

IN THE HIGH COURT OF FIJI
AT LABASA
COMPANIES JURISDICTION

Winding Up Action No.: 2 of 2017

IN THE MATTER of **NADI MOTOR PARTS LIMITED** body corporate having its registered office at Nadi

AND

IN THE MATTER of the **COMPANIES ACT**

AND

IN THE MATTER of application for a Winding Up Order pursuant to Section 176 and 177 of the Companies Act.

BETWEEN : **SERUWAIA TAGI PATEL** and **RAJESHNA DUSARA** of Nadawa Street, Labasa, Businesswoman and minority shareholders.

PETITIONERS

AND : **DEO ANAND** of Main Street, Nadi, Businessman and Company Director.

RESPONDENT

Counsel : Mr. A. Kholi for the Petitioners
Mr. S. Prasad for the Respondent
Date of Hearing : 11th April, 2018
Date of Judgment : 20th April, 2018

Catch words: Winding up - oppression - Sections 176, 177 of Companies Act, 2015 - minority shareholders' rights - contrary to the interest of the members as a whole.

JUDGMENT

INTRODUCTION

1. The Petitioners are minority shareholders of Nadi Motor Parts Limited (the Company). They are seeking winding up of the company and jointly they hold 50% of the issued shares in the Company. The Respondent is the Managing Director of the Company and holds 50% and allegedly acting in oppressive manner to the Petitioners. From the inception the Respondent was the person who did operations of the Company and now he had failed to

provide financial reports for last two years. He had employed his wife and son in the Company and the wages were increased for them while the company was making losses. There is an allegation that the Company was purchasing items at a higher price from his son while he is employed in the Company. He is also allegedly renting a part of the building for his business without paying any rent. The Petitioner seeks to wind up the Company for oppressive behaviour of the Respondent.

FACTS

2. At the hearing both parties said that they would not be calling oral evidence and would rely only on the affidavits.
3. The Petitioner also said that they would only seek winding up of the Company and would not seek other orders sought in the application.
4. So the issue is whether the Company should be ordered wound up, due to the oppression by the Respondent.
5. Following facts are alleged oppressive acts by the Petitioner in the application for winding up of the Company
 - i. Unlawfully paying wages for his son while he is studying in University.
 - ii. Bought vehicle registration No FH 100 for his son and paid vehicle insurance also from the Company funds.
 - iii. Company funds were used to buy property in the name of the Respondent.
 - iv. Took advances from the Company without approval from other shareholders amounting to 65,012. And also pay interest to the tune of \$24,232 from 2014 without approval from the other Directors.
 - v. Pays personal electricity and internet connections from the Company funds.
 - vi. Has transferred a vehicle FL 082, belonging to the Company, to himself.
 - vii. Rental receipts from the building owned by the Company has not been included in the financial statements and presently it is over \$165,000
 - viii. Failed to call any meetings, and to notify any such meetings to the Petitioners.
 - ix. Failed to provide accounts for past two consecutive financial years.
6. In the affidavit in opposition filed by the Respondent stated following facts
 - i. The Company employs two full time employees.
 - ii. It specialized in second hand motor parts.

- iii. Has conducted operations of the company in manner oppressive to the Applicants and have never discriminated ... (see 10.1 of affidavit in reply)
- iv. Respondent's son studies in the afternoon and worked in the company as he needed help.
- v. He bought vehicle registration number FH 100 in return the ownership of EN 188 to Amrit Patel.
- vi. Admitted purchase of land, but denied that it was brought from company funds.
- vii. Transfer of the vehicle (FL 082) was to obtain capital after floods in 2012 destroyed, or damaged 'all stocks'.
- viii. A loan was obtained in the name of the Respondent from Credit Corporation Fiji Limited, for 20,000 against vehicle FL 082.
- ix. The building was purchased from the money from the Company. Deny that he had taken \$165,000.
- x. The Company is solvent and it is trading. The Petitioners had not taken active role in operations of the Company.

