IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

COMPANIES [WINDING UP ACTION]
NO. HBE 71 OF 2012.

IN THE MATTER OF **PACIFIC EMERGING TECHNOLOGIES LIMITED**

AND

IN THE MATTER OF THE **COMPANIES ACT (CAP 247)**.

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Ms. Muir & Mr. Pal A.** for the **Petitioner**
Mr. Udit J. for the Respondent

Date of Hearing : **18th April, 2013**
Date of Judgment : **25th July, 2013**

JUDGMENT

A. CATCH WORDS

Winding up-disputed debt- petition annexed invoices relating to debt, is it fatal irregularity – who should sign the notice under Section 221 of Companies Act- irregularity – Section 202 (1) of Companies Act- bona fide dispute.

B. INTRODUCTION

1. The Petitioner is holding 49% of the Respondent Company and the majority shareholder holding 51% is ATH. The Petitioner had supplied electronic

terminals in pursuant to Respondent's Board decision and now seeks to recover the payments due to said supply of electronic terminals to the Respondent.

C. ANALYSIS

2. The Petitioner had filed the Petition through its agent and a solicitor had signed the said petition on behalf of the Petitioner and had also annexed the invoices. The winding up notice was issued for a sum of AUD 49,775.00 and FJD 78,200 and this was signed by a solicitor on behalf of the solicitor firm who had engaged for the Petitioner. The Respondent object to both acts and state these are fatal irregularities and petition should be struck off.

D. PRELIMINARY OBJECTIONS

3. The Respondent objects to the winding up notice on the basis that it was signed on behalf of solicitor firm by an unnamed person. This is obviously an associate or a partner of the firm. No such objection were made when the said winding up notice was served, but some other objections were raised indicating that there was no prejudice or misleading due to alleged irregularity. It is clear that the name of the solicitor firm appears below the signature and it also denotes that the signature was placed as the agent of their client, who is the petitioner. I cannot consider this as fatal irregularity to reject the petition in terms of the Section 202(1) and the Winding Up Rules. A legal practitioner can institute an action on behalf of the client and this needs no further elaboration as it is a trite law.

4. The respondent again objects to the winding up petition where there are annexed documents, namely the invoices of the alleged debt.

   Halsbury's Laws of England/COMPANY AND PARTNERSHIP INSOLVENCY (VOLUME 16 (2011) 5TH EDITION, PARAS 1-629; VOLUME 17 (2011) 5TH EDITION, para 408. States as follows regarding the Winding Up Petition 408. Form and contents of petition other than a petition presented by one or more contributories as follows

"ii) Procedure on Petition

A. PETITION PRESENTED OTHER THAN BY ONE OR MORE CONTRIBUTORIES

408. Form and contents of petition other than a petition presented by one or more contributories.

Every petition for the winding up of a company by the court presented by any person entitled to do so[1], other than one or more contributories[2], must be in the prescribed form[3], with such variations as circumstances may require[4]. No insolvency proceedings[5], which include a winding-up petition, are to be invalidated by any formal defect or by any irregularity **unless the court before which objection** is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by an order of the court[6]." (Foot notes deleted and emphasis added)

5. Companies Winding up Rule No 4 deals with the forms of the winding up and states that forms in the schedule, with such variations and circumstances may require will apply and the Part V of the said rules deals with the winding up Petition and Rule 21 indicates the Form No 3,4,5 with such variations as circumstances may require. I cannot consider the annexing of invoices to the Winding Up petition would make it fatal for the application before me. The variation to Forms are allowed under the Companies Winding Up Rules, hence more detailed petition would help the Respondent to ascertain the correctness of the details of the alleged debt and this cannot be a reason to reject the petition as it will assist the Respondent as there is no injustice to Respondent.

