

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

CIVIL ACTION NO. HBE 4 OF 2023

IN THE MATTER of COSMIC SERVICES PTE LIMITED a limited liability company having its registered office at 2 Lekutu Street, Samabula, Suva, Fiji

AND

IN THE MATTER) of the COMPANIES ACT 2015

BETWEEN : **METAL WORKS & JOINERY PTE LTD** **APPLICANT**

AND : **COSMIC SERVICES PTE LIMITED** **RESPONDANT**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. V. Lagonilakeba, for the Applicant.
Ms. S. Narayan, for the Respondent.

DATE OF RULING : 28th September, 2023

RULING

A. Introduction:

1. Before me is an Application for winding up, filed on 28th February 2023, by MEATALWORKS JOINERY PTE LTD, the Creditor- Applicant Company (the Applicant) , seeking to wind up the Respondent- Debtor Company (the Respondent) namely, COSMIC SERVICES PTE LTD. under the provisions of the Companies Act 2015.
2. The Application is supported by the affidavit sworn on 22nd February 2023 by Sailesh Kumar Singh, the Director of the Applicant , filed along with annexures marked as "GT-1" being a copy of the statutory demand for a sum amounting to \$21,505 .00 (Twenty One Thousand Five Hundred and Five Dollars) and an account statement.

B. Background:

3. The affidavit in support , *inter alia*, avers **THAT:**
 - a. On or about 31st October, 2022 the Respondent was indebted to the Applicant in a sum of \$21,505.00 for the services performed by the Applicant for the Respondent.

- b. On 8th November 2022, the Applicant through its Solicitors, Messrs. Millbrook Hills Law Partners, served on the Respondent a statutory demand notice requiring to pay the amount mentioned therein.
- c. The Respondent failed for three (3) weeks after service of the statutory demand to pay the amount or to secure or compound for it to the reasonable satisfaction of the Applicant.
- d. The Respondent is unable to pay its debts and it is believed that there is no genuine dispute as to the existence or amount of the debt referred to in the affidavit in support.

C. Events before this Court & hearing.

4. While the matter was to be first called for hearing on 11th April 2023 as per the Application on 28th March 2023, it being brought to my attention that the new Registrar of this Court had not yet assumed duties, who was to attend the compliance hearing, I made the following directions;
 - i. Further date is given for compliance.
 - ii. Summons shall be re-dated.
 - iii. Parties to appear before registrar on 18th April 23.
 - iv. Mention date before me on 11th /04/23 is vacated.
 - v. Parties to appear before me on 03/05/23.
5. Subsequently, the compliance hearing being held before the Registrar on 18th April 2023 and 19th April 2023, the compliance certificate by the Registrar and the affidavit of compliance by the Applicant's Solicitors were duly filed on 19th April 2023, together with annexures marked as "SL-1" to "SL-3" (Official receiver's appointment letter and proof of publications).
6. When the matter came up for hearing on 03rd May 2022, as the Director of the Company, **Mr. Amit Narayan**, appeared in person, he was advised by Court that he cannot oppose the Application without the leave of the Court. However, since he indicated that he wishes to settle the matter, two weeks' time was granted for settlement and the matter was fixed for 19th May 2023.
7. Accordingly, when the matter came up on 19th May 2023, Ms. S. Narayan, appeared for the Respondent, and moved for time to file the appointment and papers for seeking leave to oppose the Application.
8. Despite the counsel for the Applicant objected and moved for Orders in terms, considering the submissions made on behalf of the Respondent, the Court made orders for the appointment and the relevant papers to be filed and served before 26th May 2023, and made a further order that if the appointment and the papers seeking leave are not filed before 26th May 2023, orders in terms of the Application will be granted. A sum of \$500.00 was ordered to be paid as costs before the next date and the matter was fixed for 09th June 2023.
9. Thereafter, as per the record, it transpires that Messrs. JITEN REDDY LAWYERS, on **26th May 2023 at 3.20 pm**, having tendered at the Registry an originating summons, together with an affidavit in support, **notably without their formal appointment on behalf of the Respondent,**

on 01st June 2023 paid the relevant fees and formally filed the same, seeking reliefs, *inter alia*, leave to oppose the winding up Application.

