

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL ABU 45 OF 2013**  
**(High Court HBE 29 OF 2013)**

**BETWEEN** : **GUNAC (SOUTH PACIFIC) LIMITED** *Appellant*

**AND** : **FORMSCAFF (FIJI) LIMITED** *Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr W Hiware for the Appellant**  
**Ms S Narayan for the Respondent**

**Date of Hearing** : **1 May and 4 June 2014**

**Date of Decision** : **13 June 2014**

**DECISION**

[1] This is an application by summons filed by the Appellant on 26 August 2013. for a number of orders including:

- "1. That leave be granted to the company Gunac (South Pacific) Limited to file an appeal out of time against a Winding up Order issued (by the High Court) on 5 July 2013

2. *That the said Winding up Order be stayed and or set aside pending final hearing of the Company's appeal herein.*
3. *That costs ordered on 5 July 2013 be stayed and or set aside pending final hearing of the Company's appeal."*

- [2] The application was supported by an affidavit sworn on 19 August 2013 by Akuila Naco and supplementary affidavits sworn by Abhi Ariyan on 27 January and 7 February 2014. The application was opposed by the Respondent on whose behalf was filed an answering affidavit sworn on 24 February 2014 by Raj Rakesh Kumar. The Appellant filed a reply affidavit sworn on 3 March 2014 by Abhi Ariyan. Pursuant to leave granted on 1 May 2014 the Appellant filed a supplementary affidavit sworn on 9 May 2014 by KoroVuli-Muritamana Tuitubou. The Respondent then filed an answering affidavit sworn on 2 June 2014 by Raj Rakesh Kumar.
- [3] Both parties filed helpful written submissions. The background facts may be summarised. The parties had been doing business with each other for some time. The Respondent supplied scaffolding to the Appellant on hire over certain periods of time. The scaffolding was required by the Appellant in the course of its construction business. The Appellant was involved in a project under contract with Suva City Council. It is alleged by the Respondent that the Appellant had requested and the Respondent had supplied scaffolding for hire for several weeks for use by the Appellant on this particular project. It was alleged that the scaffolding was provided by the Respondent at a rate of 1,800.00 per week from on or about 15 November 2012 to 14 January 2013. It was claimed by the Respondent that the sum of \$10,738.60 was owed by the Appellant for the hiring of scaffolding for the project. That amount consisted of a balance of \$600.00 owing under invoice 1978 and \$10,138.00 owing under invoice 2136.
- [4] The Respondent commenced winding up proceedings by filing a winding up petition against the Appellant on 17 May 2013 under section 222 of the Companies Act Cap 247. The basis for the petition was apparently that the Appellant was unable to pay its debts (section 220(e) of the Companies Act). It was not made clear to me under which definition of "unable to pay debts" in section 221 of the Companies Act did the Respondent rely for its allegation.

- [5] It would appear that the Appellant did not respond to the petition until the petition came on for mention before the learned Judge on 28 June 2013. The Appellant's Counsel sought time to file an affidavit in opposition to the petition. The learned Judge granted one week's adjournment for the Appellant to file such an affidavit. It would appear that when the proceedings resumed part heard on 5 July 2013, Counsel for the Appellant informed the Court that the affidavit was ready. It had not been filed prior to the hearing resuming. There is no material before me to suggest that Counsel had attempted to file such an affidavit in court before the learned Judge nor was Counsel for the Respondent provided with a copy of the affidavit at any time prior to or on the day of the part heard hearing. In the absence of such an affidavit and on the basis of the petition and the other material required under the Winding up Rules the learned Judge granted the petition.
- [6] Pursuant to Rule 27 of the Court of Appeal Rules the Court of Appeal has the necessary jurisdiction in this case to enlarge the time for filing and serving a notice of appeal. Pursuant to section 20(1) of the Court of Appeal Act a single judge of the Court may exercise the Court's power to enlarge time
- [7] The Appellant is seeking to appeal an order of the High Court ordering the winding up of the Appellant under the provisions of the Companies Act and appointing the Official Receiver as interim liquidator. The Appellant was ordered to pay \$1000.00 costs to the Respondent.
- [8] The principles to be applied by a court in an application for an enlargement of time to appeal are well settled. Whether the application should be granted involves the exercise of a discretion. In exercising that discretion the following factors are usually considered: (i) the length of the delay, (ii) the reason why the notice of appeal was not filed within time, (iii) whether there is a ground of appeal that, in this case, not only merits consideration by the Court of Appeal but will probably succeed and (iv) whether the Respondent will be unfairly prejudiced if time is enlarged?
- [9] The length of the delay is calculated from the last day for which time is allowed to file and serve a notice of appeal to the date on which the application for an extension of

time was filed. In this case the winding up order was pronounced by the learned Judge on 5 July 2013. The winding up order was a final order and as a result under Rule 16 of the Court of Appeal Rules (the Rules) the Appellant was required to file and serve his notice within 42 days from that date, being 16 August 2013. The application by summons and the affidavit in support were filed on 26 August 2013. However the documents were not served on the Respondent until 26 November 2013. Since Rule 16 of the Rules requires both filing and serving to be effected within the prescribed time limit, there are reasonable grounds for inferring that the length of the delay should take into account the time when the application for an enlargement of time was not only filed but also served on the Respondent. Here although the delay in filing was only 10 days, service was effected some 3 months after the filing and such delay should also be explained.

