

IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 60 of 2020

IN THE MATTER of METAL SAFEWAY ENGINEERING & CHEMICAL

SUPPLIES PTE LIMITED a limited liability company having its
registered office at Lot 1 Reservoir Road,
Warehouse No. 2, Suva, Fiji.

AND

IN THE MATTER of the Companies Act 2015.

Counsel : Mr. Narayan E. for the Creditor Company
Mr. Chand A. for the Debtor Company
Ms. Kete P. for Supporting Creditor
Ms. Nand S. for Supporting Creditor

Date of hearing : 25th March 2021

Date of Judgment : 07th October 2021

JUDGMENT

[1] Carpenters Fiji Pte Ltd, (the Applicant) served on the Metal Safeway Engineering & Chemical Supplies Pte Ltd (the Respondent) a statutory demand claiming \$23,245.19 together with \$2000.00 being the legal costs.

[2] The respondent did not make an application to set aside the statutory demand and the applicant filed the application for winding up.

[3] Four companies namely, BASIC INDUSTRIES PTE LIMITED, KASABIAS PTE LIMITED, VINOD PATEL & COMPANY LIMITED and VODAFONE FIJI PTE LIMITED filed notice of intention to appear as supporting creditors.

[4] At the time this matter was taken up for hearing the period within which an application for winding up should be concluded has lapsed. The court brought this to the notice of the parties and they were heard on this issue. The parties were also given time to file their respective submissions and only the Creditor Company filed its submissions.

[5] Section 528 of the Companies Act 2015 provides:

An application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made.

(1) 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.

(2) An application is, because of this subsection, dismissed if it is not determined as required by this section.

[6] The learned counsel for the Creditor Company in his submissions relied on section 674 of the Companies Act 2015 which provides:

(1) In this section, unless the contrary intention appears—

- (a) a reference to a proceeding under this Act is a reference to any proceeding, whether a legal proceeding or not; and
- (b) a reference to a procedural irregularity includes a reference to—
 - (i) the absence of a quorum at a meeting of a Company or a Managed Investment Scheme, at a meeting of Directors or creditors of a Company or Manager of a Managed Investment Scheme, at a joint meeting of creditors and Members of a Company or a Managed Investment Scheme; and
 - (ii) a defect, irregularity or deficiency of notice or time.
- (2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
- (3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, being a person entitled to attend the meeting or the Registrar, declares proceedings at the meeting to be void.
- (4) A Member does not have a reasonable opportunity to participate in a meeting of Members, or part of a meeting of Members, held at two or more venues, the meeting will only be invalid on that ground if—
 - (a) the Court is of the opinion that—
 - (i) a substantial injustice has been caused or may be caused; and
 - (ii) the injustice cannot be remedied by any order of the Court; and
 - (b) the Court declares the meeting or proceeding, or that part of it, invalid.
- (5) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by

any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes—

- (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a Company is not invalid by reason of any contravention of a provision of this Act or a provision of a Company's Articles of Association;
 - (b) an order directing the rectification of any register kept by the Registrar under this Act;
 - (c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
 - (d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation including an order extending a period where the period concerned ended before the application for the order was made or abridging the period for doing such an act, matter or thing, or instituting or taking such a proceeding, and may make such consequential or ancillary orders as the Court thinks fit.
- (6) An order may be made under subsection 5(a) or (c) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.
- (7) The Court must not make an order under this section unless it is satisfied—
- (a) in the case of an order referred to in subsection (5)(a)—
 - (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
 - (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
 - (iii) that it is just and equitable that the order be made;
 - (b) in the case of an order referred to in subsection (5)(a), that the person subject to the civil liability concerned acted honestly; and

(c) in every case, that no substantial injustice has been or is likely to be caused to any person

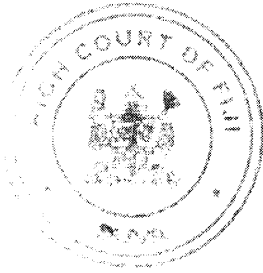
- [7] Section 674 above deals with irregularities and in this matter there is no irregularity but the issue here is whether the court has the power to extend the time prescribed by section 528 of the Companies Act 2015 (the Act) after the expiration of that period.
- [8] The learned counsel also in his written submissions referring the to some Australian decisions and relevant section of the Corporation Act 2001 which is identical to section 528 of the Companies Act 2015 has relied on the "slip rule" and Latin maxim "*nunc pro tunc*".
- [9] In the decision of the Federal Court of Australia in **Elyard Corporation Pty Limited - v- DDB Needham Sydney Pty Ltd** [1995] FCA 1685 (24 November 1995). In that case the extension granted by the registrar but it was not included in the judgment and the learned primary Judge subsequently included it in the judgment relying on the slip rule and the maxim *nunc pro tunc*.
- [10] The learned counsel also cited the decision in **Soil and Contracting Pty Ltd -v- Boban Pty Ltd** [2014] WASC 402. In that case the Master of the Supreme Court of Western Australia has referred to many authorities and set down principles governing the application of the slip rule. Rule No. 1 is that there must be an order in need of correction.
- [11] Slip rule according to the Oxford Dictionary of Law is;
- The rule permitting the correction of any accidental slip or omission in judgment or orders.
- [12] *Nunc pro tunc* means now for then that is what the court should have done earlier could be done now.
- [13] I am of the opinion that the above decisions and the maxim "*nunc pro tunc*" permits the court to correct it's mistakes and avoid any injustice that would be caused to the parties.
- [14] Section 528 of the Companies Act 2015 specifically confers power on the court to extend the time before the expiration 6 months period or if the time has already been extended before the expiration of the extended period.

[15] The Court does not have power to override statutory provisions exercising its inherent powers. Inherent powers can be exercised in the interest of justice only when there are no statutory provisions available.

[16] For the reasons set out above the court makes the following orders.

ORDERS

- (1) The application for winding up is dismissed.
- (2) There will be no order for costs.



Lyone Seneviratne

JUDGE

07th October 2021