

IN THE HIGH COURT OF FIJI  
AT SUVA

Winding Up Action No. HBE 66 of 2014

IN THE MATTER of TOA (FIJI) LIMITED

AND

IN THE MATTER of the Companies Act 1983, Section  
221.

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Emmanuel Narayan with Mr. Krishneel Naidu : for the Petitioner  
Mr. Dor Sami Naidu : for the Respondent

Date of Hearing : 23<sup>rd</sup> July, 2015  
Date of Judgment : 08<sup>th</sup> December, 2015

## JUDGMENT

### INTRODUCTION

1. The Petitioner, Pacific Feeds Limited instituted this winding up proceedings against the debtor company Toa (Fiji) Limited is seeking the following orders inter alia;
  - i. *That the company Toa (Fiji) Ltd may be wound up by the court under the provisions of the Companies Act,*
  - ii. *That the costs of the Petitioner be taxed and paid out of the assets of the Company,*
  - iii. *That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company,*

- iv. That in the alternative such other order may be made in the premises as shall be just.*
2. The application is made pursuant to the *Companies Act 1983*.
  3. Reference is also made to *s. 2(1) and (4) of the interpretation Act Cap 247, Rev. 1985*, as well as *Legal Notice No. 89 of 1983* respectively.
  4. The Winding up Petition was served on the Respondent Company on 17<sup>th</sup> December, 2014.
  5. The Respondent Company filed an affidavit deposed by Anand Atilesh Chandra in his capacity as the Managing Director opposing the Petition.

#### BACKGROUND FACTS OF THE CASE

6. The winding up petition herein is filed on the basis that the debtor company is truly and justly indebted to the Petitioner in the sum of \$110,812 together with accrued interest thereon being monies due and owing on account of goods sold and delivered between 17<sup>th</sup> February, 2014 to 14<sup>th</sup> March, 2014 by Pacific Feeds Limited to Toa (Fiji) Ltd together with \$350 being the Creditor's legal costs for this demand.
7. The Debtor Company has defaulted or neglected to pay its debt pursuant to *section 220(e)* of the Companies Act.
8. Further, the Company is unable to pay its debt pursuant to *section 221 (c)* of the Act.
9. These proceeding are based on debt owed for goods sold and delivered to the Debtor Company.

10. On 01<sup>st</sup> September, 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.
11. The s.221 notice was served on the Company at its registered office situated at Nalovo, Nadi and P.O.Box 444, Nadi, Fiji on 12<sup>th</sup> November, 2014.
12. Despite service of the s. 221 notice, the Company made no payments.
13. On 10<sup>th</sup> December, 2014, the Winding-up Petition ('the Petition') was presented to Court.
14. The Winding-up Petition was appointed to be heard before the Chief Registrar of the High Court on Wednesday 21<sup>st</sup> January, 2015 at 9:00 am, for the Petitioner or his Barrister and Solicitor to appear for the purpose of rule 28 of the Companies (Winding Up) Rules, 1983.
15. The affidavit of Anal Rajnesh Prasad Verifying Petition was sworn on 09<sup>th</sup> December, 2014 and filed into court on 09<sup>th</sup> December, 2014.
16. On 20<sup>th</sup> January, 2015, Affidavit of Service by Ashnita Artika Kumar was filed verifying service of the Winding-up Petition.
17. The Petition was published in the Fiji Sun on 18<sup>th</sup> December, 2014 and the Fiji Government Gazette on 16<sup>th</sup> January, 2015 respectively as is the evidence provided in the affidavit of Ashnita Artika Kumar filed on 20<sup>th</sup> January, 2015.
18. On 22<sup>nd</sup> January, 2015, the Petitioner's Memorandum of Due Compliance (MODC) was filed pursuant to rule 28 of the Companies (Winding Up) Rules of the High Court Practice Direction No. 2 of 1986.

#### THE LAW

19. *Section 220* of the *Companies Act* [Cap 247] ("the Act") states that a company may be wound up if it is unable to pay its debt.

20. 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".*
21. 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.

22. As stated in *section 221 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 have 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."

#### ANALYSIS and DETERMINATION

23. In this case, the Counsel representing the Debtor Company makes reference to the Affidavit of Anand Atilesh Chandra, Managing Director of the Respondent Company and challenges the Winding up Petition, disputing the debt claimed by the Petitioner and denies that the Respondent Company is indebted in the sum of \$110,812 or any sum at all on the following basis-

- (i) *That the Respondent has been having negotiations with the Petitioner as regards the sum claimed for poultry feed supplied since March, 2014 as the same was not of the standard and quality and therefore not fit for the purpose.*
- (ii) *That the Respondent Company denies the receipt of the Demand Notice and the service of the Winding up Petition on the 17<sup>th</sup> December, 2014.*
- (iii) *That I only became aware of the Petition after the same appeared in the Fiji Sun on 18<sup>th</sup> December and informed by other business associates.*

- (iv) That the Petition should have been filed in High Court at Lautoka since the dealing with the Respondent Company took place in Nadi.
- (v) That the Petition filed on 09<sup>th</sup> December, 2014 appeared in the daily newspaper on 18<sup>th</sup> December, 2014.
- (vi) That the Petition is defective since it is issued against Toa (Fiji) Ltd but states at paragraph 3 of the Notice that 'it entitles Vinod Patel & Co Ltd to present a Petition.'
- (vii) The debt is disputed and that there has been ongoing discussions.
- (viii) That the Respondent Company is not insolvent as alleged and
  - (a) Is ready and able to pay debts which are proved to be owed and therefore in the circumstances it would not be just and equitable that the Company should be wound up;
  - (b) The Petitioner is acting unreasonable in seeking to have the Company wound up when the debt claimed is disputed by the Respondent. (underline is mine for deliberation)

24. 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)

25. Justice Pathik had a similar view in *Vivross 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. 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.

