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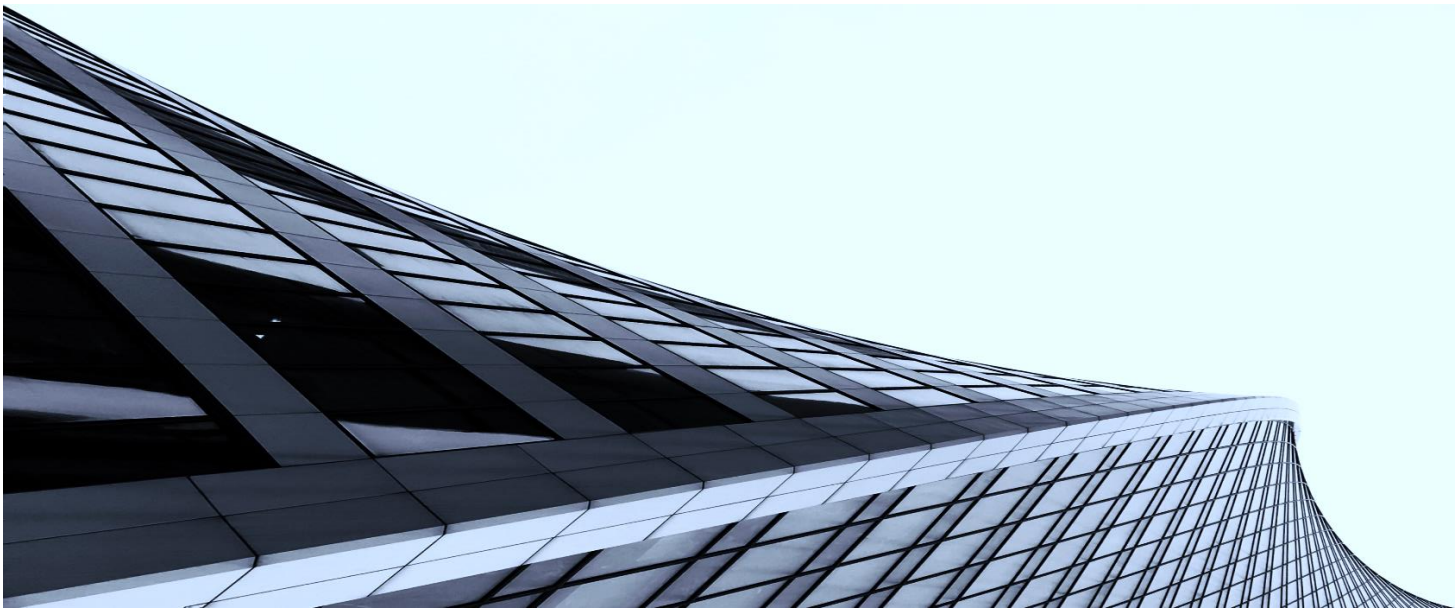
LEGAL ALERT

The Restoration of a Wound-Up Company



In another quite novel precedent following the very recent case of *Christopher Peter Van Zyl & Ors V The Registrar of Companies [2023 SCJ 473],*[1] a judgement delivered by the Supreme Court of Mauritius (the "**Court**"), in *Jayechund Jhingree I.P.O The Registrar Of Companies [2024 SCJ 24]* the Court has again created another precedent regarding wound up companies. Although the Learned Judge in the present case has set aside the application and ruled that the applicant has failed to satisfy the Court that it is just and equitable to restore the said company pursuant to section 320(1)(b) of the Companies Act 2001 ("**Companies Act**"), the Learned Judge has nonetheless given an interpretation as to whether or not a wound up company is indeed removed from the register of the Registrar of Companies and whether that company can then be restored under section 309 of the Act.

The Case

The applicant in this matter made an application under section 320(1)(b) of the Companies Act to restore Meko Group Holdings Limited (the "**Company**") to the register of companies on the ground that it was just and equitable to do so. The reason advanced by the applicant is that the Company still holds 58.68% shares in Jasra Graphics Private Limited, a company incorporated in India. The Company was wound up by way of a voluntary winding up in December 2012 and the applicant was a director of the Company at that time. It is the contention of the applicant that, the shares could not be transferred to an Indian shareholder at the time of the winding up of the Company since the process of the transfer of shares would have been lengthy which would have posed an issue to the winding up process. The shares were recorded in the account books as receivables. The application for restoring the Company was resisted by the Registrar of Companies ("**ROC**").

[1] *A link to our legal alert on this case can be found here.*

Rationale

The ROC argued that since the Company was wound up and was a defunct company, it had not been removed from the registers by virtue of section 309 of the Companies Act and as such there are no provisions under the Companies Act which provides for the restoration of a wound-up company.

The applicant, on the other hand, relying on section 309(1)(e) of the Companies Act averred that its application was justified on the basis that the Company had been removed from the register following its winding up.

The Learned Judge dismissed the ROC's argument and held that *"a defunct company means that is no longer in existence and not operating so that it can be safely concluded that it is no longer on the register."* The conclusion of the Learned Judge is therefore that a wound-up company does fall under the purview of a company removed from the register under section 309 of the Companies Act.

On the merits of the application for restoration, the Learned Judge did not consider it just and equitable to restore the Company to the register under section 320(1)(b) of the Companies Act and has set aside the application for following reasons:

(a) the liquidator was aware that the Company holds shares in the Indian company at the time the Company was being wound up;

(b) the liquidator chose to go ahead with the winding up of the Company without disposing the shares; and

(c) the liquidator chose to record the shares as receivables and did not deem fit to dispose the shares to recover money for distribution to the creditors.

The Court has further invited the Director of Insolvency to enquire and look into the matter as to whether at the material time, the liquidator was right in not dealing with the issue of transfer of shares on account that this would delay the process of winding up of the Company.

Analysis

The Court when applying its discretion whether or not to restore the Company was correct in its analysis since it cannot adopt an open-door policy when it comes to the restoration of a company. That is so because the restored company is deemed to have continued in existence as if it had never been removed from the register and such a restoration might be prejudicial to other concerned parties.

Nonetheless a precedent has been created whereby it is now the legal position that a wound-up company is only removed from the register, whereas in the past, it was market practice that a wound-up company, similar to a deceased individual, could not be revived and restored to the register.

Concluding remarks

In the last three months, two judgments have been delivered by the Court relating to the restoration of companies that have been wound up.

The authors are of the humble view that it would be helpful for the Court (or the legislator) to elaborate on a substantive test which ought to be satisfied so that only applications with a robust rationale would be entertained before the Court.

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