

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Case No. HBE 28 of 2019

**IN THE MATTER OF PACIFIC
COLLECTION HOUSE LIMITED**

AND

**IN THE MATTER of the Companies Act
2015**

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. V. Prasad for the Applicant
Mr. A. Liverpool for the Company

Date of Hearing : 18 September 2019

Date of Decision : 09 October 2020

DECISION

WINDING UP *Appeal – Appeal of interlocutory decision of the Master - Failure to comply with or set aside a statutory demand – Leave to oppose winding up – Rules 4, 15 & 115 of the Companies (Winding Up) Rules 2015 – Stay of the winding up order – Section 513 (c), 515 (a), 516, 529 & 553 of the Companies Act 2015 – Order 59 Rule 16 of the High Court Rules 1988.*

The following case is referred to in this decision.

- a. *In re RPA Group (Fiji) Ltd, [2020] FJHC 325; HBE 52.2019 (18 May 2020)*
 - b. *Kelton Investments Ltd & Tappoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited ABU 0034d.1995s; [1995] FJCA 15 (18 July 1995)*
 - c. *Ex Parte Bucknell [1936] 56 C.L.R 221*
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1. There are two applications that this court must determine: one for leave to appeal an order dated 10 June 2019 by the hon. acting master (“master”) of the High Court of Suva supported by an affidavit filed on 18 June 2019, and a notice of motion dated 16 July 2019 for stay of execution of the winding up of Pacific Collection House Limited (“the company”) by order dated 16 July 2019 supported by affidavit filed on 16 July 2019. A third application dated 15 July 2019 for stay of execution of the winding up inquiry need not be decided in view of the orders made by this court.
2. The respondent filed an application for winding up the company, together with an affidavit verifying the application for winding up, a copy of the statutory demand and the consent of the official receiver to act as the provisional liquidator. Prior to that the respondent sent the applicant a statutory demand dated 15 December 2018, demanding a sum of \$49,819.59, which was not satisfied or challenged within the 21 day period stipulated by the statute.
3. Winding up documents were served on the company on 26 April 2019. The newspaper publication of 3 May 2019 and the government gazette publication of 10 May 2019 gave notice that the winding up hearing would be at 8.30 am on 3 June 2019. The affidavit referring to the respective advertisement and the notice was filed on 14 May 2019. The matter came up before the chief registrar on 15 May 2019 and again before the deputy registrar on 29 May 2019, and on that day the certificate of compliance was issued.

4. When the matter was listed before the master on 3 June 2019, both parties were represented. The master directed the applicant to make appearance in terms of the rules and file its opposition by 7 June 2019. The applicant filed notice of appointment of its solicitors and the affidavit in opposition on 7 June 2019. However, when the matter was mentioned on 10 June 2019, the master struck out the applicant's affidavit in opposition on the ground that it was late and that leave was not obtained.
5. Summons for leave to appeal the interlocutory order of the master was filed by the applicant on 18 June 2019. This was supported by the affidavit of solicitor Vanhdna Kirti, who appeared for the applicant before the master on 3 June 2019. The application was on the basis that the master failed to consider her own orders when striking out the affidavit in opposition. The respondent filed its affidavit in response on 16 July 2019. The parties were directed to file affidavits, and the hearing into the application was fixed for 18 September 2019.
6. Thereafter, a notice of motion was filed on 15 July 2019 – a day prior to the winding up hearing – for a stay of the winding up inquiry pending appeal supported by the affidavit of the applicant's solicitor, Vanhdna Kirti. Meanwhile, the master proceeded with the winding up hearing as there was no stay order, and on 16 July 2019 ordered the company to be wound up. When the notices for stay pending appeal were listed on 17 July 2019 before this court, the master had already, on the previous day, ordered the company to be wound up.
7. In practical effect, the summons dated 18 June 2019 and the notice of motion dated 15 July 2019 could be said to have been overtaken by the master's winding up order on 16 July 2019. The more pertinent is the *ex parte* notice of motion dated 16 July 2019 for stay of execution of the winding up order, which was listed before court on 26 July 2019. At the hearing of these applications on 18 September 2019, both parties made submissions and filed their written submissions on 25 September 2019. The respondent also filed supplementary submissions.

