

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Winding Up Action No. HBE 27 of 2014

IN THE MATTER of UNISAN CO LIMITED  
a limited liability having its registered office at  
Kalabu, Nasinu.

AND

IN THE MATTER OF THE COMPANIES  
ACT (Cap 247)

BEFORE:                    Master Vishwa Datt Sharma

COUNSEL:                Mr. Nilesh Lajendra -for the Petitioner  
                              Ms. Ulamila Fa        -for the Respondent

Date of Hearing:         14<sup>th</sup> February, 2018  
Date of Ruling:         18<sup>th</sup> April, 2018

**RULING**

*[Application for winding up pursuant to the Provisions  
of the Companies (Winding up) Rules, 1983]*

## INTRODUCTION

1. This is **VIRS CONSTRUCTION LIMITED'S** ("the Petitioner") petition to wind up **UNISAN CO LTD** ("the Company") on the basis that it is **unable to pay its debt in the sum of \$11,500 (Eleven Thousand Five Hundred Dollars) and sought for the following orders-**
  - (a) That Unisan Co Ltd be wound up by the Court under the provisions of the now repealed Companies Act Cap 247;
  - (b) That the Official Receiver be appointed Provisional Liquidator of the Company;
  - (c) That the costs of the Petition be taxed and paid out of the assets of the company; and
  - (d) That such further or other order may be made in the circumstances as shall be just.
2. The Respondent Company, Unisan Co Ltd filed an affidavit deposed by Reginald Raihman in his capacity as the Director of the Respondent Company, filed 09<sup>th</sup> December, 2015, opposed the Petition and denied that the Company was indebted to the Petitioner and as such the debt was substantially disputed.
3. The matter was heard on 22<sup>nd</sup> November, 2017. Parties were directed to furnish court with written submissions. Only the Petitioner had furnished his written submissions not the Respondent. It is noted from the file record that further extension was granted to the Respondent to furnish his written submissions, but to date has failed to do so.

## BACKGROUND

4. Unisan Co Ltd as Plaintiff commenced *Civil Action No. 40 of 2009* at the Nasinu Magistrates Court claiming certain relief against the Defendant, Virs Construction Company Limited.
5. Default Judgment was entered against the Plaintiff Unisan Co Ltd on the Defendant's counter-claim for non-appearance by the Plaintiff/Counsel on 29<sup>th</sup> October, 2013.
6. The Winding Up Proceedings herein is commenced by Virs Construction Company Limited enforcing the default judgment entered against Unisan Co Ltd in *Civil Action No. 40 of 2009* and currently seeks an order for Winding Up of the Respondent Company, Unisan Co Ltd accordingly.
7. The Company is indebted to the Petitioner in terms of the default judgment obtained in the Nasinu Civil Action No. 40 of 2009 in the sum of **\$11,500**.
8. A **Demand Notice** was issued against the Respondent Company for the payment of the debt but the same remains unpaid.
9. Since the Respondent Company Unisan Co Ltd failed to pay the money owed in terms of the default judgment of the court, hence the Petitioner filed the current **Winding up Petition** against the Respondent Company Unisan Co Ltd.

THE LAW

10. *Section 220 (e) of the Companies Act [Cap 247]* ("the Act") states that a company may be wound up if it is unable to pay its debt.
11. As indicated in *Arjun & Sons Timber Mills Ltd v Babasiga Timber Town Ltd [1994] FJHC 219; [1994] 40 FLR 260 (11 November 1994)* 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. *(Emphasis added)*.

12. 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".*

13. As stated in *section 221 (a) 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."  
(Emphasis added)

## ANALYSIS and DETERMINATION

14. The issue that needs to be determined by this court is "Whether the Petitioner is entitled to have the Respondent Company wound up" by this court under *section 220 (e)* of the Companies Act Cap 247.
15. 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.
16. **VIRS CONSTRUCTION LIMITED** commenced proceedings by a winding up petition to wind up **UNISAN CO LIMITED** on the basis that it is unable to pay its debt of **\$11,500** together with the interest at the rate of 5% per annum on the judgment sum computed from 29<sup>th</sup> October, 2013 until full payment awarded in the Nasinu Magistrate's court Civil Action No. 40 of 2009.  
  
Following Orders were made in *Civil action No. 40 of 2009* on 29<sup>th</sup> October, 2013-
  - *That the Plaintiff's action against Virs Construction Limited is struck out;*
  - *Judgment is entered against the Plaintiff in the sum of \$10,000 being rental arrears owed by the Plaintiff to Virs Construction Limited;*
  - *Interest on the judgment sum at the rate of 5% effective from today until full payment of the sum of \$10,000; and*
  - *The Plaintiff to pay wasted cost to Virs Construction Limited in the sum of \$1500.*
17. According to the Petitioner, this debt remained unpaid to date and prompted the Petitioner, Virs Construction Company Limited to commence and proceed with this Winding Up action to recover the Debt of \$11,500.
18. On 23<sup>rd</sup> January, 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 within 21 days of the receipt of the Notice. Twenty-one days lapsed since the Petitioner had served the Notice and there was no Response or payment received from the Company.
19. The *s.221* notice was served on the Company on 31<sup>st</sup> January, 2014 by leaving a copy with the Director of the Company, namely Mr Sabastian Rahiman at Sand Dunes Nightclub, Carnarvon Street, Suva. Subsequently, on 03<sup>rd</sup> February, 2014, *s.221* notice was also served on Law Solutions, solicitor for **Unisan Co Ltd** at 71 Gordon Street, Suva.
20. Despite service of the *s.221* notice, the Company made no response and/or received any payments as can be ascertained from the parties and the written submissions.
21. Pursuant to **Rule 22 (1)**, the Winding-up Petition ("**the Petition**") was presented to this Court. The Petitioner filed its Petition on 27<sup>th</sup> March, 2014 and in compliance with **Rule 25** an affidavit verifying the said Petition was deposed by the Petitioning Company's Director, Mr. Nilesh Prasad on 02<sup>nd</sup> April, 2014.
22. In terms of **Rule 23**, the Petition was advertised in the Fiji Gazette on 16<sup>th</sup> May, 2014 and in the Fiji Times on 13<sup>th</sup> May, 2014.

