

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 21 of 2014

IN THE MATTER of **UNIVERSAL ENTERPRISES LIMITED** a limited liability company having its registered office at Suite No 5, 2nd Floor, Nina House, Robertson Road, Suva in the Republic of Fiji Islands.

AND

IN THE MATTER of the Companies Act

BEFORE : **Master ThusharaRajasinghe**

COUNSEL : **Mr. Nand** for the Plaintiff
Ms.Preetika for the Defendant

Date of Hearing : **17th October, 2014**
Date of Judgment : **20th February, 2015**

JUDGEMENT

A. INTRODUCTION

1. The Petitioner, Broadway Muffler Manufacturing Company instituted this winding up proceedings against the debtor company Universal Enterprises Limited seeking following orders inter alia;
 - i. *That Universal Enterprises Limited be wound up by the court under the provisions of the Companies Act; or*
 - ii. *That such other order may be made in the premises as shall deem just,*

2. Subsequent to filing of this petition, the Petitioner filed their affidavit verifying the petition and the memorandum of due compliance pursuant to rule 28 (1) of the Winding Up Rules. The Debtor Company with the leave of the court then filed their affidavit in opposition, which was followed by the reply affidavit of the Petitioner. Subsequently, this petition was set down for hearing on 17th of October 2014. The counsel for the petitioner and the debtor company consented to conduct the hearing by way of written submissions; I accordingly directed them to file their respective written submissions which they filed as per the directions. Having considered the petition, respective affidavit and the written submissions of the parties, I now proceed to pronounce my judgment as follows.

B. BACKGROUND,

3. This winding up petition is founded on the allegation that the debtor company is unable to pay its debts pursuant to section 220 (c) of the Companies Act. The Petitioner has served the debtor company a winding up notice demanding them to pay sum of \$ 22,500, which they claim as the total amount due and owing in respect of the sale transaction involving crown lease No 182564. The Petitioner stated that the debtor company failed to pay that debt amount within 21 days as demanded in the winding up notice. Hence they claim that the debtor company is now deemed to be insolvent or unable to pay its debts pursuant to section 221 (a) of the company Act.
4. The debtor company vehemently denied the allegation and stated that they are not indebted such amount to the Petitioner and disputes the existence of this debt. The debtor company filed an affidavit of Mr. Sunil Datt, the Managing Director of the debtor company in opposition of this petition. Mr. Datt deposed in his affidavit that the Petitioner agreed to sale the said Crown Lease No 182564 for sum of \$ 420,000, which they paid in full. Mr. Datt tendered the settlement notice issued by their solicitors, which indicated the actual agreed price and settlement amount, together with the copies of the bank cheques as annexure to the affidavit. Mr. Datt further deposed that sometime after the transfer of this land was completed, Mr. Krishan P. Vilash, the Director of the petitioner visited him and requested him to sign an acknowledgment of debt. Mr. Krishan had explained to Mr. Datt that he needed it only for banking purposes. Mr. Datt later found that the Petitioner has

fraudulently used his wife's signature and the company seal on this alleged acknowledgment of debt notice. The petitioner's claim in this petition is based on this alleged acknowledgment of debt. The debtor company has lodged a complaint with the Police in respect of this alleged fraudulent document.

5. The Petitioner in their reply affidavit deposed that actually the original price for the land was \$ 450,000 but it was reduced to \$ 420,000. The petitioner then gave a debtor company an allowance of \$ 15,000 for the said purchase price of \$ 450,000. The debtor company then agreed to pay the remaining \$ 15,000 in monthly installments of \$ 1,000 with an interest of 10% per annum.

C. THE LAW,

6. Section 220 of the Companies Act has stipulated the grounds upon which a company can be wound up by the court. The inability to pay its debts is one of those grounds stipulated under section 220. This petition for winding up is founded on the ground that the debtor company is unable to pay its debts.
7. The Definition of inability to pay the debts has been defined under section 221 of the Companies Act, where it states that;

"A company shall be deemed to be unable to pay its debts-

- (a) *if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$100 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has, for 3 weeks thereafter; neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
- (b) *if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or*

(c) *if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company”.*

8. In view of the petition and the respective affidavits of the parties, it appears that this application falls within the meaning of section 221 (a), where the petitioner has served a demand notice demanding the debtor company to pay the debt amount, which the petitioner alleged that the debtor neglected or not in a position to pay it.