10. Accordingly, when the matter came up on 9th June 2023, the Court directed the Applicant to file its affidavit in opposition in 14 days, and the Respondent to file reply affidavit in 7 days' time and fixed the matter for hearing for 18th August 2023. The record also reveals that although, the Applicant filed the affidavit in opposition on 27th June 2023, no affidavit in reply was filed by the Respondent.
11. At the end of the hearing on 18th August 2023, when the Court fixed the matter for ruling for 28th September 2023, learned Counsel for the Applicant was heard to remind me of the impending expiry of the 6 months' time period on 28th August 2023, apparently, in his attempt to have the six months' time period further extended. Though, the Court, positively, responded to the effect that it will be extended before the expiry, unfortunately, due to an oversight on my part, the time period remains un-extended. This issue will be dealt with in detail towards the end of this Ruling.

D. Legal Provisions:

12. Companies (Winding Up) Rules 2015, rule 15 states as follows;

Affidavits and notices opposing the application and affidavits in reply

- 15.—(1) *On the hearing of an application under section 513 of the Act, a person may not, without the leave of the Court, oppose the application unless the person has, not less than 7 days before the time appointed for the hearing—*
 - (a) *Filed an affidavit in opposition to the application; and*
 - (b) *Served on the applicant or the applicant's solicitor—*
 - (i) *a notice in the form of Form D6 in Schedule 2 of the grounds on which the person opposes the application; and*
 - (ii) *a copy of the affidavit (emphasis mine)*

Period within which application must be determined

13. Section 528 of the Companies Act 2015 states as follows

- 528.—(1) *an application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made.*
- (2) *The Court may by order (on such conditions as it considers fit) extend the period within which an application must be determined, 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.*
- (3) *An application is, because of this subsection, dismissed if it is not determined as required by this section.*

14. Section 529 of the Companies Act states as follows;

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.

E. Discussion:

15. Admittedly, the Respondent had not made an Application to have the impugned statutory demand notice dated 4th November 2022 set aside within the prescribed time period. Thus, the alternative for the Respondent before the Court was to oppose the Application for winding up by filing and serving an affidavit in opposition 7 days prior to the hearing in terms of Rule 15, which the Respondent failed to do. It was at this backdrop, the Respondent filed the present Originating summons seeking leave to file its belated opposition for winding up.
16. The next hurdle that awaits for the Respondent, owing to its failure to comply with the statutory demand is, having to seek the leave of the Court pursuant to the Section 529 of the Companies Act of 2015. This leave is required, if an opposing Respondent at the hearing, intends to rely on the grounds that it relied on for the purpose of an Application for setting aside a statutory demand ; or those grounds the Respondent could have relied on , but did not so rely on for that purpose (whether the Respondent made such an Application for setting aside or not).
17. When the matter came up on 19th May 2023, acceding to the verbal Application of the learned Counsel for the Respondent, the Court made specific direction for both the appointment and the Application, seeking leave to file affidavit in opposition, to be filed and served before 26th May 2023. The Court also had made an unless order, that if the papers are not filed and served before 26th May 2023, orders will be granted in terms of the Applicant's Application for winding up.
18. The record now reveals that the Respondent, by not filing and serving the Application as per the direction made on 19th May 2023, has violated the same. It also reveals that the Application has been formally filed only on 1st June 2023, without a formal Appointment as Solicitors on record for the Respondent. As a result, in terms of my further order made on 19th May 2023, the Applicant becomes entitled to have Orders in terms of the Application for winding up. As per the direction the Application should have been filed and served before the closure of the business on 26th May 2023.
19. The Respondent had neither moved to have the statutory demand set aside, nor filed an affidavit in opposition 7 days prior to the hearing. Despite the Applicant's counsel had objected for the time being granted and moved for orders in terms, the Court granted the Director of the Respondent further time as he intimated that he wishes to settle. The Respondent failed to file the application and the appointment as per the strict direction made on 19th May 2023.

