IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
COMPANIES JURISDICTION

Winding Up Action No. HBE 11 of 2024

IN THE MATTER of **A R QUARRY & CONCRETE PTE LIMITED** (Entity No. RCBS2010L1777) a limited liability company having its registered office at Lot 1, Naisoso, Nadi

AND

IN THE MATTER of the Companies Act 2015.

BETWEEN : **SOHAM INVESTMENT PTE LIMITED** having its registered office at 184 Kennedy Avenue, Nadi.

APPLICANT

A N D : **AR QUARRY & CONCRETE PTE LIMITED** a limited liability company having its registered office at Lot 1, Naisoso, Nadi.

RESPONDENT

A N D : **ARROW CONCRETE PTE LIMITED** a limited liability company having its registered office at Lot 3, Jetset Street, Off Fantasy Road, Nadi.

SUPPORTING CREDITOR 1

A N D : **PACIFIC ENERGY (SOUTH WEST PACIFIC) PTE LIMITED** a limited liability company having its registered office at Level 7, Vanua House, Victoria Parade, Suva.

SUPPORTING CREDITOR 2

A N D : **CR ENGINEERING PTE LTD** a limited liability company having its

registered office at Lot 3, Navutu Industrial Subdivision, Lautoka.

SUPPORTING CREDITOR 3

A N D : **ALL ENGINEERING (FIJI) PTE LTD** a limited liability company having its registered office at Lot 6, Ravouvou, Lautoka.

SUPPORTING CREDITOR 4

A N D : **LION ONE LIMITED**

SUPPORTING CREDITOR 5

A N D : **PHILIP'S AUTOPORT PTE LTD** a limited liability company having its place of business at Corner Queens Road, Field 40 Road, Lautoka

SUPPORTING CREDITOR 6

Before : U.L. Mohamed Azhar, Acting Judge

Counsels : Mr. V. Chandra with Mr. V. Swamy for the Applicant,
Mr. E. Wainiqolo for the Supporting Creditor 1
Mr. V. Chandra with Mr. V. Swamy for the Supporting Creditor 2 and for the Supporting Creditor 3 on instruction of Nilesh Sharma Lawyers
Ms. S. Devi for the Supporting Creditor 4
Ms. D. Sadrata on instruction of Fa & Co, for the Supporting Creditor 5
Mr. Dass for the Supporting Creditor 6
Mr. M.H.M. Ajmeer with Ms. S. Ben for the Respondent

Date of Hearing : 06.08.2024
Date of Judgment : 19.03.2025

JUDGMENT

01. The applicant company commenced the proceeding seeking an order to wind up the respondent company, upon failure of latter to set aside the statutory demand sent by the former and to comply with the same. The applicant completed all procedural steps as required by the Companies Act 2015 and Winding Up Rules 2015. The applicant company complied with all requirements and the application was fixed for hearing. The supporting

creditors filed the Notice of Intention to Support the Winding up Applications pursuant to Rules 12 (3) to (7) of the Winding up Rules 2015.

02. In the meantime, the respondent company made an application to stay and or restrain the winding up proceedings pursuant to Section 524 of the Companies Act 2015. Thereafter the respondent company filed another summons pursuant to Section 529 of the Companies Act 2015 seeking leave to oppose the winding up proceedings. On 05 July 2024, the counsel for the respondent company withdrew the summons filed pursuant to Section 524 of the Companies Act 2015. It was allowed without cost. Thereafter, the directions were given to all parties to file and serve their respective affidavits to the summons filed by the respondent company pursuant to section 529. Furthermore, the time to determine this application was extended pursuant to section 528 (2) of the Companies Act 2015.

03. The applicant company and the supporting creditors opposed the summons filed pursuant to section 529 of the Companies Act 2015. At hearing of the summons for leave, the counsels for the applicant company and the supporting creditors raised a preliminary objection to the new evidence adduced by the respondent company in its affidavit in reply. There are two exhibits annexed to the affidavit in reply filed on behalf of the respondent company. The Exhibit RA3 is the statement of operating cash flow forecast and the Exhibit RA4 is the Bank Statement of an account of the respondent company, from 01 July 2024 to 17 July 2024.

04. In addition, the offsetting claim has been changed from the amount for hire of equipment to sale price of equipment in the affidavit in reply. It was submitted on behalf of the applicant company and the supporting creditors that, this new evidence ought to be disregarded, because they did not have any chance to respond to it, since it was introduced through the affidavit in reply. This preliminary objection will be discussed later in this judgment when analyzing the said affidavit in reply.

