

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

CIVIL ACTION NO. HBE 10 OF 2023

IN THE MATTER of VITI BURE BUILDERS CO PTE LIMITED a
limited liability Company having its registered office at
Transmitter Road, Malolo Village, Nadi, Fiji

AND

IN THE MATTER of the COMPANIES ACT OF 2015

BETWEEN : **GORE INVESTMENTS PTE LIMITED** **PLAINTIFF**

AND : **VITI BURE BUILDERS CO. LIMITED** **DEFENDANT**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr A. Michael with Mr. V. Lagonilakeba, for the Plaintiff
Mr E. Maopa, for the Defendant

DATE OF HEARING : 13th September, 2023

DATE OF JUDGMENT : 13th September, 2023

RULING

A. INTRODUCTION:

1. This is the written form of my extempore ruling, with the reasons thereto, pronounced on 13th September 2023, after hearing the learned Counsel for the Parties on the following Applications pending before me; They are-
 - a. The Application filed by the Applicant Company "***Gore Investment Pte Limited***" ("the Applicant") as the Creditor of the Respondent company "***Viti Bure Builders Co Pte Limited***" ("the Respondent") seeking to wind up the Respondent.
 - b. The Summons by the Respondent, seeking leave to **Set Aside Statutory Demand out of time**, filed on 24th July 2023, along with the Affidavit in support sworn on 20th July 2023 by Sanjay Reddy, being the Director of the Respondent Company.

B. SEQUENCE OF EVENTS:

2. The events that occurred before this Court are as follows :

- a. The Applicant Company on 23rd May 2023 filed the Application (a) above, along with the Affidavit verifying the Application, sworn by the Director of the Applicant, seeking to wind up the Respondent.
- b. All the formalities in relation to the said Application being complied with as per the Affidavit of compliance filed on 22nd June 2023, the Deputy Registrar, after the compliance hearing, filed the compliance report 23rd June 2023.
- c. The Solicitors for the Respondent, having filed their Notice of Appointment on 13th June 2023, filed an Affidavit on 26th June 2023 sworn by Sanjay Reddy, together with annexures marked as "SR-1" to "SR-4" opposing the winding up Application.
- d. When the Matter came up on 6th July 2023, being the first hearing date as per the News Paper & Gazette publications, Solicitors for the Respondent appeared by filing the "Notice of Intention to Appear on Application".
- e. As the Respondent had not filed an Application to have the Statutory Demand set aside within the prescribed time period, the Court on 6th July 2023, having observed the averments therein that the grounds relied on in the Affidavit filed on 26th June 2023 are on disputation of debt, which cannot be relied on without the leave of the Court, adjourned the hearing for 13th September 2023 for the Respondent to contemplate on the requirement pursuant to section 529 of the Companies Act, however, subject to payment of cost in a sum of \$300.00 unto the Applicant.
- f. Subsequently, the Respondent, instead of moving to proceed for hearing, wherein it can seek the leave of the Court pursuant to section 529 of the Act to rely on grounds that it could have relied on in an Application for setting aside the Statutory Demand, on 24th July 2023 chose to file the Summons out of time (b) above supported by an Affidavit of Sanjay Reddy, sworn on 20th July 2023, along with annexures marked as "SR-1" to "SR-5".
- g. Accordingly, when the Respondent's said summons was supported inter-partes on 21st August 2023, an Application being made by the Counsel for the Applicant for a short adjournment and the same being granted, when the matter came up on 23rd August 2023, the Court having observed the non-maintainability of the Setting aside Application, granted a further adjournment till 28th August 2023 for the Respondent's solicitors to inform the Court about their stance on the said belated Application for setting aside, ie to consider the withdrawal of it.
- h. Thereafter, when the Matter came up on 28th August 2023, as the said Application was not withdrawn, the Applicant was granted 7 days' time to file Affidavit in opposition, and 7 days thereafter for the Respondent to file Affidavit in reply.
- i. In the meantime, the Respondent on 8th September 2023 filed a Supplementary Affidavit sworn by Sanjay Reddy, along with annexures marked as "SR-1" to "SR-5" in order to substantiate that the Company is solvent.

- j. The Applicant did not file Affidavit in opposition as per the direction given on 28th August 2023, thus no necessity arose to file Affidavit in reply. However, when the matter came up for hearing on 13th September 2023, the Court had to decide first on the purported Application for setting aside. Accordingly, after hearing both the learned Counsel, by my extempore ruling dismissed the said summons.
- k. Though, the Respondent's purported Summons for setting aside was dismissed, the Court decided to grant leave in terms of section 529 of the Companies Act 2015 allowing the Respondent to rely on those grounds that could have been relied on in an Application for setting aside.

