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

CIVIL ACTION NO. HBE 8 OF 2022

IN THE MATTER of MAKANJI BROS. PTE LTD a limited liability Company having its registered office at 72 Naviti Street, Lautoka

AND

IN THE MATTER OF S. 513(d) of the COMPANIES ACT OF 2015

BETWEEN : **JAGDISH RATILAL,** formerly of Lautoka, Fiji, now of 49 Rush Creek Drive, Westgate 0614, Auckland, New Zealand, Company Director.

APPLICANT

A N D : **UMESH CHANDRA,** of 6363 Drasa Avenue, Lautoka, currently of Melbourne, Australia, Company Director.

1ST RESPONDENT

A N D : **MAKANJI BROS PTE LTD,** a limited liability company, having its registered office at 72 Naviti Street, Lautoka.

2ND RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. C. B. Young, for the Applicant
Ms. K. Singh, for the Respondents

DATE OF RULING: 6th March, 2023

RULING

[Winding Up under Sec 513 (d)]

A. INTRODUCTION:

1. The Applicant, Jagadish Ratilal, formerly of Lautoka, Fiji , now of 49, Rush Greek Drive, Wesgate 0614, Auckland , New Zealand, Company Director, filed the Application at hand on 19th April 2022, seeking for reliefs, inter-alia, to have the Company named 'MAKANJI BROS PTE LTD' ('the Company') wound up under the provisions of Section 513 (d) of the Companies Act 2015.

2. The Application is supported by the verifying Affidavit sworn by the Applicant on 7th April, 2022 and filed with the annexures marked as "JR-1" to "JR-4".

3. The Respondents, on 30th of May 2022, filed their Notice of Intention to Appear and the Affidavit in Opposition, sworn by the 1st Respondent, Umesh Chandra, on 27th May 2022, along with annexures marked as "UC-1" to "UC-5".

4. When the matter came up on 03rd June 2022 for hearing, learned Counsel for the Applicant (Applicant's Counsel) raised an objection to the Notice of Intention to Appear and the Affidavit in Opposition filed by the Respondents on the ground that since those had been filed and served within less than 7 days prior to the date of hearing, the Respondents cannot oppose the Application, unless the leave is obtained in terms of Rule 15(1) of the Companies (Winding Up) Rules 2015.

5. Accordingly, with the consent of the Applicant's Counsel, the Respondents filed their Summons dated 9th June, 2022, seeking leave to appear and oppose the Application.

6. Pursuant to the hearing held before me into the said Summons, this Court by its Ruling dated 19th September, 2022 granted leave to appear and oppose the Application.

7. Accordingly, the substantial hearing being held before me on 17th November, 2022, this final Ruling is pronounced after considering the contents of followings.

    a. The Application for Winding up filed on 19th April, 2022. (the Application)
    b. The Affidavit verifying Application & the annexed documents.
    c. The Affidavit in Opposition of the 1st Respondents filed on 30th May, 2022 & the documents annexed thereto.
    d. The Affidavit in reply by the Applicant, filed on 11th October, 2022 & the documents annexed thereto.

e. Affidavit of the Applicant filed on 28th October, 2022 seeking leave to file supplementary Affidavit, with further documents (Director's Report and final Accounts for the years ended on 31st December, 1997 and 1998).
f. Affidavit in opposition by the 1st Respondent to the above Affidavit in (e) above.
g. The oral submissions made at the hearing on 17th November, 2022.
h. The Written Submission by the Applicant's Solicitors.
i. The Written Submission by the Respondent's Solicitors.
j. The authorities cited and tendered.

8. This Ruling will also encompass the reasons for my extempore ruling made prior to substantial hearing on 17th November, 2022, allowing the Supplementary Affidavit of the Applicant that accompanied two more documents.

B. LAW:

9. The substantial Application by the Applicant is made under section 513 (d) of the Companies Act 2015 , which reads as follows ;

"A company (which where applicable in this part includes a Foreign Company) may be wound up by the Court, if

a. ..
b. ..
c. ...
d. ***The Court is of opinion that it is just and equitable that the Company should be wound up. (Emphasize mine)***

C. BACKGROUND FACTS:

12. Followings are the brief facts extracted from the averments in the Affidavits

a. The business of 'Makanji bros' was started by, RITILAL, the father of the Applicant and 1st Respondent in or about 1958 and the first Respondent became a partner thereof in 1961. The Applicant joined the business in 1972-73 albeit not as a partner.

b. ln early 1987 a shelf-company, Verbatim Limited, registered on 11 November 1986 was acquired and its names was changed to 'Makanji Bros Ltd' on 30 March 1987.

