

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBC NO. 96 OF 2018**

**BETWEEN** : **REDBRICK LAUNDRY** trading as **REDBRICK HOLDINGS LIMITED** a limited liability Company having its registered office at HLB Crosbie & Associates, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi, Fiji.

**PLAINTIFF**

**A N D** : **AJAY CHAND ENGINEERING WORKS LIMITED** a limited liability Company having its registered office Shop 9, Kisan Sangh Building, Ravouvou Street, Lautoka, Fiji.

**DEFENDANT**

**Before** : A.M. Mohamed Mackie- J

**Appearance** : Ms. R. Chand for the Plaintiff.  
: Ms. K. Kumar for the Defendant

**Date of Hearing** : 12<sup>th</sup> February 2019.

**Written Submissions:** By the Plaintiff on 4<sup>th</sup> March 2019;  
By the Defendant on 11<sup>th</sup> March 2019.

**Date of Ruling** : 18<sup>th</sup> March 2019.

**R U L I N G**

**A. Introduction**

1. This ruling is pronounced pursuant to the hearing held before me on 12<sup>th</sup> February 2019 to decide on the issue as to whether the interim injunction, which is presently in operation, should be extended until the final determination of this action.

2. This Court on 8<sup>th</sup> of May 2018, after considering an Ex-parte application of the Plaintiff, inter-alia, granted a temporary interim injunction to the following effect;

*“The Defendant and/or its servants and/or it’s agents or it’s Solicitors are restrained from advertising or proceeding any further with the Winding-up petition of the plaintiff Company in the Local Newspapers or in the Fiji Republic Gazette or in any other way whatsoever until the 21<sup>st</sup> day of May ,2018”.*

3. The above injunction Order has, time to time, been extended pending the hearing and the outcome of this ruling today.

**A. Background:**

4. On a verbal agreement, the defendant was contracted by the plaintiff to carry out high pressure welding services to the new Steam line at the plaintiff’s laundry premises for a sum of \$100,000.00 being the total charges for the job.
5. The plaintiff alleges that, despite assurance being given by the defendant that the work will be carried out in compliance with the specifications and other requirements, after the completion of the work, mechanical failures occurred and the high pressure steam pipes blew up during the working hours giving hazardous fumes to the employees of the plaintiff.
6. The defendant failed to rectify the defective works, even after the plaintiff obtained a report and advised the defendant to rectify same and as a result the plaintiff had to engage the services of another welder and spent \$34,300.00 to reconstruct the components in the new steam line.
7. While the plaintiff had already paid the defendant \$54,941.01 for the work done, the defendant served a Demand Notice dated 25<sup>th</sup> October 2016 marked “D” on the plaintiff demanding the sum of \$37,061.74 being the outstanding payment for the work it had carried out.
8. The Plaintiff through its Solicitors responded to the Demand Notice by the letter

dated 26th October 2016, marked as "E", subsequent to which the defendant gave Statutory Demand Notice on 1<sup>st</sup> March 2017 as per the marking "F", which was responded by the plaintiff by the letter dated 7<sup>th</sup> March 2017 marked "G".

9. The plaintiff then filed an application for the Statutory Demand Notice to be set aside on the basis that the amount was disputed. This application was dismissed by the learned Acting Master on 2<sup>nd</sup> February 2018 as per the ruling marked "H".
10. The plaintiff averred that it has numerous clients for whom it supplies laundry services and was in the process of placing tender to secure new job. If the defendant proceeds with advertising, that the Winding Up proceedings has been commenced, it will lose its contracts with its existing clients and there is a chance that the plaintiff may lose out on the tender it has placed.
11. It is also pleaded that if the defendant proceeds with the Winding Up Action it will be an abuse of process as the sum demanded by the defendant is disputed and the Winding Up proceedings is not a debt collecting exercise.

**B. Submissions:**

12. Learned counsel for the plaintiff, in addition to the oral submissions, has filed the written submissions as well covering the aforesaid matters and main 3 principles that govern the injunction orders as laid down in American *Cyanamid Co. v- Ethicon Ltd (1975) A C 396 (1975) All ER 504 H L*.
13. The learned counsel for the defendant in his submissions alluded that the plaintiff has failed to set aside the Statutory Demand by filing the relevant application within the prescribed time limit of 3 weeks from the date of receiving the Statutory Demand as per section 516 of Companies Act and the Summons, purportedly, filed pursuant to Section 516 and 517 of the Companies Act, was dismissed by the Master on 2<sup>nd</sup> February 2018.
14. Learned defence counsel has also discussed the law under Companies Act that govern the setting aside Statutory Demands, determination of the application and the effect of order setting aside Statutory Demand.

