

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Winding Up Cause HBE No. 52 of 2019

IN THE MATTER OF RPA GROUP (FIJI) LIMITED a duly incorporated company having its registered office Shop 3, Fiji Muslim League, Lakeba Street, Samabula, Suva.

AND

IN THE MATTER of Companies Act, 2015

AND

IN THE MATTER of an application by RPA Group (Fiji) Limited for an Order for Stay of Proceedings and/or of Restraint of Further Proceedings in Companies Jurisdiction winding up case No. HBE 52 of 2019 pursuant to Section 524(1) (b) of the Companies Act.

BETWEEN : **RPA GROUP (FIJI) LIMITED** a duly incorporated company having its registered office at Shop 3, Fiji Muslim League, Lakeba Street, Samabula, Suva.

APPLICANT

AND : **PACIFIC MARINE & CIVIL SOLUTIONS PTE LIMITED** a duly incorporated company having its registered office at C/-O' Driscoll & Co., Suite 2, 1st Floor, 22 Carnarvon Street, Suva.

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. G. O' Driscoll for the Applicant
: Mr. F. Haniff for the Respondent

Date of Hearing : 21 November 2019

Date of Decision : 24 April 2020

RULING

COMPANY LAW: WINDING UP Setting aside of statutory demand – Failure to oppose within 21 days – Leave to oppose – stay of winding up proceedings – Sections 515, 516, 517, 524, 529 and 553 of the Companies Act – Comparison with section 482 of the Corporations Act 2001 of Australia – Order 29 Rule 1 (1) and (3) of the High Court Rules 1988.

Cases referred to:

- a. *Pacific & Civil Engineering Designs Limited v Nadi Land Development Limited HBE 17 of 2017*
- b. *In the matter of Pax in Bello Pty Ltd [2019] NSWSC 889*

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1. This relates to a summons filed on 5 September 2019 seeking to set aside a statutory demand issued to the respondent, RPA Group (Fiji) Limited by Pacific Marine & Civil Solutions Pte. Limited, the applicant, and to restrain the winding up of RPA Group (Fiji) Limited, until the hearing and determination of the respondent's application. It was supported by the affidavit in opposition of Ronesh Kumar. The respondent's application was made in terms of section 524 (1) (a) & (b) of the Companies Act 2015 (the Act) and Order 29 Rule 1 (1) and (3) of the High Court Rules 1988.

2. The applicant raised a preliminary objection that an application to set aside a statutory demand could only be made to court within 21 days after the demand is served in terms of sections 516 and 517 of the Act, and that the company sought to be wound up had failed to seek leave of the court in order to make its application in terms of section 524 of the Act.
3. The sum demanded in the winding up notice dated 29 May 2019, which was served on RPA Group (Fiji) Limited on 6 June 2019, was \$325,239.94, allegedly arising from the sale of vessels and related chattels following an agreement between the parties dated 17 March 2017.
4. A company¹ may apply to the court for an order setting aside a statutory demand served on such company and, an application may only be made within 21 days after the demand is so served. A company is deemed to be unable to pay its debts in the circumstances set out in section 515 of the Act. The section provides *inter alia* that unless the contrary can be proven to the satisfaction of the court, a company is 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 \$10,000 or such other prescribed amount, has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due (“statutory demand”) and the company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice. Section 515 (b) sets out other situations in which a company is deemed unable to pay its debts.
5. Section 517(1) of the Act applies where, on an application to set aside a statutory demand, the court is satisfied of either or both of the following: (a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates; (b) that the company has an offsetting claim. The court is required to calculate the substantiated amount of the demand, and if such amount is less than the statutory minimum for a statutory demand, the court must, by order, set aside the demand. If the substantiated amount is at least as great as the statutory minimum amount for a statutory demand, the court may make an order (a) varying the demand as

¹ Section 516 (1), Companies Act 2015

specified in the order, and (b) declaring the demand to have had effect, as so varied as from when the demand was served on the company. The court may also order that a demand be set aside if it is satisfied that (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside, or (b) there is some other reason why the demand should be set aside.

