

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS NO. 291 OF 2007

BETWEEN:

NATHANIEL POYA
Plaintiff

AND:

REX PAKI
Defendant

Lae: Gabi, J
2008: 7th April
23rd & 26th May
18th July
14th & 26th August
23rd & 26th September
8th, 17th & 24th October
14th November
8th December

***COMPANIES ACT – Section 300 – Termination of liquidation – "Just and Equitable"
- Considerations***

Cases Cited

Papua New Guinea Cases:

Canopus No. 16 Limited v Maisi Trust Company Limited (2008) N3401
*In the matter of an application by Agmark Pacific Ltd and James Sinton Spence
Liquidator of Sepik Coffee J. V. Ltd (In Liquidation)* (2007) N3223)
Wep Kilip, Kamsi Trading Ltd and Liquidator Hugh Mosley (2005) SC784

Overseas Cases:

Calgary and Edmonton Land Co Limited (In Liquidation) (1975) 1 WLR 355
Collison v Warren [1901] 1 Ch 812
Data Homes Pty Ltd [1971] 1 NSWLR 338
Mercy v Wanari [2000] NSWSC 756

Counsel

K Gamoga, for the plaintiff
B Ovia, for the defendant

RULING

8 December, 2008

1. **GABI, J: Introduction:** There are two (2) applications before the court; one by Nathaniel Poya to terminate the liquidation of Voco Point Trading Ltd pursuant to section 300 of the *Companies Act* and the other by Rex Paki to dismiss the proceedings pursuant to Order 12 rule 40 of the *National Court Rules*. He is also asking for the following injunctive orders:

1. *"That the Plaintiff and his company Kabila Ltd and its staff be evicted from the property at Voco Point known as Section 27, Allotment 48, Lae, Morobe Province for breach of Agreement of Sale of Business Assets entered in by the Parties on 15th December 2004."*

2. *"That the Plaintiff be restrained from interfering with the Defendant from exercising his powers and functions as Liquidator in the Liquidation process."*

3. *"That the Plaintiff, his servants, agents, associates and tribesmen be restrained from harassing, intimidating and or interfering with the employees and agents of the Defendant at Section 27, Allotments 25 and 06, Lae, Morobe Province until the liquidation process is concluded."*

The Evidence

2. The evidence in both applications is comprised of the following affidavits: affidavit of Peter Honale dated 18th September 2007; 3 affidavits of Nathaniel Poya dated 4th September 2007, 18th June 2008 and 8th August 2008 respectively; affidavit of John Lim dated 24th September 2008; 6 affidavits of Rex Paki dated 22nd August 2007, 6th March 2008, 18th June 2008, 22nd August 2008 and 10th October 2008 respectively; and affidavit of Buri Ovia dated 10th October 2008.

3. Voco Point Trading Limited (In Liquidation) went into voluntary liquidation on 5th March 2004. Rex Paki agreed and was appointed Liquidator on the same day. There are 89 creditors of the company; however, the only registered and secured creditor is Bank of South Pacific Ltd. The fourth liquidator's report of October 2008 shows that the total debts of the company stands at K3.9 million while its assets are worth K4.2 million. Tax liabilities of the company have not been provided; however, it is alleged that the Income Tax Returns for the years ending 31st December 2003 and 31st December 2004 have not been lodged with Internal Revenue Commission.

The Law

4. The defendant argues that as the creditors have agreed to retain him as liquidator at the meeting of 16th June 2008 the proceedings should be dismissed under Order 12 Rule 40 of the *National Court Rules*. Clearly the plaintiff has a cause of action and I am

unable to agree with the argument.

