

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBE 51 of 2021

In the matter of Sea Quest (FIJI) Pte Limited

Counsel: Mr I. Fa for the applicant
Mr T. Low for the respondent
Date of hearing: 20th December, 2022
Date of Judgment: 25th August, 2023

Ruling

1. The applicant, Sea Quest (FIJI) Pte Limited, (SQL) seeks leave to appeal a decision of Nanayakkara J of 12 August, 2022, declining to set aside an extension order made in terms of section 528 of the Companies Act.
2. *Chronology of events*
 - a. The respondent, Dae Myung Fishing Gear Manufacturing Pte Ltd (DFGM) filed an application to winding up SQL.
 - b. On 11 April, 2022, consequent to the respondent's application, Seneviratne J ordered a 6 months extension of the winding up proceedings in terms of section 528 of the Companies Act.
 - c. On 12 May, 2022, SQL filed an application to set aside the extension order.
 - d. On 12 August, 2022, Nanayakkara J declined the application.

3. The proposed grounds of appeal read as follows:

- a. *That the learned Judge erred in law and in fact in failing to set aside the Decision of Seneviratne J dated 11.04.22, to extend the time for a period of a further 6 months for the Winding Up of Sea Quest (Fiji) Pte Limited, when at all material times there was no application before the Court for an extension of time pursuant to Section 528 of the Companies Act 2015.*
- b. *The Learned Judge erred in law and in fact in holding that the proper cause for the application was to appeal the Decision of Seneviratne J pursuant to section 572 of the Companies Act 2015, when at all material times the Court failed to note that the Decision by Senenviratne J dated 11.04.22 was not a final Order as the issue of extension of time and the issue was not Res Judicata and therefore open to the application to have it set aside as the Order was made unilaterally by Seneviratne J after an oral application was made from the bar table by counsel for the Respondent.*
- c. *That Appeals under Section 572 of the Companies Act 2015, are appeals from a final determination by the court on the merits of the issue before it. In this case there was no determination by the court on the issue before it, but rather an Order/Decision made by the court on an oral application from the bar table. Clearly, this Order was made ex-parte as it was made solely for the benefit of the party making the oral application.*
- d. *That the learned Judge erred in law and in fact in holding Ms. Fifita Fa had acquiesced to the application by her presence in court, when at all material times the application was made orally before the court with no time given to Ms. Fa to obtain instructions. Further, the judge's notes clearly established that the Judge had predetermined the matter and for this court to say that Ms. Fa acquiesced to the application is a false and dishonest finding.*
- e. *That the learned Judge erred in law and in fact in failing to determine that the central issue of the Appellants application to set aside the Orders of Seneviratne J dated 11.04.22 was whether or not the court was functus. Clearly, the court was not functus as the Orders by Seneviratne J was made without a hearing or the Appellant being given an opportunity to be heard on the same.*
- f. *That the Learned Judge erred in law and in fact in holding that Order 32 of the High Court Rule 1988, did not apply to the Appellant's application.*

4. The proposed grounds of appeal contend that Nanyakkara J erred in failing to set aside the decision of 11 April, 2022, and holding that the applicant should appeal that decision. Or 32 of the High Court Rules apply.
5. It is argued further that the decision of 11 April, 2022, was made on an oral ex parte application by counsel for the respondent in the presence of counsel for the applicant on that occasion, without giving her time to obtain instructions. Section 528 requires a formal application to be made to extend time and an opportunity for the respondent to respond to same.
6. Section 528(1) of the Companies Act states that an application for winding up of a company has to be determined within 6 months. Sub section (2) provides that Court may by order extend the period, “*but only if—*
 - a) *the Court is satisfied that special circumstances justify the extension; and*
 - b) *the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires*”.
7. I have perused the proceedings of 11 April, 2022. Seneviratne J made Order extending time in the presence of counsel for both parties. Counsel for the applicant on that occasion did not raise any objection nor seek time to file opposition to the oral application made to extend time.
8. In my view, the Order of 11 April, 2022, was made inter partes.
9. I note that section 572 of the Companies Act provides that “*an appeal must lie to the Court of Appeal from **any decision or order** given or made by the Court in the exercise of the jurisdiction conferred upon it by this Part.*” (emphasis added)
10. Or 32, r.5 titled “***Proceeding in absence of party failing to attend***” as relied on by Mr Fa, counsel for the applicant governs civil proceedings.

11. The application for leave to appeal is declined.

12. **Orders.**

- a. The application for leave to appeal is declined.
- b. The applicant shall pay the respondent costs summarily assessed in a sum of \$1000.00.



A.L.B. Brito-Mutunayagam
JUDGE
25th August, 2023

