

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBE 07 of 2019

BETWEEN : **SOUTH PACIFIC MARINE LIMITED** a limited liability Company having its registered under the Companies Act and having its registered office at 1 Copra Shed Marina in Savusavu.

APPLICANT

AND : **PRICEWATERHOUSECOOPERS** registered as a Firm under the Companies Act, and member Firm of the PwC Global Network, having its office situated at Level 8, Civic Tower, 272 Victoria Parade, Suva.

RESPONDENT

Counsel : Applicant: Mr S. Deo
Respondent: Ms P. Low & Mr K. Skipper
Date of Hearing : 18 February, 2019
Date of Judgment : 21 February, 2019

JUDGMENT

INTRODUCTION

1. This is an action filed in terms of Section 516 of Companies Act, 2015, seeking setting aside of the statutory demand notice for a winding up of Applicant. This matter was filed on 31.01.2019 and it was issued subsequently on 4.2.2019 and it was served to the Respondent's registered office on 8.2.2019. These facts are admitted by the Applicant. When the matter was called on 18.2.2019 the counsel for the Respondent raised a preliminary objection that the application needs to be dismissed *in limine* as it had not complied with the mandatory provisions contained in Section 516 of Companies Act, 2015. The Applicant was given an opportunity to make oral submissions and file written submissions. The Respondent did not submit written submission and only relied on Fiji High Court case HBC 112 of 2014 *One Hundred Sands Ltd vs Te Arawa Ltd* (Decided on 30.6.2015).

ANALYSIS

2. The Applicants had filed a written submission. Two cases submitted with the written submissions relate to old Companies Act which was repealed. In the repealed Act, there was no provision for setting aside of Statutory Demand or provision similar to Section 516 of Companies Act, 2015 and cannot be applied, to this case. The other two decisions were rulings of Master, but they do not interpret the Section 516 of Companies Act, 2015 or whether it is directory or mandatory.
3. Companies Act, 2015 introduced new statutory regime for setting aside Statutory Demand and reference to repealed Companies Act and cases decided on the procedure, regarding setting aside of Statutory Demand, is irrelevant and spent.
4. The Applicant had also relied on Companies (Winding Up) Rules 2015. Again when the provision in the Companies Act, 2015 is clear and unambiguous, as to make it mandatory Rules made under the same Act, cannot make it directory. It is trite law that subordinate legislation needs to be interpreted so as not to conflict with the Act that empowered such rules. If the argument of the Applicant is taken there will not be any mandatory provisions contained in Companies Act, 2015 regarding winding up, even when the language of the Companies Act is clear and unambiguous, to make the provision mandatory. This is not correct interpretation of a statute.
5. In *Britnell v Secretary for State for Social Security* [1991] 2 All ER 726 (at p732) UK House of Lords (Per Lord Keith of Kinkel) discussed a statute that allowed Regulations to modify it, but held that even in such a situation,

"It would in any event have been strange if a power to modify had been construed as authorising the annulment of a mandatory provision."

6. *A fortiori*, Rule 5(1) of Companies (Wining Up) Rules 2015¹ states that said rules will only apply if no procedure is provided in the Companies Act, 2015. Since the procedure regarding time limit and service of the application and affidavit in support of setting aside of Statutory Demand is contained in the Companies Act, 2015, no reliance can be made on the said rules.
7. Even if I am wrong on the above, the Court is empowered to give directions in terms of Rule 5(2) of Companies (Winding Up) Rules, 2015 to adopt a correct procedure if there is a doubt. As I have stated earlier Rule 116 of Companies (Winding Up) Rules, 2015 can only apply to directory provisions in the Companies Act, 2015. Application of that to mandatory provision in the Act, would create an unintended position.

¹ Companies (Winding Up) Rules , 2015(LN 110 of 2015) commenced on 1.01.2016.

8. There is no dispute as to the facts of this matter. The statutory demand in terms of Section 515 of Companies Act, 2015 for a winding up action, was served on the Applicant by the solicitors of Respondent on 11.01.2019. This action for setting aside of the Statutory Demand, was filed on 31.01.2019 and the service of the summons and affidavit in support of summons was on 8.2.2019.
9. Section 516 of the Companies Act, 2015 states as ;
- “516.—(1)A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.*
- (2)An application may only be made within 21 days after the demand is so served.*
- (3)An application is made in accordance with this section only if, within those 21 days—*
- (a) an affidavit supporting the application is filed with the Court. and*
- (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.”(emphasis added)*
10. A company that had been served with the Statutory Demand, can apply to the High Court for an order to set aside the Statutory Demand but the time period is restricted to 21 days.
11. Section 516(3) of Companies Act, 2015 states that such application is made only if affidavit in support is also filed within the 21 day time period and both application and copy of affidavit supporting affidavit is served to the ‘*person who served*’ the statutory demand to the Company (i.e Applicant).
12. In this case it is admitted, that there was no service of summons and or affidavit in support of the application to the solicitors of the Respondents who had served the statutory demand to the Applicant. This was not raised as an objection so I would refrain from determining that.
13. The preliminary objection was regarding noncompliance with the time period regarding the service.
14. In the absence of any specific provision regarding the computation of time in the Companies Act, 2015 the following provision in the Interpretation Act, 1967. Applies: Section 51 of Interpretation Act