6. In Section 202 (1) of the Companies Act will make any formal defect or any irregularity invalid ipso facto unless there is substantial injustice which cannot be an order of the court. The preliminary objections taken by the counsel for the Respondent falls fairly and squarely under this provision and I do not think

that these objections hold water and reject them. The Section 202(1) of Companies Act states as follows

> *'202 (1) No proceedings under the Act or these Rules shall be invalid by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceedings in of opinion that substantial injustice has been causes by the defect or irregularity and that the injustice cannot be remedied by any order of that court.'*

E. Whether there is bona fide dispute of the Debt

7. The alleged debt is disputed by the Respondent. The test to determine whether or not a debt is disputed was stated in Palmers Company Law Vol. 13. It was quoted in *In re Comsol Fiji Ltd* [2009] FJHC 77; HBE 0048.2007L (25 March 2009) as follows:

> "To fall within the general principle the dispute must be bona filed in both a subjective and an objective sense. Thus the reason for non paying the debt must be honestly believed to exist and must be based on substantial of 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 pay the debt that the court sees that there is a question to be decided**". [emphasis added]

8. In the matter of *Shoeworld (Fiji) Limited* – Winding Up Action No. HBE 47 of 2007, it was held as to admission of debt as follows:

> "The issue for determination is a relatively short, and perhaps is answered by a decision of *His Lordship Plowman* in *Tweeds Garages Limited, 1961 CHD 406*. At page 414 His Lordship said: "*In my judgment where there is no doubt*

(and there is none here) that the petitioner is a creditor of a sum which would otherwise entitle him to a winding –up order the precise sum which is owed to him is not of itself a sufficient to the petition".

[6] What is necessary is for the purpose of opposing a winding up petition is that the debt must be bone fide disputed. At *page 413* His Lordship said; "…*moreover it seems to me that it would in many cases be quite unjust to refuse a winding – up to a Petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owning"*. What this necessarily entails is that where a debt is owed by a Company and it admits only some of it, it ought to pay that portion and contest the balance. On the other hand, the Petitioner is entitled to wind –up the Company only on the admitted amount which remains unpaid. This was stated by *Harman J.* in *Cornhill Insurance PLC – v – Improvement Services Limited & others* 1986 1 WLR 114 at pg. 4 where his Lordship said that the following:-

"That appears to me to be sound reason and sound law. I re-enforce it by reference to a decision in Re a Company 1950 (94) SOL J 369 Visey J in the matter in which counsel of the utmost distinction in Chancery at that time both leading and junior counsel appeared said that where a Company was well known and wealthy it was the more likely the delay in settlement of its obligation would create suspicion of its financial embarrassment." "Rich man and rich companies which did not pay their debts had only themselves to blame if it were thought that they could not pay them."

9. In Halsbury's Laws of England/COMPANY AND PARTNERSHIP INSOLVENCY (VOLUME 16 (2011) 5TH EDITION, PARAS 1-629; VOLUME 17 (2011) 5TH EDITION, **394. Inability to pay debts** states as follows

"**Omission by a company to pay a debt by reason of a genuine dispute** does not amount to a neglect to comply with the statutory demand[17]. Default in complying with the statutory demand of a creditor gives not only him, but other creditors and contributories, the right to petition for a **winding up**[18].

Inability to pay debts may be shown in other ways than by proof of non-compliance with the statutory demand, as, for example, where a bill of exchange or promissory note has been dishonoured at maturity[19], or a judgment creditor has not issued execution because the company's solicitor has told him that there are no assets, or no unmortgaged assets, on which he may levy[20]. The court may infer that the company is unable to pay its debts as they fall due if it fails to pay an undisputed debt, payment of which has been demanded by the creditor[21]. **Even if there is evidence showing that the company has a large surplus of assets over liabilities, the court may infer that the company is insolvent if it has failed to pay a debt which has been duly demanded[22].** The court will, however, be slow to infer insolvency if payment has not been duly demanded[23].