c. At that time the shareholders of the company were Father, Ratilal, (10%) first Respondent 50% and the Applicant 40%.

d. In 1997 father, Ratilal, died and left his 10% shares in the Company to the first Respondent and the Applicant equally. The Company carried on the business of Makanji Bros Ltd from 1987 to 1998.

e. In 1998, the Applicant migrated to New Zealand and the business of Makanji Bros Ltd was transferred by the Company to the first Respondent's company, Makanjee Enterprises Ltd.

f. The company owns one property at 72 Naviti Street, Lautoka ('the property') which is a two-storey concrete building consisting of 2 shops on the ground floor and one residential flat on the first floor.

g. The property is on a new 99 years State Lease No. 512286 issued on 19 July 2002, which presently produces following income for the Company, which is debt free.

i. Shop 1 is rented to 'Instantwealth Investment Pte Ltd' at $6,250/month (VEP).
ii. Shop 2 is rented to Fashion World at $6,250/Month (VEP).
iii. Residential Flat rented to Manish Kumar at $550/month (VIP)

h. The first Respondent and the Applicant are the only shareholders of the company today with the first Respondent holding 55% of the shares and the balance 45% by the Applicant.

13. The Applicant states that when father, Ratilal, was alive, he and the first Respondent enjoyed good personal and business relationship. However, he alleges that after the death of their father, Ratilal, in 1997, their personal and business relationship became increasingly strained resulting his migration to New Zealand in 1998.

14. The Applicant states further, that the initial directors of the Company were Ratilal, he and the first Respondent and the current directors are he and the first Respondent.

15. Until early 2020 the Company's affairs were largely handled by the first Respondent. Since 2020 when the first Respondent went to Australia, the Applicant has been largely managing the company's affairs with the help of his Fiji based son, Vinay, who is an Airline Pilot with Fiji Airways.

D. THE GROUNDS UPON WHICH OR WHY THE WINDING UP IS SOUGHT?

a. When the Applicant migrated to New Zealand in 1998 and the Company's business was transferred to the first Respondent's company, Makanji Enterprises Ltd, the first

Respondent has sold the business to 'Instant wealth Investment Pte Ltd', who is one of the tenants of the property. As a result, the company became an investment company. There is no longer any compelling reasons to own the property.

b. In the last 7 years the Company has not distributed any dividends and its restrained earnings as at 31st December 2021 was $504,597.

c. No Directors' fee has been paid by the Company in the last 7 years.

d. The Applicant has established his business in Auckland, New Zealand and his investment in the Company in Fiji is no longer attractive from tax point of view.

e. The Applicant has tried several times in the last 20 years to resolve the shareholding issue with the first Respondent, but those attempts were unsuccessful.

f. The first Respondent and the Applicant are getting old and both of them have medical issues. The first Respondent has been in Australia for the last 2 years. The Applicant's Sons are not interested in owning or managing the property.

g. The first Respondent and the Applicant are not able to agree on the mode of managing the Company. In recent times they have disagreed on the operation of the Company's internet banking and on whether the Company's Accountants should be changed. The first Respondent and the Applicant were the signatories to the Company's cheque account at ANZ Bank. Without consulting him, or obtaining a Board resolution, the first Respondent set up the internet banking and, despite his request, the First Respondent has refused to allow him to operate that account.

i. The First Respondent is trying to appoint his son as an additional director of the Company, which will give him majority on the Board to conduct the affairs of the Company, without the need to consult the Applicant or to seek his agreement or views on company matters. They are losing trust in each other.

j. The Applicant is genuinely concerned about the future personal and business relationship of the two families when either the first Respondent or the Applicant is not around and the likely detrimental impact on the property investment.

k. The Applicant wants to cash up his Fiji investment to reduce his New Zealand mortgage and to expand his New Zealand business and investment portfolio. The Applicant does not want to be locked in the company indefinitely.

l. The Applicant by his solicitor's letter dated 28 February 2022 marked as JR-2 offered to sell his 45 % shares to the first Respondent at fair market price and told that that if he does not agree to buy, then he would apply to the High Court to wind up the Company on 'just and equitable' ground. The first Respondent was also told that this course could be avoided if both agree to voluntary winding up of the Company. But, the first Respondent, as per the letter dated 14th March ,2021 marked JR-3 from Howard's Lawyers , has not agreed to buy the Applicant's shares or to the voluntary winding up of the Company.

m. In the circumstances it is just and equitable that the Company should be wound up by the Court.