The orders made by the master

8. When the applicant appeared on 3 June 2019, the master made a direction in the following terms: *“company to make necessary application under rules for appearance and filing opposition to be done by 4 pm 07/6/19. Mention on 10/06/19. Applicant can file list of persons appearing on the application”*. The record suggests that the hearing of the application was not on that day.
9. The respondent submitted that it objected to the direct filing of any affidavit without leave contrary to rule 15, and that the master had directed to file an application for leave. The record, however, does not reveal an unequivocal direction to the applicant to file an application seeking leave.
10. The applicant insists that leave was granted by the master. That is not so easily evident from a perusal of the record. Moreover, the minutes recorded by the master also do not reveal whether the applicant sought leave to oppose the winding up.
11. The applicant filed the affidavit on 7 June 2019. The applicant argues that it did so following permission by the court to file the affidavit in opposition. The rules contemplate a reply by the respondent within 3 days of service, but the court made no direction to file an affidavit in response to the applicant’s affidavit.
12. When the case was mentioned as directed on 10 June 2019, the minutes of the master read: *“Minutes of 3/6/19. The opposition is out of time without leave is struck out. Hearing on application for winding up on 16/7/19 at 9.30am”*.
13. On 16 July 2020, the master ordered the company to be wound up. The master’s winding up order, which was sealed on 20 March 2020, stated:
 1. The respondent company, Pacific Collection House Limited, is hereby wound up under the provisions of the Companies Act 2015.
 2. The official receiver is appointed as provisional liquidator of the said company.

3. The applicant is granted summarily assessed costs of \$1000.00 against the respondent company.

The applicable law

14. Rule 15 (1)¹ states that on the hearing of an application under section 513 of the Companies 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 filed an affidavit in opposition to the application; and served on the applicant or the applicant's solicitor a notice in the prescribed form and a copy of the affidavit.
15. A literal reading of rule 15 would suggest that leave will not be necessary if an affidavit opposing the winding up is filed 7 days prior to the hearing. An affidavit in reply to the affidavit in opposition must be filed within 3 days of the day of service on the applicant of the affidavit in opposition². But, the question of leave under rule 15 must be read with section 529 of the Companies Act, which is examined below. The rules do not specify a timeline for the seeking of leave to oppose a winding up, and it is for the court to issue directions on the filing of affidavits if leave is sought.
16. As the applicant's affidavit was struck out for being "out of time and without leave", it is apposite to consider the court's authority to grant parties' time to file papers under the rules. Winding up rules vest the court with the discretion to dispense with compliance of any rule or to extend or abridge the time needed to do an act. Rule 4³ states that the court may dispense with compliance with all or any of the provisions of the rules. Rule 115 provides that the court may, in any case in which it sees fit, extend or abridge the time appointed by the rules or fixed by any order of the court for doing any act or taking any proceeding; this being similar to the discretion placed on court by Order 3 Rule 4 of the High Court Rules 1988 to grant an extension of time when appropriate.

¹ Companies (Winding Up) Rules 2015

² Rule 15 (2) *ibid*

³ *ibid*

17. A company to which a statutory demand has been served must comply with such a demand within 3 weeks of the date of the notice⁴. A company may also apply to the court for an order setting aside a statutory demand within 21 days after the demand is served⁵. If it fails to do so within the prescribed time it cannot oppose a winding except with the leave of court, which will be granted only if the company can establish its solvency. This is contained in section 529 of the Companies Act 2015 which provides:

(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.

