

RE TAXI 2000 TOURS LTD (HBE0026 of 2011L)

HIGH COURT — COMPANIES JURISDICTION

5 TUILEVUKA M

26 January 2012

10 **Corporations — winding up — petition for winding up — disputed debt — proof of debt — onus to refute debt — whether substantial ground for disputing debt — Interpretation Act s 51 (b), (d) — Companies Act ss 20 (e), 221, 225, 227(2) — Companies (Winding Up) Rules r 25 — High Court Rules O 3 r 2(5).**

15 Fiji Gas Ltd sought an order to wind up Taxi 2000 Tours Ltd. The main ground for the petition was that Taxi 2000 Tours Ltd was unable to pay its debt. Fiji Gas Ltd also alleged that Taxi 2000 Tours Limited's directors were trying to sell the company instead of paying its debts.

Held –

20 (1) The Courts will penalize in costs a creditor who uses winding up proceedings in an attempt to enforce a debt, where the creditor knows or suspects that the debt is disputed and it has not been pursued through normal litigation channels.

Re Lympne Investments [1972] 2 All ER 385, cit

25 (2) The balancing exercise must account for, on the one hand, the need to see that the winding up procedure is not being abused in using the threat of a winding up as a means of forcing a company to pay a bona fide disputed debt and, on the other, the need to assess whether there is a substantial ground (as opposed to a mere frivolous assertion) for disputing the debt.

In the Matter of Savusavu Hire Plant Services Ltd [1988] FJHC 144' HBE 0047j.98S foll

Order made that company be wound up

30 **Cases referred to**

Avery v Worldwide Testing Services Pty Ltd. (1990) 2 ACSR 834; *Offshore Oil NL and Investment Corporation of Fiji Ltd*; Civil Appeal No: 29/84; *Re Tweeds Garages Ltd* [1962] 1 Ch 406, cited.

35 *A. Patel* for the Petitioner

S. Krishna for the Respondent

Tuilevuka M.

40 **BACKGROUND**

[1] Fiji Gas Ltd seeks an Order to wind up Taxi 2000 Tours Ltd. The main ground for the petition is that Taxi 2000 is unable to pay its debt. Fiji Gas also alleges that Taxi 2000's directors are trying to sell off the company instead of paying off its debts.

45 [2] I need only remind Taxi 2000 that under section 225 of the Companies Act (Cap 247) any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company made after the commencement of the winding up, shall, unless the Court orders otherwise, be void. Under section 227(2) the winding up of the
50 company by the Court shall be deemed to commence at the time of the presentation of the petition.

[3] The petition was presented to this Court on 26 August 2011. The Affidavit Verifying Petition was filed on 31 August 2011. The Petition was duly advertised in the Fiji Sun on 07 September 2011 and in the Fiji Government Gazette on 02 September 2011. The Memorandum of Due Compliance was filed on 12 October 5 2011.

[4] The petition alleges a debt amount of \$21,145.34 (twenty one thousand one hundred and forty five dollars and thirty four cents) as owed by Taxi 2000 for autogas supplied by Fiji Gas to Taxi 2000's taxis between 17 January 2011 to 11 April 2011. Details of these supplies are set out in the section 221 statutory notice 10 that was served on the company on 06 June 2011.

[5] Taxi 2000 opposes the petition. It has filed the affidavit of Aslam Khan¹ sworn on 21 November 2011 and filed on the same day. In reply, Fiji Gas has filed the affidavit of David Aitcheson sworn on 20 December 2011².

15 DRAW DOWN ACCOUNT

[6] Fiji Gas is supplier of gas and operates an auto gas station. Taxi 2000 is a business proprietor which operates a fleet of taxis which all run on auto gas.

