IN THE HIGH COURT OF FIJI AT SUVA
COMPANIES JURISDICTION

Winding Up Action No: HBE 34 of 2023

IN THE MATTER of **THE CREATIVE COMPANY PTE LIMITED** a limited liability company having its registered office situated at 150 Nailuva Road, Suva.

AND

IN THE MATTER of the Companies Act 2015

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. M. Saneem for Petitioner

Mr. V. Kapadia for the Respondent Company

Date of Hearing: 30.5.2024

Date of Judgment: 24.07.2024

JUDGMENT

INTRODUCTION

[1] Petitioner had borrowed money to the Company (Respondent) in terms of agreements since 2008. On default of the payments on two such agreements, a statutory Demand was served to the Company on 30.6.2023 for a sum of $374,614.82.

[2] One such default was loan of $100,000 in terms of loan agreement entered on 5.6.2018 and the other was an agreement for re- write of three existed loan accounts and consolidation of amounting to $180,000.

[3] The Company is estopped from denying both agreements as it had

complied with payments as agreed in terms of two payment schedules relating to the two agreements, for some time and, had also paid reduced instalments for years, before payments were stopped. So the loan agreements were partially complied by the Company, without any objection for a long period.

[4] The Company did not file an application to set aside statutory demand but sought to seek leave from the court to file an affidavit in opposition and this was granted in terms of Section 529(1) of Companies Act 2015, after filing of the affidavits on 22.1.2024 and the time for hearing of this action was also extended in terms of Section 528(2) of Companies Act 2015 considering the issues for determination.

[5] Admittedly the parties had long term business relationship due to the Company obtaining finance from the Petitioner, but contend Petitioner was neither a licensed nor exempted moneylender in terms of Moneylenders Act 1938.

[6] The Company had obtained the exemption in terms of Section 2(d) of Moneylenders Act 1938, and this fact was confirmed by the secretary to the relevant ministry even as late as 22.3.2024.

[7] According to the Company, exemption from the said Act was not gazetted, hence all the lending to the Company were *null and void ab initio.* This is legally and factually wrong proposition, as there is no mandatory provision to gazette exemptions granted in terms of Section 2(d) of Moneylenders Act 1938.

[8] Next issue is whether there was a genuine dispute to the debt and for this the Company relied on the validity of the exemption granted to Petitioner in terms of Section 2(d) of Moneylenders Act 1938.

[9] Apart from that the Company had also sought a set off for a sum of $49,231.79 and $13,576.25 which cannot be considered as payment of said two loan agreements and the values of the invoices deliberately inflated and it also included services provided by an entiry other than the Company. There is not merit in alleged set off for several reasons, but the main reason is such set off will not reduce the debt below statutory minimum amount.

[10] Alleged set off were for services provided, but these were obvious exaggerations, perhaps to create a non-existent dispute from thin air. Similarly, since the loan accounts clearly shows how the Company had

defaulted and interest charged, which were dealt in detail. So there is no genuine dispute and the debt is above statutory minimum amount.

[11] Petitioner was providing finance to the Company without any form of security which is a high risk, and for this a premium on interest was charged and they were agreed and paid and also re-negotiated by re-writing of the same. By conduct the Company is estopped from denying interest charged and or authority.

[12] The Company is now disputing the authority of the Petitioner to grant such finances, having obtained such money and invested them in its business for a considerable time period. The dispute is not genuine and a delaying tactic for repayment for obvious reasons.

[13] Petitioner had submitted two letters from the relevant line Ministry confirming the exemption granted in terms of Section 2(d) of Moneylenders Act 1938 and one such letter is from the Permanent Secretary of the relevant ministry , even as late as 22.3.2024. The Company's refusal to accept Petitioner exempted from Section 2(d) of Moneylenders Act 1938, is not a genuine dispute.

[14] There is no requirement to gazette exemptions in terms of Section 2(d)of Moneylenders Act 1938 or Interpretation Act 1967, though such publication where made regarding some entities which were exempted, but the **legislature had not made such publications mandatory** though Section 6 of Moneylenders Act 1938, required publication of licenced Moneylenders in terms of Moneylenders Act 1938. *Expressio Unius Est Exclusio Alterius* rule applies.

[15] Permanent Secretary to the line ministry had indicated why they did not publish gazette notification relating Petitioner's exemption. So non publication of the Company as exempted under Section 2(d) of Moneylenders Act 1938 and publication of some of such exempted entities cannot be used against the Petitioner.

[16] Objections raised by the Company cannot be considered as *bona fide* disputes as the Company is estopped from denying the agreements and outstanding balance in terms of the agreement it had entered and complied in terms of the payment schedules. Legal objections taken by the Company were overruled for the reasons given and order for winding up granted and official receiver is appointed as provisional liquidator.

FACTS AND ANALYSIS

[17] Following affidavits were filed;

a) Application for Winding Up and Affidavit Verifying application for Winding up filed on the 14.08.23;

b) Notice of Intention for Respondent to Appear on Application filed on 27.10.23;

c) Notice of Motion and Affidavit of Manish Vishal Sharma in Support of Notice of Motion filed on 27.10.23 seeking leave to file affidavit in opposition.

d) Affidavit in Response of Arveen Anand (Application for Leave to file Affidavit in Opposition) filed on 24.11.23;

e) Affidavit of Manish Vishal Sharma (in Reply to Affidavit of Arveen Anand) filed on 08.12.23;

(Leave to oppose in terms of Section 529(1) of Companies Act 2015, granted)

f) Affidavit of Manish Vishal Sharma (in opposition to the Winding Up Application) filed on 23.02.24;

g) Affidavit of Arveen Anand (in Response to Affidavit in Opposition to the Winding Up Application) filed on 18.03.24;

h) Supplementary Affidavit of Arveen Anand (in support of Winding Up Application) filed on 20.05.24;

k) Affidavit in Opposition of Manish Vishal Sharma (to the Supplementary Affidavit of Arveen Anand) filed on 27.05.24;

i) Affidavit of Arvind Anand sworn on 30.5.2024. (which was objected at the start of hearing but relied by counsel for the Company to its Annexed document marked 2 which was a document provided by the Petitioner's solicitor with its letter of 20.9.2023 and acknowledged by letter of 17.10.2023. Both communications of the solicitors were annexed, **without the attached 'account statement'** which was annexed in the said affidavit marked 2. So the said 'account statement' accepted as evidence by consent at hearing and relied by counsel for the Company to show unexplained penal interests charges amounting to $1,525 in Account No 1010004183119)

[18] Debt in terms of statutory demand served was a sum of $374,614.82 under two agreements. The Statutory Demand dated 30.6. 2023 annexed to the Statutory Affidavit filed on the 14.8. 2023.