7. Second named Petitioner replied to the Respondent's affidavit in opposition and stated inter alia as follows

- i. Financial Statements for years ending 2015 and 2016 were not provided but on 15th June, 2016 Respondent wrote to the mother of the deponent. In the said letter Respondent had stated that he could hardly make a sale and no profits were made.
- ii. There was an overdraft of \$251,437.17 as at 6th June, 2016.
- iii. On 1st January, 2014 wages of Respondent's wife increased from \$4 to \$6 per hour, despite objections from minority shareholder Amrit Patel.
- iv. The Company sold new parts and sale of used parts was a unilateral decision of the Respondent.
- v. The parents of the deponent had mortgaged personal property and given a bill of sale over their personal vehicle DA 032 and had also given personal guarantees to secure finance for direct imports from overseas.
- vi. The Respondent had doubled his salary in last two years.
- vii. The Respondent is avoiding meeting with the Petitioners.
- viii. He is paying rents for his house from money from the Company.
- ix. The Company vehicles are driven by non employees of the Company.
- x. The Respondent had rented a shop of the building owned by the Company to his son and purchasing spare parts at higher price.
- xi. The Respondent had helped his son to set up another spare parts shop and purchasing items at higher price.
- xii. These issues were raised as far as in 23.6.2011, but failed to address the same.
- xiii. The vehicle FH 100 was bought without consultation with others.
- xiv. The Respondent had admitted purchase of the land from funds kept in trust and promised to reimburse the same, but this had not happened.
- xv. Only a stock of \$23,500 was damaged in financial year, 2012 from floods
- xvi. The Respondent is being paid for his work as Managing Director
- xvii. Elite Motor Spares and Unique Motors were owned by the parents of the deponent and they had paid \$175,000 for the spares obtained by the Company.

- xviii. The Respondents actions are detriment to the Company and also oppressive to the minority shareholders and there is a deadlock.

LAW

8. The Petitioners are seeking winding up of the company and state that the affairs of the company are conducted by the Respondent in oppressive manner. Companies Act 2015 defines oppression of minority shareholders in Section 176 and remedies are contained in Section 177. Sections 176 and 177 of the Companies Act, 2015 state as follows.

Grounds for Court order

176. (1) *The Court may make an order under section 177 if*

- (a) the conduct of a Company's Affairs;*
- (b) an actual or proposed act or omission by or on behalf of a Company; or*
- (c) a resolution, or a proposed resolution, of Members or a Class of Members of a Company,*

is either—

- (i) contrary to the interests of the Members as a whole; or*
- (ii) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a Member or Members whether in that capacity or in any other capacity.*

(2) For the purposes of this Part, a person to whom a Share in the Company has been transmitted by will or by operation of law is taken to be a Member of the Company.

Orders the Court can make

177.—(1) The Court can make any order under this section that it considers appropriate in relation to the Company, including an order—

- (a) that the Company be wound up;*
- (b) that the Company's existing Articles of Association be amended or repealed;*
- (c) to regulate the conduct of the Company's Affairs in the future;*
- (d) for the purchase of any Shares by any Member or person to whom a Share in the Company has been transmitted by will or by operation of law;*
- (e) for the purchase of Shares with an appropriate reduction of the Company's share capital;*
- (f) for the Company to institute, prosecute, defend or discontinue specified proceedings;*
- (g) authorising a Member, or a person to whom a Share in the Company has been transmitted by will or by operation of law, to*

institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the Company;

(h) appointing a Receiver or Manager of any or all of the Company's Property;

(i) restraining a person from engaging in specified conduct or from doing a specified act, or

(j) requiring a person to do a specified act.

(2) If an order that a Company be wound up is made under this section, the provisions of this Act relating to the winding up of Companies apply-

(a) as if the order were made under Part 39; and

(b) with such changes as are necessary.

(3) If an order made under this section repeals or modifies a Company's Articles of Association, or requires the Company to adopt Articles of Association, the Company does not have the power under section 46(6) to change or repeal the Articles of Association if that change or repeal would be inconsistent with the provisions of the order, unless

(a) the order states that the Company does have the power to make such a change or repeal; or

(b) the Company first obtains the leave of the Court.

