

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

WINDING UP CAUSE NO. HBE 10 OF 2012

IN THE MATTER of CON-FORM
HARDWARE SUPPLIES LIMITED a limited
liability company having its registered office at
Shop 2, Beddoes Plaza, Namaka, Nadi.

AND

IN THE MATTER OF THE COMPANIES
ACT.

Appearances : Ms A. B. Swamy for the petitioner
Mr D. Nair for the respondent
Date of Hearing : 19 June 2020
Date of Ruling : 23 June 2020

RULING

Introduction

[01] On 9 May 2012, Mahesh Kumar t/a Mahesh Enterprises (hereinafter may be sometimes referred to as "*the Petitioner*") presented and filed a petition for a

winding up order under section 221 of the repealed Companies Act (*“the repealed Act”*) and prayed for the following orders:

- a) *That Con-Form Hardware Supplies Limited a limited liability Company having its registered office at Shop 2, Beddoes Plaza, Namaka, Nadi may be Wound Up by the Court under the provisions of the Companies Act.*
- b) *Or that such other Order may be made in the premises as to the Court shall deem just.*

[02] On 11 May 2012, the Petitioner had also filed an affidavit of Mahesh Chand, the Managing Director for the petitioner verifying the petition (*“the verifying affidavit”*). The petitioner in the verifying states that the statements in the petition presented on 9 May 2012 as relates to the act and deeds of the petitioner to be true, and such of the statements as relates to the acts and deeds of any other person or persons to his belief to be true.

[03] It is not clear that the petition was duly advertised in one of the daily newspapers and in the Fiji Government Gazette. A memorandum of due compliance has not been filed.

[04] However, the respondent company had filed an affidavit of Anil Kumar, the Managing Director of the respondent company objecting the petition.

[05] Notably, the petitioner did not file any reply to the respondent’s affidavit in opposition. In the absence of the reply to the affidavit in opposition, the statements in the affidavit in opposition or the respondent’s affidavit evidence remains unchallenged.

[06] The petition was presented in court in May 2012. Initially, the matter was handled by the then Master. On 4 April 2013, the then Master ordered that: *“Take off cause list. Petitioner to apply for reinstatement.”* Thereafter, the matter had been stagnant at the registry without any step being taken by the petitioner until the

application for reinstatement of the matter on 27 April 2017, i.e. the matter was dormant at the registry for more than 4 years. On 14 September 2017, the current Master made an order reinstating the matter back to the cause list. Subsequently, the matter was fixed for hearing on 2 December 2019. On 2 December 2019, the hearing was vacated and adjourned to 29 January 2020 for settlement. Thereafter, the matter had been adjourned from time to time up until the matter was referred to me on 26 May 2020. I then listed the matter for hearing on 19 June 2020.

[07] At the hearing, both parties orally argued the matter.

The ground for winding up

[08] The petitioner has presented the petition to have the respondent company wound up on the following grounds:

8.1 Con-Form Hardware Supplies Limited ("*the respondent*") is indebted to the petitioner in the sum of \$28,340.21 being the amount due and owing by the respondent to the petitioner in respect of goods and services supplied to the respondent particulars of which has been rendered to it.

8.2 The Petitioner gave several verbal and a written notice but the respondent has either failed or refused to pay the sums or any part thereof.

8.3 On 21 March 2012, the petitioner by its solicitors served at its registered office a copy of demand notice requesting the company to pay the sum of \$28,340.21, together with costs in the sum of \$575.00 which demand was in the following terms.

8.4 21 days have now elapsed since the petitioner served the said demand but the company has neglected to fully pay or satisfy the sum or any part of or to make any offer to the petitioner to secure or compound the same.