[19] The two agreements relate to two accounts (The Two Accounts) of the Company and they were:

a. 101000418321(balance as at 30.04.2023, for a sum of $243,174.62)
b. 101000418319(balance as at 08.06.2023, for a sum of $131,440.20)
(Total sum contained in the demand was total of a and b for $374,614.82)

[20] According to the Company alleged debt is disputed by the due to the fact that:

a) Firstly it is unenforceable being in breach of the Moneylenders Act 1938.
b) **Secondly** the debt is not payable and no reconciliation has been given on the amount outstanding.
c) Thirdly there being no offset of claims for services provided by the Company to Petitioner and another legal entity in the sum of $49,231.79 and $13,576.25

GENUINE DISPUTE

[21] The Company must show that there is a plausible contention as to the debt hence, there is a genuine or bona fide dispute. At the hearing of winding up, the dispute must be to show that there is no undisputed debt of over $10,000. If the dispute is bona fide relating to sum or part of it, first it must pay the undisputed sum to show it's bona fide.

[22] Statutory Demand was relating to loan agreements entered along with specific payment schedules. The loan agreement entered on 5.6.2018 was a loan of $100,000 and the other was a re-write of three existed loan accounts, and both had separate loan repayment schedules. The Two Accounts relating to statutory demand were commenced from said agreements for the sums stated in the said agreements.

[23] From the Two Accounts 101000418321 relate to loan agreement entered on 5.6.2018. The later account relate to re-write of three

existed loans to consolidate a sum of $180,000 for the repayment schedule agreed by the Company. The Company had partially complied with said schedules of payment, but then paid reduced instalments and then stopped payment before demand was served.

[24] The conduct of the Company shows its inability to pay as the Two Accounts had continued beyond the time initial term of loan (Account 101000418321 intended for 12 months with 6 monthly rates of 25% and 20%, but payments were made as late as 30.8.2022 and Account 101000418319 was for 18 months at 30% 180,000 as principal sum total of three existed accounts for details given, but payments continued till 31.01.2022. A sign of inability to pay its debt when they were due and payable.

[25] The solicitor for the Company had acknowledged the two agreements relating the Two Accounts provided by solicitors for the Petitioner, '**together with account statement**' but this 'account statement ' was not annexed and only the communication of solicitor that annexed such account statement was annexed.(see Annexed documents G, and B of affidavit filed on 27.10.2023.) . This document was later submitted at hearing and the Company relied on that to show two Penalty Interest charges.

[26] On 17.10.2023 solicitors for the Company had written to the solicitors for the Petitioner and referred to their letter of 20.9.2023 which had annexed the account statements of the Two Accounts, but there was no dispute raised about any one or more such transactions contained in the said account statements.

[27] This shows that there was no genuine dispute as to the outstanding debt on the said two loan accounts as per the account statements provided by solicitors for the Petitioner, and the dispute is an afterthought and not a *bona fide* dispute. By this time admittedly parties had also tried to settle the debt amicably as commercial common sense prevailed.

SET OFF

[28] In terms of the agreements relating to the Two Accounts there cannot be any set off other than payments in terms of the agreed payments and services provided to the Petitioner are not part of this repayment schedule agreed by the Company. Even such set off is considered the debt is clearly above the statutory minimum debt for a winding up.

[29] In the letter of 17.10.2023 solicitors for the Company had indicated that there can be a set off of more than $62,000 and had emailed statement of accounts relating to alleged set off and the amounts are exaggerated and prima facie no basis for charging interest on invoiced amounts. Without prior agreement for interest charge for unpaid invoices. This was a deliberate attempt after this action for winding up for obvious reasons.

[30] Solicitors for the Company in the abovementioned letter had raised the issue of non-publication of exemption granted to the Petitioner, under Section 2(d) of Moneylenders Act. This was after obtaining the two loans and also not disputing the account statement provided by solicitors of the Petitioner for the said two loan accounts amounting $374,614.82 and buying time to settle the same through alternate methods. This is dealt later in the judgment .

[31] In the submissions Petitioner contends that no accurate account statement or loan agreements provided, but no such issue was raised in the immediate communication where account statements were acknowledged without any reservation and offered to settle through its solicitors.

[32] Account statements provided are not complex and needs no detail analysis as alleged by purported letter from APNR Partners which lacked fundamental components of a loan account , which is the interest charged under the said loan agreement. There is no allegation by the Company that Petitioner granted money without interest.

[33] The Company stated that this amount claimed is also not due and payable as no accurate account statement or loan agreements from inception of loan from 2008 have been provided by the Applicant.

[34] There is no such additional materials need, as the Two Accounts relate to two specific agreements and payment schedules agreed by the parties. That is the starting point. Loan Account 10100048321 is pursuant to separate loan agreement made on 5.6.2018 and its payment schedule and terms are clear and account balance can be calculated without additional information and verified with the account statement provided by the solicitor of the Petitioner.

[35] According to submissions of the Company the sum claimed in the statutory demand was a collated amount of numerous loans given over

many years prior from 2008 which apparently includes compound interest and other charges that are not revealed by the Applicant

[36] Above contention of the Company cannot be accepted as the debt stated in the statutory demand relate to the Two Accounts which relate to two separate agreements with specific payment schedules under two agreements and the Company had made some payments in terms of those.

[37] The debt of $243,174.20 relate to a separate loan agreement (5.6.2018) for a sum of $100,000 with its own payment schedule and its account 101000418321 and the interest charged for the said account can be ascertained from the loan agreement of 5.6.2018 and its agreed terms and interest contained in payment schedule. This loan was to be paid with 12 months and if not paid the balance of the said account is carried forward as a principal sum for subsequent intervals of twelve month period under same conditions. (Loan agreement and payment schedule is annexed B to affidavit of 20.5.2024)

[38] So the interest rates applicable to first six months (20%) and next six months (25%) at the expiration of 12 moth periods These were the same conditions applicable at renewal at twelve month intervals and this is clear from the accounting statement and the payment schedule.

[39] Purported loan reconciliations attached to letter of APNR Partners had not applied the agreed interest rates and only shown payments which cannot be considered as reconciliation of loan accounts.

[40] So purported reconciliation of loans did not contain interests in terms of the clear conditions agreed by the parties , and should be rejected prima facie as lacking fundamental requirements.

[41] The Company allege that in these proceedings the Respondent was not able to obtain the original documents and statements from the Petitioner. This was again not an issue between the parties as they had conducted business in the same capacity, since 2008 and had cordial relationships even after institution of this action. If there was any requirement to inspect original documents that could have been requested and also provided without difficulty before this action. It is clear that in order to create a dispute APNR Partner is not considering obvious facts and seeking further material without providing an accurate reconciliation, after institution of this action.

[42] What were the information relevant to the specific loan agreement entered on 5.6.2018 other than the relevant agreement and loan account? Such requests cannot create genuine dispute as they were not done in bona fide.

