

IN THE HIGH COURT OF FIJI
AT SUVA

Winding Up Action No. HBE 10 of 2016

IN THE MATTER of 3SA CARPETS LIMITED
a Limited Liability Company having its registered office
situated at c/c Aliz Pacific, Level 8 Bsp Life Center,
3 Scott Street, Suva, P O Box 2475, Government Building
Suva.

A N D

IN THE MATTER of the Companies Act 1983,
Section 221

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Nilesh Sharma - for the Petitioner
: Mr. Kunal Singh - for the Respondent Company

Date of Ruling : 30th July, 2018 @ 9am

RULING

[Application for winding up pursuant to Companies Act 3 of 2015]

INTRODUCTION

1. This is UB FREIGHT (FIJI) LIMITED'S application seeking to wind up 3SA CARPETS LIMITED on the basis that it is unable to pay its debt of \$25,270.05.
2. The application was strongly opposed and subsequently the Affidavit in Opposition was filed as was required by the Rules.
3. The Applicant and the Respondent Company relied on the affidavit evidence and the written submissions filed in this proceeding and submitted their oral arguments at the hearing.

BACKGROUND

4. On 21st April, 2016, the Respondent Company was indebted to the Applicant in the sum of \$25,270.05 for freight and Customs services provided to the Company upon request which sum was then due and payable.
5. Statutory Demand notices pursuant to section 515 of the Companies Act 2015 was personally served on 25th April, 2016 at the Company's registered office at Lot 7, Jai Hanuman Road, Vatuwaqa, Suva, requiring the Company to pay the debt. The Company failed for three weeks after service of the two Demand Notices to pay the same and/or secure or compound for it to the reasonable satisfaction of the Applicant.
6. The Applicant feels that there is no genuine dispute to the existence or the amount of Debt of \$25,270.05 and believes that the Company is unable to pay its Debt.
7. The Respondent Company failed to pay the money/Debt owed and hence filed a Winding up Petition against the Respondent Company.

SERVICE of the APPLICATION and AFFIDAVIT VERIFYING PETITION

8. On 15th August, 2016, 3SA Carpets Limited was served with a true copy of the Application for Winding Up and Affidavit Verifying Application for Winding Up by Nilesh Kumar at the registered Office located at c/- Aliz Pacific, Level 8, BSP Life Centre, 3 Scott Street, Suva.
9. The Winding-up Petition was listed to be heard before the Master of the High Court on 12th September, 2016, at 9:00 am, for the Petitioner or his barrister and solicitor to appear for the purposes *Section 513 and 523 of the Companies Act*.
10. The Affidavit of Jekesoni Rasai Verifying Application for Winding Up (Statutory Affidavit) was deposed on 31st August, 2016.

ADVERTISEMENT of the PETITION

11. The Petition was duly advertised in the *Fiji Times* newspaper on 19th August, 2016, and in the Republic of the Fiji Islands Government Gazette (No. 63, Volume 17) on 19th August, 2016 respectively.

MEMORANDUM of DUE COMPLIANCE

12. A certificate signed by the Court Registrar was issued and sealed on 24th August, 2016 pursuant to *rule 19 (1) of the Companies (Winding Up) Rule, 2015* and the *High Court Practice Direction No. 2 of 1986*.

THE LAW

13. *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."

14. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd*^d 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)

15. 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

16. 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)

17. Justice Pathik had a similar view in *Vivress Development Ltd v Australia and New Zealand Banking Group Ltd*². 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)

18. The Company after service of the Statutory Demand Notice was effected failed to take any pro-active measures to pay and/or dispute the Debt.
19. The Respondent has disputed the alleged Debt and referred court to *Halsbury's Law 4th Edition, 1986 Reissue Volume 7(2) Companies* at paragraph 1451 (page 1101) states-

"A winding up order will not be made on a debt which is disputed in good faith by the company, the court must see that the dispute is based on a substantial ground...."

20. The Respondent submitted that the Applicant shows that the Respondent has acted in bad faith, there was a payment of \$1,000 made by the Company for the release of goods. The payment showed the

genuine interest in payment and the importance of releasing the goods was high. Further, there was no denial of non-payment of overdue amount rather issuance of two cheques consecutively were given to the Applicant with the information that these cheques only to be served in bank for cash upon directions by the Manager of the Company. However, the Applicant presented both cheques at once and held the Bill of lading in ransom of full payment. Since the consignment of the Respondent was held at ransom by the Applicant, the Respondent under duress had to pay the Applicant in order to the consignment cleared. This is evident by the \$1,000 paid to Neel Shivam Lawyers.