20. The above conduct is a clear disregard on the part of the Respondent for the direction/ order made by the Court. Therefore, on this failure of the Respondent , the Applicant Company is entitled to have the order made on 19th May 2023 activated and have orders in terms of the Application to wind up the Respondent company.

F. Merits

21. In fairness to the Respondent, notwithstanding the above predicament it has to face, I have carefully considered the contents of the affidavit in support filed on behalf of the Respondent, in order to ascertain whether there is any merit for the leave to be granted to oppose the Application, pursuant to the rule 15 of the Companies (Winding up) Rules 2015.

22. Even if the leave is granted to oppose under rule 15 above, another hurdle that would stand against the Respondent is the requirement of leave pursuant to section 529 (1) of the Companies Act 2015 **to rely on the grounds that it had relied on or could have relied on, but did not rely on in a setting aside Application.** However, for the leave to be granted under this section, the Court has to be satisfied that the Respondent is solvent as required by sub section 529 (2).

23. For the purpose of proving the Solvency, what the Respondent has adduced as evidence is an email from HFC Bank, which merely states that its client (**Shivanjali Narayan**) has been meeting the required loan repayments for the past 6 months. This is not proper document that can be accepted as evidence and acted upon. No satisfactory evidence is adduced to substantiate the solvency. Granting of leave under these circumstances is not warranted at all. Accordingly, this Court has no alternative, but to refuse the leave and grant orders as prayed for in the Application for winding up.

24. The Respondent's contention, if any, that there is a genuine dispute about the existence or amount of a debt, or if there is an offsetting claim, or there is an alleged defect in the statutory demand, or if there will be substantive injustice if the statutory demand is not set aside, all these should have been addressed in an application for setting aside statutory demand, which stage is now beyond the reach for the Respondent company.

25. A company which does not apply to have the statutory demand set aside within the 21-day strict time limit set out in section 516, or having so applied, has been unsuccessful in its Application to set aside the statutory demand – cannot – at the subsequent winding up application - rely on the existence of a genuine dispute about the debt, or on an alleged offsetting claim, or on an alleged defect in the demand, or an argument that substantial injustice will be caused if the demand is not set aside. The court will only grant leave if it is satisfied that the ground is material in proving that the company is solvent.

26. Before proceeding to conclude, let me consider whether this Court is at liberty to reopen a winding up Application, which is deemed dismissed with the operation of law under section 528 (3) , if it is not extended in terms of Section 528(2) of the Companies Act 2015.

27. I am mindful of the statutory requirement under section 528 of the Companies Act that winding up Applications are to be determined within six months from the date of filing. The

winding up proceedings hereof were filed on **28th February 2023**. The six months would have lapsed on **28th August 2023**, which was just 10 days after the final hearing held on **18th August 2023**. Section 528 provides that an Application "***is to be determined within six months***". However, the Court may by order, pursuant to section 528(2), extend that time if special circumstances justify the extension provided the order for extension is made within the six months period.