C. REASON FOR RULING:

3. Admittedly, the Respondent had not filed an Application pursuant to Section 516 of the Companies Act 2015 (the Act) to have the Statutory Demand set aside within the prescribed time period. The Companies Act 2015 and the winding up Rules do not make any provision to make an Application for setting aside out of time. The Affairs of the Companies have to be dealt with only within the four corners of the Companies Act and the Winding up Rules.
4. Learned Counsel for the Respondent was heard making submissions that the Court can use its discretion in allowing the impugned Application out of time. Learned Counsel for the Applicant vehemently objected the Application. When the Act and the Rules are silent on this, the Court cannot use its discretion to entertain such an Application. This kind of Applications, if allowed, will undoubtedly open the flood-gate for the influx of such Applications, which would defeat the purpose of the very Act.
5. However, the Respondent is not without a remedy, as it is at liberty to oppose the Application for winding up under Section 529 of the Companies Act, subject to the leave of the Court to do so. Accordingly, the Court had no alternative, but to dismiss the Summons filed out of time by the Respondent on 24th July 2023.
6. The next issue came up for consideration was whether the Respondent should be granted leave to oppose the winding up Application under section 529 of the Act.
7. Section 529 of the Act states as follows;

Company may not oppose application on certain grounds

529. (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.(emphasis mine)

8. As per the above provisions, the Respondent, in order to oppose an Application for winding up in Insolvency, without the leave of the Court, cannot rely on a grounds on which it had relied on; or could have relied on, but did not rely on, in an Application for setting out a statutory demand. This leave is subject to Section 529 (2) of the Act.
9. The first opportunity given for the Respondent to have the Statutory Demand set aside is found under section 516 and 517 of the Act. I will reproduce here only the relevant part of the section 517 of the Act, which shows the grounds that the Respondent is supposed to rely on for the purpose of a setting aside Application.

Determination of application where there is a dispute or offsetting claim

517.(1) This section 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. (Emphasis mine)


10. The above section means that the Respondent at the hearing cannot be heard to say that it has a genuine dispute and/ or an offsetting claim, unless the Court grants leave.
11. What the section 529 stipulates is that the Company may not, without the leave of the Court, oppose the Application for winding up on those grounds. If the Court grants leave, the Company will not have any bar in relying on those grounds found in section 517 (1) (a) and (b). But, the section 529 (2) of the Act stipulates that the Court is not to grant leave under sub section 1 unless it is satisfied that the ground is material to prove that the Company is Solvent.
12. The Company hereof has filed a Supplementary Affidavit, together with the financial Statements of the Company for the year ended on 31st December 2022, which prima-facie shows that the Company is solvent. If the Court is satisfied of it, the Court is at liberty to grant leave.
13. I don't find any specific requirement of making a formal Application for leave by adhering to any mode of commencement. If the Company satisfies that it is Solvent, then with the leave being obtained, at the hearing of the winding up Application, the Company can rely on a ground that it had relied and/ or could have relied at the Setting aside hearing. If the Court is satisfied of the Solvency then the leave can be granted.
14. With leave being granted, the Company may sometimes be in a position to demonstrate and substantiate its side of story averred in its Affidavit in opposition filed initially on 26th June 2023. This Court has to go into the contents thereof to see whether there is a serious question to be tried before it proceeds to makes its final decision on the Winding up Application.

15. Since the Applicant Company has not filed an Affidavit in response to the Respondents Affidavit filed on 26th June 2023 to oppose the winding up Application and to the Supplementary Affidavit filed on 8th September 2023 to substantiate its Solvency, the Court wishes to hear the response from the Applicant Company by way of its Affidavit evidence, if the Applicant wishes. The Counsel for both the parties can also be heard orally and/ or by way of written submissions before the final decision is made on the winding up Application.
16. The purpose of the whole exercise is dispensing justice at the end of the day. The question of leave should not hamper the way of seeking justice. Otherwise, the final outcome may sometimes become disastrous as far as the Respondent is concerned.
17. I am inclined to follow Hon. Javed Mansoor- J's Ruling in **RPA Group (Fiji) Ltd, In re [2020] FJHC 325; HBE52.2019 (18 May 2020)** wherein leave was granted to the Respondent, who had failed to have the Statutory Demand set aside.
18. Leave is granted to the Respondent pursuant to Section 529 of the Act. There will be further hearing into the Application for winding up. The Affidavit filed by the Respondent on 8th September 2023 will be treated as a Supplementary to its Affidavit filed on 26th June 2023 to oppose the winding up Application. The Applicant is at liberty to file Affidavit in Response if it wishes. Counsel for both the parties will be heard further orally and/ or by way of written submissions.

D. FINAL OUTCOME:

- A. The Summons filed by the Respondent seeking leave to set aside Statutory Demand out of time is dismissed.
- B. The Respondent is granted leave under Section 529 of the Companies Act 2015 to oppose the Application for winding up.
- C. The Applicant is at liberty to file Affidavit in response to the Respondent's Affidavits.
- D. Parties will be heard orally and/ or by way of written submissions.
- E. Order for cost, in respect of the Respondent's Summons to set aside, is reserved.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 13th day of September, 2023.

SOLICITORS:

For the Plaintiff: Messrs. Millbrook Hills Law Partners. Barristers & Solicitors
For the Defendant Messrs. Babu Singh & Associates- Barristers & solicitors