

**IN THE HIGH COURT OF FIJI AT SUVA**  
**COMPANIES JURISDICTION**

**Action No. HBE 60 of 2020**

**IN THE MATTER of METAL SAFEWAY ENGINEERING AND**  
**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. Lal N. for the Applicant (the Creditor Company)  
Mr. Chand A. for the Respondent (the Debtor Company)  
Mr. Nand S. and Ms. Nand S. for supporting Creditors.

**Date of Hearing** : 16<sup>th</sup> December 2020

**Date of Ruling** : 24<sup>th</sup> December 2020

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# RULING

*(Application pursuant to section 529 of the Companies Act 2015)*

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- [1] The applicant served statutory demand on the respondent demanding the payment of \$23,245.19. The respondent did not seek to have the statutory demand set aside and the applicant initiated winding up proceedings.
- [2] On 21<sup>st</sup> October 2020 the respondent filed a notice of motion pursuant to section 529(1) of the Companies Act 2015 and Order 29 rule 1 of the High Court Rules 1988, seeking the following orders:
1. An injunction be granted against the petitioning creditor from carrying out advertisement of the application of winding up in the dailies and as well in the Fiji gazette.
  2. Leave be granted to the respondent company namely 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 to file its AFFIDAVIT IN OPPOSITION to the winding up application.
  3. An early date be given to this application as it is a matter of urgency and time for service be abridged.
  4. Any such order may be made in the premises as shall be just.
- [3] It appears from the minutes of the Deputy Registrar that the application for winding up had been advertised on 07<sup>th</sup> October 2020, about two weeks before the filing of this application. Therefore, the application for injunction must necessarily fail.
- [4] Section 529(1) of the Companies Act 2015 provides:
- In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court, oppose the application on a ground –
- (a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or

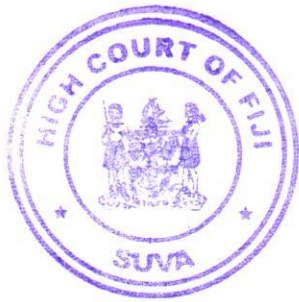
(b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).

- [4] In an application for winding up of a company on the ground that it is insolvent the only matter the court will take into consideration is whether the company is in fact insolvent. If the court finds that the company is solvent then the application for winding up is liable to be dismissed. The burden of proving that it is solvent is entirely on the debtor company.
- [5] The application of the respondent was opposed by the applicant on the ground that the respondent did not take action to set aside the Statutory Demand and the respondent's position is that it was not served but pasted on window of the office and when they found it, it was wet and could not read its contents. However, it appears from the copy of the Statutory Demand attached to the Affidavit Verifying Application for Winding that one Sabina Mataki has accepted the Statutory Demand and placed the Company's Stamp on it. The learned counsel for the respondent could not explain how the Company's Stamp was placed on the Statutory Demand if, as he says, it was not personally served.
- [6] I do not think the delay in coming to court and not filing an application to have the Statutory Demand set aside is relevant to the present application before this court for the reason that under section 529(1) of the Companies Act 2015 what the court has to decide is whether the respondent should be allowed to rely on the same grounds at the hearing of the Winding Up application, it would have relied on at the hearing of the application to set aside the Statutory Demand if such an application was made.
- [7] From the affidavit in support of the notice of motion it is clear that the respondent is seeking to adduce affidavit evidence to prove that it is not insolvent which the court, in my view should be allowed. As I always say, winding up procedure should not be used for the recovery of debts. All business enterprises are the life blood of the economy of any country. The judges should always bear in mind the effect of its orders in Winding Up matters on the economy of the country. Before ordering the Winding Up of a company the court has a duty to ascertain whether the company sought to be wound up is in fact insolvent and for that it must give a fair hearing to hear both parties and allow them to present their respective cases before the court without any hindrance.

[8] In the circumstances the court is of the view that the respondent must be allowed to file its affidavit stating its current financial status.

**ORDERS**

1. Application for injunction is refused.
2. The respondent is granted leave to file and serve its affidavit in opposition within fourteen days from the date of this ruling.
3. The affidavit in response, if any, to be filed and served by the applicant within fourteen days from the date of service of the affidavit in opposition.



  
Lyone Seneviratne

**JUDGE**

24<sup>th</sup> December 2020