IN THE HIGH COURT OF THE REPUBLIC OFFIJI
(WESTERN DIVISION) AT LAUTOKA
BANKRUPTCY AND WINDING UP CAUSE

COMPANIES PROCEEDING
No. 25 of 2011

IN THE MATTER of BOBULA LOGGING COMPANY LIMITED a limited liability Company havings its registered office of Fiji Pine Commission, Drasa Avenue, Lautoka.

A N D

IN THE MATTER of **COMPANIES ACT CAP 247**

Before: **Actg Master M H Mohamed Ajmeer**

Appearance: Mr J Sharma for the applicant

No appearance by or for the respondents

Date of Hearing: 14 April 2014

Date of Ruling: 14 April 2014

RULING

[1] Bobula Logging Company Limited, the applicant company in these proceedings by notice of motion dated 9 January 2014 and filed 14 January 2014 (the application company) seeking orders that the petitioners' winding up petition filed on 25 August 2011 be struck out for want of prosecution and/or on the ground of abuse of the process of the court. The application is supported by an affidavit of Toga Raidriwa (a Director of the Applicant

Company). The application appears to have been made pursuant to Ord. 25, r, (9) of the High Court Rules of 1988 (as amended) (the HCR). That rule provides:

> *"(1) If* ***no step*** *has been taken in any cause or matter* ***for six months*** *then any party on application or the Court of its own motion may list the cause or matter for the parties* ***to show cause why it should not be struck out for want of prosecution*** *or as an abuse of the process of the Court.*
>
> *2) Upon hearing the application the Court may either* ***dismiss*** *the cause [or] matter on such terms as may be just or* ***deal with the application as if it were a summons for directions.***(Emphasis added)" .

[2] Ms Sabra Bibi and Mr Sanjay Kumar, the petitioners on 25 August 2011 filed a winding up petition to have the applicant company wound up on the ground that the company is indebted to the petitioners in the sum of $26,000.00 on account of a consent judgment made by the Magistrate Court, Lautoka on 16 March 2011 and the judgment amount still remaining satisfied.

[3] Both Parties had sought quite a number of adjournments to explore settlement. Unfortunately, they could not arrive at any settlement. As such, the applicant company filed its affidavit in opposition on 22 March 2013 and stated that, the company had obtained interim stay of execution of the consent orders made on 16 March 2011 upon its application to set aside the consent judgment.

[4] On 27 May 2013 the court had taken the matter off the cause list as there was no appearance by the petitioner for consecutively two occasions.

[5] Thereafter, the petitioners did not make any application to have matter reinstated to the cause lists, until the applicant company filed its application to dismiss for want of prosecution on 14 January 2014.

[6] The striking out application had been served on both the petitioners (respondents in these proceedings) on 4 February 2014 (Sanjay Kumar) and

5 February 2014 (Sabra Bibi) as per affidavit of service filed by the applicant company in proof of service.

[7] Surprisingly, the respondents neither appeared in court, nor filed any affidavit in response opposing the application to strike out the petition.

[8] Pursuant to Ord. 25, r. (9) of the HCR, if no step has been taken in any cause or matter for 6 months any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court. Apparently, the applicant company were entitled to make an application to list the matter which was taken off the cause list for the respondents to show cause why it should not be struck out for want of prosecution.

[9] In addition to the powers to dismiss an action under Ord. 25, r. (9) of the HCR, the court has an inherent jurisdiction to dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in the prosecution of the action causing or likely to cause serious prejudice to the defendant (in this instance the applicant company) or giving rise to the substantial risk that a fair trial would not be possible, see **Allen v Alfred McAlpine & Sons Ltd** [1968]1 All ER 543, CA and **Birkett v James** [1977] 2 All ER 801, HL.

[10] The respondents in this case did not take any step to have the matter restored to the cause list between the date the matter was taken off the cause list, i.e. 27 May 2013 and the date the applicant company filed its application to strike out, i.e. 14 January 2014. In other words the respondents did not take any step for more than 8 months to get on the matter.

[11] The respondents did not mind to appear in court and file affidavit in opposition to the application to strike out the action. That itself shows that the respondents are not interested in pursuing the matter any further.

[12] In my opinion 8 months delay in progressing the matter is substantial. The respondents had failed to explain the delay. As a result they had failed to show cause why the action should not be struck out for want of prosecution. I therefore acting under Ord. 25, r. (9) of the HCR struck out the winding up petition filed on 25 August 2011 for want of prosecution with no order as to costs. The applicant did not insist for costs.

[13] Finally, I make the following orders:

i) The winding up petition filed on 25 August 2011 is struck out for want of prosecution with no order as to costs;

ii) Order accordingly.

.....

M H Mohamed Ajmeer

Actg Master of the High Court

At Lautoka

14 April 2014