

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 30 of 2015

IN THE MATTER of AUTO ONE
IMPORTERS & EXPORTERS COMPANY
LIMITED a limited liability company whose
registered office at 147 Ratu Mara Road, Suva.

AND

IN THE MATTER of the COMPANIES
ACT 1983 (Cap 247)

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Jiaoji Savou for the Petitioner
 Mr. Parmendra Kumar for the Respondent

Date of Hearing: 20th November, 2015
Date of Ruling: 30th November, 2017

RULING

*[Application for winding up pursuant to the Provisions
of the Companies (Winding up) Rules, 1983]*

INTRODUCTION

1. This is SPARE PARTS ZONE PTE LIMITED'S ("the Petitioner") petition to wind up AUTO ONE IMPORTERS & EXPORTERS LIMITED ("the Company") on the basis that it is unable to pay its debt.
2. The Company opposed the petition on the following basis:
 - (a) That the debt is genuinely disputed;
 - (b) That the Company is a reputable and profitable limited liability Company;
 - (c) That the Petitioner is statute barred from claiming invoices and goods purportedly delivered from 30th May, 2006 to 29th October, 2007;
 - (d) That the Petitioner is demanding payments on invoices that has already been paid;
 - (e) That the Petitioner is demanding payments on bogus invoices that does not match with the Customs entry and invoices issued to the Company;
 - (f) That the Petitioner is fraudulently making up new invoices for the purpose of its wrongful demand;
 - (g) That the statement of account relied upon by the Petitioner does not show all transactions with the Company;
 - (h) That the Winding Up Petition has been filed beyond the six (6) year Limitation period stipulated by Section 4 (1) of the Limitation Act Cap 35: and
 - (i) That this Court does not have the discretionary powers to grant enlargement of time for filing of the Winding Up Petition if it is caught by the Limitation Act and there is no exception to this Rule.
3. The parties relied on the affidavit evidence filed in this proceeding. These are:
 - (a) The original Affidavit of Jiaoji Savou Verifying the Petition filed on 08th July, 2015;
 - (b) The Affidavit of Neo Chin Aik filed on 24th July, 2015; and
 - (c) The Affidavit in Opposition of Mohammed Rafiq filed on 20th July, 2015.

BACKGROUND

4. The Company has been bulk purchasing automotive parts from the Petitioner via a running account to which payments received from the Debtor Company are credited and credit purchasers are debited.
5. The Company has been trading with the Petitioner for a number of years and commenced purchasing automotive parts, on credit from the Petitioner when it was known as Soon Aik Auto Parts Trading Co Pte Ltd (and prior to its name change on 02nd August, 2010 to Spare Parts Zone Pte Ltd.

6. The relationship between the Petitioner and the Company was once terminated by the Company in 2007 for a number of reasons including disputes on Credit Notes, wrong goods supplied and unethical trade on the part of the Petitioner.
7. The Petitioner from 2008-2010 continued to persuade the Company to enter into business relationship and in mid-2010, the parties again entered into business.
8. The Company has no exclusive supply Contract with the Petitioner.
9. The Company is indebted to the Petitioner in the sum of \$SGD72, 270-13.
10. A Demand Notice was issued against the Respondent Company on 03rd October, 2014.
11. The Respondent Company failed to pay the money owed and hence the Petitioner filed a Winding up Petition against the Respondent Company.

THE LAW

12. **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.
13. 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)

14. The Definition of inability to pay the debt 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".*

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**. 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. 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.
17. **Spare Parts Zone Pte Limited** previously known as **Soon Aik Auto Parts Trading Co. Pte Limited** ("the Petitioner") commenced proceedings by a winding up petition to wind up **Auto One Importers & Exporters Company Limited** ("the Company") on the basis that it is unable to pay its debt of **\$SGD 72,270-13**, being the amount owing to the Creditor in respect of supplies made by the Creditor for which the Company made offers to settle but have failed to do so.
18. On 03rd October, 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.
19. The **s.221** notice was served on the Company by delivering the same to its registered office situated at 147 Ratu Mara Road, Samabula, Suva requiring the Company to pay the debt of **\$SGD 72,270-13** within 21 days to the Petitioner.