*(Emphasis Added)*

26. Reference is also made to the Affidavit of Anand Atilesh Chandra deposed on 03<sup>rd</sup> February, 2015 and reproduced at paragraph 23 (i) - (viii) inclusive.

At paragraph 23 (i) above- the Respondent admits having negotiations with the Petitioner as regards to the sum claimed for the poultry feed supplied to him although the feed was not to the standard and quality and not fit for the purpose. What matters here is: why indulge yourself in negotiations if such was the position and carry out other alternatives in order to resolve the issue. The Respondent Company could have either returned the poultry feed and or sought for replacement and or resorted to legal action against the Petitioner. Denying a debt and complaining about the product (poultry feed) are two different things.

At paragraph 23 (viii) above-The Respondent Company denies that the Company is not insolvent and is ready and able to pay the debt. If such is the position of the Company then why wasn't the debt settled when the Company was issued and served with the statutory Demand. The Law provides that after the service of the statutory Demand, the Debtor Company has three (3) weeks within which it can settle the debt.

At Paragraph 23 (ii) above- The Respondent Company denies the receipt of the Demand Notice and the service of the Winding up Petition on the 17<sup>th</sup> December, 2014, but later at paragraph 23 (iii) states that the Company became aware of the Petition after the same appeared in the Fiji Sun on 18<sup>th</sup> December and informed by other business associates.

If one calculates from the alleged date of service of the Demand Notice (i.e. 12<sup>th</sup> November, 2014) till the date of the advertisement of the Winding up Petition (i.e. 18<sup>th</sup> December, 2014), it may add up to 5 weeks, in excess of 2 weeks upon the expiry of the Statutory Demand (12<sup>th</sup> November, 2014), still the Respondent Company was at liberty to act accordingly rather waited all along to counter the Winding up Petition in a Court of Law.

Further, according to the affidavit of service of Ashnita Artika Kumar, she served the Winding up Notice dated 01<sup>st</sup> September, 2014 on 12<sup>th</sup> November, 2014 on Toa (Fiji) Ltd

having its registered office at Nalovo, Nadi, and P.O. Box 444, Nadi, Fiji by way of registered posting at the General Post Office, Suva, and evidence of a receipt is attached.

On the evidence before me I am satisfied and I do so find that there has been a service of the demand under the said section 221 and that service by registered post at the postal address of the Company was a proper and sufficient service. The Creditor is entitled to adopt this mode of service by section 391(1) of the Act which provides that "a document may be served on a company by sending it by post to the registered postal address of the company in Fiji, or by leaving at the registered office of the company". Similarly, I find that the Petition although served by mail, was properly served and in accordance with the provisions of the said section 391(1). The affidavit of service has been filed and is on the court record.

I therefore find that Mr D.S.Naidu's argument that there has not been a service of a demand and the Petition whether proper or otherwise, and that an affidavit of service of demand should have been filed, are devoid of merits.

At paragraph 23 (vi) above- The Respondent Company is of the contention that the Petition is defective since it quotes the name of Vinod Patel & Co in place of Pacific Feeds Limited.

The same has been explained in the affidavit of Anal Rajnesh Prasad filed on 16<sup>th</sup> April, 2014 at paragraph 17 that '*unequivocally explains that it is a harmless misnomer and that it does not cause any confusion or prejudice to the Debtor.*

Further, the Respondent Company has not shown on whether it was prejudiced by the misprint. There has been no confusion created on to who the debt was owed to, which is the petitioner in this matter. Thus this is very petty and it has been explained and the court accepts the Petitioner's explanation accordingly.

27. 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

28. There is clear evidence which indicates that a 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.

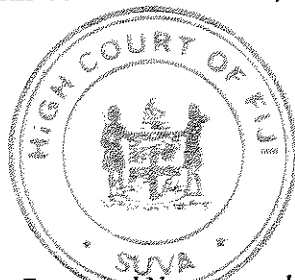


29. The Company has failed to provide any evidence to establish a dispute on substantial grounds as required in terms of the Companies Law. It is insufficient for the Company to simply assert that the debt is disputed. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.
30. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, Toa (Fiji) Limited is hereby acceded to and I now proceed to make the following orders.
31. In my conclusion, I make following orders that;

**FINAL ORDERS**

- a. That TOA (FIJI) 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 costs of the Petitioner be taxed and is hereby ordered to be paid out of the assets of the Company.

Dated at Suva this 08<sup>th</sup> of December, 2015



.....  
VISHWA DATT SHARMA  
MASTER HIGH COURT, SUVA

cc: *Mr. Emmanuel Narayan and Mr. Krishneel Naidu of Patel Sharma Lawyers, Suva.*  
*Mr. Dor Sami Naidu of Pillai Naidu & Associates, Nadi.*