[43] It is clear that once statements of the Two Accounts were provided with relevant two agreements the debt could be calculated and this was provided by the Company in its account statement by the solicitors of the Petitioner.

[44] The Company produced a letter of APNR Accountants dated 21.2. 2024 being annexure N in the Affidavit of Manish Vishal Sharma filed on the 23.2. 2024. It stated;

> "We are writing to address concerns regarding the account statements provided by Finance Pacific Corporation Ltd for our above mentioned client. After thorough reconciliation efforts, it has come to our attention that the **statements we have received are insufficient and inaccurate.**
>
> **While we have made efforts to reconcile the principal amounts,** it appears that principal amount has been paid and interest continues to be carried forward incorrectly. Attached is a copy of repayment analysis from the most recent loan statements and reconciliation process. Additionally, the loan agreement and loan statements provided to us do not align, indicating a significant discrepancy in the information provided…"
> (emphasis added)

[45] The Company had failed to annex the 'the account statement provided by Finance Pacific Corporation Ltd'. Without which the said statement cannot be considered for what was stated therein and no value can be added to said document in analysis of evidence.

[46] The Company had relied on said letter of APNR Partners of 21.2.2024 which was issued long time after the service of statutory demand on 30.6.23 "While we have made efforts to reconcile the principal accounts…" from the said letter of APNR Partners Petitioner had failed to annex the documents relied for such statement. This is an incomplete statement which cannot be relied to form an opinion as to genuineness of the dispute.

[47] Counsel for the Petitioner also raised the issue of APNR Partners not

being legally recognized as a firm of Accountants by Fiji Institute of Chartered Accountants, but failed to show such requirement in terms of Companies Act 2015. It is suffice to state both communications from APNR Partners were not signed as a member of Fiji Institute of Chartered Accountants, but an unknown person on behalf of APNR Partners. To my mind this is secondary, and more fundamental issue is whether said letters and opinion stated can be accepted on the evidence provided by the parties.

[48] Reconciliation of loan account can be prepared by non-members of a professional body if that is not precluded from law and Petitioner's counsel had not shown such a bar in Companies Act 2015

[49] What is more important is the content and not the qualification of the person, unless law specifies minimum qualification to provide such a document. I was not shown such requirement by the Petitioner for winding up action.

[50] The letter of APNR Partners dated 21.2.2024 written to the Company under the heading "Re The Creative Company PTE Limited" annexed as M to affidavit on 23.2.2024 had annexed a purported reconciliations which related the Two Accounts.

[51] It had failed to include interests for the purported reconciliation of account for more than five years in loan account 101000418319 as drawdown of $180,000 was re-written of balances of three existed account for 18 months. The Company had signed that agreement with repayment schedule.

[52] Similarly Loan Account 1010004183421 disbursement was on 30.7.2018 and in the purported reconciliation of APNR Partners, for more than four years for a loan of $100,000 no interest shown when the interest rates were clearly stated for annual renewal (interest rate changed at six month intervals at 25% and 20%) and anything outstanding in the said loan account renewed yearly on same conditions but APNR Partners had considered $100,000 borrowed for more than four years without interest! So on what basis APNR Partners assumed such re scheduled loan was granted 'interest free' after expiration of 18 moths from 8.8.2018?

[53] There is no dispute that Petitioner provided finance for the Company since 2008, and these were charged high interest rate and no reconciliation of loan account be without interest.

[54] It is a fundamental error in purported reconciliation by non-inclusion of interest in purported loan reconciliation accounts. Interest component is significant amount in any loan account and failure to consider it makes reconciliation of APNR Partners, unacceptable to court.

[55] Petitioner had provided detail accounts of the two loan accounts 101000418321 which commenced on 30.7.2018 and payments were made till 5.8.2022 and also Loan Account 101000418319 which had commenced on 8.8.2016, after consolidation of existed debts, for which last payments were made till 31.01.2022

[56] So said letter from APNR Partners dated 21.2.2024 annexing purported reconciliation of the Two Accounts cannot be considered as to 'genuine dispute' of debt and can only show that the Company had paid to both loan accounts as agreed between the parties in the respective two accounts, hence the two agreements and payment schedules and the interest rates were accepted by parties and agreements were partially performed for considerable time before the Two Accounts were defaulted. The dispute of such debt is not genuine.

[57] This shows there was no dispute as to the said loan accounts at least till late 2022. APNR Partners had conveniently deleted interest component of the said loans which is a significant component in any commercial loan amortization. So this letter of APNR Partners cannot be considered as true depiction of said loan accounts for the reasons given.

[58] APNR Partners had also forgotten cost of funds in any organization that provides finance , can only be recovered through interest component and without an interest no commercial loan will be obtained from Petitioner who had no recourse to a security even in a default, which is high business risk. Such an entity cannot survive from 2008 in the business of providing loans to business, without interest and or security.

[59] The debt consisted of two Loan Accounts and they are considered separately.

A. Loan Account 101000418321

i. Debt unpaid on the said account as at 27.6.2023 was $243,174

ii. Date of commencement of the said debt 30.7.2018 and the principal sum loaned $100,000.

a. The date of loan agreement relating said loan was 5.6.2018 and the repayment schedule given in the said loan and the term of the loan was twelve months and the total amount to be paid back is $145,000 with interest.

b. Said loan agreement further stated that it will 'automatically renewed on balance on the due date based on the same terms and conditions.

c. According to payment schedule the payments from 5.7.2018 to 5.11.2018 were $4,000 *per mensum* for five months and then for a one month $5,000 on 5.12.2018 and thereafter $20,000 *per mensum* for six months. So that capital and interest together consisted $145,000 as stated in loan agreement of 5.6.2018 (annexed I to affidavit of the Company filed 27.10.2023)

d. The payments according to statement of accounts were as follows

i. 31.7.2018 was for 2,965.00 (there were some additional costs such as documentation ,approval etc for $2965) and thereafter $4000 *per mensum* for September,2018 to December,2018 for five months (total $20,000) and then $10,000 payments were made in September,2019 , October,2019, November,2019 and December ,2019 (total $50,000).

e. From the said payments it is clear that the **Company had failed to comply with payment schedule** contained in the loan agreement of 5.6.2018 and money disbursed on 30.7.20118. **It had initially complied with payment schedule for five** months and, since December, 2018 till expiration of the said

term of 12 months in July, 2019 due payments were defaulted , resulting the balance carried forward as new loan under same condition. This is clear from account statement. No evidence of payment presented by the Company to dispute the balance.

f. So according to the loan agreement 'it will be renewed on balance on the due date on the same terms'.

g. The balance on the due date 30.7.2019 was $ 125,000 and according to loan agreement it is renewed under 'same terms and conditions. The renewal interest is due for payment on the date of renewal.'

