

IN THE HIGH COURT OF FIJI
AT SUVA

Winding Up Action No. HBE 22 of 2016

IN THE MATTER of NAKABATI COMPANY LIMITED a Limited Liability Company having its registered office situated at c/c Aliz Pacific, Level 8 Bsp Life Center, 3 Scott Street, Suva, P O Box 2475, Government Building Suva.

A N D

IN THE MATTER of the Companies Act 2015

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Ronald Singh : for the Petitioner
: Non-appearance : for the Respondent Company.

Date of Ruling : 03rd August, 2018 @ 10 am

RULING

[Applicant's Winding up Application pursuant to the Companies Act, 2015]

INTRODUCTION

1. This is the Application for Winding Up by The De Jong Family Trust filed on 06th October 2016 seeking the following orders:
 - (a) That Nakabati Company Limited ("Company") be wound up under the provisions of the Companies Act 2015;
 - (b) That a liquidator be appointed to conduct the winding up;
 - (c) That the Applicant's costs be summarily assessed and paid out of the assets of the Company; and
 - (d) For such further other order as may be just.
2. The Respondent Company did not file and/or serve any Affidavit in Opposition for the reasons best known to the Company.
3. The Application was heard unopposed.

AFFIDAVITS FILED

4. The following affidavits in the prescribed forms have been filed in these proceedings:
 - (a) Affidavit Verifying Application for Winding Up of Jean-Philippe De Jong, the Director of the Applicant filed on 6 October 2016 and refiled on 2 November 2016 ;
 - (b) Affidavit of Service of Jope Tikoisua filed on 28 October 2016; and
 - (c) Affidavit of Service of Anwar Dean filed on 2 November 2016.

BACKGROUND

5. The Applicant obtained and sealed a default judgment on 07th September 2015 against the Company in Lautoka High Court Civil Action No. HBC 121 of 2015 for:
 - (a) the sum of AUD 7,544,676.28;
 - (b) interest on the sum of AUD 7,544,676.28 at a rate of 19% per month from 23 March 2012; and
 - (c) costs on an indemnity basis.
6. The Respondent Company failed to secure or compound the Default Judgment within 3 months of service of the sealed order. That sum remains due and payable.

THE LAW AND PRACTICE

The test for Insolvency

7. Section 513 of the Act states:

"513. A company (which where applicable in this Part includes a Foreign Company) may be wound up by the court, if -

...

(c) the Company is Insolvent;"

8. Section 514 of the Act states:

"514. (1) A company or Foreign Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable.

(2) A Company or Foreign Company which is not Solvent is Insolvent."

9. Section 515 of the Companies Act 2015 states:

"515. Unless the contrary can be proven to the satisfaction of the Court, a Company must 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 \$10,000 or such other prescribed Amount then due, has served on the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due ("Statutory Demand") and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice".

10. In *Re Tweets Garages, Ltd'* [Tab 1], Plowman J explained insolvency for the purpose of a winding-up petition as follows (at page 122):

"Insolvency in the relevant sense is explained in BUCKLEY ON THE COMPANIES ACTS (13th Edn.), p. 460, in this way:

"The particular indications of insolvency mentioned in paras. (a), (b) and (c) [of s. 223 of the Companies Act, 1948] are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if the assets are realised there will be ample to pay 20s. in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up".

11. Section 523(1) of the Companies Act 2015 deals with the powers of the court in exercise of its discretion and provides as follows:

"523. (1) On hearing a winding up application, the Court may -

(a) dismiss the application;

- (b) adjourn the hearing conditionally or unconditionally; or
- (c) make any interim order, or any other order that it thinks fit,

but the Court must not refuse to make a winding up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets or that the Company has no assets."