8.5 The Company is insolvent and unable to pay its debts.

8.6 In the circumstances it is just and equitable that the Company should be wound up.

Respondent's opposition

[09] The respondent filed its affidavit in opposition and states that:

- 9.1 The respondent company requested the petitioner to provide the local purchase order and the delivery notes confirming orders placed by the respondent and subsequent receipt by the respondent of the goods as per the purchase order along with the signature of the person or the Director confirming receipt of the goods. To date, no delivery notes with signatures have been provided save as they have provided invoices without corresponding purchase orders and delivery notes. If the same is provided the respondent can settle the debt, if any.
- 9.2 Sometime in March 2012, an undated winding up notice was given to the respondent by an unknown person ("AKI" is a copy of the said Notice).
- 9.3 There is no Sunil Kumar working for the company and further Sunil Kumar is not the Managing Director.
- 9.4 According to the respondent's records it paid \$14,000.00 when \$13,143.53 was due and outstanding from 11 August 2009 to 7 October 2010 to the petitioner.
- 9.5 The respondent used to call and talk to Mahesh on several occasions and disputed the debt as the invoice numbers provided did not reconcile with the respondent Company's local purchase order and the delivery slip of the same was not attached to confirm the order from the respondent Company and the actual delivery note with the purchase order to confirm delivery of items amounting to \$28,340.21 as per the Statutory Demand.
- 9.6 This is highly irregular as the petitioner can only issue invoice upon the respondent Company with the local purchase order with the delivery slip with description of goods confirming delivery and amount.

- 9.7 The respondent company had been requesting Mahesh for the same to reconcile with the respondent's accounts and make payments. To date, the respondent company had not been able to reconcile the accounts.
- 9.8 It was the respondent's understanding that the petitioner will provide the same and after 221 Notice was served the respondent kept on requesting for the same.
- 9.9 It was the respondent's understanding that Mahesh Enterprises will not proceed with the winding up unless the respondent company's records are reconciled with the Local Purchase Orders, invoices and the delivery notes.
- 9.10 The respondent company is in a position to pay its just and legitimate debts and further the respondent is in position to pay the debt sum and ready to deposit the sum of \$28,340.21 in Court as security and further in the event the petitioner provides the relevant delivery notes and local purchase orders payments can be effected.

The law

[10] The repealed Companies Act in relation to winding up provides as follows:

213.-(1) The winding up of a company may be either-

- (a) by the court; or*
- (b) voluntary; or*
- (c) subject to the supervision of the court.*

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of those modes.

219. The Supreme Court (now the High Court) shall have jurisdiction to wind up any company registered in Fiji.

220. A Company may be wound up by the court, if-

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) the company is unable to pay its debts;

(f) *the court is of opinion that it is just and equitable that the company should be wound up;*

(g)... (Emphasis added).

235. *For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators (Emphasis added).*

221. *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;(Emphasis provided) 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.

Discussion

[11] The Petitioner has preferred this petition seeking an order winding up the respondent company on the ground that it is unable to pay its debts.

[12] It is alleged that respondent company is indebted to the petitioner, in the sum of \$28,340.21. The petitioner had served, under section 221 of the repealed

Companies Act ("*the Act*"), a statutory demand notice at the respondent's registered office requiring it to pay the debt within 21 days. The demand notice had been served on 21 March 2012. The 21 days allowed for the respondent to settle the debt had already elapsed. The petitioner is still unable to settle the debt demanded by the notice.

- [13] Indeed, the respondent had neglected to pay the alleged debt for more than 3 weeks. In the circumstances, the deeming provisions of section 221 will come into operation. In terms of that section, a company will be deemed to be unable to pay its debts if a creditor, to whom the company is indebted in a sum exceeding \$100.00 (in this instance the demanded sum was \$28,340.21) then due has served on the company, a demand 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.
- [14] A company may be wound up by the court under section 213 (1) (a) of the Act. According to section 220 (e), one of the grounds on which a company may be wound up by the court is that the company is unable to pay its debts.
- [15] The question then arises whether the respondent company should be deemed to be unable to pay its debt because it had neglect to pay the sum demanded in the statutory notice issued under section 221 of the Act.
- [16] It is to be noted that the petitioner had not filed the memorandum of due compliance as required in the Winding up rules, 28 (1).
- [17] In *Mann and Another v Goldstein and Another* (1968) 2 ALL ER 769 (a case cited in *re Dawasamu Transport Limited* [2014] FJHC 656; HBE02.2014 (5 September 2014)), dealing with the requirements for winding up proceedings and the insolvency Thomas J observed that:

"To enable the companies court to make the winding-up order itself, not only must the petitioner have been shown to be entitled to present the petition, but also one of the grounds specified in s 222 of the Companies Act, 1948a must be established: and the only such ground relied on in the petition and before me was that the company is unable to pay its debts. This requirement is additional to the pre-condition of presenting the petition, that the petitioner must be a creditor, and is not alternative to it. The insolvency requirement, however, unlike the creditor

requirement, is only a pre-requisite of the order and not a pre-requisite of the presentation of the petition. So if a person is entitled to present a petition, then the company's inability to pay its debts is the very matter which it is appropriate for the companies court to enquire into and decide in the exercise of its jurisdiction to make a winding-up order."