28. The Section, in my view, does not impose any hard and fast rule, and the words used in the section 528 read as "***An application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made***". I am inclined to extend the time period as I consider that special circumstances exist in this case as follows.
- a. When this matter, as per the Application, was to be heard on 11th April 2023, being the first hearing date, it being brought to my notice on 28th March 2023 in Chambers that the new Deputy Registrar for this Court had not assumed duties, directions were given by me as per paragraph 4 above. Accordingly, having fixed the new date for compliance hearing before the Registrar, the hearing before the Court was fixed for **3rd May 2023**. As a result, a period of more than 3 weeks' time was lost out of six months' statutory time period.
 - b. When the matter came up on 3rd May 2023, being the due date for hearing, the Director of the Respondent by appearing in person obtained 2 weeks' time to settle. The learned Counsel for the Applicant was amenable for granting two weeks' time. But later on 19th May 2023, instead of settling the matter, the Respondent through its Solicitors moved to file papers seeking for leave to oppose the Application, which too was granted despite the Applicant's Counsel objected and moved for Orders in terms of the Application for winding up. This process alone from 19th May 2023 till the final hearing on 18th August 2023 had delayed the matter for further 3 months out of the 6 months statutory period.
 - c. Finally, the hearing being held on 18th August 2023, just 10 days prior to the 6 months expiry date that was to fall on 28th August 2023, the matter was then adjourned for Ruling today 28th September 2023 .
 - d. I can vividly remember that the learned Counsel for the Applicant, at the end of the hearing, reminding me of the impending expiry date falling before the date fixed for ruling, which was positively responded by me to the effect that the expiry date would be extended. From the hearing transcript, I find that, unfortunately none of our voices have been duly captured by the sound system. The relevant part remains blank in the script. However, until I ventured to prepare the Ruling just one week ahead of the date for Ruling, it had escaped my attention that the 6 months period had already expired on 28th August 2023.
 - e. In this matter, I observe that the Applicant's Solicitors had taken all the required steps in timely manner and no delays were caused by them. But, due to certain administrative delays, the delays caused by the Respondent and due to inadvertency occurred on the part of the Court, the 6 months period has expired. I am of the view that the parties should not be punished for no fault on their part.

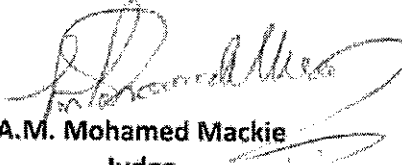
29. The above factors have caused some delay in the determination of these proceedings. Accordingly, in order to do justice in this regard, I am inclined to follow the decision of Justice A. Tuilevuka, in ***Dominion Wire & Cables Pte Ltd v AJYNK Electrical Pte Ltd [2022] FIHC 181; HBE26.2021 (12 April 2022)*** where his Lordship stated as follows;

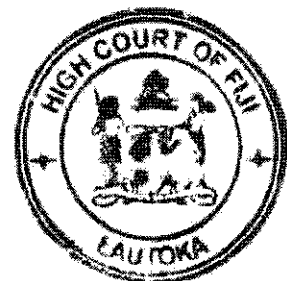
"In the circumstances, I am of the view that this Court has a discretion to step in to preserve the integrity of the processes, which the applicant has set in motion in these proceedings. In saying that, I take into account that the ruling date had been set by the court inadvertently with oversight of the fact that the date set would take this judgment to barely a week out of the six months provision. Considering that, I rely on the principle of nunc pro tunc ("an act done retrospectively so as not to prejudice a party- what should have been done then could be done now by court") – with all the necessary time adjustments (Southwick v State [1997] FJCA 5; Aau0020u.96s (14 February 1997). Accordingly, I extend the time for determination of this matter from 04 April 2022 to 12 April 2022".

30. For the reasons stated above, I decide to extend the time period for the determination of this matter by further one month time with effective from 28th August 2023 till 28th September 2023. I grant an order that the Company be wound up and further orders in terms of the Application for winding up filed on 28th February 2023. Considering the circumstances no costs ordered.

G. Final Orders:

- a. The time period for the determination of this winding up Application is extended with effective from 28th August 2023 till today the 28th September 2023.
- b. The Application by the Respondent seeking for leave to oppose fails.
- c. The Originating Summons filed on 1st June 2023 by the Respondent is hereby dismissed.
- d. Orders are hereby granted in terms of the Application for Winding up filed on 28th February 2023.
- e. No costs ordered.


A.M. Mohamed Mackie
Judge



At High Court Lautoka this 28th day of September, 2023.

SOLICITORS:

For the Plaintiff:

Millbrook Hills Law Partners, Barristers & Solicitors

For the Defendants:

Jiten Reddy Lawyers, Barristers & Solicitors