h. The interest rate on the loan agreement will apply as the 'same terms and conditions' will also include the same interest (25% for six months and 20% for next six month).

i. It was renewed at same rate for outstanding balance of $125,000 as at 30.7.2019 and accordingly a monthly interest was $4687.50 for this second 12 month (when 20% p.a. interest for first 6 months and 25% p.a. for next 6 months). This is the monthly rate when same interest rate applied.

j. The renewed loan's principal sum was $125,000 as opposed to initial sum of $100,000.hence there is increase of monthly interest rate. It should be noted that there was no penal interest charged despite default for more than six months which industry standard to be considered as bad debt in financial entities. So while there was a high interest rate of 20% there were no penal rate applied for this account.

k. In the second period of 12 months the Company had initially paid $50,000 till 13.1.2020 from monthly payments of $10,000 from September, 2019 and thereafter payments significantly reduced and no payments made for more than six months from 13.1.2020 to 7.8.2020

l. This shows the conduct of the Company and its default of the loan obtained on 30.7.2018 which had accrued to $234,174.20. The calculation of balance of the said loan account needs no further details.

m. There is no genuine dispute as to this loan account and its balance of $234,174.20 and this amount is above the statutory minimum required to seek winding up of the Company on the basis of insolvency due to unable to pay its debt.

n. Without prejudice to above other loan account is also considered for completeness but the evidence before the court is sufficient to grant winding up as there is no genuine dispute as to said balance of $234,174.20.

B. Loan Account 101000418319

i. This was pursuant to "Re write of the Creative Company Loan Accounts' on 15.7.2016

ii. Accordingly under Item 1
   1. Loan Account 418315 of $100,000
   2. Loan Account 418317 of $50,000
   3. Loan Account 418318 of $30,000

   Amounting to $180,000 were taken as principal sum for a new loan of 18 months starting from 15.8.2016 Interest Rate for 18 months for $180,000 was 30%

iii. Repayment of the said loan was through $13,000 *per mensum* payments for eighteen months.

iv. The Company is estopped from disputing this agreement as they had made payments as agreed for nearly a year and then defaulted.

v. The Company had made payments as agreed in the said re-write of monthly payment of $13,000 from August 2016 to July, 2017 and thereafter defaulted for two months and there after $10,000 from November ,2017 for three months and then defaulted and further reduced to 7222.22 from 4.6.2018

vi. The account statement provided details, and this account had accrued a debt of $131,440.62.

vii. Under item 2 there is a renewal of interest at 20% reading Loan Account of 418316. This was not made part of the alleged debt the Company was unable to

pay.

viii. The Company had renewed unpaid loan amount at 20% despite not having a clause for renewal of the said loan on the same terms as stated in the previous loan account.

ix. The balance at the end of 18 month period was $100,000 and thereafter monthly interest of $1666.66 charged and the Company also continued payments for renewed interest rate.

x. There is no common seal contained in the said agreement regarding re-write but the Company had complied with the said agreement for more than a year by payments of monthly payments of $13,000 as stated above and there after continued with payments with reduced instalments till 31.01.2022 This partial compliance confirms the agreement with the Company and absence of common seal in the said agreement does not make it unenforceable. The Company had made payments in terms of payment schedule in term of the said payment and payment of reduced amount show that the re-write agreement was entered by the Company.

[60] The Company in submission stated that it had not received the money stated in the agreements but this contention cannot be accepted as the Company had paid in terms of the payment schedule ($13,000 per *mensum*) for seven months and there after defaulted one month and paid $13,000 and again defaulted two months and paid another !3,000. These defaults accrued monthly interest in terms of the agreement and there after paid $10,000 for three months relating to Account 1010004183119 and thereafter defaulted in payments without clearance of the account. So this loan account was in arrears of $100,000 at the conclusion of 18 month time period stated in the re-negotiated agreement.

[61] This loan account was renewed at a monthly rate of $1666.66 for another year and again the Company continued to pay for the reduced balance. The interest rate applied for renewal was 20%.

[62] In two months a Penalty Interest of $750 and $775 were charged apart from 20% interest charged. This part is not explained by the Petitioner, but it clear that exclusion of those two transactions amounting to

$1,525.00 is not a genuine dispute of the debt.

[63] If that amount is disputed the Company could have paid the undisputed debt without two Penalty Interest charges and there will not be a winding up action as the threshold for winding will not be met in such a situation.

[64] Once the Petitioner had established a debt over the statutory threshold any dispute as to the debt that does not make the undisputed debt below $10,000 cannot be considered as dispute to refuse winding up as the legal fiction of insolvency is not removed as long as there is undisputed debt of over $10,000 due and payable.

[65] The Company contended that no time any monies set out in the Two Accounts were paid out. If so why did they pay according to the payment schedule under said agreements for considerable time and even maintained said loan accounts?

[66] It is not disputed that Petitioner provided finance for the Company and re finance and re structure of such outstanding loans are also part of such dealings between lender and borrower. So, in a re-writing of $180,000 regarding three accounts stated in the said agreement were consolidation of the existed debt on terms agreeable to both parties at that time. The Company cannot state it did not receive money in a restructure of debt as the principal sum was outstanding sum which parties agreed to re-write on commercial terms.

[67] Account 101000418321 commenced 30.7.2018 and payments according to the payment schedule continued for four months and payments continued to be made till 5.8.2022 with reduced payments. Account 101000418319 payments were made for a year in terms of the payment schedule. These indicate that the allegation that the Company did not receive money in terms of said agreements cannot be accepted and not bon fide dispute.

[68] Counsel for the Company in submission stated that the Petitioner has inserted in his last Affidavit belatedly an additional page stating a rewrite consolidation of the loans at annexure B in loan agreement dated 5.6. 2018 which consolidation is dated 15.7. 2016 in the Supplementary Affidavit filed on the 20.5. 2024. The Company had failed to explain why it had made payments in terms of the said schedule, which shows that the dispute is not genuine. Are they denying their own payments? The Company had failed to submit its payments that shows any dispute,

while admitting obtaining finance from the Petitioner since 2008.

[69] The Company had admitted obtaining finance from Petitioner and it had provided the statement of accounts relating the Two Accounts and agreements where payment schedules shown.

[70] It is clear from above detailed analysis of Account no 101000418321 that the debt of $243,174.20 is undisputed. Accordingly Petitioner is entitled to seek winding up of the Company on the basis of deemed insolvency of the Company as it was unable to pay said debt when it was due and payable.

INSOLVENCY

[71] Two issues relating to insolvency according to submissions of the parties are,

a. Is there a presumption of insolvency when a company had failed to set aside statutory demand in terms of Section 516 of Companies Act 2015?
b. Can a company which is deemed insolvent in terms of Companies Act 2015 due to its inability to pay a debt of over $10,000 due and payable contest the legal fiction of insolvency in a winding up action?