C. Discussion:

15. Before proceeding to examine the propriety of an injunction order restraining the publication of the intended winding up proceedings, the pivotal question that arises for determination here is whether the alleged debt, the defendant is attempting to recover by initiating winding up proceedings against the plaintiff is a debt as envisaged in section 221 of the Companies Act (Cap 247) which reads as follows;

A Company shall be deemed to be unable to pay its debts-

- a. *If a creditor, by assignment or otherwise, to whom the company, is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter; neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor ;or*
  - b. *If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or*
  - c. *If it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.*
16. Section 6(1) (a) of the Bankruptcy Act (Ca0 48) provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debt is a liquidated sum, payable either immediately or at some certain future time.
17. In this case it is the defendant who decided that the amount claimed is due from the plaintiff as a debt. The transaction between the plaintiff and the defendant is based on a verbal agreement for the defendant to attend certain welding works at the plaintiff's laundry premises and dispute arose allegedly due to poor quality of work and usage of substandard material for the work. The quality of the material used by the defendant for the work and that of the work performed by the defendant are matters to be ascertained on evidence at the trial.

18. The defendant in this case cannot initiate bankruptcy proceedings against the plaintiff without obtaining a decision that the amount claimed is due and owed by the plaintiff, from a Court of competent jurisdiction or through other similar proceedings. The situation could have been different if the plaintiff did not dispute the claim of the defendant. From the documents and correspondences tendered along with the supporting affidavit, it is clear that the plaintiff had duly disputed the claim at the time it was made by the defendant.
19. The application made by the plaintiff before the Master challenging the Statutory Demand was dismissed by the Master not after consideration of the Merits of it. It was dismissed on a technical ground stating the failure on the part of the plaintiff to file the application by way of Originating Summons. Since the merits were not gone into the plaintiff had the opportunity to make a fresh application to decide the propriety of the Statutory Demand. Thus, the amount claimed by the Statutory Demand remains not being duly adjudicated.
20. In the case of *Lodhias Ltd v Geoffrey Hughes (Export) Pty Ltd [2004] FJHC 231; HBC0140.2004 (1 August 2004)* the court followed the principles laid down in *Offshore Oil N.L. v Investment Corporation of Fiji Limited 30 FLR 90 at 101* and Winding up action No. 40 of 1996 in the matter of *Silimaibau Sunset Express (Fiji) Limited* (unreported judgment) on the question of winding up;

The law is clear that there is a discretion in a court seized of a Winding up Petition, to decline to hear the petition where the debt is contested. There is a general principle that a petition for winding up with a view to enforcing payment of disputed debt is an abuse of process of Court and should be dismissed with costs.

Winding up proceedings should not be used to exert pressure on a company to resolve a disputed debt. If a debt is disputed on substantial grounds, then the petitioner is not a creditor within the provisions of section 221(a) and section 222 of the Companies Act.

21. Palmer's Company Law Volume 3 at paragraph 15.214 explains the meaning of the word "substantial" as follows.

Substantial means having substance and not frivolous, which dispute the Court should ignore. There must be so much doubt and question about the ability to pay

the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action by some other proceedings.

22. The Company Law by Brenda Hannigan (3<sup>rd</sup> Edition, 2012- at page 623-624 ) explain the circumstances under which an application for winding up is entertained and adjudicated upon by a court , as follows;

Failure to pay an undisputed debt, despite repeated requests, must prima facie mean an inability to pay and a Winding –up order may be sought by a creditor, the Company is not entitled to have the petition struck out, or prevent it being issued, merely because it is in fact solvent.

If the debt is due and is disputed, the petition proceeds to hearing and adjudication in the normal way, but it is an abuse of process and the petition will be struck out if the debt is bona-fide disputed and the petition is used as a means of pressurizing the company. A petition may also be dismissed if the company has genuine and serious cross-claim for an amount which exceeds the petitioner's debt and which the company has been unable to litigate, subject to the court's residual discretion to consider whether there are any special circumstances which might make it inappropriate to dismiss the petition.

This long-established approach of dismissing the petition where the debt is bona fide disputed is a rule of practice only, however, and it must give way to exceptional circumstances which make it desirable that the petitioner should proceed. In particular, the Court will have regard whether the petitioner would otherwise be without a remedy, whether injustice would result, whether there is some other sufficient reason for allowing the petition to proceed or whether there is likelihood of damage to the company if the petition is not dismissed.

23. In this case in hand, from the day one, the plaintiff has disputed the alleged debt. In turn the plaintiff is making a counter claim, which is larger than the alleged debt claimed by the defendant. The proceedings commenced by the plaintiff before the Master against the Statutory Demand Notice served by the defendant on the plaintiff was not adjudicated on merits and as a result the alleged debt claimed by the defendant remains unadjudicated.

24. In this case it cannot be said that the defendant would be without a remedy because it can always institute legal proceedings before a court of competent jurisdiction and recover the amount claimed with interest and on the other hand if the plaintiff company is wound up that would have an adverse effect on its reputation and it would probably result in losing business thereby causing financial loss, which, undoubtedly, could be higher than the amount of the alleged debt claimed by the defendant.
25. The plaintiff has deposited the amount claimed by the defendant to the credit of this case and provided sufficient security for any would be damages as well.
26. For the reasons given above, I make the following orders.
- a. The Ex-parte interim injunction made by this court on 8<sup>th</sup> May 2018 shall remain in force until the final determination of this action.
  - b. The defendant shall pay unto the plaintiff \$2,000.00 being the costs of this application.
  - c. The matter will be mentioned before the Master for the pre-trial formalities.
  - d. Parties are directed to appear before the Master.



A. M. Mohammed Mackie

Judge

At Lautoka

18<sup>th</sup> March, 2019