5. With respect to the injunctive orders, counsel for the plaintiff submits that as no action has been brought against the plaintiff, the defendant cannot seek such orders. Order 12 Rule 1 of the *National Court Rules* in essence allows the court at any stage of the proceedings on the application of any party to make such orders as the nature of the case requires notwithstanding that the applicant does not make a claim for those orders in the originating process. In *Canopus No. 16 Limited v Maisi Trust Company Limited* (2008) N3401, His Honour, Hartshorn J. commenting on O12 r 1 said:

"This provision provides for what was permitted in Collison v Warren [1901] 1 Ch 812. In that case a defendant successfully obtained a mandatory injunction against a plaintiff even though he had not filed a counterclaim, as what he was seeking arose out of the same contract upon which relief was sought in the proceedings."

6. Section 300 of the *Companies Act* provides:

"300. COURT MAY TERMINATE LIQUIDATION.

(1) *The Court may, at any time after the appointment of a liquidator of a company, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company.*

(2) *An application under this section may be made by the liquidator, or a director or shareholder of the company, or any other entitled person, or a creditor of the company, or the Registrar.*

(3) *The Court may require the liquidator of the company to furnish a report to the Court with respect to any facts or matters relevant to the application.*

(4) *The Court may, on making an order under Subsection (1), or at any time thereafter, make such other order as it thinks fit in connection with the termination of the liquidation.*

(5) *Where the Court makes an order under this section, the person who applied for the order shall, within one month after the order was made, submit a certified copy of the order to the Registrar for registration.*

(6) *Where the Court makes an order under Subsection (1) the company ceases to be in liquidation and the liquidator ceases to hold office with effect on and from the making of the order or such other date as may be specified in the order.*

(7) *Every person who fails to comply with Subsection (5) commits an offence and is liable on conviction to the penalty set out in Section*

413(2)."

Just and Equitable

7. Section 300(1) confers on the Court discretion to terminate the liquidation of a company after the appointment of a liquidator. The liquidation may be terminated upon an application by the liquidator, a director or a shareholder, any other entitled person, the Registrar of companies or a creditor (sec 300(2)). The Court must be satisfied that it is "*just and equitable*" to terminate liquidation. The effect of an order to terminate liquidation is that the company ceases to be in liquidation and the liquidator ceases to hold office with effect on and from the making of the order or such other date as may be specified in the order (sec 300(6)). The considerations for the termination of liquidation are not set out under the *Companies Act*. In an enquiry into whether it is *just and equitable* to terminate liquidation, the relevant factors include: (a) whether the creditors and contributories had been served with the application; (b) the nature and extent of the creditors & whether all of the debts have been or will be discharged; (c) the attitude of creditors, contributories and the liquidator; (d) the current trading position of the company and its general solvency should be demonstrated; (e) any non compliance by directors with their statutory duties should be fully explained with all reasons and circumstances; (f) the general background which led to the winding up should be explained; (g) the nature of the business carried on by the company should be demonstrated and whether in any way the conduct of the company was contrary to commercial morality or the public interest (see *Wep Kilip, Kamsi Trading Ltd and Liquidator Hugh Mosley* (2005) SC784).

Service of the application

8. There is no evidence before the court that the application for termination has been serviced on the creditors; however, from the fourth liquidator's report it appears that the 25 out of 89 creditors that attended the meeting on 16th June 2008, resolved to retain the liquidator and complete the liquidation as soon as possible. It appears to me that Nathaniel Poya, who is a contributory of the company, is the only person that wants the liquidation terminated.

Whether all debts have been settled or will be discharged

9. As at 16th June 2008, total debts to the Bank of South Pacific stands at K2.2 million while trade creditors are owed K1.6 million. Final staff entitlements are estimated at K117, 000.00. It is not known how much is owed to the Internal Revenue Commission in taxes, but there is no doubt that an amount is owed by the company. There is no evidence that the debts will be settled or a scheme made to have all the debts discharged.