23. Subsequently, the Winding-up Petition was listed to be heard before the Master of the High Court for the Petitioner or his barrister and solicitor to appear for the purposes of *rule 28 of the Companies (Winding Up) Rules, 1983*.
24. On 21<sup>st</sup> May, 2014, the Petitioner's **Memorandum of Due Compliance** was filed pursuant to *rule 28 of the Companies (Winding Up) Rules* and the *High Court Practice Direction No. 2 of 1986*.
25. On 06<sup>th</sup> June, 2014, there being no appearance by the Respondent Company, the Court proceeded to grant the order for the **Winding Up** of the Respondent Company, **Unisan Co Ltd**.
26. This Winding Up Order of 6<sup>th</sup> June 2014 was set aside by the Court pursuant to Order 19 Rule 9 of the High Court Rules 1988 on 19<sup>th</sup> May 2015.
27. Where the debt is **disputed** (as in this case through the affidavit of Reginald Raihman), 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)
28. Justice Pathik had a similar view in *Vivrass 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 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)
29. Although the Debtor Company disputes the debt of \$11,500, his contention has been that the **Debt by Default Judgment in the Nasinu Magistrate's court Civil Action No. 40 of 2009** was obtained **irregularly**. He added that the claim should have been proved formally because it was a liquidated claim. Further, he orally submitted at the hearing that this matter should have been proceeded with a **Writ Action** and therefore **Winding Up** is not the answer.
30. The Petitioner submitted that in light of the **Company's inability to pay its debt**, the Petitioner has duly complied with all the necessary provisions of the *Companies (Winding Up) Rules 1983*, the Company is **insolvent** and is **unable to pay its debt** and the orders prayed in the Petition be granted.

31. For the abovementioned rational, I find that 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**.

### IN CONCLUSION

32. The Respondent was aware that the following orders were made against the Plaintiff in the Nasinu *Civil Action No. 40 of 2009* on 29<sup>th</sup> October, 2009-
- That judgment was entered in the sum of \$10,000 being rental arrears owed by the Plaintiff to Virs Construction Limited;
  - Interest on the judgment sum at the rate of 5% effective from today until full payment of the sum of \$10,000; and
  - The Plaintiff to pay wasted cost to Virs Construction Limited in the sum of \$1500.
33. Therefore, this judgment in itself establishes clear evidence that the **debt** is owed by the Company to the Petitioner which remains unpaid and has prompted the Petitioner to proceed with and seek the **Winding Up** of the Respondent Company, **Unisan Co Ltd** accordingly.
34. The Petitioner issued a **statutory demand** to recover the Debt 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 of the Winding Up process.
35. The failure of the **Debtor Company Unisan Co Ltd** to comply with the statutory demand notice served under section **221(a) of the Act** requires this court to deem that the Debtor Company is unable to pay its debts.
36. In such circumstances, the court is not to determine whether a Debtor Company is **solvent** or not nor it is relevant for this court to determine whether the **Debtor Company** has **assets** to cover its **debts**. By mere operation of the law, pursuant to **section 221(a)**, the Respondent Company, Unisan Co Ltd must be necessarily deemed **insolvent** if the court is satisfied that the application is not an **abuse of the due process of court**.
37. I therefore find and conclude that the Petitioning Creditor, **VIRS CONSTRUCTION LIMITED** has **satisfied** this court that it duly served the statutory demand notice on the Company, pursuant to section 221(a) of the Companies Act but the Debtor Company **UNISAN CO LTD** has failed to pay the **debt** within the statutory period and to date continues to do so without any reasonable cause whatsoever. I am also satisfied and find that the long standing **dispute** between the parties to this Winding Up proceedings before this Court is **bona fide** and not an abuse of the court process.
38. In these circumstances, this court concludes that the Respondent Company, **UNISAN CO LTD** is unable to pay its **debts** nor has shown any cause why the Company should not be wound up.
39. 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**.
40. Accordingly, I have no alternative but to proceed and wind up the Unisan Co Ltd as sought by the Petitioner, Virs Construction Company Limited.

41. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, UNISAN CO LTD is hereby acceded to and accordingly Wind Up the Company.
42. Further, I appoint the Official Receiver as the provisional liquidator accordingly
43. In light of the manner in which the Respondent had the conduct of this matter, I am inclined to order costs summarily assessed at \$1,500 to be paid to the Petitioner within 14 days.
44. The SCO and the Civil High Court Registry, Suva to take the necessary action hereafter and inform the Official Receiver of this Winding Up of the Respondent Company, Unisan Co Ltd as required in terms of the Law.
45. I now proceed to make the following Final Orders.

#### FINAL ORDERS

- a. That UNISAN CO LTD 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 Petitioner's costs is summarily assessed at \$1500.00 and ordered to be paid out of the assets of the Company within 14 days.

DATED AT SUVA THIS 18<sup>th</sup> DAY OF APRIL, 2018



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MASTER  
VISHWA DATT SHARMA

cc. Mr. Nilesh Lajendra of Lajendra Law, Suva  
Ms. Ulamila Fa of Law Solutions, Suva