E. DISCUSSION:

16. The Applicant, JAGADISH RATILAL, through these proceedings, is seeking to wind up the Second Respondent Company, **Malkanji Bros Pte Limited** ("Company") on "Just and equitable" grounds under section 513 (d) of the Companies Act 2015.

17. The Applicant complains that the affairs of the Company are being conducted in a manner not conducive to him as the 45% shareholder and that he wants the Company wound up on just and equitable ground those he adduced from paragraphs 28 to 47 of his Affidavit in support.

18. The Respondents are opposing the Application for an Order under section 513 (d). As per paragraphs 18 and 20 of the first Respondent's Affidavit in opposition, the stern position of the Respondents is that the facts and grounds pleaded by the Applicant do not show that it is just and equitable and those grounds are not sufficient for the 2nd Respondent to be wound up.

19. In other words, it is argued on behalf of the Respondents that the grounds relied on do not fall within any of the conventional or traditional grounds to warrant an Order for winding up under the said provision.

ISSUES

20. The issues to be determined by the Court are as follows:
    a. Are the ground/s adduced by the Applicant acceptable/ sufficient for obtaining relief under section 513 (d) of the Companies Act?
    b. Have the affairs of the 2nd Respondent Company been conducted by the First Respondent in a manner causing the Applicant to seek relief under section 513 (d)?

c. Whether the Applicant is entitled to a remedy under section 513 (d) of the Companies Act, 2015.

21. This case in my view, calls upon the Court to delve into an important question of law on the scope and application of the "just and equitable" ground enshrined in the section 513 (d) of the Companies Act. This exercise would enable the Court to recognize as to what are the other instances that the litigants can rely on seeking redress under this section.

22. If particular facts and circumstances do not squarely fall into the category of "conventional and traditional" grounds, what would be the alternative remedy available and appropriate to grant relief to a minority shareholder seeking to exit the Company due to substantial change of circumstances of the Company? This is the pivotal question raised by the Applicant's Counsel, an appropriate answer to which would undo the deadlock that paralyzes the smooth running of a corporate creature.

23. In ***Thomas v Mackay Investments Pty Ltd [1996] 22 ACSR 294 (SCWA) Owen J*** pointed out (at 300) that;

> *"The classes of conduct which will justify a winding up order on the just and equitable ground are not closed. Much will depend on the circumstances of each case"*

His Honor went on to note (at 300) that there were, however, "typical examples of when an order will be made". Those included; first, "the failure of the corporate substratum", and, secondly, "the breakdown of a quazi- partnership".

Later (at 302) his Honor rejected as irrelevant a submission of those opposing the winding up application that the case before him did not fall within any of the recognized areas in which the just and equitable ground was usually employed: He stated :

> *"Counsel for the respondents submitted that this case did not fall within any of the recognized areas in which the just and equitable ground is usually employed. It must be recognized that there is no limit to the generality of the words "just and equitable". They are to be applied in their ordinary meaning as calling for the exercise of judgment in the conventional way."*

24. The above decision , like others, specifically rejects the Respondents position that the facts must come within one of the conventional or traditional grounds to justify an Order for winding up on "just and equitable" ground under section 513(d).

25. The fact that the first Respondent hereof has been managing the Company's affairs need not necessarily be considered in deciding whether the Company can be wound up on "just

and equitable" ground. In ***Re Fildes Bros. Ltd [1970] 1 All ER 923 Megarry J. said at 926 d***:

> *"At the same time words "just and equitable" are very wide in their scope, and I cannot say that they are incapable of embracing a case where one director is far more active in the company's affairs than the other"*

26. Also it has to be borne in mind that there is no presumption that a solvent Company cannot be wound up. In the Matter of ***Gearhouse BSI Pty Ltd [2021] NSWSC 98 (17 February,2021) Williams J*** said in the context of Australian s. 461(1) (k) of the Corporation Act which confers power on the Court to Order that a Company be wound up if the Court is of the opinion that it is just and equitable to do so:

> *"167. The cases in which winding up orders are made under s 461 (1) (k) conventionally fall into number of classes , including the following classes identified by Breteton J in the matter of Catombal Investments Pty Ltd [2012] NSWSC 775*
>
> 1) *Failure of the substratum of the company;*
> 2) *Deadlock or disagreement in the management of the of the company's affairs,*
> 3) *Fraud in the information of the company:*
> 4) *Misconduct by the directors of the company,*
> 5) *Constitutional and administrative vacuum in the management of the company, and*
> 6) *Lack of confidence, fairness and public interest and commercial reality"*

27. It is to be observed that the averments from paragraphs 1 to 16 of the Applicant's Affidavit in support, which encompass the introduction, the parties, and some material background facts, are admitted by the first Respondent. Further, some other material facts averred in paragraphs 18 to 23; 25 & 26 and 44 to 46 are also admitted.

