

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Winding Up Action No. HBF 005 of 2009**

**Re :**           **MA-TAPULE INVESTMENTS LIMITED**

**Before**     :     Master Tuilevuka

**Counsels** :     K. Tunidau                             for the Petitioner  
                  N/A                                     for the Respondent

**Date of Hearing:**     02<sup>nd</sup> October 2009

**Date of Ruling:**     03<sup>rd</sup> November 2009

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**J U D G M E N T**

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**Introduction**

- [1] On the 20<sup>th</sup> day of February 2009, the Mr. Ilaitia Qasenivalu Cavu "**the Petitioner**" filed a Petition to wind-up Ma-tapule Investments Limited "**the Company**" on the ground that the company is insolvent and unable to pay its debts and that it is therefore just and equitable to wind up the company. The total debt of \$ 187,860.15 is verified by an *Affidavit Verifying Petition* deposed and filed on 20<sup>th</sup> February 2009.
- [2] The Petition does not state how the debt was owed. However, a copy of the section 221 statutory notice is annexed to the Petition. That Notice states inter alia as follows:

***“TAKE NOTICE*** that ***ILAISA QASENIVULI CAVU*** of 7 Kadavu Street, Lautoka ***HEREBY DEMANDS*** from you the outstanding payment of the sum of ***\$187,860.15 (One Hundred and Eighty Seven Thousand Eight Hundred and Sixty Dollars and Fifteen Cents)*** being the amount due and owing from return of his capital investment into the company and pursuant to clause 2 of the written agreement executed on 10<sup>th</sup> day of March 2008”.

- [3] The Petitioner served the above Notice to the Company on 21<sup>st</sup> January 2009. Later, the Petitioner served *the Winding-up Petition* on the Company.
- [4] In due course, as required, the Petition was published in the Fiji Times on 21<sup>st</sup> February 2009 and in the Republic of Fiji Government Gazette on 6<sup>th</sup> March 2009.
- [5] Following the advertisement, on 12 August 2009, the Company filed an Affidavit Opposing Winding Up. That Affidavit was sworn by one Eremasi Cumu Rova, a Director of Ma-tapule Investments Limited.
- [6] The Affidavit of Rova deposes that a Working Relationship Agreement (“**Agreement**”) was executed on or about 10<sup>th</sup> March 2008 between Ma-Tapule Investments Limited and the Petitioner. He annexes to his Affidavit a copy of the said Agreement. He swears that the Agreement evidences the intention between the parties of going into business together. He acknowledges that after the Agreement was executed, the sum of \$20,000 was paid to the Company by the Petitioner.
- [7] Rova stresses however that the payment (and other payments by the Petitioner) was/were a capital investment by the Petitioner to Ma-Tapule. The other payments include an extra \$4,500-00 for the purchase of two sets of chainsaws and other accessories, \$2,500 for saw milling costs in Nasinu and a further \$5,000 for milling and logging operations in Suva which was never received by the Ma-Tapule Investments Limited company management which

is based in Nadi but were sent to the relation of the Petitioner who was in Suva.

[8] In my reading of Rova's Affidavit, his case in essence is that any business will have its ups and downs and the lack of any return on any capital investment cannot be the basis for a Petition to Wind Up any company under section 221 of the Companies Act. He disputes paragraph 5 of the Petitioner's petition and states that his solicitor has requested particulars of the claim. He states that the amount claimed by the Petitioner is uncalled for and puts the Petitioner to strict proof to provide him particulars of the said amount. He further states in paragraph 10 that **"the only capital investment paid into Ma-Tapule if the sum of \$20,000 by the Petitioner instead of the \$100,000 actually promised"**. He states at paragraph 12 that **"the company is solvent financially sound and stands ready to meet all its legitimate trade obligations"**.

[9] The Petitioner did not respond to Mr.Rova's affidavit. Instead, on the day of hearing, the Petitioner called Mr.Paula Cavu to give evidence on his behalf.

