

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

WINDING UP ACTION NO. HBE 6 OF 2022

**IN THE MATTER of J KEVI REFRIGERATION & AIR
CONDITIONING SERVICES PTE LIMITED** a limited
liability Company having its registered office at
Suite 10, Level 1 Ganesha Complex, Nadi Back
Road, Nadi, Fiji.

AND

**IN THE MATTER OF THE WINDING UP
PROCEEDING UNDER COMPANIES ACT OF 2015 of
the Companies Act**

BETWEEN : **WESTERN ALUMINIUM JOINERY PTE LIMITED** a limited liability
company having its registered office at 18 Nasoki Street, Lautoka,
Fiji

APPLICANT

AND : **J KEVI REFRIGERATION & AIR CONDITIONING SERVICES PTE
LIMITED** a limited liability Company having its registered office at
Suite 10, Level 1 Ganesha Complex, Nadi Back Road, Nadi, Fiji

RESPONDENT

BEFORE : A.M. Mohamed Mackie -J

APPEARANCES : Ms. A. Chand for the Applicant
Ms. Tunikula for the Respondent

DATE OF HEARING : 4th October, 2022

WRITTEN SUBMISSIONS: By the Applicant on 07th December, 2022.
No Written Submissions filed by the Respondent.

RULING PRONOUNED ON: 16th February, 2023 @ 10.30am

RULING

[On Applicant's Winding up Application pursuant to the Companies Act, 2015]

A. INTRODUCTION:

1. Before me is an Application for Winding Up preferred by the Applicant Company, WESTERN ALUMINIUM JOINERY PTE LIMITED on 06th April, 2022 seeking the following orders:
 - 1) That J KEVI REFRIGERATION AND AIR CONDITIONING SERVICES PTE LIMITED be wound up under the provisions of the Companies Act 2015;
 - 2) That a liquidator be appointed to conduct the winding up; and for such further or other order as may be just.

B. AFFIDAVITS FILED:

2. The following Affidavits in the prescribed forms have been filed by the Applicant in these proceedings:
 - a. *Affidavit verifying Application for Winding Up sworn by ALEXANDER TZU LIK FONG, the Director of the Applicant Company filed on 6th April, 2022 along with the Application and annexures marked as "ATLF-1" to "ATLF-4" & "RS-1";*
 - b. *Affidavit of Service by PITA MOLIDUA filed on 16th May, 2022;*
 - c. *Affidavit of Service of Winding up Notice for News Paper Publication, sworn by KITIONE MATEILEVUKA, and filed on 16th May, 2022; and*
 - d. *Affidavit of Service of Winding up Notice for Publication in Gazette, sworn by KITIONE MATEILEVUKA, and filed on 16th May, 2022.*
3. The Respondent Company, on 19th May, 2022, along with its Notice of Intention to Appear, filed its Affidavit in Opposition sworn by RONALD DEO, the Manager Accounts, with annexures marked from "RD-1" to "RD-3".

C. BACKGROUND:

4. As per the pleadings and other contents of the record, it is stated THAT:
 - a. The Applicant Company is in the business of, *inter-alia*, designing and installing of Aluminum doors and window frames and other things. The Respondent Company had engaged the Applicant's services to supply and install assorted Aluminum fittings and fixtures to the Respondent's office.
 - b. On account of the total price for the work done by the Applicant Company, which was \$ 164,000.00, the Respondent Company had paid only \$8,800.00 leaving an outstanding balance in a sum of \$155,200.00 as at 06th April, 2021. The Respondent Company had given few Cheques as part payment of said outstanding debt, but all were dishonored on being presented for payment.

- c. On the 09th April, 2021, the Applicant Company caused to be served on the Respondent Company at its Registered Office, a Statutory Demand Notice dated 08th April, 2021, demanding the said sum of \$155,200.00, together with the Legal fees in a sum of \$545.00.
- d. The Respondent Company failed for three weeks after the date of service of Statutory Demand, to pay the amount or to secure or compound for it to the reasonable satisfaction of the Applicant Company.
- e. Accordingly, the Applicant Company on 06th April, 2022, filed the Application for Winding up seeking reliefs as stated in paragraph 1 above.

D. OPPOSITION BY RESPONDENT:

5. The Respondent Company on 19th of May, 2022 filed its Affidavit in Opposition to the Winding up Application, together with its Notice of Intention to appear and oppose the Application at the hearing.
6. Accordingly, when the matter was mentioned before me on 26th of May, 2022, Counsel for the Applicant, while supporting the Application for winding up, raised preliminary objection to the Affidavit in opposition filed by the Respondent, on the grounds that no leave had been obtained by the Respondent Company to appear at the hearing, and the grounds relied on in the said Affidavit in opposition could and should have been relied on by the Respondent in an Application to set aside the Statutory Demand Notice, which the Respondent had failed.
7. Then, the Court directed the parties to file written submissions on the preliminary objection. The Respondent's Counsel filed written submissions on 15th June, 2022, and no written submissions was filed by the Applicant. Accordingly, this Court on 12th July, 2022 made the following orders.
 - a. *The Respondent Company shall be at liberty to take part in the hearing and oppose the application for winding up;*
 - b. *However, the Respondent Company shall not be allowed to rely on the grounds averred in the Affidavit in opposition, which could have been relied on by it at the hearing for setting aside statutory demand;*
 - c. *The Applicant, if needed, can file and serve the Affidavit in reply within 7 days from today;*
 - d. *Costs in cause; and*
 - e. *The matter is adjourned to fix substantial hearing.*
8. Accordingly, in order to survive, the Respondent Company was left with no alternative but to prove that it is **solvent and in a position to pay its debts**, which became undisputed due to its failure to have the Statutory Demand Notice set aside.