[72] A company can be wound up, by court, if it is insolvent in terms of Section 513(c) of Companies Act 2015. This is by application of legal fiction for the purpose of winding up application in terms of Section 515(a) of Companies Act 2015.

[73] The word 'insolvent' is defined in Section 514 of Companies Act 2015. A 'Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable'.

[74] So if the Company is unable to pay all its debts when they become due and payable, it is deemed insolvent in terms of Companies Act 2015. So the burden of the Petitioner is to prove that there was a debt of over $10,000 which was due and payable. In this fact is proved by the Two Accounts and the 'account statement' provided by the Company as analysed in relation to the Two Accounts previously.

[75] In such a situation court cannot allow evidence to adduce that the Company is solvent, through financial accounts or any other manner including letter from APNR Partners.

[76] If letters or reports are allowed to contravene a legal fiction after fulfilment condition precedent for such a legal fiction, that makes the legal fiction unworkable .

[77] Whether a company solvent, is a complex issue and even accounting professionals might differ, depending on accounting principles applied and also other factors to be considered. Such a scope is not intended for winding up in terms of Sections 513,514 and 515 of Companies Act 2015.

[78] That is the reason for deeming provision which is fictitious. If not and more thorough analysis of accounts may be required and a time consuming exercise and winding up are not geared for such evidence being adduced which invariably delay the proceedings. Time is the essence of winding up action as insolvent company is prevented from commercial dealings thus creating additional bad debts, after a liquidator appointed.

[79] Winding up proceedings is a statutory action, based on provisions under Companies Act 2015 and Companies (Winding up) Rules 2015. The time granted for determination of winding up is six months though there are provisions to extend that time period under special circumstances. So the intention of the legislature is clear that winding up actions needed to be disposed on priority basis. Winding up of a company is on the basis of insolvency is determined when the company is unable to pay a debt of more than $10,000. When such facts are established legal fiction of 'insolvency' under Companies Act 2015 is created and next consequence will flow.

[80] Once a legal fiction is created in law, it that can only be disputed by proving that the requirements for legal fiction, are absent or it is not applicable. This can be done before the proof the existence of the facts to create legal fiction. Legal fictions are imaginary or non- existent position created for the ease of dealing with a complex issue in more clear and consistent manner.

[81] So 'deemed' insolvent under Companies Act 2015, is through proof of debt of more than $10,000 which was due and payable. The purpose of this legal fiction is to put beyond the doubt a state of affairs of a legal entity which is otherwise uncertain and can lead to unnecessary delay without resolution of the issue of insolvency in effective manner for the purposes of winding up. (See *St Aubyn(LM) v A.G*(No2) 1951 All ER 473(HL) , *Hill v .East and West India Dock co.*, (1884)9 AC 448, *Ex parte, Walton,In re, Levy*(1881) 17 Ch D 746)

[82] If not, a preposterous situation can arise as legally 'deemed' fact, will be disputed through evidence making utility of 'deemed' provision negated.

[83] Such an exercise is impractical and legislative provision cannot be ignored by courts. Legal provisions in a legislation needs to interpret in accordance to the meaning given considering the purpose. Winding up actions are statutory actions which needs early resolution and the purpose of deeming provision is not to allow questions of solvency when specific facts exists. These facts are a debt more than $10,000

and it was due and payable and refusal by the debtor to pay it.

[84] If there is no debt, or even if there is a debt, but it is neither due nor payable, such an instance cannot be considered as insolvent, and are examples where legal fiction cannot be applied. This is not the same as accepting a company deemed insolvent and there after allowing it to be refuted by, evidence through opinion of professionals or reports. This is not allowed and such evidence cannot be considered as genuine dispute.

[85] There is no need for a company to be always able to settle all its debts. As long as debt is manageable the company cannot be considered insolvent .At the same time when a company was defaulting and unable to pay its debts for a long period of time there is a great danger of present and future creditors being default as well. This is the rationale in having a deeming provision to impute 'insolvency' to such an entity.

[86] Hence legislation had created legal fiction of insolvency in terms of Companies Act 2015 to create fictitious position upon satisfaction of some facts in terms of Section 515 of Companies Act 2015.

[87] What is important to note is that a company should be able to honour its debts when they are due and payable. So the emphasis is on ability to pay debt as and when they are due. It is important that all the three requirements such as existence of debt, that it was due and it was payable, should be at the time of statutory demand was issued for winding up in terms of Companies Act 2015. Apart from the above, the debt should also be above the stipulated sum under the Act, for legal fiction to be applied.

[88] In this action the Petitioner had established all three requirement in loan account 101000418321, with a balance of more than $243,174.20 as at 27.6.2021.

[89] Section 515(a) of Companies Act 2015, creates a legal fiction and according to that, a company is deemed unable to pay its debts if a creditor serves a notice of debt exceeding $10,000 in terms of said provision and the company was unable to settle the debt, to the reasonable satisfaction of such creditor.

[90] What is important is not the value of demand exceeds $10,000 but rather there was in law, a debt of over $10,000, due and payable at the time of demand notice was issued to the company. This 'debt' and failure to honour it to the satisfaction of creditor, is the crux of the deemed 'insolvency' of the Company.

[91] Neither the fact that statutory demand was over $10,000, nor failure to make a setting aside of statutory demand in terms of Section 216 of Companies Act 2015, creates any presumption as to the insolvency of the Company, in terms of Companies Act 2015. The Company can

have a genuine dispute, but this cannot be used to delaying tactic or delay inevitable consequence of winding up or buying time.

[92] The fact that the Company had not filed an application for setting aside statutory demand, a relevant fact, but, the failure to set aside, does not create presumption that the Company was insolvent.

[93] It should also borne in mind how a company decide to deal a statutory demand is entirely with the company and its management and or its solicitors. But having not exercised statutory provision, it cannot again seek provisions specifically designed for setting aside in terms of section 517 of Companies Act 2015. Said provision clearly state that its application is for setting aside and cannot rely on winding up.

[94] The Company in its written submission had paragraph 3.3.1 relied on Section 517 of Companies Act 2015, and a decision of setting aside of statutory demand in terms of Section 517 , but this cannot be used as precedent to hearing of winding up action for the reasons given above. Once the Company had decided not to proceed with Section 517 of Companies Act by not seeking setting aside it cannot rely on the same provision at hearing as the provision state ‘’This section applies where, on an application to set aside a statutory demand’. There is provision to calculate the actual debt in terms of Section 517(2) of Companies Act 2015, but this cannot be resorted, when the Company decided not to seek setting aside of statutory demand. Even if I am wrong on that it is clear that Petitioner had established undisputed debt of $243,174.20 which is sufficient to seek winding up of the Company.

