

IN THE HIGH COURT OF THE REPUBLIC OF FIJI

WESTERN DIVISION

AT LAUTOKA

[CIVIL JURISDICTION]

Winding Up Action No. 17 of 2013

**IN THE MATTER OF TRIVEST
INTERNATIONAL LIMITED** a

limited liability company having its registered office at C/- Messrs. Vasantika Patel, Barristers & Solicitors, Suites 16 & 17, First Floor, Town Council Arcade, Nadi Town (P.O. Box 11, Nadi)

AND

**IN THE MATTER OF COMPANIES
ACT 1983, Section 221**

Appearances: Messrs Siddiq Koya Lawyers, Barristers & Solicitors for the Petitioner.

Mr Nemani Tuifagalele for the Company.

Messrs Munro Leys, Solicitor for supporting creditor ((Strategic Consultants in Planning & Engineering Pacific Limited trading a Scope Pacific).

Messrs Faiz Khan Lawyers, Solicitors for supporting creditor (Freddy's Marketing Limited).

Date of Hearing: 29 October 2013

Date of Ruling: 29 October 2013

Date of Reasoning: 5 November 2013

REASONS FOR R U L I N G

INTRODUCTION

[1] On 29 October 2013 I, after hearing submissions advanced by the both counsel, made order in terms of the Petition. These are my reasons for making such order.

[2] **Freddy's Marketing Limited** (the Petitioner) presented and filed on 6 June 2013 a Petition for a winding up order pursuant to section 221 of the Companies Act and prayed for the following orders:

- (i) *That **TRIVEST INTERNATIONAL LIMITED** be wound up by the Court under provisions of the Companies Act,*
- (ii) *That the costs 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,*
- (iv) *That such other order may be made in the premises as shall be just.*

[3] The Petitioner has also filed affidavit of Abdul Rahiman Ali verifying petition dated 10 June 2013 with annexure "A1" and "A2".

[4] The TRIVEST INTERNATIONAL LIMITED (the Company) filed affidavit of Albert Bertini (Director of the Company) in opposition together with annexure "AB1" and "AB2" and stated, disputing the quantum of the debt claimed by the Petitioner, that he strongly admits the Company is solvent and is a multimillion dollar foreign investor Company in Fiji, financially sound and stands ready to meet all of its legitimate trade obligations.

FACTUAL BACKGROUND

[5] The Company was registered on 28 October 2011 in Fiji under the Companies Act. The registered office of the company is situated at C/- Messrs Vasantika Patel, Barristers &

Solicitors, Suites 16 & 17, First Floor, Town Council Arcade, Nadi Town (P.O. Box 11, Nadi).

[6] The nominal capital of the company is \$2,000,000.00 divided into 2,000,000 ordinary shares of \$1.00 each.

[7] The objects for which the company was established are to engage in and carry on the business of Resort operators, resort owners, hoteliers, restaurateurs, cafes, bars, tourism related activities and property developers, including travel and recreation, transport and engineering.

[8] The Petitioner has presented the petition to have the Company wound up on the ground that the Company is truly and justly indebted to the Petitioner in the sum of \$79,596.04 on account of purchase of Groceries and Fresh Produce and that it is unable to pay its debt.

[9] Two other creditors also support the winding-up petition of the Petitioner.

ISSUES

[10] The issue to be determined by the Court is that whether the petitioner is entitled to a remedy under section 213 of the Companies Act (“the Act”).

THE LAW

[11] The Act provides as follows:

213.-(1) The winding-up of a company may be either-

(a) by the court; or

(b) voluntary; or

(c) subject to the supervision of the court.

(2) The provisions of this Act with respect to winding-up apply, unless the contrary appears, to the winding-up of a company in any of those modes

219. The Supreme Court (now the High Court) shall have jurisdiction to wind up any company registered in Fiji.

220. A Company may be wound up by the court, if-

- (a) ...;
- (b) ...;
- (c) ...;
- (d) ...;
- (e) **the company is unable to pay its debts;**
- (f) *the court is of opinion that it is just and equitable that the company should be wound up;*
- (g)... *(Emphasis added).*

235. *For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, **the court may appoint a liquidator** or liquidators (Emphasis added).*