ANALYSIS and DETERMINATION

12. It is a **general principle** that a Petition for Winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs (Palmer's Company Law Vol.3. **THE DE JONG FAMILY TRUST** commenced proceedings by a Winding up Application to wind up **NAKABATI COMPANY LIMITED** on the basis that it is unable to pay its debt of \$AUD 7,544,676.28 with an interest of 19% per annum from 23rd March 2012 pursuant to the Default Judgment sealed on 07th September, 2015 in Lautoka High Court Civil Action No. HBC 121 of 2015.
13. On 26 February 2016, the Applicant served on the Company a Statutory Demand pursuant to section 515 of the Companies Act 2015 at its registered office at 23 Kennedy Avenue, Nadi. The Statutory Demand demanded payment of AUD 7,544,676.28 with interest at the rate of 19% per annum from 23 March 2012.
14. The Statutory Demand expired on 18 March 2016. The Applicant received no response to its Statutory Demand by 18 March 2016 and the Company failed to pay the sum demanded or satisfy the Default Judgment.
15. The Applicant filed this Application on 06th October 2016 against Nakabati Company Limited in order to enforce its judgment debt.
16. The Application was served on the Company's registered office at 23 Kennedy Avenue, Nadi on 28th October 2016 by leaving a copy of the Form D1 and Form D4 at the premises of the registered office since no officer of the Company was present. It is also noted that the Applicant also attempted to serve at Lot 77 Vuci South Road, Nausori which is listed as the address of the registered office of the Company in its Annual Return filed on 15th May 2009. It was discovered upon enquiry that this address did not exist within that vicinity.
17. On 01st November 2016, the Application was called before the Chief Registrar for the purpose of complying with rule 19 of the Companies (Winding Up) Rules 2015. The Chief Registrar granted leave to the Applicant to advertise the Form D4 Notice of Winding Up.
18. Pursuant to rule 12 of the Rules, the Form D4 Notice of Winding Up was advertised in The Fiji Times in its 02nd November 2016 issue.

19. Pursuant to the Chief Registrar's leave granted on 01st November, 2016, the Applicant had the Winding up Notice published in the *Government of Fiji Gazette* on Friday, 04th November 2016.
20. On 14 November 2016, the Chief Registrar issued a Provisional Winding Up Rule 16(2)(b) Compliance Certificate dated 09th November 2016 certifying that the rules for winding up under section 19(1) were complied with except publication in the *Government of Fiji Gazette*.
21. On 15 November 2016, the Applicant pursuant to the Chief Registrar's directions on 08th November 2016 filed a Memorandum enclosing a copy of the Form D4 published in the *Government of Fiji Gazette*. It will be noted that both advertisements as per the Newspaper and the *Gazette* have been filed herein.
22. The Applicant or its solicitors have not received any Notice of Intention to Appear and/or Affidavit in Opposition 7 days prior to the date of hearing assigned and/or at the Hearing of the Application at the date of these Submissions.
23. The Respondent Company's director Mr Enesi Yavala in an email dated 07th December 2015 informed the Applicant's solicitor's that he and/or the Company will satisfy the entire judgment debt pursuant to the Default Judgment. To date that debt remains unpaid and pending and hence resulting in the issuance of this Winding up proceedings.
24. The debt in this Application is pursuant to the Default Judgment entered against the Respondent Company in Lautoka High Court Civil Action No. HBC 121 of 2015 and is established. The Company has neglected to pay or satisfy the Default Judgment or the Statutory Demand.
25. **Section 523(1)** of the Companies Act, 2015 grants the Court discretion on the orders it can make on a winding up Application. The Respondent Company has failed to appear in this proceeding and/or filed the Affidavit in Opposition presenting facts warranting the court to exercise its discretion in favour of the Company.
26. The Company's failing to take any appropriate action resulted in the enforcement of the proceedings by the issuance of the current Winding up Application against the Company.

IN CONCLUSION

27. There is clear evidence which indicates that a debt of \$AUD7544,676.28 is owed by the Respondent Company to the Petitioner. The Petitioner issued a statutory demand for the recovery of this debt sum which the Company failed to satisfy within 3 weeks of its issue.
28. The Petitioner has complied with the requirements of the Act and the Rules and now seeking an order for Winding up of **NAKABATI COMPANY LIMITED**.
29. The Company has failed to appear and counter and/or provide any evidence to establish a dispute on substantial grounds as required in terms of the Companies Law. There is no evidence before this Court to indicate the Company is solvent or that it is able to pay its debts.

30. For the above reasons, the Petitioner's application seeking winding up of Respondent Company, **NAKABATI COMPANY LIMITED** is hereby acceded to and I now proceed to make the following final orders.

FINAL ORDERS

- a. That **NAKABATI COMPANY LIMITED** is hereby wound up under the under the provisions of the Companies Act.
- b. That the Official Receiver is appointed Provisional Liquidator of the Company.
- c. That the Petitioner's costs is summarily assessed at \$750.00 and ordered to be paid out of the assets of the Company.

DATED AT SUVA THIS 03RD DAY OF AUGUST, 2018



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MASTER,
VISHWA DATT SHARMA

*cc: Munro Leys Solicitors, Suva
Nakabati Company Limited, Nadi*