[7] Fiji Gas supplied auto gas to Taxi 2000's taxis. I gather from the affidavits filed³ that both parties had envisaged a system of gas supply by the former to the 20 latter based on a draw down account. This was to be a special account into which Taxi 2000 would deposit monies in advance with Fiji Gas. The fees or costs for gas supplied to every taxi were then to be debited against that account. In other words, gas supplied by Fiji Gas to every taxi belonging to Taxi 2000 was to be paid directly from the draw down account⁴.

[8] According to Taxi 2000⁵, the arrangement was that Taxi 2000 would pay \$5,000-00 (five thousand dollars) in advance into its draw-down account with Fiji Gas and that Fiji Gas was to supply gas to Taxi 2000's taxis only if there was a credit balance on the account. If the account was exhausted at any time, Fiji Gas 30 was not to supply gas to any of Taxi 2000's taxis until Taxi 2000 tops up the draw down account with another advance payment of \$5,000 - from which the cost of any further supply of gas was to be debited.

[9] But according to the petitioner⁶, Taxi 2000 never did make any advance deposit of \$5,000. Fiji Gas however did supply auto gas to Taxi 2000's taxis on 35 an account which was always in arrears.

SETTLEMENT PROPOSAL

[10] In paragraph 6 of his affidavit, Aslam Khan deposes that Taxi 2000 did propose to Fiji Gas' lawyers on 19 July 2011 to pay \$1,000 a month to settle the 40 debt. He conveniently does not exhibit a copy of that letter but says that the offer was rejected. Had he exhibited a copy of that letter, I would have been more enlightened as to how many installments of \$1,000 was being proposed and from that –the debt amount that Taxi 2000 was conceding to.

45 1. Manager of Taxi 2000 Tours Ltd.

2. Manager of Fiji Gas Ltd.

3. See paragraph 5 of the affidavit of Aslam Khan filed for Taxi 2000 and paragraph 2 of the affidavit in reply of David Aitcheson filed for Fiji Gas.

4. See paragraph 4 of the affidavit in opposition of Aslam Khan sworn on 21 November 2011. See also paragraph 2 of the affidavit in reply of David Aitcheson sworn on 20 December 2011.

50 5. See paragraph 5(i) to (iii) of the Affidavit of Aslam Khan – the Manager of Taxi 2000.

6. See Affidavit of David Aitcheson, Branch Manager of Fiji Gas – sworn on 20 December 2012 - at paragraph 2.

[11] But then - later in paragraph 6, Khan deposes that Taxi 2000 disputes owing \$5,000 and asserts that this has been paid on 01 April 2011. On this, Aitcheson's replies as follows in his affidavit in reply:

5 As for the payment of \$5,000 on 01 April 2011, our records show this was received on 04 April 2011. It was credited towards older invoices. This payment represented partial payment of account due.

[12] I find Khan rather confusing and misleading.

10 [13] Aitcheson exhibits a copy of the reply sent by Fiji Gas' lawyers to his affidavit⁷. The letter states that Fiji Gas accepted Taxi 2000's proposal of a first payment of \$5,000 on 31 July 2011 but does not accept:

...your installment of \$1K, which will take 17 months to clear. Our client proposes \$2,995.26 per month for the next 6 months till all the debt is paid.

15 [14] The above may be interpreted to read that Taxi 2000 had proposed to pay \$5,000 initially and the balance of \$17,000 by 17 installments of \$1,000 which will take the balance up to \$22,000. This seems to tally with the amount that Fiji Gas had demanded in its section 221 statutory notice (see paragraph [3] above).

20 [15] What is undeniable from both affidavits is that Taxi 2000 is indeed indebted to Fiji Gas and had offered a scheme of settlement to the latter. The latter had refused the proposal but had suggested an alternative. This was not acceptable to Taxi 2000. And the debt remains unsettled to this date.

PRELIMINARY POINT

25 [16] As a preliminary point, Mr Krishna submits that the petition in this case was filed in Court on 26 August 2011 and yet the Affidavit Verifying Petition was filed on 31 August 2011. Rule 25 of the Companies (Winding Up) Rules stipulates that the affidavit verifying petition "shall be sworn and filed within 4 days after the petition is presented."