9. In view of the above Ruling, the Respondent's averments in the Affidavits and submissions with regard to its disputation of the debt and amount thereof cannot be considered at this stage. The only way out to survive is to establish that it is solvent / in a position to pay its debt.

E. **THE LAW AND PRACTICE:**

10. **The test for Insolvency**

Section 513 of the Act states:

- a. A company (which where applicable in this Part includes a Foreign Company) may be wound up by the court, if –
- b.
- c. the Company is Insolvent;"

Section 514 of the Act states:

(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."

Section 515 of the Companies Act 2015 states:

"515. 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".*

11. In *Re Tweets Garages, Ltd' [Tab 1], Plowman J* explained insolvency for the purpose of a winding-up petition as follows (at page 122):

"Insolvency in the relevant sense is explained in BUCKLEY ON THE COMPANIES ACTS (13th Edn.), p. 460, in this way:

"The particular indications of insolvency mentioned in paras. (a), (b) and (c) [of s. 223 of the Companies Act, 1948] are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if the assets are realized there will be ample to pay 20s. in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up".

12. Section 523(1) of the Companies Act 2015 deals with the powers of the court in exercise of its discretion and provides as follows:

"523. (1) on hearing a winding up application, the Court may —
(a) Dismiss the application;
(b) Adjourn the hearing conditionally or unconditionally; or
(c) Make any interim order, or any other order that it thinks fit,

But the Court must not refuse to make a winding up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets or that the Company has no assets."

F. ANALYSIS & DETERMINATION:

13. It is a general principle that a Petition for Winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3.) This means that the winding up mechanism should not be made used as a tool for the recovery of disputed debt, by painting a picture before the Court that the Company is insolvent and it is unable to pay its debt.

No one should be allowed to take up this tool in hand to recover the disputed debt, which process could sometime be a threat to the right to life of a vibrant Company. Therefore, as per law, unless the debt and/or the amount is genuinely disputed , the only consideration left in a Winding up proceedings is whether or not the Company sought to be wound up is in a position to pay off its debts as and when become due.

Stern argument of the Applicant Company is that the Respondent Company is not in a position to pay off its debt to the Applicant, which is due and owing for more than 3 years. It is observed that all the five (5) cheques issued by the Respondent Company , out of which the 1st one marked as "ALTF-3" for a sum of \$50,000.00 & dated 20th Nov,2018, and other 4 cheques marked as "ALTF-4" for a sums of \$5,000.00, \$2,000.00, \$5,000.00 and \$5,000.00 and dated 12th Nov.2019, 25th Nov,2019 , 05th Feb,2020 and 15th Oct,2020, respectively, have been dishonored. This *prima-facie* shows that the Respondent Company is insolvent and not in a position to pay its debt.

If the Respondent Company was solvent and willing to pay, it could have paid a substantial sum, reserving the balance to be paid after resolution of the dispute over the alleged bad workmanship and quality of materials utilized.

The Companies Act clearly says that the Company is only to be deemed solvent if it is in a position to "*pay all its debts, as and when they become due and payable.*" The above Cheques had been issued with a long time of interval in between. The time period in between 1st Cheque and the 2nd & 3rd cheques was about one (1) year. The time period between the 2nd, 3rd Cheques and 4th Cheque was more than two (2) months and the time period between the 4th Cheque and the 5th Cheque (the last one) was more than 8 months.

The Respondent has had enough time to pay and settle. Though, the Statutory Demand Notice was, undisputedly, served on the Respondent Company, they neither respond nor paid the debt or resorted to any other action. By its failure to pay the debt demanded or to apply in order to have the Statutory Demand Notice set aside, by disputing the debt and/or the amount therein, the Respondent Company has demonstrated that it is unable to pay its debt owing to its insolvency.

In the recent case of *Dominion Wire & Cables Pte Ltd v Ajynk Electrical Pte Ltd [2022] FJHC 181; Lautoka High Court Winding Up Cause No. HBC 26 of 2021* at paragraphs 26, 27 and 34, Justice A. Tuilevuka, had this to say;

“26. Notably, the time to apply to set aside the statutory demand under section 516 has long lapsed. When a company neglects to apply to set aside a statutory demand –there is a presumption of insolvency which is raised out of section 513(c) read together with the deeming provision of section 515 (a) of the companies Act 2015.

“27. In other words, the statutory demand matures into a presumption that the company is insolvent.”