(emphasis added)

9. Section 176 did not make an exclusive definition of what forms oppressive acts of a majority shareholder, and or the management of the affairs of the company. The definition is broad and if the conduct is '*contrary to the interests of the Members as a whole*' (Section 176(1)(i)) or '*oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a Member or Members whether in that capacity or in any other capacity*' (Section 176(1)(ii)), an order can be made in terms of Section 177 of the Companies Act, 2015.
10. So the Petitioner needs to establish requirements contained in Section 176(1)(i) or Section 176(1)(ii) in order to obtain an order a order for winding up of the Company under oppression. The scope of the said two provisions are wide.
11. In Wayde v New South Wales Rugby League Ltd (1985) 180 CLR 459; 10 ACLR 87 at 95 held (Per Brennan J)

"Nevertheless, if directors exercise a power albeit in good faith and for a purpose within the power-so as to impose a disadvantage, disability or burden on a member that, according to ordinary standards of reasonableness and fair dealing is unfair, the court may intervene under s 320... The operation of s 320 may be attracted to a decision made by directors which is made in good faith for a purpose within the directors' powers but which reasonable directors would think to be unfair."

12. In Kokotovich Constructions Pty Ltd v Wallington (1995) 17 ACSR 478 and Re Buck 2 Bay 6 Pty Ltd (1994) 12 ACSR 614 and Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd (2002) 40 ACSR 619 courts have granted winding up orders against the companies, when there are acts of oppression.
13. So the test is reasonableness in the decisions or actions of the Respondent who owns 50% of the shareholdings, in order to wind up a company.
14. The human ingenuity has no boundaries and oppression cannot be defined restrictively and that is the reason for legislating Section 176(1)(i) and (ii) which can cover a wide range of unsatisfactory conducts of a company. Some of the examples of such conducts are as follows
 - a. Improper diversion of the business
This can be where a competitor or a supplier is given special treatment eg. Larger mark-up than usual or buying at a higher price than usual where the decision maker has a stake, or interest. See Scottish Co-operative Wholesale Society Ltd v Meyer [1950] AC324; Re Bright Pine Mills Pty Ltd Ltd [1969] VR 1002; Webb v Stanfield (1990) 2 ACSR 283.
 - b. Payments of close associates or relatives (immediate family members) which cannot be justified or above market rate without specific job description. Here the performance of the company and the contribution of the person who was granted payment should be unproportionate. (See Sanford v Sanford Courier Service Pty Ltd (1987) 10 ACLR 540 at 557)
 - c. Denial, refusal or delaying to the vital information such as annual financial statements or other books of accounts (see Re Buck 2 Bay 6 Pty Ltd (1994) 12 ACSR 614)
 - d. Not banking money daily to the bank account. This allows the person who is in operation of the company to misappropriate money and lead to lack of transparency in financial affairs of the company.
 - e. Board Room tactics by the majority shareholder or the chief operating personnel which are carried out due to majority rule though itself not oppressive if done repeatedly to undermine the minority interests (see John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Asia) Pty Ltd (1991) 6 ACSR 63)

- f. Failure to hold board meetings regularly that amounts to one-man-rule, which is detriment to the other shareholders. (See *Shum Yip Properties Development Ltd v Chatswood Investment & Development Co Pty Ltd* (2002) 40 ACSR 619 at 659)
 - g. Decisions that favour related companies or relatives or entities or persons who are directly connected to a person who is operating the company, which are detrimental to the company as a whole (see *Re Spargos Mining NL* (1990) 3 ACSR 1)
 - h. Loss making of a company repeatedly during a favourable market condition in order to suppress the share value is an oppression. This can happen when the majority shareholder or the person who operate the company wants or desires to purchase the company at a lower price. So the profits are suppressed through various means to show that company is not profitable. The members do not have much choice in such a situation. This can happen in a small company where there are only 2-3 shareholders or in a large corporation. In a small company when one member is operating the company, due to the lack of financial transparency such oppressive behaviour can occur. In large corporation this can happen due to various accounting methods and valuation methods. Such oppression is possible due to lack of transparent management decision making, where actual profits are hidden or diverted to another.
 - i. Using company funds to defend an action for oppressive actions can amount to oppression. (See *Re DG Brims and Sons Pty Ltd* (1995) 16 ALSR 559).
15. From the above, it can safely deduce that acts of oppression are not taken lightly by the court and Section 176 of the Companies Act, 2015 is the basis of derivative action against any oppression. Winding up of a company is also a remedy that can be exercised at the discretion of the court considering the circumstances of the case.