- [10] The explanation for the delay of ten days in filing the application was discussed briefly in the affidavit sworn by Abhi Ariyan on 7 February 2014 at paragraph 4. A fuller explanation was provided in the affidavit sworn by Koro Vuli-Muritamana Tuitubou on 9 May 2014. The explanation offered by the Appellant relates to the time taken by the Appellant's former legal practitioner (Mr A Naco) to swear the affidavit in support of the application. According to Mr Tuitubou he was asked on 9 August 2013 to deliver to Mr Naco the affidavit for him to swear. The affidavit was delivered to Mr Naco on that day. It was only after two telephone requests that Mr Naco swore and signed the affidavit on 19 August 2013. On 22 August the Appellant paid the filing fee and on 26 August 2013 the affidavit with the summons was filed in the Registry. There is however no explanation in the affidavit material for the reason why it was not until 9 August 2013 that the affidavit was ready for swearing by Mr Naco. Some five weeks had elapsed between 5 July and 9 August 2013. By allowing just five working days for Mr Naco to make himself available to sign the affidavit the Appellant's legal practitioner had unreasonably assumed that Mr Naco would be available. There is also no explanation for the delay in serving the documents between 26 August and 26 November 2013. The explanations or lack thereof for the delay, apart from 9 August to 19 August 2013, reflect an attitude that the Rules of the Court can readily be disregarded.

- [11] The position is that there has been delay of 10 days in filing and delay of over 3 months in serving the application and virtually no satisfactory explanation for those delays. The delay of 10 days in filing the application means that it took 52 days from the date of the pronouncement of the winding up order for the Appellant to finally lodge any court document relating to the appeal. Under those circumstances the exercise of the Court's discretion will depend to some extent on the merits of the proposed appeal. As Thompson JA in Tevita Fa -v- Tradewinds Marine Ltd and Another (unreported ABU 40 of 1994; 18 November 1994) observed at page 3:

*"However as important as the need for a satisfactory explanation of the lateness, is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds."*

- [12] In a case such as the present where the explanation for the delays is on the one hand unsatisfactory and on the other non-existent, the Appellant is required to show at the very least that he has a reasonable chance of success. In assessing the chances of success a single judge in an application such as the present will not consider in detail the merits of any particular ground. A single judge exercising the power of the Court of Appeal under section 20 (1) of the Act does not decide the appeal. The task is to form an overview of the appeal on the basis of the limited material that is available in the absence of the appeal record and to assess the chances of success.
- [13] In the affidavit filed in support of the application for an enlargement of time, the deponent Naco exhibited a draft notice of appeal listing 3 grounds of appeal upon which the Appellant proposes to rely in the event that time is enlarged. They are:

"1 That the learned Trial Judge erred in law and in fact in not allowing the Respondent to disclose documents and materials pertinent to the winding action which was requested by the Appellant's lawyer based on the appellant filed Notice of Intention to Defend.

2 That the learned Trial Judge misdirected and did not exercise his discretion fairly in refusing the Appellant application's to file its affidavit in opposition and put the matter for proper hearing on the next date.

3     *That the winding up Order ought not to grant have been made in all the circumstances of the case."*

- [14] At the outset it must unfortunately be observed that these grounds of appeal have been drafted without any proper care for the correct use of grammar and without any attempt to particularise or clarify the real issues.
- [15] As for the first ground, the reference to a "*notice of intention to defend*" is misplaced as no such document was filed nor was it required to be filed by the Appellant in winding up proceedings in the High Court. At the hearing on 28 June 2013 the Appellant sought and was granted time (one week) to file an opposing affidavit. The Appellant failed to do so. The onus was on the Appellant to establish by affidavit that there was a dispute on substantial grounds to the debt claimed by the Respondent. I am satisfied on the affidavit material filed by the Respondent that the Appellant had in its possession the documentation that supported the Respondent's claim for the amount owing to it from the Appellant. This ground is unlikely to succeed.
- [16] As for ground 2, there is no material in the affidavits that would suggest that the learned Judge had refused the Appellant's request to file the affidavit when the hearing resumed on 5 July 2013. It would appear that an affidavit in opposition sworn on 4 July 2013 by Abhi Ariyan was in existence. There is no assertion in the affidavit material that the Appellant had attempted to file the affidavit on either 4 or 5 July 2013. There is no assertion in the affidavit material that Counsel for the Appellant had attempted to file the affidavit in court at the hearing. There is no assertion that Counsel for the Appellant had been refused leave to refer to the affidavit in his oral submissions before the Judge. This ground is unlikely to succeed.
- [17] The third ground is that the winding up order ought not to have been made. The circumstances under which a court may intervene in a statutory procedure such as the winding up provisions in the Companies Act were discussed by the Court of Appeal in Aleems Investments Limited -v- Khan Buses Limited (unreported ABU 36 of 2009; 24 January 2011). There was no material before the learned Judge upon which he could be satisfied that the debt was disputed on substantial grounds and as a result this ground is unlikely to succeed. It was for the Appellant to establish a dispute on

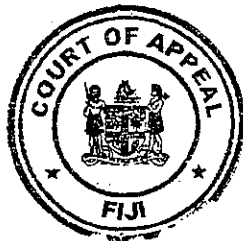
substantial grounds. As Marshall JA observed at para. 66 in the Aleems decision (supra):

*"Within the legal framework of winding up proceedings the duty of Khan Buses Limited (the debtor) \_\_\_ was to prove facts that Khan Buses Limited disputed the debt on substantial grounds."*

- [18] For the above reasons I have concluded that the appeal does not have any reasonable prospect of success and consequently in view of the delay and the largely unsatisfactory explanation for that delay, the application for an enlargement of time is dismissed. The Appellant is ordered to pay costs to the Respondent in the amount of \$2,000.00 within 28 days from the date of this decision.

**Orders:**

1. *Application is dismissed.*
2. *Appellant to pay costs of \$2,000.00 to the Respondent within 28 days.*



*W. Calanchini*

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HON. MR JUSTICE W. D. CALANCHINI  
PRESIDENT, COURT OF APPEAL