28. The Applicant's position in paragraph 17 of his Affidavit in support that when he went to New Zealand in the year 1998, the then business 'Makanji Bros Ltd' was transferred by the Company to the First Respondent's Company, Makanji Enterprises Limited, has been denied by the First Respondent in paragraph 8 of his Affidavit in opposition. But, the Applicant has successfully proved the contrary by producing minutes of meeting signed by none other than the First Respondent on 9th September, 1999, where in page 2 thereof it is stated that the business was transferred. (Vide "JR-1" annexed to the Reply Affidavit by the Applicant) This demonstrates the dishonesty on the part of the First Respondent in these proceedings.

29. Another instance where the First Respondent has displayed his dishonesty is the denial of the Applicant's claim in paragraph 28 of his Affidavit in support that the Company **changed** the nature of its operation in 1998 from trading to an investment Company. This denial is in paragraph 13 of his Affidavit in opposition. This change is in fact reflected in the Director's Reports and Profit and loss Accounts extracted from the Financial Statements of the Company for the years ended on 31st December, 1987 and 1988which were tendered by the Applicant along with his Supplementary Affidavit filed on 28th October, 2022. This was vehemently objected by the Counsel for the Respondent, but allowed to be admitted by my extempore ruling made on 17th November, 2022.

30. It is obvious, that the first Respondent was objecting the admission of the above documents for the reason best known to him that, if those are admitted it would be detrimental to him. On the other hand, if these documents were denied admission, it would have deprived the Applicant in substantiating his Application. These documents were not foreign to the First Respondent and it could not have taken him by surprise or prejudiced him. Therefore, I justify my extempore ruling made on 17th November, 2022 allowing those documents.

31. Coming back to the schedules 1 &2 of the Profit & Loss account of the year 1997, I see that the annual income from Drapery business was $828,622.00 compared to annual rental income of $26,700.00. This shows the adverse effect of the change stated in paragraph 29 above.

32. On the other hand, schedules 1 and 2 of the Profit and Loss Account for the year 1998 shows that the annual income from Drapery business is Nil, while the annual rental income was $48,700.00. This is obviously an adverse outcome of the Transfer of the business to the First Respondent's 'Makanji Enterprises' from 1998 and the subsequent selling of the same unto 'Instant wealth Investment Pte Ltd', who is one of the Tenants of the property, as alleged by the Applicant in paragraphs 29 and 30 of his Affidavit in support.

33. In paragraph 39 of his Affidavit in support, the Applicant alleges that he and the First Respondent are not agreeable on the mode of managing the Company. It included their disagreement on the operation of the Company's internet banking and on whether the Company's Accountant should be changed. It is alleged that without consulting him or obtaining the board resolution, the First Respondent has set up the internet banking, and despite his request, he has refused to allow the Applicant to operate the account.

34. The contents of the above paragraph have been responded by the First Respondent through paragraph 21 (i) to (vii) of his Affidavit in Response. Though, the Applicant had

not raised any question with regard to the Tenants in paragraph 39 of his Affidavit, the First Respondent has made various allegations against the Applicant. But, I find that the Applicant by paragraphs 8.9 and 10 of his reply Affidavit has appropriately dealt with all those allegations and established that all his dealings with the Tenants were with the knowledge of the First Respondent.

The issue with regard to Internet banking also seems to have contributed to the tussle between the parties to some extent. The First Respondent has not denied the allegation that the Applicant was not consulted and a resolution was not obtained for this purpose.

35. The allegation by the Applicant in paragraph 40 of his Affidavit in support that the First Respondent is in a move to appoint his Son as an additional director of the Company has not been denied by the First Respondent. The justification by the First Respondent for this move is that the Applicant (Secretary) has not called for the meetings and failed in his duties and as such he was advised to appoint another director. There is no evidence adduced to show that the Applicant refused to call for meetings or to attend the meetings and corporate obligations. The Applicant's concern and allegation that they are losing trust in each other is obvious and cannot be disregarded.

36. The Applicant is 66 years of age, while the First Respondent is at his early eighties. The Applicant's Son is said to be flying for Fiji Air Lines and not interested in business. The Applicant is living in New Zealand and said to be engaged in business there with Mortgage liability. According to him, he intends to expand his investment there and settle his Mortgage. This is not disputed. He also states that he does not want to be locked in the Company indefinitely. His offer to sell his 45% shares to the First Respondent has not so far been favorably considered by the First Respondent.