ANALYSIS

16. Both parties did not lead any evidence at the hearing and they both indicated that they would rely on the materials contained in the affidavits. There is no dispute as to the shareholding of respective parties and affidavit evidence on that fact had not been refuted. So the Respondent is holding 50% of the shares and Petitioners are minority shareholders holding the rest of the Company. (See Annexed E of the Affidavit in reply of the Petitioners) Minutes of 7th September, 2005 indicate transfer of 48% of the Company shares to 2nd named Petitioner.)
17. The Petitioners had filed two affidavits and the Respondent had filed only one affidavit.

The issue before the court is whether the Company is to be wound up or any other order be made on the oppression.

18. The burden of proof of oppression is with the Petitioners. The affidavits filed by the Petitioners allege more than one way of oppressive actions by the Respondent. In Respondent had not replied to the oppressive actions and had elected not to lead any evidence, too.
19. The Respondent is the Managing Director and also the person holding 50% of the shareholding. The Petitioners are minority shareholders but jointly they hold remaining 50%.
20. At the moment there is no consensus between the Respondent and Petitioners as to the manner in which the Company is being managed. The dissatisfaction of the Petitioners have been a long standing one and they had tried to resolve, but without any success. (See letter of 15.6.2016 annexed as A to the affidavit in reply). In that letter the Respondent stated
"Firstly, your question regarding daily banking- how can we do banking when we hardly sell the parts. We do not have stock to sell only what we have from old stock we doing sale. From which I have to collect and pay wages to my staff. I am not in a position to employ my staff full time so I am giving a week off to them. From 2012 flood we have really gone down customers belief we don't have parts so they don't turn up." (emphasis added)
21. After painting a very bad picture as to the status of the Company it is surprising that as a solution the Respondent is willing to purchase remaining 50% of the Company.
22. Even in the affidavit in opposition the Respondent had indicated his desire to purchase the remaining 50% of the Company. Is this a calculated strategy, or economic duress? If not why should be anyone interested in a loss making venture for more than 4 years, when it was entirely under Respondent's management? The Respondent had not stated any bad market conditions but have complained about a flood

that happened more than a half a decade ago (2012 February) as the reason for bad performance.

23. The acts of the Respondent should be oppressive to, unfairly prejudicial to, or unfairly discriminatory or contrary to the interest of the members as a whole.
24. The requirement of an act contrary to the interest of the members as a whole is a separate ground that is not based entirely on rights as minority shareholder or as a shareholder who is not involved in the operations of the company. This has wider scope than that of the rights based oppression, as shareholders.
25. The approach in *Foss v Harbottle*¹ is a more restrictive interpretation of oppression nearly two centuries ago and this cannot be applied to the Section 176 of the Companies Act, 2015. This was long before specific legislative intervention for derivate actions as contained Sections 176-177 of the Companies Act, 2015.
26. *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 is an early decision where oppression based on interests as opposed to rights were recognized. In this case two persons carried on a business as a partnership and then it was converted to a company. After some time one share holder brought in his son and they became majority shareholders. Father and son acted together to make the other party excluded from the directorship of the entity and also distributing profits as their remuneration. Though the majority could take a decision of a company, such decisions cannot oppress the minority.
27. The Petitioners had stated in their affidavits the manner in which the Respondent had brought in his son as a part time employee and had had made him a full time employee of the Company, while he is engaged in supply of the spare parts to the Company at a higher price. For this purpose the Respondent had also given a shop in the building owned by the Company at no cost.

