

IN THE HIGH COURT OF FIJI
AT SUVA

Winding Up Action No. HBE 2 of 2015

IN THE MATTER of SCUD
TIMBER (FIJI) LIMITED
AND

IN THE MATTER of the
Companies (Act 247)

BEFORE : Acting Master : Mr. Vishwa Datt Sharma
COUNSEL : Mr. Fung : for the Petitioner
Ms. Lagilevu : for the Respondent

Date of Hearing : 27th August, 2015
Date of Judgment : 03rd November, 2015

JUDGMENT

INTRODUCTION

1. On 26th January, 2015, Mega Maderas International Corp.'s ("the Petitioner") filed a petition to wind up SCUD TIMBER (FIJI) LIMITED ("the Company") on the basis that it is unable to pay its debt.
2. The Company opposes the petition on the basis that the debt is disputed.
3. Following are the affidavit evidence filed in these proceedings. These are:
 - (a) The original Affidavit of Roberto Rios Verifying the Petition filed on 3 March 2015;

- (b) The Affidavit of Che Hao Kuo (also known as Peter Kuo) opposing the petition filed on 9 March 2015; and
- (c) The original Affidavit in response of Roberto Rios filed on 19 May 2015.
4. Both parties to the proceedings also furnished court with written submissions in support of their respective cases.

BACKGROUND

5. The Petitioner's contention is that on or about 29 November 2012, the Petitioner entered into an agreement with the Company. The agreement was inter alia for the provision of a loan of USD200, 000 from the Petitioner to the Company. The Company would repay the loan via the sale of mahogany timber to the Petitioner. It was agreed that the prices of mahogany timber supplied by the Company to the Petitioner would remain the same as agreed earlier in October 2012. Any increase in the price would need to be agreed in writing before it could be effective.
6. On or about 7 February 2013, the Petitioner entered into another agreement with the Company to increase the price of mahogany sold by the Company to the Petitioner by 4.5%. In effect, this would assist the Company in repaying its debt to the Petitioner.
7. On 10 May 2013, the Petitioner and the Company mutually terminated the agreements of 29 November 2012 and 7 February 2013. This was recorded in an agreement, referred to in the Affidavit in Reply as the Termination Agreement. In the Termination Agreement, the Company signed and acknowledged that it owed a debt of US\$189,524.21 ("**the debt**") to the Petitioner, and agreed to repay that debt.
8. On the other hand, the Respondent Company's contention is that the debt is disputed since the funds provided by the Petitioner to the Company were advance payments for the purchase of mahogany timber.
9. An advance payment of USD \$198,460 (FJD \$352,567) was made on 15th February, 2013 by the Petitioner for the supply of mahogany timber. The Company proceeded

to supply the Petitioner with mahogany as per the first and second agreements and spent the money advanced to facilitate the supply of mahogany timber to the Petitioner.

10. The petitioner allegedly breached its agreements with the Company by terminating them without valid reasons or circumstances. Mr Carlos, an employee of the Petitioner, informed the Respondent on 08th May, 2013 that the Petitioner intended to immediately end the second agreement without citing any reasons for this termination. The Company manager, Mr. Kuo disagreed on the said intention instead proposed that the business between the parties to continue.
11. On 10th May, 2013 Mr. Kuo was informed that he had to execute a Termination Agreement to end the second Agreement. The Termination Agreement was signed. However, it was not mutually agreed to the extent of the Respondent fully understanding the contents of the Agreement but solely on the trusted assurances from Mr. Carlos that no legal implications drew from the Agreement. Therefore, there was no agreement to any debt.
12. This winding up proceeding is based on the Termination of Agreement between the parties herein. (Underline for emphasis)

THE LAW

13. Section 220 (e) of the Companies Act [Cap 247] ("**the Act**") states that a company may be wound up if it is unable to pay its debt.
14. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994) the onus is on the Petitioner to establish that the Company is unable to pay its debt. Justice Pathik stated:

This Petition is brought on the ground that the Company is unable to pay its debts. I find that such is the situation here. **The creditor has to**

prove a negative, that negative being that the Company cannot pay its debts.

