

IN THE HIGH COURT OF FIJI AT SUVA

COMPANIES PROCEEDINGS

Action No. HBE 24 of 2016

IN THE MATTER OF WESTERN WRECKERS LIMITED a limited liability company

having its registered office at 34 Belo Street, Samabula and P.O. Box 4096

Samabula, Suva in the Republic of Fiji.

AND

IN THE MATTER OF THE COMPANIES ACT 2015.

Counsel : Mr. G. O'Driscoll for the Appellant.

Ms. J. Lal for the Respondent.

Written Submissions : 02nd May, 2018 & 17th May, 2018

Date of Judgment : 22nd May, 2018

JUDGMENT

[1] The respondent, Bank of South Pacific instituted these proceedings before the learned Master of the High Court seeking an order of winding up of the appellant company. The learned Master in his ruling dated 28th June, 2017 made the following orders:

- (i) That Western Wreckers Limited is hereby wound up under the provisions of Companies Act No. 3 of 2015;
- (ii) That the Official Receiver is appointed as the liquidator to the conduct of the Winding Up herein; and
- (iii) That there will be an order for costs against the respondent Western Wreckers Limited summarily assessed at \$1,500 to be paid within 14 days timeframe.
- (iv) Special circumstances justified the extension to the delivery of Judgment to 28th June, 2017

[2] On 05th July, 2017 the appellant Western Wreckers Limited filed notice and grounds of appeal seeking to challenge the findings of the learned Master on the following grounds:

- (i) The application for winding up filed on 11th November, 2016 had not been determined prior to 11th May, 2017. The Master of the High Court erred in law having not disposed the matter on or before 11th May 2017 and in granting an extension beyond that date without application having been made acted in breach of the provisions of the Companies Act 2015.
- (ii) The Master of the High court erred in law and in fact in failing to consider the argument put forward by the company that the Petitioner had made arrangements with other security donors in respect of the same debt to the detriment of the company and thereby should have ordered that the matter be filed in the civil jurisdiction so that such issues could be made rather than making summary orders.

[3] The court by its ruling dated 29th September 2017 stayed the enforcement of the order of the learned Master until the final determination of the appeal.

[4] When this appeal came up for hearing before this court on 11th April, 2018 both parties informed court that they would be relying on written submissions and the court granted both parties to file their respective submissions till 02nd May, 2018. The respondent filed written submissions of 02nd May, 2018 but the appellant did not file submissions.

[5] Section 528 of the Companies Act 2015 (the Act) provides as follows:

(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.

[6] Section 528(1) of the Act 2015 requires the court to determine winding up applications in insolvency within six months from the date of the application for winding up. In this instance it is common ground that the application for winding up was made on 11th November, 2016 and the winding up order was made on 28th June, 2017 more than seven months after the application was made.

[7] Under section 528(2)(a) an extension of time can be given only if there are special circumstances warranting such an extension. In the ruling of the learned Master no reasons have been given for the extension. In the ruling it is merely stated that special circumstances justified the extension to the delivery of judgment to 28th June, 2017 which is, in my view, not sufficient compliance of the requirements of section 528(2)(a).

Therefore the court is unable to consider whether the circumstances referred to in the ruling of the learned Master in fact warranted the extension of time.

[8] Section 528(2) requires the court to make an order extending the time and the reasons for the extension must be given but no such order is found on record. Section 528(2) confers discretion on the court to extend the time and such discretionary power must be exercised judicially.

[9] Section 528(3) provides that if the matter is not determined as required by section 528(2) and (3) it stands dismissed. This is a very harsh provision but the court is not entitled to deviate from it. The respondent is penalised for no fault of his. The situation would have been different had the learned Master made an order extending the time giving reasons for the extension of time before the time prescribed by section 528(1) of the Act. The failure to comply with the provisions of section 528(1) and (2) is fatal to the application for winding up and therefore, the application for winding up stands dismissed by operation law.

[10] The other ground of appeal is that the learned Master failed order that the matter be filed in the civil jurisdiction rather than making a summary order. This ground of appeal is based on the argument that the petitioner had made arrangements with other security donors in respect of the same debt to the detriment of the company.

[11] Section 513(c) of the Companies Act 2015 provides that a company can be wound up if it is insolvent.

[12] Section 515(a) provides:

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; ...

[13] The respondent (creditor) is free to decide which cause of action he will pursue to recover his debt. The court cannot and will not tell a party which cause of action he should pursue to recover his debts. The law in its own wisdom has not made provisions as to which cause of action one should pursue when he has more than one causes of action. Therefore, the 2nd ground of appeal is without merit.

[14] For the reasons aforementioned the court makes the following orders:

1. The appeal of the appellant is allowed.
2. The ruling of the learned Master of the High Court is set aside.
3. The application winding up is dismissed.
4. The respondent is ordered to pay \$1000.00 as costs of this appeal.



22nd May, 2018


Lyone Seneviratne

JUDGE