6. The grounds upon which the court can interfere and set aside a statutory demand are laid down by the statute in clear terms.
7. Section 529(1) of the Act states that 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 the statutory demand, the company may not, without leave of the court, oppose the application on a ground (a) that the Company relied on for the purpose 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).
8. The applicant referred the court to the decision in *Pacific & Civil Engineering Designs Limited v Nadi Land Development Limited*², where the High Court examined sections 516 and 517 of the Act pursuant to an application for the setting aside of a winding up notice. The court in that case stated that if a company failed to file an application to set aside a statutory demand within the prescribed time of 21 days, then the winding up application should be heard.
9. I have no reason to disagree with that view. The statutory provisions have clearly prescribed the route available to a company intending to set aside a statutory demand. The respondent has chosen to not take that direction. However, I agree with Mr. Haniff's submission that the decision in *Pacific & Civil Engineering Designs Limited v Nadi Land Development Limited* is not applicable to the respondent's application under section 524 of the Act. That case was concerned with an application under sections 516 and 517 of the Act.
10. The respondent's application before court is in terms of section 524 of the Act. Section 524 (1) states:

² HBE 17 of 2017

“At any time after the making of a winding up application, and before a winding up order has been made, the company, or any creditor or contributory, may-

- (a) where any suit or proceedings against the company is pending in the Court or Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings; and*
- (b) where any other suit or proceeding is pending against the Company, apply to the Court having jurisdiction to wind up the Company to restrain further proceedings in the suit or proceeding.*

and the Court to which the application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit”.

11. Counsel for the applicant submitted that as the respondent failed to comply with sections 516 and 517 of the Act, it could not rely on section 524 of the Act without obtaining the leave of court, and that, therefore, the application filed by the respondent should be dismissed with costs.
12. Counsel for the respondent argued that section 524 of the Act allowed the respondent at any time after the making of a winding up application, and before the winding up order has been made, to apply to court to stay or restrain the winding up proceedings, and that under this section a stay could be sought without seeking the leave of court as the winding up order was not yet made. Submitting that as far as he was aware an application under section 524 (1) (a) & (b) of the Act had not been considered in Fiji, the counsel’s contention was that this application was not for the purpose of setting aside the statutory demand, but to stay or restrain proceedings as the court thinks fit.
13. This, it was contended, was different to the requirements imposed by sections 516 and 517 of the Act. In terms of section 529 of the Act, counsel for the company pointed out, it was imperative to seek the leave of court to oppose an application on the grounds set out under that section; but this was not so in terms of section 524 of the Act.
14. Mr. Haniff contended that section 524 was similar to section 482 of the Corporations Act 2001 of Australia which reads that at any time during the

winding up of a company, the court may, on application, make an order staying the winding up either indefinitely or for a limited time or terminating the winding up on a day specified in the order. Counsel referred the court to the decision of the Supreme Court of New South Wales in *In the matter of Pax in Bello Pty Ltd*³.

15. The court held in that case that the company's solvency was the most important consideration in an application such as that, while other considerations would also be taken into account in determining whether a company has returned to, or will be returned to, solvency.
16. Drawing a parallel with *Pax in Bello*, counsel for the company submitted that solvency was a crucial element to be determined in an inquiry under section 524. He contended that if the application to set aside a statutory demand is filed within 21 days, then the sole consideration for the court would be whether the debt is disputed, and not whether the company is solvent under section 524. The affidavit in support given by Ronesh Kumar and filed on 5 September 2019 on behalf of the company asserts that the company is solvent and able to pay its debts as and when they fall due. The affidavit disputes the debt on the basis that contra payments have been disregarded by the applicant. Financial statements, account reconciliation statements, valuation of properties and correspondences were annexed to the affidavit in support of the respondent's application under section 524.
17. I am unable to agree with Mr. Haniff that section 524 of the Act is similar to section 482 of the Corporations Act 2001 of Australia. The latter enactment clearly provides for a stay of winding up proceedings either indefinitely or for a limited time. It also makes provision for terminating the winding up. The section in the Australian law makes detailed provision for several situations in which a stay of proceedings may be sought and sets out the matters to be considered by court.
18. Submissions on behalf of the respondent seemed to rely on both limbs of section 524 of the Act. In my view, the counsel's contention is misconceived. The phrase

³ [2019] NSWSC 889

any suit or proceedings against the company in Section 524 (1) ought not, in my view, be taken to mean the winding up proceedings, which are not, in the ordinary sense, proceedings against the company. An application to the High Court⁴ for the winding up of a company can be presented either by the company or by a creditor or a contributory, or by all of them together⁵.