20. Reference is made to the e-mail Annexure "E" within the Affidavit in Support of Neo Chin Aik written By Mr. Rafiq, the Company Director to SAH accounts and reads as follows-
- "At present our dollar is very weak and the situation is not so good but I can promise you some payments beginning from January. I want to start paying you and clear your debts."*
- In reply SAH Accounts writes back to Mr. Rafiq on 08th December, 2009 and states as follows-
- "....As your previous email mentioned, until today we have not received your 1st instalment yet. Kindly effect the payment at your soonest.".....*
21. Despite service of the s.221 notice, the Company made no payments as can be ascertained from the abovementioned e-mail.
22. On 08th July, 2015, the Winding-up Petition ("the Petition") was presented to this Court.
23. The Winding-up Petition was listed to be heard before the Master of the High Court for the Petitioner or his barrister and solicitor to appear for the purposes of rule 28 of the Companies (Winding Up) Rules, 1983.
24. The Affidavit of Jiaoji Savou Verifying Petition was sworn on 13th July, 2015 and filed into this Court.
25. On 05th August, 2015, Affidavit of Service by Jiaoji Savou 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.
26. The Petition was duly advertised in the *Fiji Times* newspaper on Tuesday 14th July 2015, and in the Republic of the Fiji Islands Government Gazette (No. 16, Volume 50) on Friday 17th July, 2015 respectively.
27. On 10th August, 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 and says that the Petition is statute Barred and the Petitioner therefore cannot claim invoices and goods purportedly delivered from 30th May, 2006 to 29th October, 2007.
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 *Vivrass 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 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. Although the Debtor Company appears not to dispute sourcing supplies from the Petitioning Company but disputes the sum claimed as the principal amount.
32. Further, there is no evidence provided by the Debtor Company of paying the Petitioned Debt, whether in the form of Bank Statements, Swift Transfer Statements, Money Transfer payments or Wire Transfer Payments.
33. The payments made by the Debtor Company in relation to the invoices that are the subject of the Statement of Account have been acknowledged in the Statement of Account provided for and annexed as "c" within the Affidavit of the Petitioner.
34. On the issue of whether the Winding Up Petition has been filed beyond the six (6) year Limitation period stipulated by Section 4 (1) of the Limitation Act Cap 35:

The invoices for the period 30th May 2006- 29th May 2007 cannot said to be statute barred since the Affidavit of the Petitioner at Annexure "c" filed on 24th July, 2015 shows that it is a "Running Account Statement" and the last payment made is recorded on the 12th October, 2007.

Therefore, the right of the Petitioner to recover the Debt from the Debtor Company accrues from the 12th October, 2007 which resulted in a 6 year limitation period commencing from that date.

Thereafter, the Company made multiple purchases between 16th October 2007 and 16th December, 2010 and this created or resulted in a new starting point on the limitation period on the Running Account.

35. Further issue raised by the Debtor Company whether the Court has the discretionary powers to grant the enlargement of time for filing of the Winding up Petition or not and if it is caught by the Limitation Act and there is no exception to this Rule?

"Section 12 (3) of the Limitation Act, Cap 35 refers and states thus-

"(3) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:"

36. Therefore, the Limitation period is a non- issue here because the Winding up Petition has been filed within the timeframe set out in the Law.
37. For the abovementioned rational, I find that 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 the 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, **Auto One Importers & Exporters Company Limited** is hereby acceded to and I now proceed to make the following orders.

FINAL ORDERS

- a. That AUTO ONE IMPORTERS & EXPORTERS COMPANY 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 30th DAY OF NOVEMBER, 2017




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MR VISHWA DATT SHARMA
Master of the High Court
SUVA

cc. *Mr. Jiaoji Savou esq, Suva*
M. A. Khan ESQ, Suva