

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 34 of 2021

IN THE MATTER OF PACIFIC BUILDING SOLUTIONS PTE LIMITED a limited liability company having its registered office at 9-12 Nukuwatu Street, Wailada Industrial, Lami, Viti Levu.

AND

IN THE MATTER of the Companies Act 2015.

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr Singh R. for the Applicant
Mr O'Driscoll G. for the Respondent

Date of Ruling: 31st October 2022 at 9-30am.

DECISION

[Winding Up Application - Period within which Application to be determined]

Introduction

- [1] The Applicant, Teqwise Business Innovation Pte Ltd formerly known as Fiji Xerox Business Centre (Fiji) Pte Ltd, filed this Winding Up Application on 20th August 2021 and sought for the following orders:-
- (i) That Pacific Building Solutions Pte Limited be wound up under the provisions of the Companies Act 2015.
 - (ii) That the Official Receiver be appointed to conduct the winding up, and
 - (iii) That such further or other orders as may be just.
- [2] The Application is required to be determined with a period of 6 months after it is made. That is on or before the 20th February 2022 under **Section 528(1) of the Companies Act 2015**.
- [3] On 24th September 2021, the Respondent Company filed a Notice of Motion coupled with an Affidavit in Support and sought for Leave to oppose the application of the Applicant together with costs pursuant to **Section 529 of the Companies Act 2015**.
- [4] This Court heard the Respondent Company's Notice of Motion and delivered a Decision on 16th February 2022, some 04 days prior to the 6 months expiration period on 20th February 2022 and made the following orders:-
- (i) The Respondent Company is granted Leave to Oppose the Application and at liberty to file and serve it's Affidavit Evidence within fourteen days' timeframe.
 - (ii) There will be an Order for summarily assessed costs of \$500 to be paid by the Applicant to the Respondent Company, Pacific Building Solutions Pte Limited.
 - (iii) The substantive matter to take its normal cause of action and a date to be assigned accordingly.
- [5] The hearing date of 8th July 2022 was accordingly assigned.
- [6] It will be noted from the file records, that the Applicant did not endeavour to seek the extension of the Winding up Application beyond the 6 months period when it is to be determined either orally or by formal application.
- [7] The Winding up Application came for Hearing on the returnable date of 8th July 2022. This Court then found that the substantive Winding up Application had already expired on 20th February 2022. Therefore, there was no application before this Court for hearing and determination.
- [8] The Applicant's then raised a **preliminary issue** that the substantive Winding up Application was still very much alive after the delivery of the Decision on 16th February 2022 and that the Court Registry had accepted documents thereafter. Therefore, the Applicant's contention was that by its implication, the Application for the substantive Winding up was still alive.
- [9] The Respondent submitted that Court should decide on the Preliminary Issue.

- [10] The Court had to vacate the Hearing date of 8th July 2022 and reschedule the case to 25th July 2022 for the preliminary hearing and determination.
- [11] The Applicant in summary submitted that the Winding up Application filed on 20th April 2021 should expire in February 2022.
- [12] However, the Respondent filed **Section 529** application to oppose the application and was accordingly granted the orders by the Court on 16th February 2022, some 04 days prior to the expiry period of 6 months and pursuant to **Section 528 of the Companies Act**.
- [13] The Respondent's contention was that the Courts power under **Section 528** which deals with "**Period within which application must be determined**" will overrule **Rule 20 of the Companies (Winding Up) Rules 2015, which deals with "Adjournment of winding up applications"**.
- [14] He also made reference to the Lautoka Case: **HBE 26 of 2021 - In the Matter of Ajynk Electrical Pte Limited**. Reference was made to **Rule 3 of the Companies (Winding up) Rules 2015 which deals with "Dispensation from compliance with these rules**.
- [15] Winding up Application filed on 20 August 2021 and after a lapse of 6 weeks called "before the Deputy Registrar on 8th October 2021, 11th October 2021 then vacated and re scheduled to 23rd November 2021 respectively. It will be noted that from 20th August 2021 to 23rd November 2021 a period of 3 months had already expired.
- [16] The Respondent submitted that-
- Winding up Rules not mentioned in Hon. Chief Justice's Practice Directions issued during Covid 19.
 - Reference was made to the Lautoka case: HBE 08 of 2021 -with reference to **Section 528(1), 528(2) and 528(3) of the Companies Winding up Act**, Justice A.M. Mohammed Mackie said "**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 should stand dismissed by the operation of the law.**"
- [17] There is no mechanism to extend time. **And no formal application made before 6 months expiry for extension of time beyond 6 months (s.528 refers).**

Determination

- [17] The Preliminary Issue for this Court to determine now is "Whether the substantive Winding up Application survives and/or has expired?"
- [18] The Preliminary Issue hinges on **Section 528 of the Companies Act** which states as follows:-

"Period within which application must be determined

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 at 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."*

[19] **Section 528(1) of the Act** hereinabove, has a compulsory requirement of court to hear and determine Winding up Application in solvency where six (6) months from the date of the filing of the Application.