30 [17] 26 August actually fell on a Friday in 2011.

35 [18] Sections 51(b) and (d) of the Act Interpretation Act (Cap 7) state that Saturdays, Sundays and public holidays are not reckoned with in the computation of time for any act or proceeding required by any written law to be done within six days. The same days are also excluded under Order 3 Rule 2(5) of the High Court Rules 1988 where the stipulated time for compliance is seven days or less.

[19] So the affidavit verifying petition in this case was on time.

ANALYSIS

40 [20] A company may be wound up if it is unable to pay its debt (section 20(e)) and the circumstances are such that it is just and equitable to wind up the company. Section 221 (a), (b) and (c) set out the instances when a company shall be deemed to be unable to pay its debt. The relevant provision in this case is section 221(a) which states as follows:

45 A company shall be deemed to be unable to pay its debts –
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....

50 7. Annexure DA1 – a copy of the letter dated 20 July 2011 from Chan Law to Neil Shivam Lawyers.

- [21] A debt alleged in a Petition is prima-facie proved when the Affidavit Verifying the Petition is filed. The onus then shifts to the Company to refute the debt alleged which it must do so on substantial grounds as opposed to a mere frivolous assertion (see *Offshore Oil NL and Investment Corporation of Fiji Ltd*; 5 Civil Appeal No: 29/84; cf *Avery v Worldwide Testing Services Pty Ltd*. (1990) 2 ACSR 834 at 841). The Courts will penalise in costs a creditor who uses winding up proceedings in an attempt to enforce a debt where the creditor knows or suspects that the debt is disputed and which has not been pursued through normal litigation channels (see *Re Lympne Investments Ltd* [1972] 2 All ER 385).
- 10 [22] In *Re Tweeds Garages Ltd* [1962] Ch 406 at 408 is widely cited as authority for the proposition that a dispute must be as to the existence and not necessarily the quantum of debt. Mr Patel submits that the debt in this case is not in dispute. The company had asked for time to settle its debt vide an arrangement but failed to honor it. In the Matter of *Savusavu Hire Plant Services Ltd* [1988] 15 FJHC 144' HBE 0047j.98S (23 October 1998), the petitioning creditor and the respondent company had written agreement as to the balance amount owing by the latter. The company had then made some payments towards the debt then stopped. A section 221 statutory demand notice was then served on the company. 20 The company's solicitors replied to the demand stating that there was a substantial dispute as to the balance amount without any detail. At Memorandum of Due Compliance stage, the company indicated in court that it was disputing the debt and that it would contest the proceedings. Pathik J found that the manner in which the company was opposing the petition amounted to no more no less than a general assertion without any facts and figures.
- 25 There must be something more than mere assertion (*Re Louisbridge Pty Ltd* [1994] 2 Qd R 144 at 145). The Company must say something that promotes the company's case and what it stated would not support the application, namely, to advance further or assist the company's case without outlining in detail the actual dispute.
- 30 [23] I follow the approach of Pathik J in the above case. The balancing exercise must account for, on the one hand, the need to see that the winding up procedure is not being abused in using the threat of a winding up as a means of forcing a company to pay a bona fide disputed debt and on the other, the need to assess whether there is a substantial ground (as opposed to a mere frivolous assertion) 35 for disputing the debt.
- [24] I find that Aslam Khan's affidavit does not contain any evidence that might raise a substantial ground for disputing the debt. I am of the view that the petition is substantiated and accordingly, order that the company be wound up under the provisions of the Companies Act (Cap 247). However, the Order is to come into 40 effect within 28 days to enable the company to pay up the debt⁸. Costs to the petitioner in the sum of \$850.00 (Eight Hundred Fifty Dollars Only).

Order made.

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50 ⁸ This was the approach of Singh J in *In re Khan's Shipping Company Ltd* [2005] FJHC 20; HBE 0039.2004 (7 February 2005).