

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Winding Up Action No. HBE 34 of 2014

IN THE MATTER of FOOD FOR
LESS (FIJI) LIMITED

AND

IN THE MATTER of the
Companies Act (Cap 247)

BEFORE : Master Thushara Rajasinghe

COUNSEL : Mr. Solanki for the Petitioner.
Mr. Naidu R for the Respondent.

Date of Hearing : 30th October, 2014

Date of Judgment : 16th of April, 2015

JUDGEMENT

INTRODUCTION

1. The Petitioner, Export Freight Services (Fiji) limited instituted this winding up proceedings against the debtor company Food For Less (Fiji) Limited seeking following orders inter alia;

- i. That the company may be wound up by the court under the provisions of the Companies Act,*
 - ii. That the cost of the Petitioner be taxed and paid out of the assets of the Company,*
 - iii. That the Official Receiver attached to the court be constituted Provisional Liquidator of the affairs of the Company,*
 - iv. That such other order may be made in the premises as shall be just,*
2. Subsequent to filing of this petition, the Petitioner filed their affidavit verifying the petition and the memorandum of due compliance pursuant to rule 28 (1) of the Winding - Up Rules. The Debtor Company filed their affidavit in opposition, which was followed by the reply affidavit of the Petitioner. The Petitioner with the leave of the court filed an supplementary affidavit thereafter. Subsequently, this petition was set down for hearing on 30th of October 2014. The counsel for the petitioner and the debtor company made their respective oral arguments and submissions during the cause of the hearing. Both counsel tendered their respective written submissions at the conclusion of the hearing. Having considered the petition, respective affidavit and the submissions of the parties, I now proceed to pronounce my judgment as follows.

BACKGROUND

3. This winding up petition is founded on the allegation that the debtor company has defaulted or neglected to pay its debts pursuant to section 220 A (e) of the Companies Act. The Petitioner has served the debtor company a winding up notice demanding them to pay sum of \$ 129,000 being the total

amount due and owing for container detention charges. However, the debtor company did not comply with the said winding up notice, wherefore, the Petitioner instituted this action on the ground that the debtor company is now deemed to be insolvent or unable to pay its debts pursuant to section 221 (a) of the Companies Act.

4. The Petitioner alleged that they acted as the agent for the debtor company to clear some containers from custom and stored them at their storage facilities. The debtor company failed to clear those containers within 14 day time and is liable to pay the detention charges after that.
5. The debtor company in their objection vehemently denied that the Petitioner acted as their agent. Therefore, they stated that they do not owe any detention charges to the Petitioner as claimed. The debtor company stated that there was no such contract in place between the debtor company and the Petitioner for them to pay container detention charges as the Petitioner was not the agent for the debtor company. Furthermore, the debtor company stated that any dispute arising from the bill of lading, should be decided by the condition stipulated under the bill of lading.
6. In response to the debtor company's objections, the Petitioner stated that the debtor company was aware of the existence of this detention charges and was in discussions with the Petitioner and Shipping Service Fiji Limited. (Hereinafter referred as SSFL). Moreover, the Petitioner stated that the Managing Director of the debtor company Mr. Rudra Prasad had discussions with the Petitioner and admitted the liability. Having done so, the debtor company had paid \$ 5000 to the Shipping Service Fiji Limited and agreed to pay the remaining amount in instalments.

7. Having considered the respective contentions of the parties to this dispute, I now turn to discuss the laws pertaining to the application of this nature.

THE LAW

8. Section 220 of the Companies Act has stipulated the grounds upon which a company can be wound up by the court. The inability to pay its debts is one of those grounds stipulated under section 220. This petition for winding up is founded on the ground that the debtor company is unable to pay its debts.
9. The Definition of inability to pay the debts 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”.

10. In view of the petition and the respective affidavits of the parties, it appears that this application falls within the meaning of section 221 (a), where the petitioner has served a demand notice demanding the debtor company to pay the debt amount, which the petitioner alleged that the debtor neglected or not in a position to pay it.

11. Ungoed – Thomas J in Mann and Another v Goldstein and Another (1968) 2 ALL ER 769 has discussed the requirements for winding up proceedings and the insolvency, where his lordship 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, 1948^a 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.

12. Master Udit in In re Comsol Fiji Ltd (2009) FJHC77;HBE0048.2007L (25 March 2009) held that section 221 of the Companies Act is a deeming provision and the presumption of inability to pay the debts can be rebutted. He further held 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 Palmers 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.” (emphasis added)

13. Peter Gibson LJ in Raja v Rubin and Another (1999) 3 All ER 73 held that “a person seeking to wind up a company on a disputed debt, as in such case, it is well established that the petition is an abuse of process”.

14. I now turn into this instant case. The main contention of the debtor company is that there was no such an agreement between the Petitioner and them to pay detention charges for the containers. Wherefore, they do not owe any money to the Petitioner. Moreover, they contended that the Petitioner was not their agent to clear and store their containers.

15. Having carefully considered the respective affidavits and submissions of the parties, it appears that the Petitioner has failed to establish that there was an agreement between them with the debtor company for this alleged detention charges. Moreover, it appears that there is no preciseness of who own the debt, either the Shipping Service Fiji Limited or the Petitioner. The Petitioner,

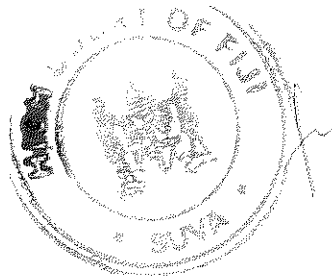
themselves deposed in their affidavit in reply, that the debtor company had paid \$ 5,000 to the Shipping Service Fiji Limited directly and agreed to pay the remaining amount in instalments. This actually creates a doubt that who actually owns this alleged debt from the debtor company.

16. In the absence of precise evidence of the existence of an agreement between the Petitioner and the debtor company for this alleged storage charges and the actual ownership of this alleged debt, it is my opinion that this is a disputed debt and could not be determined in a summary procedure as of this winding up proceedings.

17. In my conclusion, I make following orders that;

- i. The winding up petition dated 15th of May 2014 filed by the Petitioner is hereby refused and dismissed,
- ii. The debtor company is awarded sum of \$ 500 as for the cost of this proceedings assessed summarily,

Dated at Suva this 16th of April, 2015.



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R.D.R. Thushara Rajasinghe
Master of High Court, Suva