¹ (1843) 2 Hare 461

28. By this act the Company would be ruined if continued to allow to run as no entity can survive if purchases are bough at higher value. It is contrary to the interests of the members of the Company as a whole. Any entity that buys items at a higher price cannot make ends meet and this seems to be the strategy of the Respondent as this would make the Company worthless. At the same time profits will accumulate to Respondent's son.
29. The Respondent did not refute these allegations contained in the affidavit by calling any evidence to the contrary, and by not electing to lead any evidence the court has to act on evidence presented in affidavits.
30. The scope of oppressive acts cannot be defined precisely, but taken in the context and circumstances it is possible to see the objective and the results of such actions. It is not one particular act but the cumulative effect of the Respondent, that is oppressive.
31. The Respondent as the Managing Director had employed his son and wife and all three of them are earning from the Company, and despite alleged losses had increased their salaries.
32. Though the Respondent had denied use of the company funds to purchase a real estate he had failed to state how he got funds to purchase the same while he and his family were fully employed in the company. The affidavit in reply stated that money used to purchase a personal property was a trust for the Company. How a person obtain funds to purchase a substantial property is even a requirement for banking and it is not a difficult thing to state or prove though documentary evidence. The absence of such proof only substantiate the Petitioner's version.
33. The Respondent had failed to submit financial accounts for years 2016 and 2017. This is a clear indication of oppression of the remaining minority shareholders in the context of the allegations made against the Respondent, and conduct of him towards the minority shareholders. This also make it difficult or impossible to value the company as a going concern.

34. The bank account of the Company with Westpac for the period 30.4.2016 to 6.4.2016 indicates that there were no deposits during that time and the Company had exceeded even the overdraft facility limit. This is also another indication of non-disclosure of turnover by not banking the cash on daily basis.
35. It is also noted that despite the Company's dire status since the 2012 there was request for salary increment of the Respondent as well as his family members. Respondent's wife's hourly rate of wages were increased 50% whereas and by a memo dated 6.1.2014 Anrit Lal Patel had objected to the increment of salary/wages and stated
- 'In brief I do not agree with the consequence and choice of Dewa for any wage increase and focus with some of the procedures that he should come up with:-*
- 1. That he manamgne had never received financial statement for current year and I'm confident that the company is making loss and facing financial constraints to meet its current obligations.*
 - 2. Please explain on what basis you had recommended her wages to be increased and hours to be shortened.*
 - 3. You tell me her full job description, contract detail, how you utilize her personal hours while she is out from her duties and other information that you think are necessary.*
 - 4 I understand she works as an office clerk and you should stick to labour rate or the rate she was getting before. If the jobs are performed in timely manner and above excellence than she shall be rewarded with annual bonus just like other staff's*
 - 5. On the other hand if she is paid desired wages then there is no need to get service or assistance of any accountant. The accountants are paid for preparing vat returns, filling wages records etc as this entire job can only be done by the clerk.*
 - 6. Dewa please shop around let me know which companies are paying wages for \$6.00 per hour. I believe companies such as FSC are not paying and our company is not very rich as you may think. Even Graduates from USP and FNU are paid \$4 an hour. Look back to the company's financial results ten years before and compare what you are doing now.*
 - 7 Think seriously and smartly like a businessman, where you are sitting? I prefer you take advice from your accountant and ask them whether the company is growing or shrinking and tell them to write a management letter in detail towards the future prospects of the company. I know there is competition not only in Nadi but everywhere and still we can prosper with better results'*
36. The said letter urgently requested financial statements and more than three years have passed and even in the affidavit of the Respondent or no financial statements were

annexed. This is not the only oppressive action of the Respondent, but culmination of acts would indicate that affairs of the Company under the Respondent's management is clearly contrary to the interest of the Company's members as a whole. There is no reason for a spare part selling business to do bad if they were in the business from 1998 as the vehicles on the road had increased exponentially and the bulk of such vehicles are also used vehicles thus making room for thriving business for spare parts. It seems that due to some reason the Company is doing bad. Flooding in 2012 is made the scapegoat for bad performance, but the financial statement indicate only a loss of \$23,500 which cannot be a significant loss considering the total expenditure excluding this was \$267,663, for the year 2012. This kind of natural disasters are common in Fiji. So a company should be able to withstand them. Even after 5 years if such a trading company cannot recover, it also support an order for winding up.