221. *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.*

[12] In **BW Holdings Ltd –v- Sinclair Knight Merz – Fiji Ltd** (2008) FJCA 24; ABU0066.2007S (2 July 2008), the case cited in the course of argument on behalf of the Petitioner, their Lordships John Byrne, JA, Nazhat Shameem, JA, and Andrew Bruce, JA delivering the judgment of the Fiji Court of Appeal stated under paragraph 13 that:

“13.The Judge focused his decision on the fact that there was no dispute as to the existence of the debt but only as to quantum. This is picked up in grounds 3 and 5 of the grounds of appeal put forward on behalf of the Appellant. The argument of the Appellant before the Court of Appeal was that the judge failed to take into proper consideration that the amount claimed by the Respondent was strongly

disputed by the Appellant and such dispute did not give a right to the Respondent to proceed with the winding up proceedings. This proposition is, with great respect to counsel, misconceived in law. That is precisely the right that is given to the Respondent. That right would have been taken away if the Appellant had paid the \$5,303.29 to the Respondent. In that event, the Respondent would have been left with a right to proceed to recover the balance of the amount owing in civil proceedings”.

DETERMINATION

[13] The Petitioner has preferred this petition seeking to wind up the Company on the ground that the Company is unable to pay its debts.

[14] The Company is a registered company in Fiji under the Act. The Court therefore has jurisdiction to wind up the Company (s.219 of the Act). A company may be wound up by the Court on the ground that it is unable to pay its debts (s.220 (e) of the Act).

[15] The Petitioner says that the Company is truly and justly indebted to them in the sum of \$79, 596.04 on account of purchase of Groceries and Fresh Produce and that the Company is unable to pay the debt owing to them. The Petitioner further says that they made several requests in writing but the Company has either failed and/or neglected to pay the same or any part thereof.

[16] On 26 April, 2013 the petitioner’s solicitor served on the Company the Winding-up Notice at its registered office requiring the company to pay the sum of \$78,596.04. By making this demand the Petitioner had complied with the provisions of section 221 (a) of the Act.

[17] The Company had failed and/or neglected to pay the whole sum demanded or part of it following the demand notice issued under section 221 of the Act.

[18] The Petition has been supported by two other creditors of the Company namely:

- a) **STRATEGIC CONSULTANTS IN PLANNING & ENGINEERING PACIFIC LIMITED** trading a **SCOPE PACIFIC** of level 9 FNPF Place, Victoria Parade, Suva a **creditor for \$60, 985.19.**

- b) **VUKSICH & BORICH (FIJI) LIMITED** a limited liability company having its registered office at Denarau Island, P O Box 794, Nadi a **creditor for \$149, 749.93.**

[19] Only issue raised on behalf of the Company was that the Company is disputing quantum of the debts including the debts of the supporting creditors. It was argued that the Petitioner has overcharged the Company. It is to be noted that the issue of overcharging was not raised at any time before the Petition was presented to the Court. It is also to be noted that the Company continued to place orders for supply of goods by the Petitioner until April 2013 (vide annexure “AR1”). It appears to me that the complaint that the Petitioner had overcharged the Company is conveniently taken for the purpose of these proceedings.

[20] The Company neither provided any figures confirming the debts that it owes to the Petitioner or the supporting creditors, nor submitted its proposed payment arrangement to settle the debts. The Petitioner would not have had right to winding up the company if the Company had paid a reasonable portion of the debt. The company has failed to do so.

[21] Mere denial or dispute as to the quantum of the debts is not sufficient to avoid the winding-up.

[22] The Company had neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the Petitioner (creditor) even after service of the demand notice required under section 221 (a) of the Act. The deeming provisions contained under section 221 of the Act operate against the Company. In the circumstances, the Company could be deemed to be unable to pay its debts.

[23] Having considered the affidavit in support, affidavit in opposition and affidavit in reply and having heard the submissions made by both the counsel, I am satisfied that the Company is unable to pay its debts. In the premises, the Petitioner has a right to have the Company wound up by the Court. I therefore make order that the Company be wound up on the ground

that it is unable to pay its debts. I also make order pursuant to section 235 of the Act that Official Receiver be appointed Liquidator of the Company. The costs of the Petitioner of this petition be taxed and paid out of assets of the Company.

FINAL ORDERS

- I. The Company (TRIVEST INTERNATIONAL LIMITED) be wound up.**
- II. The Official Receiver be appointed Liquidator of the Company; and**
- III. The Petitioner is entitled to taxed costs to be paid out of the assets of the Company.**

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Mohamed Ajmeer

Acting Master

At Lautoka