

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Case No.: HBE 17 of 2017

BETWEEN : **PACIFIC CIVIL & ENGINEERING DESIGNS LIMITED** a limited liability company having its registered office at Lot 10 Panaromic Road, Wailekutu ("the Creditor").

APPLICANT

AND : **NADI LAND DEVELOPMENT LIMITED** a limited liability company having its registered office at Lot 1, Queens Road, Martintar, Nadi or PO Box 11199, Nadi Airport ("the Company").

RESPONDENT

Counsel : **Ms. Veitokiyaki S. for the Applicant**
Ms. Lal R. for the Respondent
Date of Hearing : **20th March, 2018**
Date of Judgment : **29th March, 2018**

JUDGMENT

INTRODUCTION

1. The applicant had filed summons on 9th February, 2018 seeking extension of time to appeal against the decision of Master pronounced on 11th October, 2017. This is an action for winding up of the applicant and at the hearing by consent the applicant was ordered to pay in to court a sum of \$ 135,096.71 on or before 18.10.2017. By consent the Master had imposed an unless order to winding up of the applicant. No payments were made and unless order was activated on 27.11.2017.

FACTS

2. The Respondent-Petitioner (the Petitioner) issued a statutory demand for a sum of \$219,868.93 in terms of Section 515 of the Companies Act 2016. These were allegedly sums due to them for the works it had done for the Applicant-Company (the Company).

3. The Company filed an affidavit in opposition and in terms of paragraph 12 it stated as follows

12. That our company had written to the Creditor's solicitors "Lal Patel and Bale Lawyers" dated on 23rd November 2016, stating that an invoice reconciliation had been provided by the Creditor which amounted to a total sum of FJD \$ 135,096.71(One Hundred and Thirty Five Thousand and Ninety Six Dollars and Seventy Once Cents) which is obviously not a reflection of the amount stipulated in their demand....'

4. In the affidavit in reply of the Petitioner filed on 29th September, 2017 annexed 'AS2' the 'invoice reconciliation' which indicate debt as 135,096.71. This letter was dated 23rd November, 2016 and it was communicated to the solicitors of the Petitioner by the Managing Director of the Company.

ANALYSIS

5. From the letter of Managing Director of the Company on 23rd November, 2016 there was an admitted debt for an amount of \$135,096.71.
6. This amount was also reflected in the paragraph 12 of the affidavit in opposition to the winding up, filed on 26th June, 2017 by the Company.
7. At the hearing before Master following orders were made
 1. *By consent Respondent company to pay into CR's interest bearing account a sum of \$135,096.71 within 7 days on or before 18.10.2017 by 4 pm.*
 2. *By consent court imposes 'unless order' and will be activated upon non-compliance by the respondent Company as follows*
 - i. *This failure to pay into CR's interest bearing account sum of \$135,096.71 on or before 18.10.2017 at 4 pm. The court will proceed to winding up the respondent company forthwith by consent and or as agreed upon.*
 - ii. *If the sum of \$135,096.71 is paid then court will make further directives on any issues thereafter ...'*

8. There was no payment of said sum or any amount to the court and the unless orders, was activated on 27th November, 2017 and it was sealed on 1st December, 2017
9. The Master had made the unless orders with the consent of the parties on 11.10.2017.
10. Even without any consent Master has jurisdiction to make an order to pay to the court the admitted sum of the debt in a statutory demand.
11. Master with consent of the parties had made unless order directing the Company to pay to the court the sum admitted in the affidavit in opposition and also correspondence by their Managing Director for a sum of \$135,096.71.
12. The Master was within his powers to make necessary orders for the case management and unless orders are very effective tool at their disposal, if properly utilized.
13. In a recent UK Supreme Court decision of **Revenue and Customs Commissioners v BPP Holdings Ltd and others** [2017] 4 All ER 756 (Per Neuberger P) cited the following quote with authority to emphasis the importance of case management .

"It is appropriate to state the words of Lawrence Collins LJ in Fattal v Walbrook Trustee (Jersey) Ltd [2008] EWCA Civ 427. [2008] All ER (D) 109 (May) (at [33]):

'[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.' (emphasis added)
14. I cannot see that Master had not applied the correct principles in ordering unless order, where the Company needed to pay the undisputed amount that amount needs to be paid (see Re ***Tweeds Garages Limited*** [1962] 1 Ch 4073).

15. The order of 11th October, 2017 was made with the consent of the parties and this is another reason not to interfere with orders apart from exceptional circumstances. Both parties were represented by counsel of their choice at that day, and change of solicitors after that does not change that situation. The Company's decision to change solicitors for their convenience. This cannot change admitted facts in the affidavits filed by their previous solicitors and also admissions made by the Managing Director of the Company.
16. The law relating extension of time is settled and the paramount consideration is the merits of the appeal. I cannot see any merits on this appeal for above reasons and it is doomed to fail, if extension of time granted.
17. In the circumstances it is futile to consider other factors such as length of delay and reasons for delay and prejudice to the Petitioner, etc. But for completeness I briefly consider them. The length of delay is approximately four months. The Company tried to justify it by referring to earlier applications and the previous conduct of the Company. The present solicitors of the Company had filed an application for appeal earlier but it was deemed abandoned under High Court Rules of 1988. This is another reason to dismiss this application for extension of time in limine. Once an appeal is deemed abandoned there is a finality to said determination.
18. There is a prejudice to the Petitioner if extension of time is granted, as it was a consent order. If the Company did not consented the hearing would have completed on that day before the Master. A party who agree to pay in court should not be allowed to disregard and appeal against order made by consent, to delay the payment, unless there are exceptional circumstances. I cannot see such grounds here.
19. The application for extension of time is struck off. I will not order any cost

FINAL ORDERS

- a. The summons filed on 9th February, 2018 seeking extension of time to file appeal is struck off.
- b. No costs.

Dated at Suva this 29th day of March, 2018



Deepthi
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Justice Deepthi Amaratunga
High Court, Suva