(Emphasis Added)

15. As stated in section 221 (a) of the Act, a company is deemed to be insolvent (unable to pay its debt) if it fails to pay its debt within 3 weeks of the creditor issuing a statutory demand.¹ Justice Pathik went on to state (in *Arjun* [supra])

No question of statutory demand arose in *GLOBE* (supra) but the Companies Act Cap. 247 has provided for certain situations where deemed inability to pay debts arises. Even if the company can show that it is able to pay its debts, it will do no good whatsoever. If the situation exists, it is deemed unable to pay its debts whether or not that is in fact correct. It was so held in *CORNHILL INSURANCE PLC v IMPROVEMENT SERVICES LTD and OTHERS* (1986 1 WLR p.114) as follows:-

"Held, refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding up."

(Emphasis added)

ANALYSIS and DETERMINATION

16. Mega Maderas International Corp.'s ("the Petitioner") commenced proceedings by a winding up petition to wind up SCUD Timber (Fiji) Limited ("the Company") on the basis that it is unable to pay its debt of US \$189,524-21, together with interests thereon, being the amount owing for monies advanced to the Company of which the Company promised to pay in its entirety no later than 10th August, 2013 in an agreement dated 10th May, 2013.
17. On 7 May 2014, the Petitioner issued a Demand Notice ("s.221 notice") to the Company pursuant to section 221 of the Companies Act ("the Act") for the payment of the debt.

18. The s.221 notice was served on the Company at its registered office situated at Lot 2 Bhindi Sub-division, Vatuwaqa, and at its principal place of business at Lot 2, East Viria Industrial Sub Division, Vatuwaqa.
 19. On 9 May 2014, the Company wrote to Munro Leys admitting the debt and claiming that it had been financially disadvantaged since 2013. The Company also proposed a repayment plan. It is submitted that Company is bound by a) the termination agreement and b) its admission in the letter of 9 May 2014.
 20. Despite service of the s.221 notice, the Company made no payments.
 21. On 20 January 2015, the Winding-up Petition ("**the Petition**") was presented on 28 January 2015.
 22. The Winding-up Petition was listed to be heard before the Master of the High Court on Tuesday 3 March 2015, at 9:00 am, for the Petitioner or his barrister and solicitor to appear for the purposes of rule 28 of the Companies (Winding Up) Rules, 1983.
 23. The Affidavit of Roberto Andre Rios Arathoon Verifying Petition was sworn on 29 January 2015 and on 30 January 2015, Affidavit of Sharon Veu Morris Annexing Affidavit of Roberto Andre Rios Arathoon Verifying Petition was filed.
 24. On 30 January 2015, Affidavit of Service by Mesake Waqa was filed verifying service of the Winding-up Petition and Affidavit Annexing Affidavit Verifying Petition at the Company's registered office and principal place of business.
 25. The original Affidavit of Roberto Andre Rios Arathoon was received by courier on 2 March 2015 and was duly filed on 3 March 2015.
 26. The Petition was duly advertised in the *Fiji Times* newspaper on Thursday 19 February 2015, and in the Republic of the Fiji Islands Government Gazette (No. 14, Volume 16) on 20 February 2015.
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27. On 3 March 2015, the Petitioner's Memorandum of Due Compliance was filed pursuant to rule 28 of the Companies (Winding Up) Rules and the High Court Practice Direction No. 2 of 1986.
28. The **Company disputes** the debt on the basis that-
- (a) the funds provided by the Petitioner to the Company were advance payments for the purchase of mahogany timber;
 - (b) the Petitioner allegedly breached its agreements with the Company by terminating them without valid reason or circumstance; and
 - (c) the Termination Agreement was not mutually agreed upon to the extent of the Respondent fully understanding the contents of the Agreement but sole on trusted assurances from Mr. Carlos that no legal implications drew from it. Therefore there was no agreement to any debt.
29. Where the debt is disputed (as in this case), the Company must prove that the dispute is on substantial grounds. Justice Pathik in *Arjun & Sons* [supra] stated:

The Company says that the debt alleged is disputed. **To be able to succeed in a case of this nature, the Company has to prove that the dispute is on 'substantial grounds'** *Re Lympne Investments Ltd* [1972] 2 All ER 385).

