

IN THE HIGH COURT OF FIJI  
AT SUVA

Winding Up Action No. HBE 09 of 2016

IN THE MATTER of MOHAMMED  
NADEEM BUILDERS LIMITED a limited  
liability company having its registered office at 193,  
Victoria Parade Suva, Fiji.

A N D

IN THE MATTER of the Companies Act  
2015

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Liverpool - for the Petitioner  
: Mr. M. A. Khan - for the Respondent Company

Date of Ruling : 30<sup>th</sup> July, 2018 @ 9am

**RULING**

*[Application for winding up pursuant to Section 513(c) the Companies Act 3 of 2015]*

### INTRODUCTION

1. This is R.C.Manubhai & Company Limited's petition to wind up Mohammed Nadeem Builders Limited on the basis that it is **unable to pay its debt**.
2. The Company **opposed** the Application for Winding Up on the basis that the **debt of \$14,759.94 is disputed**; the statement of balance released by the Creditor for the month of March sets the balance sum of \$13,969.42. That based on the statement of balance, it is absurd that the balance owing would increase by another \$790.52 to \$14,759.94 as claimed by the Applicant. That as a result of the payments made of which the Applicant is aware that the amount owed should stand at **\$12,003.42** not as the Applicant Creditor claims. That the Debtor Company is able to pay its debt and is not insolvent. That the Debtor Company is willing to continue paying off its debt if allowed so by this Honourable court. That for above reasons, the Debtor Company has a genuine argument against this application.
3. The matter was heard and both parties filed their respective written submissions.

### BACKGROUND

4. According to the Applicant, R.C. Manubhai & Company Limited, the Respondent Company is indebted to the Applicant on 04th April, 2016 in the sum of \$14,759.94 for the building materials, which sum was then due and payable.
5. The Applicant served on the Company a Demand Notice signed by the Applicant requiring the Company to pay the amount of \$14,759.94.
6. The Company failed for three weeks after service of the demand to pay the amount or to secure or compound for it to the reasonable satisfaction of the Applicant.
7. The Company is unable to pay its debt.
8. The Applicant believes that no genuine dispute as to the existence or amount of the debt of \$14,759.94.

### SERVICE of the APPLICATION and AFFIDAVIT VERIFYING PETITION

9. On 16<sup>th</sup> August, 2016 Mohammed Nadeem Builders Limited was served by Narsa Reddy with a true copy of the Application for Winding Up and Affidavit Verifying Application for Winding Up at the registered office of the Respondent at 193 Victoria Parade, Suva.
10. The Winding-up Petition was listed to be heard before the Master of the High Court on 08<sup>th</sup> September, 2017, at 9:00 am, for the Applicant or his barrister and solicitor to appear for the purposes *Section 513 and 523 of the Companies Act*.



11. The Affidavit of Jitendra Kumar Verifying Application for Winding Up (Statutory Affidavit) was deposited on 08<sup>th</sup> July, 2016.

#### ADVERTISEMENT of the PETITION

12. The Petition was duly advertised in the *Fiji Sun* newspaper on 12<sup>th</sup> September, 2016, and in the Republic of the Fiji Islands Government Gazette (Volume 17) on 16<sup>th</sup> September, 2016 respectively.

#### MEMORANDUM of DUE COMPLIANCE

13. On 24<sup>th</sup> August, 2016, a certificate signed by the Court Registrar was issued and sealed pursuant to *rule 19 (1) of the Companies (Winding Up) Rule, 2015* and the *High Court Practice Direction No. 2 of 1986*.

#### THE LAW

14. *Section 513 of the Companies Act 03 of 2015* provides for cases in which a Company may be wound by Court. *Section 513 (c) of the Act* herein is the relevant section for Court to consider in determining this application before court-

*"A company may be wound up by the Court," if the Company is Insolvent."*

15. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd*<sup>d</sup> 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.*

(my emphasis)

16. In terms of *section 515 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."*

(my emphasis)

DISPUTED DEBT

17. Where the debt is disputed, 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).*

(my emphasis)

18. Justice Pathik had a similar view in *Vivress Development Ltd v Australia and New Zealand Banking Group Ltd*<sup>2</sup>. 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.