21. The Respondent Company submitted that the Company has proved that no debt is owed by **3SA Carpets Limited** as no evidence is produced to prove the same.
22. According to the Applicant, the Respondent through their Director had admitted the Debt via e- mail on the 31st October, 2015 and referred to annexure "KK1" in the affidavit of Reply of Kamleshwar Kant which reads as follows-

"Thank you for our meeting in your office.

I confirm our discussion as follows:

1 =

2. The Debt is owed by 3SA Carpets Limited.

3

4. 3SA Carpets never refused to pay. In fact we had made all efforts to pay but UB Freight refused to even meet to settle the dues....

5 UB Freight held our goods illegally because

23. It is clear from above e-mail that the Debt claimed herein is admitted and 3SA Carpets had never refused to pay the same. It is also noted that \$1,000 was paid towards the total Debt of **\$25,270.05**. **The Applicant has informed court that there was an arrangement made between the parties to settle the Debt.**

The Applicant in his oral submissions has admitted the payment of \$1,000 and asked court to reduce the Debt amount by \$1,000 which if allowed will be reduced to **\$24,270.05**. The Respondent at the hearing did not object to this reduction of Debt by \$1,000.

24. The Applicant has also disputed the claim by the Respondent Company that the Applicant is liable for any off-setting claim.
25. Further, this court has taken note of the fact that the two cheques issued for payment was dishonoured upon presentation to the bank. These cheques dishonoured by the bank is clear evidence of the Respondent Company's financial status, that the Company is insolvent and unable to pay the Applicant's Debt.
26. Therefore, the Company has failed in its bid either to take any further pro-active measures and/or pay off the Debt as per the arrangement made between the Applicant and the Respondent Company.

27. The Respondent Company has also 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.
28. If the Respondent Company is of the view that the Applicant had caused any loss to the Respondent Company, then the Company could have sought an order to set aside the Statutory Demand and/or seek any relief appropriate to proceed by a Civil Claim in the correct jurisdiction of the court of law.
29. Whether, the Respondent Company took this cue or not is his responsibility.
30. I find that the Respondent Company was endeavouring to delay the Winding up proceedings when knowing very well that an arrangement existed between the Applicant and the Respondent Company to pay off the Debt in the manner agreed upon therein.

CONCLUSION

31. The evidence clearly indicates that **debt** is owed by the Company to the Applicant. The Respondent Company via the e-mail as mentioned hereinabove has admitted the Debt and stated further that he had never refused to pay the Debt.
32. 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.
33. 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, bearing in mind there was never any court appearance personally and/or by Counsel**. The Respondent Company **3SA Carpets Limited** is accordingly wound up.
34. Bearing in mind the nature and the circumstances in which the current case was handled by the Respondent, the Applicant is entitled to a cost in the sum of **\$1,500**, to be paid within 14 days
35. The Application for Winding Up was filed on 01st August, 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, over 06 months has lapsed. *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.'*
36. *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."*

(a) The case was heard and concluded on 22nd May, 2017 and Judgment delivered today.

37. 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 dispose off this matter in 6 months' time frame as was provided for in law. Further, the file record speaks for itself and is evident of the fact that interlocutory application was made by the Respondent seeking certain orders including an order to file and serve his Affidavit in Opposition and this court had to hear the parties and then determine that issue first before proceeding to hear and determine the substantive Winding up application. Hence the delay. Therefore this very special circumstances justified the extension beyond the 6 months' timeframe and was inevitable in any circumstance.

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

FINAL ORDERS

- (i) That 3SA Carpets 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 3SA Carpets Limited summarily assessed at \$1,500 to be paid within 14 days timeframe.
- (iv) Special circumstances justified the extension to the matter being dealt with beyond 6 months' timeframe.
- (v) Orders accordingly

DATED AT SUVA THIS 30TH JULY 2018



MASTER
VISHWA DATT SHARMA

cc. Nilesh Sharma Lawyers, Suva
K. S. Law, Nausori