(Emphasis added)

30. Justice Pathik had a similar view in *Vivass Development Ltd v Australia and New Zealand Banking Group Ltd* [2002] FJHC 245; *HBC0290d. 2001s (15 February, 2002)*, Justice Pathik stated:

The question therefore is whether the debt is disputed on substantial grounds. If so, whether the Court ought to grant the relief sought by the plaintiffs.

It is a general principle that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3

15.214 and cases cited therein). In Palmer (ibid), on the principles involved it is further stated:

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. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.**

(Emphasis Added)

31. References are also made to the agreements of 29 November 2012 and 7 February 2013 that consistently indicate that a debt is owed by the Company. The fifth paragraph of the Terms and Conditions of the 29 November 2012 Agreement states as follows:

The Supplier (the Company) agrees to repay US\$20,000 a month (regardless of the volume exported in the month) from January 2012 to the buyer (the Petitioner) **until the debt is fully repaid.** Payments will be made by way of discounting the agreed amount from the monthly repayments of Mahogany Timber.

(Emphasis added)

32. The final paragraph on the second page of the 7 February 2013 Agreement further states as follows:

If the Supplier (the Company) decides to terminate the agreement for any reason, the **remaining of the loan** provided for the formation of the Joint Venture **will have to be repaid to the buyer** (the Petitioner) with the same quality and timing terms established in the original agreement.

33. These agreements were terminated mutually via the Termination Agreement in which the Company clearly admits the debt. The Company again confirms the debt in its letter of 9 May 2014.

34. Although the Company appears to be disputing the validity of the Termination Agreement in these proceedings, the Company has taken no steps to rescind the Termination Agreement. Nor has the Company provided any evidence of misrepresentation by the Petitioner. With respect, Mr Kuo's assertion regarding his knowledge of the English language is not believable; the Company's letter of 9 May 2014 and the Affidavit in opposition itself show that Mr Kuo has sufficient knowledge of the English language.
35. In order to avoid a contract for misrepresentation, the Respondent must show that the misrepresentation was material; that is, it must have actually induced the contract. The concept of materiality is by no means clear-cut, however, it appears that a misrepresentation will be material if it did influence the contract. Consequently, to be material, the statement need not relate directly to the subject matter of the contract, it need only be an actual inducement to the final contract. Consequently, it would appear that if the statement does actually induce a representee to act in a particular way, it will be material. It will generally not be material only if it can be shown that a reasonable person would not have acted upon it because, for instance, it was patently false or an exaggeration (for example, a mere puff).

The misrepresentation the Respondent raised herein was that "*the assurance given that no legal implications would be drawn from the Agreement without him fully understanding the agreement and such was not for the purposes of good faith*".

36. For aforesaid rational, I cannot find any evidence of any representation by the Petitioner.
37. The Company has failed to adduce sufficient evidence to establish a *prima facie* case which satisfies this Court that *there is something which ought to be tried either before the court itself or in an action, or by some other proceedings, let alone any evidence to establish its solvency.*

CONCLUSION

38. There is clear evidence which indicates that a debt is owed by the Company to the Petitioner. The Petitioner issued a statutory demand which the Company failed to satisfy within 3 weeks of its issue. The Petitioner has complied with the requirements of the Act and the Rules.
39. The Company has failed to provide any evidence to establish a dispute on substantial grounds as required in terms of the Companies Law. It is insufficient for the Company to simply assert that the debt is disputed. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.
40. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, Scud Timber (Fiji) Limited is hereby acceded to and I now proceed to make the following orders.

FINAL ORDERS

- a. That SCUD TIMBER (FIJI) LIMITED is hereby wound up under the provisions of the Companies Act.
- b. That the Official Receiver is appointed Provisional Liquidator of the Company.
- c. That the Petitioner's costs is summarily assessed at \$750.00 and ordered to be paid out of the assets of the Company.

DATED AT SUVA THIS 03rd DAY OF NOVEMBER, 2015



VISHWA DATT SHARMA
Acting Master of the High Court
SUVA