(my emphasis)

19. The Respondent Company after service of the Statutory Demand Notice was effected on them that it failed to pay its debt within the three weeks thereof and/or make appropriate arrangements. Their contention has been as follows-

- That the Debt of \$14,759-94 was disputed;
- That the statement of balance released by the Creditor for the month of March sets the balance sum of \$13,969-42;
- That based on the statement of balance, it is absurd that the balance owing would increase by another \$790-52 to \$14,759-94 as claimed by the Applicant;
- That as a result of the payments made of which the Applicant is aware of that the amount owed should stand at \$12,003-42 not as the Applicant Creditor claims at \$14,759-94;



- That the Debtor Company is able to pay its debt and is not insolvent;
  - That the Debtor Company is willing to continue paying off its debt if allowed so by this Honourable court ; and
  - That for above reasons, the Debtor Company has a genuine argument against this application.
20. Upon a careful perusal of the above Respondent's contention, it can easily be ascertained and is obvious that the Respondent denies the Debt of \$14,759-94 but states that after making payments, the Debt should be reduced and stand at \$12,003-42. He added that he is willing to continue paying its Debt if this Honourable court allows him to do so. This is an indirect indication of the admission of the Debt but at a reduced amount of \$12,003-42.

### IN CONCLUSION

21. The case before this Court is a simple one. The evidence clearly indicates that **debt** is owed by the Company to the Applicant. The Applicant issued a **statutory demand** which the Company failed to satisfy within **3 weeks** of its issue. The Applicant has complied with the requirements of the **Act** and the **Rules** accordingly.
22. The Company has failed to provide any evidence to establish a **dispute** on substantial grounds. There is no evidence before this Court to indicate the Company is **solvent** or that it is **able to pay its debts**.
23. Therefore, for the abovementioned reasons, I have no alternative but to order the Winding up of the Respondent Company, **Mohammed Nadeem Builders Limited**.
23. Bearing in mind the nature and the circumstances in which the current case was handled by the Respondent Company, the Applicant is entitled to a cost in the sum of **\$1,000**, to be paid within 14 days timeframe.
24. The Application for Winding Up was filed on 28<sup>th</sup> July, 2016 and thereafter listed before the Deputy Registrar for compliance and issuance of the Certificated in terms of Rule 19 (1) of the Companies (Winding Up) Rules, 2015. The matter was then listed before the Master for further deliberation of the application. Since the filing and issuance of the Application for Winding up and the final determination of the Winding up proceedings it has taken this court over a period of 6 months to finally determine the matter. The reason being that the Masters court carries and shoulders a heavy load of civil cases which also needs to be given attention to in terms of procedures and determination.
- Section 528(1) of the Companies Act states that 'an application for a Company to be wound up in Insolvency is to be determined within 6 months after it is made.'*
25. *Section 528 (2) of the Act states that the Court may by order (on such conditions as it considers fit) extend the period within which an application must be determined, but only if-*

- (a) *'the Court is satisfied that special circumstances justify the extension; and*
- (b) *the order is made within that period as prescribed by subsection (1), or as last extended under this subsection, as the case requires."*

26. The Court in justifying the special circumstances states that because of the voluminous nature of the work load and the pressure under which Master's court was in operation was unable to determine this case any earlier than 6 months' time frame as was provided in law. Therefore this very special circumstances justified the extension till today (30<sup>th</sup> July, 2018).

21. For the above reasons, the following orders are made in terms of its Petition.

**FINAL ORDERS**

- (i) That MOHAMMED NADEEM BUILDERS LIMITED is hereby wound up under the provisions of the Companies Act 3 of 2015;
- (ii) That the Official Receiver is appointed as the Liquidator to the conduct of the Winding Up herein; and
- (iii) That there will an order for costs against the Respondent Company, MOHAMMED NADEEM BUILDERS LIMITED summarily assessed at \$1,000 to be paid within 14 days timeframe.
- (iv) Special circumstances justified the extension to the delivery of Judgment to 30<sup>th</sup> July, 2018 accordingly.
- (v) Orders accordingly

DATED AT SUVA THIS 30<sup>TH</sup> JULY 2018



MASTER  
VISHWA DATT SHARMA

cc. Reddy & Nandan Lawyers, Suva  
M. A. Khan Esq, Suva