[95] Legal fiction of insolvency of a company in terms of Section 514 read with Section 515 of Companies Act 2015 is confined to ‘deemed to be unable to pay its debt’.

[96] Winding up in terms of Section 513 of Companies Act 2015 is a discretionary remedy of the court, but this is exercised in favour of Petitioner if the condition precedent to winding up are fulfilled in terms of the legal fiction created under Companies Act 2015.

[97] Having an at least a debt more than $10,000 is the *locus standi* of Petitioner to seek winding up, hence the objections and or facts can be raised by the Company that is material for its ‘solvency’ in terms of Section 514 and 515 (a) of Companies Act 2015. In this case the Company had failed to do so.

[98] The apparent reason for providing such a mandatory precondition is to prevent an insolvent company from relying on some immaterial, technical defect on the winding up procedure and to delay order for winding up.

[99] A company having a debt over statutory minimum cannot dispute a part of debt and refuse entire debt, in statutory demand. In such an

instance undisputed debt needs to be settled if that part is above statutory minimum. If not such grounds, will not remove the legal fiction of insolvency of the company, and will not satisfy mandatory statutory precondition contained in section 529(2) of Companies Act 2015.

[100] A Company who have a genuine debt of over $10,000 must take all precautions to pay such genuine and undisputed part prior to proceeding to winding up as the Petitioner is only required to establish a debt of over $10,000 in order to seek an order for winding up.

[101] Legislature had granted six months' time period for the determination of winding up, in terms of Section 528 of Companies Act 2015. Though it can be extended within six month period for 'special circumstances' in terms of section 528(1) (a) and (b). Expiration of six month period without an extension of time under Section 528(1) of Companies Act 2015 or final determination, is fatal to the application for winding up. So, the intention of the legislative scheme is to prevent delay, and this is a consideration for an application in terms of Section 529 of Companies Act 2015, this was considered in this application where directions were given to file opposition and matter is fixed for hearing without delay.

[102] Without prejudice to above, I have discussed the law relating Section 529 of Companies Act 2015, and applications of analogous Section 459 S in Australian Corporations Act 2001, as there are some material differences in legislation which Fiji had omitted, though the two sections are identical.

[103] Australian Corporations Act 2001 created mandatory presumption of insolvency, which is absent in Fiji legislation. This difference was seldom recognized when a Petitioner submits that there is such a presumption in Fiji. This was due to 'harshness' of such a presumption as decided in Australian authorities.

[104] Sections 459 C of Australian Corporations Act 2001-Presumption as to insolvency. In *Federal Court of Australia in Soundwave Festival Pty Limited v Altered State (W.A.) Pty Limited (No 1)* [2014] FCA 466 (12 May 2014) held that scheme under relevant parts of their Corporations Act 2001 can 'operate harshly' even when there are arguable grounds for disputing the debt of statutory demand. This harshness is somewhat mitigated in Companies Act 2015 by not adopting Section 459 C as to presumptions as to debt, contained in Corporations Act 2001 which reads;

"459C Presumptions to be made in certain proceedings

(1) This section has effect for the purposes of:

(a) an application under section 234, 459P, 462 or 464; or

(b) an application for leave to make an application under section 459P.

(2) The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made:

(a) **the company failed (as defined by section 459F) to comply with a statutory demand**; or

(b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or

(c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or

(d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or

(e) a person entered into possession, or assumed control, of such property for such a purpose; or

(f) a person was appointed so to enter into possession or assume control (whether as agent for the charge or for the company).

(3) A presumption for which this section provides operates except so far as the contrary is proved for the purposes of the application' (emphasis added)

[105] Though Section 529 of Companies Act 2015 and Section 459 S in Australian Corporations Act 2001 are identical, the application of that significantly differs, due to absence of presumption of 'insolvency', in Fiji.

[106] So there is no presumption by failure of the Company to set aside statutory demand within stipulated time period. So this argument of the Petitioner is rejected.

[107] There is no presumption of insolvency, and the burden is with the Petitioner to establish a debt of over $10,000 in order to prove that the Company is insolvent by application of legal fiction created by 'deeming' provision contained in Section 515 of Companies Act 2015 read with Section 514 of Companies Act 2015. There is no room left for a company to submit its financials and ague that it is 'legally solvent' in terms of Companies Act 2015 if the debtor had already established legal fiction under the Act, to seek winding up.

[108] A financially solvent entity may be deemed insolvent for the purposes of winding up if the legal fiction of insolvency is established. This is the basis of seeking winding up on the basis of 'unable to pay a debt when it was due and payable'. Legal fictions are imaginary and that is the reason for using word 'deemed'. So its meaning should be given by the court.

Non-compliance of Stamp Duties Act 1920 (Repealed)

[109] The Company had raised the issue of failure to stamp the two agreements relevant to the debt, by the Petitioner at the time of execution of those documents. This is again not a genuine dispute as it does not create a ground material for the Company's solvency.

[110] This is a mandatory requirement to seek leave of the court to oppose winding up application in terms of Section 529(2) of Companies Act 2015. If such a ground is not taken in to consideration at the time of seeking leave it will not be a material fact at the hearing of winding up. Again it is illogical to allow a ground that is not allowed, to seek leave to be argued at the hearing. The intention of Section 529(2) is to prevent technical objections that deviate from the crux of the deemed insolvency and to expand the scope of winding up.

[111] Even if I am wrong on that, it is clear that Stamp Duties Act 1920 does not make any unstamped or under stamped document *null and void*. It only prevents such a document being used as evidence in court of law. So the argument that failure to stamp in terms of Stamp Duties Act 1920 makes the payments null and void cannot stand up.

[112] The Company submitted that the agreements were never stamped at the relevant time in 2016 and June 2018. Only when the issue of stamping was raised by the Company in its affidavit, then the Petitioner had done it. In the supplementary affidavit filed on 20.5.2024 at paragraph 5 it is sworn that the stamp duties were paid and perusal of the agreement dated 5.6.2018 contained a stamp to that effect. There is no need of any oral evidence on this point as contended by the Company in its submission and the contention discovery and interrogatories needed for such a thing cannot be accepted.

[113] The Company relied on Section 41 of Stamp Duties Act 1920 in isolation without reference to Section 100(2) of the same Act. Section 41 of Stamp Duties Act 1920 states,

> **Instruments not duly stamped inadmissible**
>
> **Section 41** "Except as aforesaid, no instrument executed in the Fiji Islands or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of the Fiji Islands shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is

duly stamped **in accordance with the law in force at the time when it was first executed**."(emphasis is mine)

[114] In my mind Stamp Duties Act 1920, is a revenue statute and the interpretation that should be given to it should be in line with the intention and the purpose of the said legislature. A correct stamping of a document , 'in accordance with the law in force at that time' is that the document can be stamped even later before such thing is accepted in court, but it should be stamped in terms of the law in force at the time of the execution. In other words the stamp duties and or any penalties for delay can be applied as they were when it was executed, irrespective of change of law later, when it was actually stamped.