05. The public policy requires that, insolvent companies should not be allowed to operate, incurring more and more debts involving the public who transacts with such insolvent companies. It is on this basis, the court held in **Re Mascot Home Furnishers Pty Ltd. (In liquidation), Re Spaceline Industries (Australia) Pty Ltd (In liquidation** (1970) VR 593) that, court's initial approach should be that hopelessly insolvent companies should be wound up.

06. The liquidation process under the Companies Act 2015 commences with the issue of statutory demand to a company. The company is given an opportunity to dispute the debt and apply to the court to get the statutory demand set aside. If the company fails to satisfy the statutory demand or to set aside the same within the time specified by the Companies

Act 2015, a statutory presumption is created that, the company is insolvent. The creditor is then allowed to commence the process for liquidation.

07. Though the process is initially commenced by an individual creditor, it has public nature. That is why the process requires public advertisement and allows the supporting creditors to take part at hearing. The proceedings does not end upon full payment to and discharge of the applicant. One of the existing creditors could be substituted. The process exists for the benefit of a class rather than the individual applicant. It aims at efficient realization of the company's assets and their fair distribution among all creditors, by avoiding the race by competing creditors to seize the assets of the debtor company to satisfy their individual debts. The appointment of liquidator is not the adjudication of claim or judgment on liability or quantum. Nor it operates as res judicata. The liquidator is free to reject either applicant's or any other creditor's debt in full or in part. If the debt is disputed by the liquidators, it has to be decided either by the court or arbitration as appropriate. This process is well explained in **Sian Participation Corp (in liq) v Halimeda International Ltd** [2024] UKPC 16).

08. Once the statutory presumption of insolvency is created and the proceedings for liquidation is commenced, the debtor company is not allowed to oppose it on the ground that the debt is disputed unless the court grants leave to the company. The court should be satisfied that the company is solvent in order to grant leave to oppose the application for liquidation. This is provided in section 529 of the Companies Act 2015 under which the current application is made by the respondent company. The section is that:

> *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 is added).

09. The solvency of the company is the only consideration to be taken into account, by the courts in either granting or refusing the leave to oppose the proceedings for liquidation commenced on the ground that the company failed to satisfy the statutory demand. The court should be satisfied that, the company is solvent. The burden to satisfy the court that the company is solvent is on the company throughout the proceedings. The burden does not shift to the applicant or supporting creditors. Neither the applicant in the liquidation proceedings, nor any of the creditors that support the liquidation is under obligation to prove that, the company is insolvent, because the statutory presumption of insolvency operates in favour them, unless and until the company satisfies the court otherwise. The applicant and the supporting creditors are required only to discredit the evidence adduced by the company if they wish to succeed in their proceedings for liquidation. In this case, the respondent company filed summons pursuant to section 529 of the Companies Act 2015. Therefore, the onus is on the respondent company to satisfy the court that, it is solvent.

10. The solvency, in the context of company's law, signifies the company's financial health and refers to its ability and capacity to meet its financial obligations as and when they become due, i.e.it has enough assets to cover its debts and liabilities. Generally, there are two tests to assess the solvency of a company. One is "balance sheet test" and other is "cash flow or liquidity test". The balance sheet test focuses on static financial position of the company at a specific point in time by looking at the assets and liabilities of the company. If the assets of the company exceed its liabilities, the company is 'balance sheet solvent'. On the other hand, cash flow or liquidity test examines whether the company has sufficient liquid and or realizable assets to meet its debts and operating expenses. It assesses the company's ability to meet its financial obligations as and when they become due. If the company is able to pay all its debts as and when they become due and payable, the company is solvent in terms of cash flow or liquidity. A wealthy company, which is 'balance sheet solvent' may be commercially insolvent if it is unable to pay its debts even though it has more investments and fixed assets which are not realizable as and when the debt becomes due and payable.

11. The Companies Act 2015 provide as to when a company or foreign company is considered solvent or insolvent. It provides in section 514 as follows:

Solvency and Insolvency

> **514.**—(1) A Company or Foreign Company is Solvent **if, and only if**, it is able to pay all its debts, as and when they become due and payable.
>
> (2)A Company or Foreign Company which is not Solvent is Insolvent.
> (Emphasis is added).