37. The allegation in paragraphs 32 that the Company has not distributed any dividends for last 7 years and its retained earnings as at 31st December, 2021 was $ 504,597 is not disputed. Undisputedly, the director's fee also has not been paid for 7 years.

38. It is evident and undisputed that the company has derailed from its prime purpose it was established for, which was income earning exercise through engaging in business, and now the Company has become a Land-lord that earns only limited rental income. This, state of affairs of the Company, particularly, the dishonesty exhibited by the First Respondent through his pleadings, clearly establishes that the mutual trust between the parties has faced extinction and the substratum of the Company has failed and disappeared.

39. The general principle of the substratum case is that " *if a shareholder has invested his money in the shares of the Company on the footing that it is going to carry out some particular object , he cannot be forced against his will by the votes of his fellow shareholder to continue to adventure his money on some quite different project or speculation" **Re Eastern Telegraph Co Ltd [1947] 2 All ER 104 At 109 Jenkins J,*** highlighted the principle laid down in the well-known case of In ***re Haven Gold Mining Co (1882) 20 Ch D 151 ,*** which states " ***Where the Court is satisfied that the subject matter of the business for which the Company was formed has substantially ceased to exist , it will make an Order for winding up the Company, although the large majority of the shareholders desire to continue to carry on the Company"***

40. In ***Lock v. John Blackwood Ltd [1924] UKPC 45; [1924] A.C. 783,*** Lord Shaw stated:

"It is undoubtedly true at the foundation of applications for winding up on the 'just and equitable rule' there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy, of the company. On the other hand, whenever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter and it is, under the statute, just and equitable that the company be wound up."

41. The courts have made a winding up order on the just and equitable ground in a number of different circumstances, these include situations where there is:

a. a breakdown in the mutual trust and confidence of members;
b. a deadlock;
c. fraud, misconduct or oppression in the conduct and management of the company's affairs; or
d. a failure of substratum.

42. The just and equitable ground is, however, not confined to these categories. The category C above is not a complaint in this case. In his Affidavit in support, the Applicant stated that he has lost all trust and confidence in the First Respondent. The company was found by their late father in 1958 and built on trust and confidence which do not seem to be existing any more. The stratum of the Company has now disappeared.

43. No dividend and directors fees have been paid for 7 years. No mutual Trust exists. The Company has lived for over 65 years taking different forms and shapes and finally has

derailed from the purpose it was found and lost its stratum. The First Respondent has not proved the contrary.

44. The facts and circumstances transpired through proceedings hereof, justifies and demands the favorable consideration of the Application, without forcing the Applicant to bear the brunt in the hands of the First Respondent, when the Company has lost its stratum. The Court should think out of the box and make orders that justice demand.

45. The above circumstances had brought the company to a deadlock situation. The just and equitable ground is established where the shareholders in a company are deadlocked to the extent that the company is unable to function property.

46. ***Charlesworth and Morse's Company Law (16th edition)*** states that one of the circumstances where an order on the just and equitable ground will be made is where mutual confidence is not maintained or the Applicant is excluded from the management.

47. In ***Re Yenidje Tobacco Co. Ltd [1916] 2 Ch. 428,*** the company made considerable profits despite of the disagreement between its 2 sole shareholders and directors who were not on speaking terms. Nevertheless, the High Court held that as mutual confidence had been lost between the two of them, the company should be wound up. The English Court of Appeal affirmed the decision of the High Court judge.

48. At the end of the day, based on the authorities, the relevant Act and all the circumstances of the matter, I am of opinion that it would be just and equitable that the Company hereof be wound up under section 513 (d) of the Companies Act.

49. The Applicant had every standing under section 513 (d) of the Companies Act to prefer this Application to the Court to have the company wound up on "just and equitable" grounds as a contributor and/or minority shareholder.

50. For these reasons stated above, in my judgment, the Applicant hereof has made out a case for a winding up order on just and equitable ground. Accordingly, the Applicant is entitled to a remedy under section 513 (d) of the Companies Act.

F. ORDERS:

1) The Company 'MAKANJEE BROS PTE LTD' is wound up under the provisions of Section 513 (d) of the Companies Act 2015.

2) A liquidator be appointed to conduct the winding up.

3) The costs to be taxed.

A.M. Mohamed Maekie
Judge

At High Court Lautoka this 6th day of March, 2023.

SOLICITORS:
For the Applicant: Messrs. Young & Associates.
For the Respondent: Neel Shivam Barristers & Solicitors