18. Thus, section 529⁶ can be said to qualify the court's discretion to grant leave in rule 15 of the winding up rules. On that reasoning, the court cannot grant leave under rule 15 of the winding up rules in disregard of section 529 of the Companies Act. Leave to oppose a winding up application becomes necessary on the basis set out in section 529 of the Companies Act. The applicant having failed to have complied with or taken steps to set aside the statutory demand, the master could not have allowed opposition to the winding up without considering the question of leave in the prescribed way.

19. The question of leave would have to be a distinct inquiry, and any affirmative decision can only be premised on satisfying court that the ground relied upon by the company is material to proving its solvency. If leave is sought, it behoves the court to inquire and decide whether or not it should grant leave to the

⁴ Section 515 (a) of the Companies Act 2015

⁵ Section 516 *ibid*

⁶ See *In re RPA Group Ltd.* [HBE 52.2019; 24 May 2020] for analysis of section 529

applicant on the basis of section 529 of the Companies Act. If leave is granted, the company is entitled to all its defences at the winding up inquiry. However, once leave is denied, the enactment makes it clear that winding up cannot be opposed. In this matter, unfortunately, the court's direction to the applicant on 3 June 2019 did not conform to either section 529 of the Act, or to rule 15 of the winding up rules.

20. The respondent referred to the decision of Alfred, J in HBC 74 of 2018, delivered on 13 November 2018, and submitted that the master took that decision into account. In that case, submitted the respondent, the court dismissed the applicant's action to deny the debt demanded in the statutory demand. The master's winding up order makes no reference to that action. The judgment in that action could, of course, be relevant at the stage of the winding up inquiry, prior to which the matter of leave must be addressed if sought, by the applicant.
21. The direction to file an affidavit in opposition in the first instance left room for ambiguity. On those facts, I am inclined to hold that the order made on 10 June 2019 was an error. The proper direction for this court to make, in the context of the confusion that has reigned, is to restrain the winding up order from taking effect. If the applicant is seeking leave to oppose the winding up, that matter must be considered prior to the winding up inquiry. The question of leave must be considered in the context of the company's solvency in the manner required by section 529 of the Companies Act.
22. The respondent submitted that the company was wound up under section 513 (c) of the Companies Act as it was insolvent, and that the application for stay of the winding order is misconceived as the company was not one of those entitled to make the application in terms of section 553 of the Companies Act. That section permitted a liquidator or official receiver, contributory or creditor to make such an application and for proof to be shown to satisfy court for stay of the winding up. However, this court can restrain the execution of an order made by the master in terms of Order 59 Rule 16 of the High Court Rules.

23. That this is an appeal against an interlocutory decision of the master is not lost on this court. Such appeals succeed only exceptionally, though no special circumstances need to be proved. This position was firmly affirmed in the case of *Kelton Investments Ltd & Tappoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited*⁷ in which the Fiji Court of Appeal stated:

“The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted”.

24. The Court of Appeal referred to the High Court of Australia decision in *Ex Parte Bucknell*⁸ in which the court expressed the view that “leave should not be granted as of course without consideration of the nature and circumstances of the particular case”.
25. Unless leave to appeal is granted in this matter, there is the possibility that substantial injustice may result. I have taken into consideration the severe and immutable consequences of winding up, and in this case the striking out of the affidavit resulted in a winding up of the company without opposition. In the circumstances, the company must have the opportunity to seek leave if it desires to oppose the winding up.
26. Unsatisfactorily, being an interlocutory appeal, this proceeding has taken longer than it should have to dispose. I acknowledge the weakness in case management that has led to this delay. The appeal will be dealt with promptitude.

⁷ ABU 0034d.1995s; [1995] FJCA 15 (18 July 1995)

⁸ [1936] 56 C.L.R 221

ORDER

- A. Leave to appeal the interlocutory order of the master dated 10 June 2019 is granted.
- B. Execution of the winding up order dated 16 July 2019 is stayed until the determination of the appeal.
- C. The parties will bear their own costs.

Delivered at **Suva** this 09th day of **October, 2020**.




M. Javed Mansoor
Judge