“34. The general rule is that the presumption of insolvency which accrues from a failure to set aside a statutory demand will prevail until the presumption is rebutted by the proof that the company is solvent. (Emphasis added)

14. Since the Respondent had failed to apply to have the Statutory demand Notice set aside, this Court in its ruling dated 15th June, 2022 (vide para 5 above), while granting leave to appear and oppose the application, has categorically stated that the Respondent is not entitled to rely on any ground that it could and should have relied in an Application for setting aside the statutory demand. But, the Respondent in its averments in the supplementary Affidavit filed on 26th August, 2022, after granting leave with such a condition, has attempted to demonstrate that there is a genuine dispute, which is a belated defence. Those averments do not establish that the Company is solvent.
15. The annexure marked as “RD-3” and filed along with the Affidavit in opposition does not carry sufficient weight to substantiate the factual financial position of the Respondent Company. The letter annexed thereto from the Accountants states that it has been prepared on the information provided by the Company, which was extracted from the **unaudited** financial statements. This is insufficient to demonstrate that the Respondent Company is solvent.
16. The Notice of Winding Up was advertised in The Fiji Sun in its 14th May, 2022 issue and published in the Government Gazette on 13th May, 2022. On 16th May, 2022, the Deputy Registrar issued a Provisional Winding Up Rule 16(2)(b) Compliance Certificate dated 09th November 2016 certifying that the rules for winding up under section 19(1) were complied with, including by advertising in the News Paper and publication in the Government of Fiji Gazette.
17. The Notice of intention to appear and oppose, filed by the Respondent, has been duly dealt with by this Court and the Ruling was given on 12th July, 2022 granting leave for the Respondent to appear and oppose the Application subject to conditions therein.
18. Section 523(1) of the Companies Act, 2015 grants the Court discretion on the orders it can make on a winding up Application. The Respondent Company, though was granted leave to appear and oppose, has failed to substantiate that the Company is solvent and in a position to pay its debts, which was not duly disputed.

19. The Company's failure to prove its solvency resulted in the enforcement of the proceedings by the issuance of the current Winding up Application against the Company. The averments in the Supplementary Affidavit filed by the Respondent do not substantiate that the Respondent Company is solvent or in a position to pay the debt.
20. In RPA GROUP (FIJI) LTD , In re [2020] FJHC ; Suva High Court Winding up cause HBE 52 of 2019 at paragraph 32, Jawid Munsoor-J stated the following in respect of the threshold of evidence to be reached by the respondent in order to prove its solvency (or otherwise)

"Understandably, such evidence need not be at its fullest, and best, in order to establish materiality of a ground for the purpose of solvency. But, there must be sufficient for the court to bite. As laid down in Tony Innaimo, the court must be satisfied on the evidence placed before it that the dispute to the debt is material to the company's solvency. To cite an instance of shortcoming, the respondent provided draft accounts in support of its application. Common sense suggests that audited accounts would have been the more acceptable form of financial statements in a proceeding as important as this. The respondent had an obligation to reveal its overall financial position, which it has not adequately discharged for the purpose of this inquiry. There is no suggestion that the company's audited financial statements were unavailable. This must be seen as an omission having a bearing on the respondent's credibility".

His Lordship further went on to state at paragraph 34 as follows.

"On the evidentiary front, as noted above, the respondent had the potential to do far better, but chose to fall short. That is a peril the respondent has willingly taken. There was no satisfactory explanation regarding the failure to take timely steps to set aside the statutory demand. That does not reflect well on the respondent, especially when, fighting, so to speak, to stay alive".

G. CONCLUSION:

21. There is clear evidence which indicates that a debt of \$ 154,200.00 is owed by the Respondent Company to the Applicant Company. The Applicant issued a Statutory Demand for the recovery of the said debt , which the Company failed to dispute within 3 weeks' time from the date of the receipt of it '
22. The Applicant has complied with the requirements of the Act and the Rules and now seeking an order for Winding up of the Respondent Company. The Applicant also on 6th October, 2022 has obtained an extension of time for the disposal of the Application pursuant to section 528 of the Companies Act and under Order 3 Rule 4 of the High Court rules.
23. The Respondent Company initially failed to have the Statutory Demand Notice set aside and subsequently also failed to provide sufficient evidence to establish that the Company is solvent or that it is able to pay its debts.

24. For the above reasons, the Applicant Company's Application seeking the winding up of Respondent Company, J KEVI REFRIGERATION AND AIR CONDITIONING SERVICES PTE LIMITED, is hereby granted and I now proceed to make the following final orders.

H. **FINAL ORDERS:**

- a. The Respondent Company, J KEVI REFRIGERATION AND AIR CONDITIONING SERVICES PTE LIMITED, is hereby wound up under the provisions of the Companies Act.
- b. That a liquidator be appointed to conduct the winding up.
- c. That the Applicant is entitled for a sum of \$ 1000.00 (one Thousand Dollars) being the summarily assessed costs to be paid out of the assets of the Company.




A.M. Mohammed Mackie
Judge

At High Court Lautoka this 16th day of February, 2023

SOLICITORS:

For the Plaintiff: Messrs. Anishini Chand Lawyers
For the Respondent: Messrs. Lal Patel Bale Lawyers