9. Ungoed – Thomas J in **Mann and Another v Goldstein and Another (1968) 2 ALL ER 769** has discussed the requirements for winding up proceedings and the insolvency, where his lordship observed that

“To enable the companies court to make the winding-up order itself, not only must the petitioner have been shown to be entitled to present the petition, but also one of the grounds specified in s 222 of the Companies Act, 1948^a must be established: and the only such ground relied on in the petition and before me was that the company is unable to pay its debts. This requirement is additional to the pre-condition of presenting the petition, that the petitioner must be a creditor, and is not alternative to it. The insolvency requirement, however, unlike the creditor requirement, is only a pre-requisite of the order and not a pre-requisite of the presentation of the petition. So if a person is entitled to present a petition, then the company's inability to pay its debts is the very matter which it is appropriate for the companies court to enquire into and decide in the exercise of its jurisdiction to make a winding-up order.

10. Master Udit in **In re Comsol Fiji Ltd(2009) FJHC77;HBE0048.2007L (25 March 2009)** held that section 221 of the Companies Act is a deeming provision and the presumption of inability to pay the debts can be rebutted. He further held that

“when a demand is made the company must act swiftly to dispute the debt or pay the same in order to negate the imposition of the said presumption. Furthermore, if the

company opts to dispute the debt it must do so on substantial grounds. The test for a disputed debt was aptly stated in *Palmer's Company Law Vol.13* as follows:-

“To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided.”(emphasis added)

11. Peter Gibson LJ in **Raja v Rubin and Another (1999) 3 All ER 73** held that “a person seeking to wind up a company on a disputed debt, as in such case, it is well established that the petition is an abuse of process”.
12. I now turn into this case. The main contention of the debtor company is that there was no such an agreement for \$15,000 and the alleged acknowledgment of debt is a fraudulent document. It appears that the debtor company disputes the existence of the debt. They argue that the sales and purchase agreement was signed on 15th of July 2008 and the full amount was settled on the 3rd of September 2008. However, this alleged acknowledgment of debt has signed on 12th of September 2008 that was two months after the execution of the sales and purchase agreement. The debtor company has already lodged a complaint with the police about this alleged fraudulent document.
13. In contrast, the petitioner claims that the agreed purchase price for the said property was \$ 450,000, however, after the negotiation the parties agreed to have the said property transferred for the sum of \$ 420,000 as the debtor company's bank had approved a loan only for that amount. Meantime, the petitioner gave the debtor company an allowance of \$ 15,000. The debtor company then agreed to pay the balance sum of 15, 000 in monthly instalment of \$ 1,000 together with the interest of 10% per annum. However, the sales and purchase agreement executed by the parties on 15th of July 2008 has not mentioned about any other ancillary agreement other than the agreed price of \$ 420,000.

14. Having considered the contrasting submissions of the both parties, it is my opinion that there is a dispute over the alleged execution of the acknowledgment of debt and the existence of such a debt. In view of the contrasting versions of the event by the parties and lack of clear evidence from the petitioner to establish the existence of this debt as claimed in the petition, it is my opinion that the debt as claimed in the petition is a disputed debt, which could not be determined in a summary procedure as of this proceedings. I accordingly make following orders that;

- i. The winding up petition dated 4th of March 2014 filed by the Petitioner is hereby refused and dismissed,
- ii. The debtor company is awarded sum of \$ 1,000 as for the cost of this proceedings assessed summarily,

Dated at **Suva** this 20th day of February , 2015.

The seal of the High Court of Fiji is circular, featuring a central emblem with three figures. The words "HIGH COURT OF FIJI" are inscribed around the perimeter of the seal. A blue ink signature is written across the seal and extends to the right.
.....
R/D.R. Thushara Rajasinghe
Master of High Court, Suva