[115] This Act was repealed on the 1.8. 2020. Prior to this date, any contract or instrument entered between parties were required to be stamped at the Fiji Revenue and Customs Service. Company contended that if the same is not done then the contract is not binding on the parties or *ab initio* lacked basic requirement this cannot hang together.

[116] This is again not the correct legal position regarding a document that was not stamped in accordance with law that existed. The purpose of the said legislation is collection of revenue and accordingly it had not completely excluded documents which were not stamped at the time of execution and such stretched meaning will prevent even an inaccurately stamped document or even over stamped document which again makes such a situation illogical.

Non Publication of Gazette of the Exemption granted to Petitioner from Moneylenders Act 1938.

[117] There is no dispute that Petitioner had provided commercial loans to commercial entities including to the Company without security charging a premium interest, for the risk involved in such loans. (see paragraphs 3 and 4 of affidavit in response 24.11.2023 and paragraphs 5 ,6, 7 of affidavit in response filed 8.12.2023). Such acts are not prohibited under Moneylenders Act 1938 by an exempted entity in terms of Section 2(d) of the same Act.

[118] The Company had entered in to agreements with Petitioner to provide loans for commercial purposes for terms agreed by parties and the Company had also made payments in terms of the payment schedules before defaulting. So the Company partially fulfilled its obligations before defaulting such payments. Having obtained and utilized money without

a risk of security being foreclosed, the Company is now abusing the same facility, commercially utilized. It is known fact that higher the risk higher the return on investment. So it is obvious exemptions were allowed in terms of Section 2(d) from Moneylenders Act 1938 in order to allow finance without security at a premium rate.

[119] It is unconscionable to state that the interest rate for such loans were high and or such agreements were *null and void* due to lack of gazette notification of the exemption from Moneylenders Act 1938. The Company can only raise an objection that is 'material to show it is solvent'.

[120] So the contention of the Company that Petitioner's business of providing commercial loans to the Company had contravened Moneylenders Act 1938 due to lack of exemption in terms of Section 2 of the Act, so the dealings between the parties relating to Two Accounts are *null and void* as the agreements relating to the Two Accounts are 'unenforceable' in terms of Section 15 of Moneylenders Act 1938 is farfetched and without merit for reasons given below.

[121] The Petitioner provides finance, but not a 'moneylender' in terms of Moneylenders Act 1938 due to exemption granted in terms of the said Act.

[122] When an act provides exemption of the provisions but does not state that it needs to be gazetted, court cannot interpret to give a meaning that was not intended only because there were some conduct relating to some entities. Such an extension will not only affect third parties who were given such exemption since 1938 and remains valid, but had failed to gazette since 1938. It is clear that there was no consistent policy regarding publication through gazette notification and present position is that there is no such requirement.

[123] The contention of the Company that lending of Petitioner is invalid due to non-publication in gazette, also affect similar unpublished exemptions granted in terms of Section 2(d) of Moneylenders Act 1938. Such 'unregulated money lend ending', also plays a vital part in a business environment in informal part of an economy. The fact that parties to this action acted in same manner is also testimony of the importance of such short term capital for medium and small enterprises.

[124] When Moneylenders Act 1938, had not specified gazette notification of

exemption that may be due to a reason and that reason should be given effect by courts, without questioning or additions to the said Act. Such additional obligation and making it mandatory, can be done by legislature by an amendment. What the Company is seeking here is even more than that as it seeks nullification of such loans on the basis of that. This cannot be accepted.

[125] Section 2 of Moneylenders Act 1938 provides the definition of a 'moneylender' and states:

> *"**moneylender**" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or herself or holds himself or herself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent **but does not include—***
> *(a) …*
> *(d) any body corporate for the time being **exempted by the Minister from the provisions of this Act;***

[126] Petitioner had produced a letter and this letter was dated 17.4.2008. It communicated to letter that sought approval in terms of Section 2(d) of Moneylenders Act 1938. It communicated to the Petitioner's then solicitors that the 'Minister' in charge of subject had granted such exemption. This position is confirmed by latest letter of 22.3.2024.

[127] There was no complaint made against Petitioner for contravention of provisions contained in Moneylenders Act 1938, but the Company is disputing the said communication, this shows that the dispute is not genuine and made in bad faith.

[128] There is a presumption contained in Section 3 of Moneylenders Act 1938, but this is irrelevant as Petitioner admits its line of business included providing commercial loans and relies on exemption granted in terms of the same Act. No exemption can be granted under the said Act unless such entity does activities of a moneylender in terms of Section 2 of the Act which defines the work of moneylender. So the application of presumption is subjected to the exemption under same provision.

[129] So a moneylending operations done by a moneylender who is exempted by Moneylenders Act 1938 is not a 'moneylender' in terms of the said Act.

Section 15 of Moneylenders Act 1938 Act states:

> ***"*Contract by unlicensed moneylender unenforceable**
> **15** No contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable*"*

[130] Petitioner is exempted from the definition of being considered as 'moneylender' in terms of the Act, hence above section 15 cannot be applied to Petitioner.

[131] The contention of the Company is twofold. Accordingly that exemption letter produced by Petitioner is not sufficient and it needs to be gazette to be valid. Next issue was the issuing authority who had granted such authority. Both objections are without merit as communication of a grant by the minister can be communicated by officer of the line ministry in charge of the subject.

[132] If the Company was genuine in its objection it had ample time to challenge the authority grated in terms of Section 2(d) of Moneylenders Act 1938, through appropriate manner, but had not done so. This shows the genuineness of the objection.

[133] Any person or body corporate qualifying under the definition of a 'moneylender' in terms of Moneylender's Act 1938, is required to take out a licence under Section 5 of the Act. This cannot be applied to persons who were exempted under the same Act as they fall outside the definition of 'moneylender'.

***"Expressio Unius Est Exclusio Alterius* rule"**

[134] In terms of Section 6 Moneylenders Act 1938 there is a requirement for all licensed 'moneylenders' to be published through a gazette. There is no such requirement for exempted entities to be gazette under Moneylenders Act 1938.

[135] So by application of accepted rules of interpretation expressio *unius est exclusio alterius* shows that there is no requirement for exempted persons to be gazetted in terms of Moneylenders Act 1938.

[136] The contention that absence of such gazette notification makes such exemption null and void hence all agreements entered by the Petitioner were also null and void cannot be accepted.

Consumer Protection

[137] Counsel for the Company stressed the point of consumer protection, and importance of regulation of the moneylending. This is the scope of legislature and Moneylenders Act 1938. It allowed exemptions from the Act in terms of it, considering the need for such unregulated or 'informal economy' in the country. These are issues that is best dealt by legislation mainly on policy considerations considering all affected parties through consensus and consultation, and outside the scope of this court in this action.