12. It is evident from this section 514 that, the Company's Act 2015 requires that, a company should be solvent in terms of liquidity, i.e. it should be able to pay all its debts as and when they become due and payable. As per this section, it is the ability of a company to pay all its debts, as and when it becomes due and payable, that matters at this point in time and not its wealth in terms of its balance sheet. Accordingly, a company, against which statutory presumption of insolvency is formed, should provide material to prove that, the company is solvent. In other words, the company must prove to the satisfaction of the court that, it has sufficient cash flow, and liquid assets which can be quickly and easily convertible into cash in order to pay all its debts as and when they become due and payable. If the company fails to prove so, the leave to oppose the winding up under the section 529 of the Companies Act 2015 will be refused.

13. The summons filed by the respondent company is supported by an affidavit sworn by its director on 20 June 2024. The deponent averred about solvency of the respondent company only in two paragraphs (5 and 17), out of total of 20 paragraphs. In paragraph 5 the deponent stated as follows:

> "I am advised by the solicitors of the company and verily believe that the company is solvent and has assets more than its liabilities."

14. The deponent averred in paragraph 17 of that affidavit under the sub-heading "Proof of Solvency" as follow:

> "The company still retains assets in excess of its liabilities, have good will and maintain a commercial trading reputation. The company has purchased a brand-new vehicle for its use which is valued at $ 102, 398.85."

15. The deponent then annexed a copy of Vehicle Registration Notice of the vehicle bearing registration number MT 130. It is issued by the Land Transport Authority. The deponent averred in other paragraphs that, there was genuine dispute about the amount claimed by the applicant company; there was offsetting claim; the statutory demand was improperly served on the company; and another action namely HBM 55 of 2023 was pending before Justice Tuilevuka.

16. Furthermore, the deponent annexed a draft affidavit of himself, which has not been sworn by him. The deponent stated that, it is his affidavit to oppose the application for winding up filed by the applicant company. Briefly, the respondent company has tendered its draft affidavit opposing the winding up, when its application for leave to oppose the same winding application is yet to be fixed for hearing.

17. It has now become important to discuss the grounds on which the respondent company can rely in its application for leave to oppose the application for winding up. The averments relating to solvency of the company will be discussed later.

18. The section 529 is clear that, the company cannot, without the leave of the Court, oppose the application for winding up 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. The company can rely on these grounds if the court grants leave. The court will grant leave only if it is proved to its satisfaction that, the company is solvent. There is a purpose behind this limitation imposed on the debtor company.

19. The liquidation takes place in several stages within the time frame set by the Companies Act 2015. This time frame and the stages are not insignificant. The position of the company changes and its ability to challenge the liquidation process differs depending on the stages. The first stage starts from issue of statutory demand and ends with the expiry of 21 days given to settle the amount or to apply to the court to set aside the statutory demand. In this stage the company is permitted to dispute the amount on two grounds set out in section 516 and the company is also at liberty to settle the amount. No presumption of insolvency of the company arises at this stage, because, at this stage the dispute between the company and its creditors is merely a private issue.

20. If the company fails to settle the amount within this 21 days period and also fails to apply to the court to set aside the statutory demand, the liquidation process goes to the second stage at expiry of the said 21 days. At this stage, the rebuttable presumption of insolvency is formed. The position of the company changes from "solvent" to "insolvent". The amount in demand becomes undisputed and it paves way to the creditors to apply to the court to wind up the company on the ground of insolvency, i.e., the company is unable to pay its debts as and when they become due and payable. The moment the company is statutorily presumed to be insolvent, it is the matter for public concern. The reason being that, the public policy requires that the insolvent companies should not be allowed to operate, and they must be wound up by the court. The public policy requirement for insolvency outweighs all other issues. It should be first dealt with before any other issues. This is the rational for requiring the company to prove the solvency only to the satisfaction of the court.

21. Accordingly, if the debtor company wishes to oppose the winding up application, it should first rebut the statutory presumption of insolvency. If the company succeeds in it, the court would grant leave. It means, the company's position is reverted back to its initial position

i.e. "solvent" and then the company would be allowed to dispute the amount and rely on those grounds mentioned in section 529.

22. Thus, the hearing at the second stage of winding up takes places in two phases if an application for leave is filed by a debtor company. First hearing focuses only on the issue of solvency of the company. If the company fails to prove the solvency, the application for leave fails. As the result, the order for winding up will be granted, because the presumption of insolvency is not rebutted. Conversely, if it is proved that, the company is solvent, the court will then grant leave and allow the company to file the affidavit to oppose the winding up. The company can raise all the issues to challenge the demand.

