere
PUISNE JUDGE

Solicitors:

Reddy & Nandan Lawyers for the Appellants

Howards Lawyers for the Respondent