[138] The consumer protection also needs to balance with cost of funding of such unregulated moneylenders who may also borrow at higher cost than Banks or other financial institutions or licensed Moneylenders. So the cost of the funding of such entities along with risk involved in that are considerations that needs to be considered in Moneylenders Act 1938 and to my mind this is the reason for allowance of exemption in terms of Section 2(d) of Moneylenders Act 1938.

[139] The Company had obtained the finance for its business being aware of its options but chose to obtain money from the Petitioner at a higher rate without providing a security for such finances. How a company does business and what risks it takes within the law are left to such businesses. In this instance the Petitioner had provided finance without security for commercial venture on rates that were agreed between parties. Having utilized such funds the Company cannot dispute such agreed conditions including rates.

[140] 'Moneylenders', under Moneylenders Act 1938 , are required to conform to the provisions of the Act, but informal sector of economy which consist of exempted entity is not required to such regulation . The protection of the borrowers needs to be balanced with risks taken by such lenders and Moneylenders Act 1938 deals with the subject.

[141] So the choice is with the entity who can evaluate all the options when commercial decision is taken. Having done so and taken advantage, cannot seek refuge to delay re- payments on the terms it had agreed on commercial basis. Such objection cannot be considered *as bona fide* dispute.

[142] The law relating to enforceability of contracts of an unlicensed moneylender was discussed in the case of ***Ali v Kumar*** [1985] FJSC 60; Civil Action 633 of 1984 (23 August 1985) and this cannot be applied to an exempted entity such as Petitioner.

[143] Counsel for the Company, argues that the provision for exemptions of a moneylender pursuant to Section 2(d) of Moneylenders Act 1938, is to be read in conjunction with Section 21 of the Interpretation Act 1967 which deals with 'subsidiary legislation'. This is incorrect legal position as all decisions taken under statutes are not subsidiary legislations hence the argument cannot hold water.

[144] Section 21 of Interpretation Act 1967 states,

> ***[INT 21] Publication and commencement of subsidiary legislation***
>
> 21 *All subsidiary legislation shall be published in the Gazette, shall be judicially noticed and shall come into operation on the day of such publication, or, if it is enacted either in the subsidiary legislation or in some other written law that such subsidiary legislation shall come into operation on some other day then, it shall come into operation accordingly.*

[145] Section 12 of the Interpretation Act 1967 states that every schedule of any law shall have effect as part of that written law.

> ***[INT 12] Schedule and tables to be part of written laws***
> Every schedule to or table in any written law shall, together with any notes thereto (unless a contrary intention appears), be construed and have effect as part of such written law.

[146] Some exemptions from Moneylenders Act 1938, are set out in schedule to the Moneylenders Act 1938, but publication of gazette is not mandatory in terms of the said Act and this was confirmed by letter of 27.3.2024 by Permanent Secretary of the relevant ministry, upon legal advice from Attorney General's Office, which is annexed as A to affidavit of 20.5.2024. That clears the air as to the exemption granted in terms of Section 2(d) of Moneylenders Act 1938. This shows the objections of the Company is not genuine.

[147] Section 36 of the Interpretation Act 1967 was also relied by the Company to dispute the signatory of the letter of 17.4.2008 which had

communicated the grant of exemption by the minister. This is a misconceived argument as the said letter had clearly stated the exemption was granted by Minister and not the signatory of the said letter. The fact of Petitioner being corroborated by letter of Permanent Secretary dated 17.4.2008.

[148] In the written submission the Company relied on .Sections 55 and 63 of the Interpretation Act 1967 but again this has no application to exemption granted in terms of Section 2(d) of Moneylenders Act 1938.

[149] Section 55 of Interpretation Act 1967 states,

> **Evidence of signature of President, Prime Minister, Minister or other officers**
>
> 55 *Where the fiat, consent or authority of the President, the Prime Minister, a Minister or any person whose appointment is specified in the Constitution is necessary before any prosecution or action is commenced, any document purporting to bear the fiat, consent, or authority of the President, the Prime Minister, a Minister or person holding an appointment specified in the Constitution shall be received as prima facie evidence in any proceedings without proof being given that the signature to such fiat, consent or authority is that of the President, the Prime Minister, a Minister or such person, as the case may be.*

[150] The above provision makes such evidence as prima facie evidence, but not the only form of evidence that is applicable. So when there are evidence that Minister had granted exemption in terms of section 2 (d) of Moneylenders Act 1938, through the communication in 2008 and this position is affirmed as late as 22.3.2024 such evidence can be admitted in a winding up action. The case of *Ram Kirpal Hira v Reginam (1967) 13 FLR 176* can be distinguished as the communication of the exemption under Section 2(d) of Moneylenders Act 1938 can be from a person and the requirement was the exemption was granted by the Minister. There is ample evidence confirming that there was no such evidence in the said case and the issue in that case was 'delegation' of the authority. There is no issue as to delegation before me as 'Minister for Finance, National Planning, Sugar Industry and Public Utilities has (had) granted exemption' in terms of communication dated 17.4.2008. This position was corroborated by letter from Permanent Secretary of Finance dated 22.3.2024.

CONCLUSION

[151] The Petitioner in winding up action is required to establish undisputed

debt of over $10,000 which was due and payable to create legal fiction of insolvency in terms of Companies Act 2015 to seek an order for winding up. The Petitioner had established these facts.

[152] The agreement for a loan of $100,000 was entered on 5.6.2018 with payment schedule signed and sealed overleaf with common seal and signed both sides. The Company had complied with payment schedule for five months and then defaulted and in terms of the said agreement loan is renewed on same conditions. The Company had made delayed payments and this resulted accrual of interests in terms of the conditions parties agreed and as at 30.4.2023 the balance of the said loan account was $243,174.20.

[153] Petitioner had established that the Company had a debt over the statutory limit, and it was due and payable. Statutory demand was also made and there was no payment. This established the legal fiction that the Company is insolvent though the Petitioner had also relied on another similar debt relating to re-write of existed debt which was discussed earlier.

[154] The Company had also raised legal objections regarding exemption granted by minister in terms of Section 2(d) of Moneylenders Act 1938 . Even letter as late as 22.3.2024 corroborate and confirms that the Petitioner is granted exemption by minster under said Act and this was not published in gazette due to legal advice it received from Attorney General's Office. The objections regarding set off and Stamp Duties Act 1920 were not overruled. So the Application for winding up of the Company is granted and official receiver is appointed as provisional liquidator.

FINAL ORDER;

a. Winding up of the Company (The Creative Company);

b. The official receiver is appointed as provisional liquidator.

Deepthi Amaratunga

Judge

At Suva this 24th July, 2024.

Solicitors

Saneem Lawyers

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