

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Winding Up Action No. HBE 17 of 2015

IN THE MATTER of EXPORT FREIGHT SERVICES

AND

IN THE MATTER of the COMPANIES ACT 1983,  
Section 221

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Ms. Singh. K - for the Petitioner  
Ms. Ulamila Fa - for the Respondent

Date of Judgment : 25<sup>th</sup> July, 2018@ 9am

**RULING**

*[Petitioner's Winding Up Petition filed pursuant to The Companies Act 1983, Section 221]*

## INTRODUCTION

1. On 06<sup>th</sup> May, 2015, SUN (Fiji) NEWS LIMITED filed a petition to wind up EXPORT FREIGHT SERVICES LIMITED on the basis that it is unable to pay its debt amounting to \$2,180.72, exclusive of interest charges thereon, being monies due and owing for services provided to the Creditor between October 2013 to August 2014 by Export Freight Services Limited to Sun (Fiji) News Limited and sought for the following orders-
  - (a) That Export Freight Services Limited be wound up by the Court under the provisions of the 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) Alternatively that such other order may be made as the Court shall deem just.
2. The Respondent Company, Export Freight Services Limited filed an affidavit in Opposition deposed by Rony Chand in his capacity as the Company Director of the Respondent Company, filed 24<sup>th</sup> September, 2015, opposed the Petition stating -

*"The Respondent doesn't owe the Sun (Fiji) News Limited, The Petitioning Creditor the monies claimed in its Petition. Further, the Receivable Statement received from the Petitioning Creditor wherein the sum of \$2,180.72 is claimed as debt has been paid".*

3. The matter was heard and both parties furnish court with their respective written submissions.

## THE LAW

4. **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.
5. 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).*

6. 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”.*

7. 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

- 8. The issue that needs to be determined by this court is **“Whether the Petitioner is entitled to have the Respondent Company EXPORT FREIGHT SERVICES LIMITED wound up”** by this court under *section 220 (e)* of the Companies Act Cap 247.
- 9. 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.
- 10. **SUN (Fiji) NEWS LIMITED** commenced proceedings by a winding up petition to wind up **EXPORT FREIGHT SERVICES LIMITED** on the basis that it is unable to pay its debt of **\$2,180.72** together with the post judgment interest at the rate of 5% per annum.

11. According to the Petitioner, this debt remained unpaid to date and prompted the Petitioner, **SUN (Fiji) NEWS LIMITED** to commence and proceed with this Winding Up action to recover the Debt of **\$2,180.72**.
12. On 26<sup>th</sup> September, 2014, the Petitioner issued a **Demand Notice ("s.221 notice")** and served the respondent Company on 29<sup>th</sup> September, 2014 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 the Respondent has failed to make any payments and/or make any appropriate arrangements for payment to the Petitioner.
13. The **s.221** notice was served on the Company on 29<sup>th</sup> September, 2014 by leaving a copy at the Company's registered office at Lot 1, Tamavua-i-wai Road, Walu Bay, Suva.
14. 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. Except an affidavit in opposition was filed.
15. Pursuant to **Rule 22 (1)**, the Winding-up Petition ("**the Petition**") was presented to this Court. The Petitioner filed its Petition on 06<sup>th</sup> May, 2015 and in compliance with **Rule 25** an affidavit verifying the said Petition was deposed by the Petitioning Company's Assistant Finance Manager Vineeta Mala on 01<sup>st</sup> May, 2015.
16. In terms of **Rule 23**, the Petition was advertised in the *Fiji Gazette* on 05<sup>th</sup> June, 2015 and in the *Fiji Sun* on 29<sup>th</sup> May, 2015.
17. 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**.
18. On 09<sup>th</sup> July, 2015 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*.
19. On 06<sup>th</sup> June, 2016, the Court proceeded to hear the Petition for the **Winding Up** of the Petitioner against the Respondent Company.
20. Where the debt is **disputed** (as in this case through the affidavit of Hari Deo Narayan), 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)

21. Justice Pathik had a similar view in *Vivress 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 principals 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)

22. Although the Respondent Company disputes the Debt of \$19,028.24, his contention has been and I reiterate that *"The Respondent doesn't owe the Sun (Fiji) News Limited, the Petitioning Creditor the monies claimed in its Petition. Further, the Receivable Statement received from the Petitioning Creditor wherein the sum of \$2, 180-72 is claimed as debt has been paid. Further, the Company denies that it is indebted to the Petitioner and as such the debt is substantially disputed. The Company is solvent financially sound and stands ready to meet all its trade obligations"*.
23. The Petitioner informed court that *"The invoices were forwarded to the Debtor Company for payment but payment had not been done. The Debtor Company has not satisfied or extinguished the entire debt amount from the date of the Demand i.e. 26<sup>th</sup> September, 2014. The Company has not paid its debt long overdue to Fiji sun and it has also not complied with the formal demand for the debt made to it under Section 221 of the Companies Act. The Debtor Company has neglected to pay as formally demanded under Section 221 of the Companies Act, an undisputed and bona fide debt, and therefore the Debtor Company should be wound up as per the provisions of the Companies Act. Referred to Judge MD Scott in In the Matter of Architectural Aluminum Limited stated in paragraph 2 that:*  
  
*"Under Section 221 (a), a debt amount remaining unpaid by a Company is in the circumstances set out in the Section prima facie evidence that the Company is unable to pay its debts."*
24. For the abovementioned rationale, I find that the Respondent 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

25. The Respondent was aware of this Debt and has since neglected to pay as formally demanded under Section 221 of the Companies Act, an undisputed and bona fide debt.

26. Further, when the current Winding Up Petition was filed against the Respondent that he was again served with all the documents together with the Demand Notice. If I may add, this Demand Notice would have reminded him that there was a Debt pending against him owed to the Petitioning Creditor, Sun (Fiji) News Limited . Yet once again the Respondent Company failed to make any appropriate arrangements rather found ways to defend the current action of Winding Up accordingly.
27. Therefore, 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.
28. The failure of the **Debtor Company** 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.
29. 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 must be necessarily deemed **insolvent** if the court is satisfied that the application is not an **abuse of the due process of court**.
30. I therefore find and conclude that the Petitioning Creditor, **SUN (Fiji) NEWS 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 **Export Freight Services Limited** 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.
31. In these circumstances, this court concludes that the Respondent Company, **EXPORT FREIGHT SERVICES LIMITED** is unable to pay its **debts** and has not shown any cause why the Company should not be wound up.
32. 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**.
33. Accordingly, I have no alternative but to proceed and wind up the **EXPORT FREIGHT SERVICES LIMITED** as sought by the Petitioner, **SUN (Fiji) NEWS LIMITED** .
34. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, **EXPORT FREIGHT SERVICES LIMITED** is hereby acceded to and accordingly Wind Up the Company, **EXPORT FREIGHT SERVICES LIMITED**.
35. Further, I appoint the Official Receiver as the provisional liquidator accordingly

36. 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 by the Respondent within 14 days timeframe hereof.
37. The *SCO* and the Civil High Court Registry, Suva to the necessary action hereafter and inform the Official Receiver of this Winding Up of the Respondent Company, **EXPORT FREIGHT SERVICES LIMITED** as required in terms of the Law.
38. I now proceed to make the following Final Orders.

**FINAL ORDERS**

- a. That **EXPORT FREIGHT SERVICES 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 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 25<sup>th</sup> DAY OF JULY, 2018

  
.....  
MASTER  
VISHWA DATT SHARMA



cc. *Patel Sharma Lawyers, Suva*  
*Law Solutions, Suva*