[20] It cannot be disputed by either party that the Application in the current proceedings was filed on 20th August 2021 and should have been heard and determined within a period of 6 months' timeframe on or before 20th February 2022; unless of course the time period was extended before the expiry of six (6) months timeframe pursuant to **Section 528(2) of the Companies Act 2015**.

[21] This Court may use its discretion to involve the provision of **Section 528(2) (a)** to extend the time period of six (6) months provided the Court is satisfied that special circumstances justify the extension beyond the period of six (6) months.

[22] On 16th February 2022, this Court delivered a Decision on Respondent's Notice of Motion for Leave to oppose the Winding up Application filed pursuant to Section 529 of the Companies Act 2015. Leave to oppose was accordingly granted to be filed within 14 days timeframe together with \$500 summarily assessed costs and the substantive Winding Up matter to take its normal cause on a date to be fixed.

[23] On 16th February 2022, the hearing date of the Winding up Application was scheduled for 7th April 2022 at 9.30am. At the same time and date, this Court used its discretion to further extend the time by six (6) months with effect from 22nd September 2021 in terms of Section 528(2) (a) accordingly. In essence, the 'extension' meant that the substantive Winding up Application shall stand disposed of on or before 22nd March 2022.

[24] However, on 7th April 2022, the Applicant sought for the vacation of the Hearing date since he was unable to file/serve his Affidavit in Reply. Accordingly, the hearing date was vacated by consent and reassigned for hearing on 21st April 2022. On 21st April 2022, the Respondent's Counsel was not present, hence the Winding up application was again adjourned to 13th May 2022 for Applicant's Counsel to inform on the representation status of the case.

[25] However, above vacation of Hearing dates and adjournments resulted in the substantive Winding Up Application being delayed beyond the 'extension' of further 6 months granted on 16th February 2022 with effect from 22nd September 2021.

[26] It was the duty of the Applicant's Counsel to ensure that the substantive Winding up Application was determined and is disposed of within the set timeframe of 6 months pursuant to **Section 528(1) of the Companies Act 2015** after the grant of further six (6) months' time on 16th February 2022 with effect from 22nd September 2021.

[27] On 22nd March 2022, the substantive Winding up Application stood dismissed by the operation of the

law.

[28] Provisions of **Section 528 (3)** states that *'an application is, because of this section, dismissed if it is not determined as required by this section 528 (2).'*

[29] The Applicant did not make any applications to Court in order to seek for further 'extension' of time prior to the expiry of six (6) months' timeframe on 22nd March 2022 in terms of **Section 528 (1) and (2)** respectively.

[30] The Applicant's Counsel's failure to comply with the provision within Sections 528(1) and (2) of the Companies Act 2015 is nothing but fatal in the circumstances to the substantive Winding up Application since it stood dismissed by the operation of the law on 22nd march 2022.

[31] Any orders and/or directions or hearing dates scheduled after 22nd March 2022 when the Winding Up Application stood dismissed is to be treated as null and void-ab-initio accordingly.

In Conclusion

[32] Bearing above in mind, the substantive Winding up Application filed on 20th August 2021 stood dismissed on 22nd March 2022.

[33] Any further directions made after 22nd March 2022 stands null and void ab initio since there was no Winding up Application impending determination.

Costs

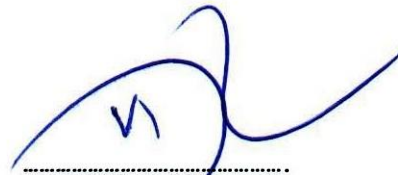
[34] Each party to bear their own costs at the discretion of this Honourable court.

ORDERS

[35] Following are the orders of this court:-

- i. **The substantive Winding up Application filed by the Applicant on 20th August 2021 stood dismissed on 22nd March 2022.**
- ii. **Any directions, orders made and/or Hearing dates scheduled after 22nd March 2022 to be treated as null and void-ab-initio since the Winding Up Application stood dismissed on 22nd March 2022.**
- iii. **Each party to bear their own costs at the Court's discretion accordingly.**

Dated at **Suva** this 31st day of October 2022.



.....
Vishwa Datt Sharma
JUDGE

cc: **Messrs O'Driscoll & Co., Suva.**
Parshotam Lawyers, Suva.