[10] Mr. Cavu said he was part of the plan to set up the company with Mr.Rova. Cavu said he was the Chairman of the Company when it was set up. A copy of the Certificate of Incorporation of the Company and its Particulars of Directors were tendered and marked **EX1** and **EX2** respectively. The Petitioner is his first cousin. He said that in 2008, the Company, through him engaged the Petitioner for the purpose of financing the Company. The company he said actually received from the Petitioner the sum of \$20,000 as the Petitioner's initial contribution to the Company. He said he considered it as an investment but was rather vague when pressed by Mr.Tunmidau as to whether that advance was in fact an investment or a loan. He said after that initial payment of \$20,000, the Petitioner further advanced a sum of \$10,000 to pay for timber and chain saw. He said he accepted the \$10,000 for and on behalf of the company as its chairperson. He refers to the Working Relationship Agreement dated 10<sup>th</sup> March 2008 between the Petitioner and

the Company which was tendered and marked **EX3**. The Agreement supports the Company's position that the monies advanced by the Petitioner were his investment contributions to the Company.

- [11] A letter dated 11<sup>th</sup> June 2008 that he wrote was tendered and marked **EX4**. The letter confirms two things: firstly, that the Petition had invested only \$26,200 into the Company (a far cry from the \$187,860.15 debt alleged in the Petition) and secondly, that the money paid was in fact an investment. The letter says in part as follows:-

*“He has requested you to say no more because they have decided to call it quits after four months of association with Ma-Tapule; **they sadly complained that there was no return to their investments of \$20,000-00**”.* (my emphasis)

- [12] A Memorandum dated 20<sup>th</sup> May 2008 that he wrote to the Petitioner as Investor was also tendered through him and marked **EX5**. Notably, that memorandum was sent by him in his capacity as Chairman of the Company to the Petitioner as an Investor in the Company.

- [13] The Petitioner himself also gave sworn evidence. He said the monies he loaned to the company were loaned from FDB and for which he is still making repayments. No loan documents were produced. In any event, in my observation, the Petitioner's evidence merely reiterates that the money was invested into the company rather than advanced as a loan. The Petitioner was not able to provide evidence on how the Company came to be indebted to him in the amount of \$187,860.15. In fact when I asked him in Court, he more or less admitted that the sum was inflated because a large part of it (ie. More than \$100,000) was based on some loan that he was to have taken out from Colonial Bank to be poured into the company. He was then to repay the loan to colonial based on a monthly payment to him of \$15,000 for a period of 12 months as reflected in paragraph 2 of the Agreement. The loan from colonial however did not happen.

### Consideration of the Petition

- [14] Under S. 220 of the *Companies Act 1983*, a company may be wound-up if it is unable to pay its debt (S. 220 (e)) and the circumstances are such that it is just and equitable to wind-up the company. A company is unable to pay its debt if :-
- (a) It is indebted for a sum in excess of \$100.00.
  - (b) S. 221 notice was duly served to the Company.
  - (c) Within three weeks of the service of the said demand notice the company neglected to pay the debt.
- [15] The Statement in the Petition is *prima-facie* proved by the affidavit verifying the Petition; ***In Re Raza Shipping Company Ltd (1980) 26 FLR 119 at 120 para 9.*** Afterwards, it is open to the company to refute the claim. Once the company disputes, the Petitioner must proof the debt.
- [16] Where a debt is disputed, it must be on substantial grounds; ***Offshore Oil NL and Investment Corporation of Fiji Limited; Civil Appeal No: 29/84.*** That is, upon evidence which make it “*substantial*” as opposed to mere frivolous assertion; ***Avery v. Worldwide Testing Services Pty Ltd. (1990) 2 ACSR 844, at 841.*** Dispute must be as to the existence and not necessarily the quantum of debt; ***In Re Tweeds Garages Limited [1962] 1 Ch 402 at 408.***
- [17] Although, the Company did not appear in Court on the day of hearing to oppose the Petition, the grounds deposed to in Rova’s Affidavit were all substantiated by the documents tendered by the Petitioner and also by the Petitioner’s own oral evidence in Court.
- [18] The evidence before me all point to the conclusion that the Petitioner did invest the sum of \$20,000 into the Company. Certainly, if it had been a

loan, I would expect a loan Agreement to be before me in evidence but no such document has been produced before me. The only documentation provided in evidence in Rova's Affidavit seem to suggest that the monies advanced by the Petitioner (i.e. \$20,000 insted of \$187,000) was in fact capital investment rather than a loan. And the evidence of both witnesses for the Petitioner would tend to support the same. The amount stated in the Petition is grossly inflated as admitted by the Petitioner himself and in any event, the amount that the Company admits that the Petitioner had paid to it (i.e. only some \$20,000) was an investment rather than a loan advanced.

### **Conclusion**

[19] The Petition is dismissed with no order as to costs.

**A. Tuilevuka**

**Master**

03<sup>rd</sup> November 2009.