23. The last hearing that was held in this case was to consider the solvency of the company and to consider the leave to oppose the application for winding up filed by the applicant company. Therefore, the issues raised by the respondent company in those 18 paragraphs are not relevant to the hearing that took place, because they only dispute the amount and the way the demand was served, rather than proving the solvency of the company. Therefore, the respondent company cannot rely on those facts averred in those 18 paragraphs at this stage. As such, I disregard the same. Likewise, the deponent annexed a draft affidavit marking as Exhibit RA 3 and claimed to be the proposed affidavit to oppose the winding up. In fact, the deponent, through that draft affidavit, pre-empts to oppose the winding up application at this stage where the leave to oppose the winding up is at question. For this reason, I expunge the said draft affidavit which came under the disguise of an exhibit.

24. I now move on to the two paragraphs (5 and 17) the affidavit filed on behalf of the respondent company. In paragraph 5, the deponent – the director of the company states that, his solicitors advised him and he believes that the company is solvent and the assets are more than the liabilities. So his belief on the solvency of the company is based on the advice by his solicitors and not on the material available in the company such as audited financial report, cash flow statement and liquid assets etc. This belief based on the solicitors' advice is incapable to rebut the statutory presumption of insolvency.

25. The deponent in paragraph 17 stated that, the company purchased a brand-new vehicle – a Toyota Hilux Double Cab. He stated that, it is valued at $ 102,398.85. Firstly, it is not clear when this valuation is done. Secondly, the total amount that has become due and payable by the company at the time of hearing was much more than this proposed value of this vehicle. This vehicle falls under liquid assets as it can be sold quickly. Even this is sold to pay the debts, the company is still need more financial assistance to become solvent. Accordingly, I decide that, the founding affidavit of respondent company lacks enough material to prove that, the company is solvent.

26. Now I turn to the preliminary objection raised by the counsels for the applicant company and the supporting creditors in relation to introduction of new evidence by the respondent company in its affidavit in reply. Again the averments which are relating to new offsetting claim and introduced in the affidavit in reply are not relevant at this point as the respondent company cannot rely on the same at this hearing which aimed at only deciding the solvency of the respondent company. Therefore, I analyze the new evidence (Exhibits **RA 3** and **RA 4**) purported to be proving the solvency of the respondent company.

27. When an application is required to be supported by an affidavit, the founding affidavit must contain all evidence required to prove reliefs sought in that application. An application either stands or falls by the founding affidavit. The general rule was established in **Faber v Nazerian** [2013] ZAGPJHC (15 April 2013) that an applicant's case was to be made in the founding or the supporting affidavit and not in the reply. However, this general rule does not restrict the discretion of the court. The court has discretion to allow new evidence if it was proved that, the new evidence adduced in the affidavit in reply were material to prove the application and were not within the knowledge of the deponent at the time of deposing the founding or supporting affidavit (**Body Corporate, Shaftesbury Sectional Title Scheme –v- Rippert's Estate and Others** 2003 (5) SA 1 (C)).

28. The deponent stated that, the Exhibit RA 3 was the "**cash flow forecast**" of the company for 12 months from July 2023 to June 2024 as it appears on top the said exhibit. If the company forecasted its cash flow from July 2023, this forecast should have been within the knowledge of the director from July 2023. The application for winding up was filed on 16 May 2024 and the founding affidavit was sworn on 20 June 2024. However, the director failed to include in his founding affidavit.

29. Likewise, The Exhibit RA 4 is claimed to be the bank statement dated 17.07.2024. There is a credit of total sum of $ 407,730.43 within few days gap in the month of July 2024. This seems to be a liquid asset and should have been forecasted previously, because this huge deposit could not have been an overnight transaction. The deponent, being the manager of the business of respondent company, could not have been unaware of this cash flow. The deponent could have mentioned in his founding affidavit, which was sworn about 20 days before the purported deposit that, this amount of credit was expected in near future and if it was so deposited, it would make the company able to pay all its debt. The deponent failed to do so. For the above reasons I decide that, the new evidence adduced in the affifavit in reply should have been within knowledge of the deponent and included in the founding or the supporting affidavit. This would have given an opportunity to both the applicant company and the supporting creditors to respond to the same. Therefore, the court cannot allow this new evidence exercising its discretion.