- [18] In *re Comsol Fiji Ltd* (2009) FJHC77;HBE0048.2007L (25 March 2009), Master Udit said that section 221 of the Company Act is a deeming provision and the presumption of inability to pay the debts can be rebutted. He further said that:

*"when a demand is made the company must act swiftly to dispute the debt or pay the same in order to negate the imposition of the said presumption. Furthermore, if the company opts to dispute the debt it must do so on substantial grounds. The test for a disputed debt was aptly stated in *Palmer's Company Law Vol.13* as follows:-*

"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."

- [19] A person seeking to wind up a company on a disputed debt, as in such case, it is well established that the petition is on abuse of process (see: *Raja v Rubin and Another* (1999) 3 All ER 73, Peter Gibson LJ).

- [20] Hoffmann J in *Re a company* (No 0012209 of 1991) [1992] 2 All ER 797 observed that:

*"It does seem to me that a tendency has developed, possibly since the decision in *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26, [1986] 1 WLR 114, to present petitions against solvent companies as a way of putting pressure upon them to make payments of money which is bona fide disputed rather than to invoke the procedures which the rules provide for summary judgment. I do not for a moment wish to detract from anything which was said in the *Cornhill Insurance* case, which indeed followed earlier authority, to the effect that a refusal to pay an indisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay. It was, however, a somewhat unusual case in which it was quite clear that the company in question had no grounds at all for its refusal.*

Equally it seems to me that if the court comes to the conclusion that a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, then the court would not be inclined to restrain presentation of the petition. But, if, as in this case, it appears that the defence has a prospect of success and the company is solvent, then I think that the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the RSC Ord 14 procedure.

- [21] In the current petition, the respondent company disputes the debt demanded in the statutory notice saying that: the invoice numbers provided did not reconcile with the respondent Company's local purchase order and the delivery slip of the same was not attached to confirm the order from the respondent Company and the actual delivery note with the purchase order to confirm delivery of items amounting to \$28,340.21.
- [22] The respondent company disputes the debt. The petitioner did not provide the requested documents to substantiate the debts claimed. The respondent's affidavit evidence remains uncontested in the absence of an affidavit in reply to the respondent's affidavit in opposition.
- [23] The dispute over the debt, in my opinion, appears to be bona fide in both a subjective and an objective sense, and it is not frivolous. There is so much doubt and question about the liability to pay the debt.
- [24] The reasons given by the respondent company for refusing to make payment of debt are founded on reasonable and substantial grounds.
- [25] Winding up proceedings should not be invoked as a mode of debt recovery. As stated in *Re a company (above)*, the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Act as an alternative to the RSC 14 procedure (summary judgment).
- [26] It would be an abuse of process to present a petition to wind up a company on a disputed debt.
- [27] In this instance, the debt is clearly disputed on substantial grounds. On the balance of probabilities, I conclude that the respondent company had

successfully rebutted the presumption of inability to pay its debt created under section 221 of the Act.

Conclusion

[28] For all the reasons I have given above, I would conclude that the respondent company had displaced the presumption of inability to pay debt created under section 221 of the repealed Companies Act. Thus, there is no proper basis upon which to make a winding up order against the respondent company. I would accordingly dismiss the petition with summarily assessed costs of \$3,000.00 payable by the petitioner to the respondent company.

Result

1. Petition for winding up dismissed.
2. Petitioner shall pay summarily assessed costs of \$3,000.00 to the respondent company.



M.H. Mohamed Ajmeer
23/6/20

.....
M.H. Mohamed Ajmeer

JUDGE

At Lautoka
23 June 2020

Solicitors:

Patel & Sharma, Barristers & Solicitors for the petitioner
Sairav Law for the respondent