“Computation of time

51. In computing time for the purpose of any written law, unless a contrary intention appears-

- a) *a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*
- b) *if the last day of the period is a Saturday, Sunday or a public holiday (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*
- c) *where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*
- d) *where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."*

15. According to the said provision the 'day on which the event happened or the act or thing was done + would be exclusive , but that is when the time period for doing a thing is less than 6 days.
16. The time period for service is 21 days, in terms of section 516 (3) of Companies Act 2015 hence excluded days will not be reckoned.
17. The date of service of to the Respondent was on 8.2.2019. Section 516 (2) of Companies Act, 2015 stipulates the time period. In Section 516(3) further states, that compliance of 21 day is '*only if*' the application and the affidavit in support is served within 21 days from the service of the Statutory Demand.
18. The compliance of Section 516(3) of Companies Act 2015 is mandatory due to two reasons. First, the use of language '*only if*' makes it mandatory. The grammatical meaning of the said provision is that requirements are indispensable. Secondly, if it is not mandatory, the alleged debtor company, could use this provision of setting aside of the Statutory Demand, to postpone or delay winding up action. The legislature had prevented, it through usage of restrictive language. Purposive interpretation of section 516(3) of Companies Act 2015 makes it mandatory.
19. If the 21 day time is not applied to service of application and affidavit, a debtor may delay the winding up action of the creditor, without a valid ground. This can be done by filing an action for setting aside of the winding up notice but delay the service of the same application to the creditor, so that they will be kept searching for the grounds of the application for setting aside of Statutory Demand or they will be in two minds to proceed with the winding up action. Statutory Demand is required to give 21 days period for debtor company to settle it, or to face winding up action. So it is nothing but fair, to give same time period to serve an application for setting aside of Statutory Demand.

20. Maxwell on the Interpretation of Statutes (5th Edi) p 28 stated as follow,

'The first and most elementary rule of construction is that is to be assumed that the words and phrases of technical legislation are use in their technical meaning if they have acquired one, and otherwise in their ordinary meaning and the second is that the phrases and sentences are to be construed according to the rules of grammar.' (Foot notes deleted)

21. It is also noted that legislation had given 21 days to file an action for setting side and the alleged debtor is also given same time period to settle the debt in order to avoid an action for winding up. So the creditor company knows whether they could proceed with the winding up notice, upon the lapse of 21 days, when the debt is not settled and there is no service of application for setting aside:
22. The service of application for setting aside of Statutory Demand and affidavit in support to the party that served it important since they can take further actions relating to their demand when there is no service of application for setting aside within 21 days.
23. According to the case record and admitted facts before the court the Applicant had not served the summons and affidavit in this action within 21 days of the service of winding up notice to 'the person served demand.'
24. Lord Diplock held that when the meaning of the provision in an enactment is plain 'it is not for the judges to invent fancied ambiguities' (see *Duport Steels v Sirs* (1980) 1 WLR 142 to 157). The language of Section 516 of Companies Act, 2015 is clear, and the requirements contained in Section 516(3) are mandatory and non-compliance is fatal.
25. In the written submissions the Applicant had also relied on Section 517 of Companies Act, 2015 which deals with the scope of an inquiry when a proper application is before the court for setting aside of Statutory Demand issued in terms of Section 515 of Companies Act,2015. When a preliminary objection is raised as to defects, as in this case, it will be wrong to consider Section 517 of Companies Act 2015 and requirements under that. So this contention that court needs to consider provisions contained in Section 517 of Companies Act 2015, contained in the written submission of the Applicant is without merit.

CONCLUSION

26. An action for winding up is the last resort for a creditor and this is available for a good reason. Company is a statutory creature and its liquidity is a concern to all persons dealing with that. Statutory Demand to the debtor is the final notification before winding up and setting aside of it is a statutory creation that stalls winding up action at its inception and takes away a vital but a important tool in the creditors' armoury for collection of debt, in

commerce. There is 21 day time period to settle the debt and if not the creditor can take steps for winding up. The same time period is given for debtor to seek setting aside of Statutory Demand. These time periods are mandatory and Rule 116 of Companies (winding up) Rules 2015 has no application to mandatory provisions contained in Section 516 of Companies Act, 2015. Accordingly the preliminary objection is sustained and the action is struck off for non-compliance of the mandatory provision contained in Section 516(3) of Companies Act, 2015.

27. The Applicant is ordered to pay a cost of \$1,000 summarily assessed to the Respondents within 21 days.

FINAL ORDERS

- a. The summons filed on 31.1.2019 seeking setting aside of the winding up notice is struck off.
- b. Cost is summarily assessed at \$1,000 to be paid by the Applicant to the Respondent within 21 days.

Dated at Suva this 21st day of February, 2019.




Justice Deepthi Amaratunga
High Court, Suva