(Foot notes to the above- .17 *Re London and Paris Banking Corpn* (1875) LR 19 Eq 444. A demand in excess of what is due is a valid statutory demand: see *Cardiff Preserved Coal and Coke Co v Norton* (1867) 2 Ch App 405 at 410. As to **disputed debts** see para 401.18 *Re Anglesea Island Coal and Coke Co Ltd, ex p Owen* (1861) 4 LT 684. 19 *Re Globe New Patent Iron and Steel Co* (1875) LR 20 Eq 337; *Re Great Northern Copper Mining Co of South Australia Ltd, ex p Great Northern Copper Mining Co of South Australia Ltd* (1869) 20 LT 264 (affd 20 LT 347); *Gandy, Petitioner* (1912) 50 SLR 3.20 *Re Flagstaff Silver Mining Co of Utah* (1875) LR 20 Eq 268; *Re Yate Collieries and Limeworks Co* [1883] WN 171. 21 *Taylor's Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216, sub nom *Re Taylor's*

> *Industrial Flooring Ltd* [1990] BCC 44, CA. There is, therefore, no necessity to serve a statutory demand if a petition is founded on an undisputed debt payment of which has been otherwise demanded. 22 ***Cornhill Insurance plc v Improvement Services Ltd*** **[1986] 1 WLR 114, [1986] BCLC 26.**23 *Re a Company (No 006798 of 1995)* [1996] 2 All ER 417, [1996] 1 WLR 491)"

10. What is important is to consider the nature of the debt and not the nature of the company as the provision is a deeming provision upon the satisfaction of the criterion therein. Even if the Respondent is solvent is not an issue under this and not a consideration as submitted by the counsel for the Respondent. The dispute of the debt should be so much that there should be a genuine doubt as to the debt as opposed to any amount or other issue. The dispute should be done in good faith and spontaneity of the said allegation is also a factor in the analysis of evidence. A dispute raised as to the debt only when there is imminent winding up has to be examined closely to see whether there was any reason for the delay and in the absence of that has to be considered as afterthoughts or inventions which do not create any bona fide dispute as necessity is mother of all inventions. The court needs to consider the affidavit evidence and careful analysis of them is needed to consider whether the dispute is made in good faith. The court also has a discretion to wind up a company considering all the circumstances.

11. *Halsbury's Law 4th Edition, 1988 Reissue, Volume 7(2) Companies* at paragraph 1451 (pages 1101 and 1102) provides an accurate summary of the case law regarding disputed debts in a winding up petition:

> 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. A dispute as to the precise amount due is not a sufficient answer to the petition. If there is a genuine dispute, the petition may be dismissed or stayed, and an injunction may

> be granted restraining the advertisement or publicizing of the petition…

The debt must be disputed in good faith and on 'substantial grounds'. *Palmers Company Law Vol. 13* as follows:

> To fall within the general principle **the dispute must be bona filed 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 of 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 pay the debt that the court sees that there is a question to be decided**. [emphasis added].

A dispute about the quantum of the debt does not amount to a disputed debt. Plowman J said in *Re Tweets Garages, Ltd* [1962] 1 All E.R. 121(at page 124);

> **Moreover, it seems to me that it would in many cases be quite unjust to refuse a winding –up order to a petitioner who is admittedly owed moneys which have not been paid** merely because there is a dispute as to the precise amount owing. …is the company entitled to say: ***"it is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?"*** I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for the sum which would otherwise entitle him to a winding –up order, a dispute as to the precise sum which is owed to him is not itself a sufficient answer to his petition. [emphasis added]

12. In Seawind Tankers Corporation v Bayoil SA [1999] 1 All ER 374, the Court of Appeal (England) at p 379 cited Buckley on the Companies Act (11th Edi) as follows

> 'A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company**.** A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debt were directed to send over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial grounds, the court may decide it on the petition and make the order'.

13. By the same token, the Respondent should not be allowed to consider that they can delay or refuse any debt owed by its minority shareholder and should not insert pressure on the minority shareholder to purchase the majority state by delay in payments. Any debtor irrespective of that entity being a shareholder or not is entitled for the relief contained in the Companies Act, and this is done with a purpose behind it. Payments for services or goods supplied is essential for working capital requirements of any company and the same applies to the Petitioner irrespective of its holding an equity in the Respondent.

