

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Winding Up Action No. HBE 43 OF 2020

**IN THE MATTER of NIKHIL BUSES PTE
LIMITED** a limited liability company having its
registered office in at Tuvu, Bemana, Sigatoka.

AND

**IN THE MATTER of THE COMPANIES ACT
2015**

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSEL: Ms. Erasito A. - for the Petitioner
No appearance - for the Respondent Company

Date of Ruling: 29th October, 2020

RULING

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

INTRODUCTION

1. This is Home Finance Company PTE Limited Trading As HFC Bank's application seeking to wind up Nikhil Buses PTE Limited on the basis that it is unable to pay its debt of \$2, 335, 627.95 and interest at the rate of 12% per annum on the judgment sum computed from 11th February, 2020 until full payment awarded in High Court at Suva Civil Action Number HBC 59 of 2020, which sum was then due and payable.
2. The Debtor company did not file any Affidavit in Opposition. Hence the matter was heard unopposed.
3. The Applicant relied on the statutory affidavit evidence verifying application for winding up and the oral submissions made at the hearing.

BACKGROUND

4. On 7th May, 2020, the Respondent Company was indebted to the Applicant in the sum of \$2, 335, 627.95 and interest at the rate of 12% per annum on the judgment sum computed from 11th February, 2020 until full payment awarded in High Court at Suva Civil Action Number HBC 59 of 2020, which sum was then due and payable.
5. Statutory Demand notice pursuant to section 515 of the Companies Act 2015 was served on Nikhil Buses PTE Limited at its registered office at Tuvu, Bemana, Valley road, Sigatoka requiring the Company to pay the debt. The Company failed for three weeks after service of the 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 \$2, 335, 627.95 and interest at the rate of 12% per annum on the judgment sum computed from 11th February, 2020 until full payment awarded in High Court at Suva Civil Action Number HBC 59 of 2020, which sum was then due and payable.
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 14th July, 2020, Nikhil Buses Pte Limited was served with a true copy of the Application for Winding Up and Affidavit Verifying Application for Winding Up by Muni Prasad at the registered Office located at Tuvu, Bemana, Valley road, Sigatoka.
9. The Winding-up Petition was listed to be heard before the Judge of the High Court on 19th Of October, 2020 at 9.30am, for the Petitioner or his barrister and solicitor to appear for the purposes of *Section 513 and 523 of the Companies Act*.

10. The Affidavit of Jainendra Kumar Verifying Application for Winding Up (Statutory Affidavit) was deposited on 3rd of July, 2020.

ADVERTISEMENT of the PETITION

11. The Petition was duly advertised in the *Fiji Sun* newspaper 17th July, 2020, and in the Republic of the Fiji Islands Government Gazette (No. 66, Volume 21) on 17th July, 2020 respectively.

MEMORANDUM of DUE COMPLIANCE

12. A certificate signed by the Deputy Registrar was issued and sealed on 5th of August, 2020 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."

As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd* 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)

14. 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

15. 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)

16. Justice Pathik had a similar view in *Vivrass Development Ltd v Australia and New Zealand Banking Group Ltd*. 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)

17. The Company after service of the Statutory Demand Notice was effected, failed to take any proactive measures to pay and/or dispute the Debt, nor did they file any affidavit in opposition and or made any court appearances.
18. According to the Applicant, on 7th May, 2020, the Respondent Company was indebted to the Applicant in the sum of **\$2, 335, 627.95** and interest at the rate of 12% per annum on the judgment sum computed from 11th February, 2020 until full payment awarded in High Court at Suva Civil Action Number HBC 59 of 2020, which sum was then due and payable.
19. On 30th May, 2020, the Applicant served a demand notice on the company requiring the company to pay the amount of judgment sum together with interest awarded in the High Court Suva Civil Action No. HBC 59 of 2020.
20. The company in fact failed for a period of 3 weeks after the service of the demand to pay the said amount and/or to secure or compound for it to the reasonable satisfaction of the applicant. Hence the company is unable to be its debts.

CONCLUSION

21. The evidence by the Petitioner clearly states that the **debt** as stated hereinabove in the judgment sum awarded in Suva Civil Action No. HBC 59 of 2020 is owed by the Company Nikhil Buses PTE Limited to the Applicant.
22. 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.
23. The Company has failed to file and serve any affidavit in opposition and/ or provide any evidence to establish a **dispute** on substantial grounds. There is no evidence before this court to indicate or establish that the Respondent Company is **solvent** or that it is **able to pay its debts, bearing in mind that no opposition was filed and further there was no appearances personally or by counsel.**
24. **The Respondent Company Nikhil Buses Pte Limited is therefore accordingly wound up.**
25. Bearing in mind that there was no affidavit in opposition filed and or court appearances made by the Respondent company either in person or by counsel, the circumstances entitles the petitioning company the cost of the proceedings, which I summarily assess at \$1, 500.00 to be paid within 14 days.
26. For the above reasons, the following orders are made in terms of this winding up Petition.

FINAL ORDERS

- (i) **That Nikhil Buses PTE 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 Nikhil Buses PTE Limited summarily assessed at \$1,500 to be paid within 14 days timeframe.**
- (iv) **Orders accordingly.**

DATED AT SUVA THIS 29th October, 2020.


VISHWA DATT SHARMA
JUDGE.



cc. Lajendra Lawyers, Suva
Nikhil Buses PTE Limited, Sigatoka