30. Nevertheless, I consider whether the court can give any probative value to these two exhibits even if the respondent company is allowed to adduce the same. In this regard, a few, but important observations should be made in relation to these two exhibits, keeping in mind the fact that the applicant company and other supporting creditors were not given an opportunity to respond to the same. Firstly, the exhibit RA3 is not an audited account. It is a mere schedule prepared in excel format. There is no guarantee on its accuracy. Secondly, it was claimed to have been a "cash flow forecast" from **July 2023**, but the accountant stated in the covering letter dated **15.07.2024** that, it was prepared based on "**current** civil contracts". If it was based on "current civil contracts" it should be contemporary to time it was prepared, i.e. **July 2024**. The "forecast" should go from **July 2024 onwards**. However, the so called "forecast" goes backward from **July 2024** to **July 2023**. It appears that, it was an afterthought attempt. Exhibit RA3 appears to have been purportedly doctored in order to defeat the application for winding up.

31. Thirdly, the exhibit RA4 is the bank statement of the account maintained by the respondent company at Bank of Baroda, **Lautoka** from 01.07.2024 to 16.07.2024. It is a corporate current account. It is a computer generated document which requires no signature. It shows that on 15 July 2024 a lump sum of $ 360,000.00 was transferred from the account of one Shazleen. The respondent company stands insolvent by operation of the statutory presumption on the basis it is unable pay its debts. This amount is much higher than the forecasted monthly amount mentioned in the purported exhibit RA3 which is discussed above. Therefore, the insolvent company must explain from where this huge amount was injected to the company's assets. What is the commercial relationship between the transferor – Shazleen and the respondent company? If a huge amount of money comes to a presumably insolvent company, it should be from the liquid assets such as Certificate of Deposits (CDs), stocks and bonds, money market fund and accounts receivable etc. However, there is no explanation whatsoever.

32. When the statute presumes a company insolvent on the basis that, it is unable to pay all its debts and requires it to prove otherwise to the satisfaction of the court, such debtor company cannot be simply allowed to just tender a document and merely assert that it is solvent. Each and every piece of evidence adduced by such company, in the course of proving solvency, should strictly be subjected to the judicial scrutiny, and the court should be satisfied that the company is solvent.

33. A careful scrutiny of those exhibits reveals that, no probative value could be given to this new evidence even if it is allowed without a chance being given to the applicant company and supporting creditors to respond to the same. The above discussion concludes that, the respondent company failed to prove to the satisfaction of the court that, it is solvent. The

statutory presumption of insolvency of the respondent company remains unrebutted. Even though the respondent company entered into repayment agreement with some creditors, others including the applicant company remain unpaid.

34. The courts established the doctrine that, if a creditor cannot get paid without winding up the debtor company, it is *ex debito justitiae* that he should have a winding up order. Irvine CJ in **Re Concrete Pipes and Cement Products Ltd** [1926] VLR 34 explained the development of this doctrine at page 38 as follows:

> The right of the petitioning creditor, where he has established any of the grounds for winding up set out in sec. 137 of *the Companies Act* 1915, is said to be *ex debito justitiae*. The expression first appears in this connection in the judgment of Lord Selborne in *In re Western Canada Oil etc. Co. [1873] 17 Eq., 1 at page 6,* where he says –"I entirely agree with the doctrine of Lord Cranworth: that if a creditor cannot get paid without winding up, it is *ex debito justitiae* that he should have a winding-up order." The reference is to the judgment of Lord Cranworth in *Bowes v. Hope Life Insurance and Guarantee Co. [1865] 24 Ch. D., 259 at p. 265.* At page 402 His Lordship stated:-"I agree with what has been said, that it is not a discretionary matter with the Court when a debt is established and not satisfied to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity."

35. The section 513 (c) Companies Act 2015 provides that, company may be wound up by court if it is insolvent.

36. Accordingly, I make the following orders:

a. The leave to oppose the application to wind up the respondent company is refused,

b. The summons filed by the respondent company pursuant to section 529 of the Companies Act 2015 is dismissed,

c. The respondent company is insolvent and it is wound up,

d. The Official Receiver to take all steps to secure more convenient and more economical conduct of winding up of the respondent company,

e. The Applicant Company is entitled for summarily assessed costs in sum of $ 2000.00 for this application,

f. Each supporting creditor is entitled for summarily assessed costs in sum of $ 1000.00 except Arrow Concrete Limited as it withdrew from supporting the application for liquidation.

g. All costs should be recovered from the assets of the company in the process of liquidation by the Official Receiver.

U.L. Mohamed Azhar
Acting Judge

At Lautoka
19.03.2025