19. My understanding is that any suit or proceedings against the company must be taken to mean any proceedings instituted against the company and pending in the High Court or the Court of Appeal. In such case, the company or creditor or contributory may apply to the High Court or the Court of Appeal for a stay of proceedings in terms of section 524 (1) (a) of the Act.
20. Section 524 (1) (b) provides that where any other suit or proceeding is pending against the company, such company or creditor or contributory may apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceedings; the enactment's language suggests that these are proceedings in courts other than the court in which the winding up proceedings are heard.
21. Such provisions are not out of place in insolvency legislation, and their likely object is to protect the company, which may be on its last legs, from incurring further liability and expenditure through litigation, so that creditors would have an even chance of recovering their debts from the company.
22. It is apposite to mention that section 553 (1) – which was not referred to by either counsel – empowers the court at any time after an order for winding up, on the application of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, to make an order staying the proceedings, either altogether or for limited time. The language here is as clear as section 482 of the Corporations Act of Australia. If the legislature had wanted to restrain winding up proceedings prior to the winding up order, it could have used in section 524 the same language as in section 553 (1).

⁴ Section 2 of the Companies Act 2015

⁵ Section 522 (1) *ibid*

23. Equally misconceived was Mr. Haniff's contention that solvency was a crucial element to be determined in an inquiry under section 524. The section does not make any reference whatsoever to solvency, and this argument merits no further consideration by court.
24. For these reasons, the respondent's application under section 524 must fail, and it is dismissed with costs.
25. The respondent's initial summons for a stay and/or restraint of proceedings filed on 5 September 2019 erroneously made reference to the company in the intitlement as the "applicant". Counsel for the respondent explained that the company was wrongly described as the applicant as the application under section 524 of the Act was intended to constitute a separate action, but that this had not taken place and instead the respondent's summons were filed in these proceedings.
26. The applicant's demand notice has given rise to two applications by the respondent in this action, including the one being ruled upon, while there is also a separate action (HBE 10 of 2020), instituted by the respondent, which the respondent's counsel submitted could be disposed on the basis of the ruling of the present application. A number of affidavits were filed at different times by the respondent, with most being relied upon in support of both applications. In the other application, the respondent has moved court under section 529 of the Act, seeking leave to oppose the winding up.
27. The record discloses a casual approach by counsel; in particular, in the filing of documents on behalf of the respondent. When the case was mentioned on 13 September 2019, counsel for the applicant, Mr. O' Driscoll was absent. On the previous day, 12 September 2019, a supplementary affidavit by Ronesh Kumar – explaining why steps were not taken within the prescribed 21 days period to set aside the statutory demand – was filed on behalf of the respondent. The applicant filed a preliminary objection to the respondent's application on 26 September 2019. Oral submissions were concluded on 21 November 2019. While this ruling was pending, a second supplementary affidavit was filed on 21 February 2020 on behalf of Ronesh Kumar for the respondent, annexed to which was a solvency report. This was in addition to the affidavits filed on 5 September

2019 and 12 September 2019. The respondent also filed summons dated 21 February 2020, seeking leave under section 529 of the Act to set aside the statutory demand dated 29 May 2019 and in the interim for a stay of proceedings under section 524 of the Act; a hearing of this summons took place on 30 March 2020, the ruling of which is pending. A third supplementary affidavit was filed on 25 March 2012; this affidavit, to which was annexed a solvency report by a firm of chartered accountants, appeared to be filed in support of the respondent's leave application under section 529 of the Act. Thus, I have not considered the contents of the last filed affidavit for the purpose of this application.

ORDER

- a. The respondent's summons filed on 5 September 2019 is dismissed.
- b. The respondent is directed to pay the applicant costs summarily assessed in a sum of \$2,500.00.

Delivered at Suva this 24th day of **April, 2020**



Justice M. Javed Mansoor
Judge of the High Court