37. The communications between the parties presented in the affidavit in reply indicate that the oppressive acts of the Respondent were brought to the notice, but no remedial action was taken.
38. Normally, a court would be reluctant to wind up a company on oppression but when there are less parties involved and there is oppression winding up is a better option. In this case there are only three shareholders and Respondent is holding 50% of the shares and also operates business whereas the Petitioners are not involved in the daily operations, and had not even received financial statements for more than 2 years.
39. Though an order for the purchase of the shares by the majority shareholder can be an option to winding up, this is not a proper instance to make such order, considering the conduct of the Respondent. In a deliberate oppression the significantly devalue shares, purchase of minority shareholders is not an option. All the indications are that the Company is not making any profits under leadership of the Respondent and or that he is acting in oppressive manner to indicate that the Company is loss making venture and to suppress the real value of the Company.

40. In *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 AC'SR 478 there was continuing deadlock between the parties as to the conduct of the affairs. There was a risk of further oppression and company was not involved in renting property. It only owned one property as its sole asset. So the request for winding up was granted as relief for oppression.
41. The Company owns a property in the jet set city of Fiji. It is a valuable asset for the Company and this was purchased from the profits of the Company. Though the Company's main business is sale of spare parts, at the moment Respondent had stated that it is not making profits since 2012. The main income source for the Company is renting of the premises in the building owned by the Company. So considering the shareholding of the each parties and deadlock of the communications between the parties and the deliberate actions of the Respondent that are against the interest of the members of the Company there is a real risk of further oppression by the Respondent.
42. In the circumstances the actions of the Respondent are oppressive in terms of Section 176(1)(i) as well as under Section 176(1)(ii) of the Companies Act 2015. For the reasons given earlier in this judgment, it is not a matter for me to order sale of the shares of the Company to the Respondent. In fact that is what Respondent wants, and evidence presented to me in the analysis indicate such a sale of the Company can be justified now. The Petitioners at the hearing stated that they do not wish to seek an order for sale of the shares. The discretion of the court is used to wind up the Company forthwith and considering the conduct of the Respondent the Official Receiver is appointed as the provisional liquidator.

CONCLUSION

43. The Respondent is holding 50% shares and Petitioners the remaining 50%. The Respondent is conducting the affairs of the Company in a manner oppressive to the Petitioners. According to the Respondent the company is solvent, but has not even produced financial statements for past two years. The Respondent had stated that Company cannot even pay wages, but had acted contrary to that. The allegations that were not refuted by the Respondent are serious and clearly detriment to the interest of the

company as a whole. So the request for winding up is granted. Considering the nature of the oppression and actions that are contrary to the interest of the Company as a whole the Official Receiver is appointed as a provisional liquidator. (See Re Enterprise bold Mines NL (1992) 6ACSR 53).

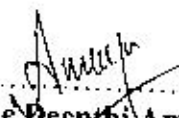
44. Cost of this action is summarily assessed at \$3,000. It should be paid by the Respondent and not the Company. It is an oppression to utilize the company funds to defend a case of this nature by utilizing the Company funds. (See Re DG Brims and Sons Pty Ltd (1995) 16 ALSR 559).

FINAL ORDERS

- a. An order is made for winding up of Nadi Motor Parts Limited.
- b. The official receiver is appointed as provisional liquidator.
- c. Cost of the action is summarily assessed at \$3,000 to be paid by the Respondent within 21 days.

Dated at Suva this 20th day of April, 2018




Justice Deepthi Amaratunga
High Court, Suva