14. The issue before me is whether the Respondent had failed to honour the alleged debt to the Petitioner and if so whether the alleged dispute is a bona fide dispute. The Petitioner is minority shareholder of the Respondent but that does not preclude the Petitioner from obtaining any relief available to any other natural or legal person. The Petitioner holds 49% shareholding in the Respondent and the rest is held by ATH. The Petitioner had supplied certain electronic terminals to the Respondent in pursuant to a board decision of the Respondent. The said board resolution is annexed IF6 in the affidavit in opposition dated 10th November, 2010 indicate 'The board approved the order for the purchase of 110 terminals for Bemobile PNG at a total cost of F$ 122,000.'

15. The following excerpts from the Respondent's Minutes of the Board Meetings annexed as IF 6 to the affidavit in opposition are noteworthy.

a. On the Board Minutes of 14th December, 2011 annexed to affidavit in opposition as IF 6 by the Respondent following decision was reported

> '2.2.2 It was resolved that if PET were purchasing terminals from PEC this needs to be recorded as assets and reconciled as soon as possible'

b. The Minutes of the Board Meeting held 22nd February, 2012 states

> '2.2.2 Decision
>
> It was resolved that, for monitoring purposes , a list of terminals , irrespective of whether it is paid or not paid, its location and the revenue derived from each terminal is provided to the Board on a monthly basis.
> .....
>
> 5.2 Decision
> The Board resolved that
>
> (a) Discussion held in this regard with Mr. Vkatora to clarify matters, must be properly minuted and the Board updated accordingly.
> (b) There must be auditable trail in place before any decision is made.'

c. The Minutes of 2nd August, 2012 states as follows

> '4.0 $178,000 Due to PEC
> Decision: It was resolved so long as that capital expenditure was authorized, all evidence was in place and terminals are in working order, and that Mr. Galloway forward Mr. Fong a

copy of the Ernst and Yong audit report for his perusal/confirmation prior to payment being made.

....

5.1 Decision

It was agreed by all parties that a future meeting be held on 1 August and both Messrs Galloway and Calrow travel to Fiji for this meeting to consider in totality Resolution of the future of PET (This adjournment would give PEC time to consider an offer or look for buyers): and Further discuss and resolve payments to PEC and Mr. Galloway.'

16. All the above evidence was supplied by the Respondent in its affidavit in opposition marked as IF6 and are all Respondent's Board decisions and the trail of events would indicate that there is a debt accrued to the Petitioner and no issues were raised except for the verifications of the electronic terminals supplied. In no Board Meeting from 2010 any of the issues raised in the reply to the winding up notice were raised. This in the analysis of the evidence would not pass the test of spontaneity, and considering the circumstances surrounding the events has to be considered with a pinch of salt. The Respondent had tried to sell its stake of 51% to the Petitioner with the existing debt as it would not make an issue as to the payment and having failed even suggested voluntary winding up, before the Petitioner initiated the winding up.

17. The debt to the Petitioner is even shown in the audited financial statement of the Respondent and the receipt of the electronic terminals were verified by the audited statement by its auditors. It proves that a stock taking was also taken and this seems to be the only issue prior payments as per the board minutes of 2nd August, 2012.

18. In the circumstances the alleged dispute is not a bona fide dispute and the refusal to pay the debt is used as a leverage to compel the minority shareholder to buy the majority stake in the company. This may be a business tactic, and this type of business plan would not work under winding up regime as the alleged dispute is not a bona fide dispute.

F. CONCLUSION

The Petitioner had established a debt from the Respondent and this is depicted in the audited financial statement as well. If the Respondent was making a genuine dispute that would have raised at the Board Meetings. The alleged dispute is not a bon fide dispute. The order for winding up is granted. I will also grant a cost of $2,500 as costs assessed summarily.

G. FINAL ORDER

a. An order for the winding up of the Respondent.
b. The Petitioner is granted a cost of $2,500.

Dated at **Suva** this **25th day** of **July, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva