

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 APPLICANT

AND : VITI BURE BUILDERS CO. LIMITED RESPONDENT

BEFORE : Hon. Justice Mohamed Mackie

APPEARANCES : Mr V. Lagonilakeba, for the Applicant
Ms. A. Goundar, on instructions, for the Respondent

WRITTEN SUBMISSION: Filed by the Applicant on 29th February, 2024.
Filed by the Respondent on 27th October 2023.

DATE OF JUDGMENT : 29th April, 2024

JUDGMENT

A. INTRODUCTION:

1. The Applicant Company, namely, **Gore Investment Pte Limited** filed this Application on 23rd May 2023 seeking for the winding up of the Respondent namely, **Viti Bure Builders Co. Pte Limited**, a company having its registered office at Transmitter Road, Malolo Village, Nadi, Fiji.
2. Affidavit deposed in support of the Application, by **Mr. Collin Brian Gore**- the Director of the Applicant Company, states, *inter alia*, **That;**
 7. "On or around the 23rd February, 2023 the Company was indebted to the Applicant for the amount of \$10,575.00 (Ten Thousand Five Hundred Seventy-Five Dollars) for refund of the consideration for the Truck that was paid by the Creditor to the Company from or around 3rd September 2019 (being a sum inclusive of VAT)"
 8. "On the 23rd day of February 2023, the Applicant Company through its Solicitors, Millbrook Hills Law Partners served on the Company a statutory demand, signed by the Company's Director Mr. Sanjay Reddy, requiring the Company to pay the amount

mentioned in paragraph 7.....". (It is to be noted that Mr. Sanjay Reddy had signed to acknowledge the service of the statutory demand).

9. *"The Company failed for three weeks after service of the statutory demand to pay the amount or to secure or compound for it to the reasonable satisfaction of the Applicant".*
10. *"The Company is unable to pay its debt"*
11. *"I believe there is no genuine dispute as to the existence or amount of the debt referred to in the paragraph 7"*
3. The Respondent Company (the purported debtor) had not made any Application to set aside the Statutory Demand. However, having caused its Solicitors to file the Notice of Appointment on 13th June 2023, the Respondent Company on 26th June 2023 filed an Affidavit sworn by its Director **SANJAY REDDY** in opposition to the Winding up Application, together with annexures "SR-1" to "SR-4".
4. The Applicant Company's Solicitors on 22nd June 2023 filed the Affidavit of Compliance, and accordingly the Deputy Registrar of this Court filed his Certificate of Compliance dated 23rd June 2023.
5. In the meantime, the Applicant's Solicitors on 6th July 2023 filed a list of Persons attending the hearing (form D5) with the name of a claimant, namely, KKS Hardware Pte Limited, for a sum of \$6,663.75 being its debt due, which was subsequently amended on 10th July 2023 to be in a sum of \$2,800.00 (Two thousand eight hundred Fijian Dollars)
6. When the Winding up Application came up for hearing on 6th July 2023, this court having observed that the grounds relied on by the Respondent company, as per the said Affidavit to oppose the Application, were mainly on the disputation of the debt, which cannot be relied upon without leave being obtained, the Court granted an adjournment for the Respondent Company to do the needful, however on payment of costs in a sum of \$300.00 by the Respondent unto the Applicant Company.
7. Thereafter, the Respondent's Solicitors on 6th July 2023 filed a Notice of Intention to Appear at the hearing of the Application and to oppose the Application for winding up on the following grounds.
 1. *That the Respondent is not a debtor.*
 2. *There is an arrangement for the sale and purchase of a Truck.*
 3. *The applicant is in possession of the said Truck.*
 4. *That the Applicant paid consideration in a sum of \$10,000.00.*
8. The Respondent Company also filed a Summons on 24th July 2023 supported by an Affidavit sworn by SANJAY REDDY, seeking, *inter alia*, **leave for the Respondent to set aside out of time the Statutory demand** dated 23rd February 2023 served by the Applicant's Solicitors. The Applicant's Solicitors opted not to file Affidavit in opposition to the said Application, but reserved their right to object to the Application for **setting aside out of time** at the hearing.

9. The Respondent Company, in the meantime, on 8th September 2023 filed a supplementary Affidavit sworn by SANJAY REDDY, for which no prior leave had been obtained. However, the Applicant Company was granted an opportunity to file its Affidavit in response to the same and it was accordingly filed.
10. Thereafter, having briefly heard the counsel for both the parties and considered the contents of the written submissions filed on behalf of the Applicant, this Court on 13th September 2023 pronounced an interlocutory Ruling to the following effects;
 - 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. *The parties will be heard orally and/or by way of written submissions.*
 - E. *Order for costs, in respect of the Respondent's Summons to set aside, is reserved.*
11. Accordingly, the Applicant Company's Director, Mr. COLIN BRIAN GORE, filed his Affidavit in Response on 16th October 2023 (scanned copy filed on 4th October 2023) along with annexures marked as "CG-1" to "CG-3", and the substantial hearing was fixed for 7th December 2023 by leaving the parties at liberty to file their written submissions, on which the Respondent's Solicitors filed their written submissions on 27th October 2023.
12. As this Court did not sit on 7th December 2023 due to my being away from Fiji on account of the annual vacation, the matter being mentioned before me thereafter on 22nd February 2024 and finally on 29th February 2024, by consent, learned counsel for both parties agreed to have the substantial hearing disposed by way of written submissions and accordingly this judgment is pronounced on the Application for winding up. The Applicant's written submission was filed on 29th February 2024, while the Respondent's Counsel opted to rely on the written submissions already filed on 27th October 2023.

B. LEGAL FRAMEWORKS IN COMPANIES ACT 2015.

13. Section 513 of the Companies Act provides;
 - A *Company may be wound up, if-*
 - a. *The company has, by Special Resolution, resolved that the company be wound up.*
 - b. *The company does not commence its business within a year from its corporation or suspends its business for a whole year;*
 - c. ***The company is insolvent; (emphasis added)***
 - d. *The court is of the opinion that it is just and equitable that the company should be wound up;*
 - e. *.....*
14. Section 514 of the Act provides;
 - 1) *A company is solvent if, and only if, it is able to pay its debts, as and when they become due and payable.*

2) A company which is not solvent is insolvent.

15. Section 515 of the Act provides;

*Unless the contrary can be proven to the satisfaction of the Court, a Company must 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 \$10,000 or such other Prescribed Amount then due, 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; or*
- (b) if during or after a period of 3 months ending on the day on which the winding up application is made—*
 - I.*
 - II.*
 - III. 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 must take into account the contingent and prospective liabilities of the Company.*

16. Section 529 of the Act 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.*

C. ANALYSIS:

17. This Court by its Ruling dated 13th September 2023, has granted leave for the Respondent Company to oppose the Application for winding up by relying on the grounds that it could have relied on in an application for setting aside the Statutory Demand, irrespective of the fact that it did not make an application for setting aside the Statutory demand, admittedly, served on it. The leave was granted on being satisfied that the ground so adduced is material in proving that the Company is Solvent.

18. It is not in dispute that the, purported, debt has arisen in connection with the sale of the Truck bearing Registration No- EF 834 owned by the Respondent Company unto the Applicant Company on 3rd September 2019 for a sum of \$10,000.00 on a mutual verbal Agreement. It is also not in dispute that the said sale and purchase had taken place, as evidenced by the cash sale TAX INVOICE dated 3rd September 2019 marked as "CG-1" and annexed to the Applicant's Affidavit in response, by handing over of

the vehicle unto the Applicant Company's Director by the Respondent Company's Director SANJAY REDDY on the same date on receipt of the said sale price of \$10,000.00.

19. For the reason best known to the Director of the Applicant Company -Mr. COLIN BRIAN GORE- and/ or to his Solicitors, none of the details, as to how the alleged debt came in to be, were revealed in the Affidavit filed in support of winding up. Those details came to light for the first time through the Affidavit in opposition filed by the Respondent's Director SANJAY REDDY on 26th June 2023, by his Supplementary Affidavit filed on 08th September 2023, and finally through the Affidavit in response filed by the Applicant's Director on 4th October 2023 to the said supplementary Affidavit.
20. The particulars, as to on what terms and conditions the said sale and purchase of the Truck had taken place, are not in any form of writing. However, it is not in dispute that it was only on a mutual verbal Agreement the sale and purchase of the Truck in question had taken place. The Respondent's position is that nothing remained to be performed on his part to complete the sale, as he had duly handed over the relevant signed papers for the Transfer of the Vehicle and it was up to the Applicant to have it registered at the LTA.
21. This Court is not in a position to arrive at a finding that a debt had been created or come into existence as alleged by the Applicant's Director, in the absence of the particulars of the actual terms and conditions of the said sale and purchase, which have to be ascertained only through the process of oral evidence at the trial in a properly constituted action. It is only through such a process; this court will be in a better position to arrive at a finding whether the sale and purchase Agreement had been breached or not, and, if breached, who is liable for such breach and as a result, whether a debt was created or came into existence as alleged by the Applicant.
22. On careful perusal of (1) the Contents of the Affidavit evidence adduced by both the parties, (2) those of the Facebook messages communicated between the parties marked as "CG-3", and (3) the contents of the Notices & the Letters exchanged between the Solicitors of both the parties, I find that there is a serious dispute to be tried and decide whether a debt was created or came into existence through the purported repudiation of the Agreement of the sale and purchase by the Applicant. It is only on finding of the existence of the alleged debt, this Court can proceed to consider whether a winding up order is warranted in terms of the Companies Act.
23. The Respondent has sold and handed over the truck in question unto the Applicant on payment of the consideration thereof and according to SANJAY REDDY the deal has come to an end. On the face of the transaction, I do not find that a debt has been created, thus the Applicant cannot be considered as a creditor under section 515 (a) of the Act.
24. Halsbury Laws 4th Edition, 1986 Reissue Vol 7(2) Companies para 1451 at p 1101 it is stated "***A winding up order will not be made on a debt which is disputed in good faith by the Company, the Court must see that the dispute is based on a substantial ground...***".

25. The Notice filed by the Respondent expressing its intention to appear and oppose the Application for winding up contains sustainable grounds to dispute the alleged debt.
26. Moreover, it is not disputed that the Truck in question has remained under the care and custody of the Applicant Company from 3rd September 2019 (date of sale) till this date, despite the Notice of repudiation dated 22nd February 2023 and the Statutory Demand letter dated 23rd February 2023 were sent to the Respondent.
27. Further, the Respondent alleges that the Truck in dispute was in use at the Farm of the Applicant Company for over 3 years from the date of its sale. Apparently, there has not been any attempt on the part of the Applicant to return the Truck in question unto the Respondent. On the other hand, this is not a case of non-delivery of the goods (Truck) after the sale and obtaining the relevant consideration by the Respondent. If it was so, it would have, *prima-facie*, established that a debt had been created.
28. When the subject matter Truck, admittedly, remains in the possession of the Applicant Company, irrespective of its alleged non-roadworthiness, which in any event requires proof at a formal trial, I am of the view that no debt whatsoever has so far been created or come in to existence in favor of the Applicant Company as alleged by its director, in order to warrant the issuance of a Statutory Demand and seek for the remedy of winding up. In my view, the “winding up” is not a “**panacea**” to all types of issues and disputes that could crop up in the commercial and business transactions.
29. Further, in the light of the admitted fact that the subject matter Truck still remains with the Applicant Company, I am of the view that the alleged debt stands **secured** in terms of the section 515 (a) of the Companies Act 2015, thus it will not be covered by the Definition of “**inability to pay debts**” under this Section and the Company cannot be deemed to be unable to pay its debts. Thus, no need would arise to examine the solvency or otherwise of the Respondent Company.
30. The learned Counsel for the Applicant Company, in his written submissions, has alleged that the Respondent Company has omitted to show the Truck in question in its Financial Statements. When the Respondent has taken up a position that the sale of the Truck in question has now been completed in terms of the verbal Agreement with the Applicant, a question arises as to how can the same vehicle be included or remain as an asset in the books of the Respondent Company.
31. Whether the subject matter vehicle was in fact roadworthy or not, or whether it was used or not by the Applicant Company during the period from 3rd September 2019 till 22nd February 2023 are also disputed questions, among other contentious issues, which have to be tried and decided in an appropriate proceeding between the parties hereof. In the absence of such an exercise to finally arrive at a finding, as to who was at fault, no liability of debt can be imposed on the Respondent to warrant a winding up order as moved by the Applicant.

32. The method adopted by the Applicant company hereof to recover the said sum of #10,575.00, alleging the same as a “debt”, by utilizing the provisions of the Companies Act 2015 is an abuse of process of this Court. Thus, it must be deterred by imposing costs on the Applicant at a higher scale. However, considering the circumstances and the expenses both the parties appear to have incurred on account of this matter, Court decide not to order any costs.

D. FINAL ORDERS:

- a. The Application for winding up fails.
- b. The Application for winding up, filed on 23rd May 2023, is hereby dismissed.
- c. Considering the circumstances, no cost is ordered and the parties shall bear their own costs.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 29th day of April, 2024

SOLICITORS:

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