Attitude of creditors, contributories and liquidator

10. It is clear to me that the creditors and the liquidator are opposed to the termination of liquidation.

The current trading position of the company and its general solvency

11. Solvency is an important consideration in an application to terminate liquidation. The question is whether the company meets the solvency test. There are 2 requirements: First, the company must be able to pay its creditors as the debts fall due. Second, assets must exceed liabilities. Both requirements must be met before a company is said to be solvent (see *In the matter of an application by Agmark Pacific Ltd and James Sinton Spence Liquidator of Sepik Coffee J. V. Ltd (In Liquidation)* (2007) N3223). Quite clearly the company does not meet the solvency test because it cannot pay creditors as the debts fall due. In *Agmark Pacific Ltd and James Sinton Spence (supra)*, His Honour Lay J. said:

"Solvency is of significance when a stay of proceedings in the winding up is sought: In Re a Rivate Company (1935) NZL a 120 and Re Mascot Home Furnishes Pty Ltd (1970) VR 593, 598. In that case solvency is used in the sense of assets of assets exceeding liabilities, but...solvency in the sense of being able to pay debts as they fall due is also a significant factor. If I make an order under s 300 (1), the company is licensed to go out and incur more debts. Indeed, there is the danger that new creditors could take the view that the company is sound and able to pay its debts as they fall due because the Court has discharged it from liquidation. The duty of the court extends beyond the existing creditors, to potential new creditors. If the company is allowed to trade again while being unable to pay its creditors as they fall due, it is potentially liable to being placed into liquidation again. New creditors would not be aware, that after liquidator's fees, employee entitlements, costs of a compromise and land rates there is a very large preferential debt due to Internal Revenue Commission pursuant to Schedule 9 (4) (b) of the Companies Act and that the Goods and Services Tax Act s 86 (2) (b), which will be rank before all unsecured creditors. The court is likely to be concerned if the proposal to terminate the liquidation preserves the existing debt, but defers payment, particularly where the deferment has no enforceable status. See the remarks of Street J. at first instance in Re Data Homes Pty Ltd [1971] 1 NSWLR 338 at 341. If the company fails again, recovery by the new creditors may be prejudiced by the existing debts: see Mercy v Wanari [2000] NSWSC 756 at para. 47...In my view it would be rare circumstances indeed where the court would make an order under Section 300 (1) in circumstances where an unpaid creditor could shortly thereafter make an application to put the company back into liquidation, which is the case here while the company does not meet the solvency test and there is no binding arrangement between the existing creditors."

12. I adopt and apply the views expressed by His Honour in that case.

Non compliance with statutory duty by a Director

13. The liquidator alleges that the delay in completing the liquidation process is due to interferences and Court battles instigated by Nathaniel Poya and Wilson Pesh. I am not entirely convinced of that allegation. The delay in completing the sale in relation to Section 43 Lot 5, Lae was contributed to by the liquidator by accepting 2 purchasers of the property.

14. This is an application by Nathaniel Poya in his capacity as Shareholder/Director. This matter requires serious consideration on the basis that if Nathaniel Poya continues to remain a Director and the company is removed from liquidation while it was not able to meet the solvency test, he could personally become liable for debts subsequently incurred by the company pursuant to section 348 of the *Companies Act*, if it were again placed in liquidation.

Commercial Morality or Public Interest

15. Monies are owed to trade creditors and employees. There is some evidence that the company has not paid taxes nor filed tax returns for a number of years. In his fourth report of October 2008, the liquidator reported that the Internal Revenue Commission has not provided him with the recent tax liabilities of the company. This is not denied by the company or Nathaniel Poya. I consider non – payment of taxes as a conduct contrary to corporate morality or public interest. It is not in the interest of public to allow the company to go into the world of commerce.

16. The onus is on the applicant to make out a positive case (see *Re: Calgary and Edmonton Land Co Limited (In Liquidation)* (1975) 1 WLR 355). I do not think a positive case has been made out.

17. For all the above reasons, I refuse the application to terminate the liquidation of the company.

Is there a case for termination of the appointment of the liquidator?

18. The applicant is seeking an order for termination of the appointment of the liquidator. The liquidation of a company commences on the day the liquidator is appointed (section 291(4) of the *Companies Act*). Rex Paki was appointed and consented to be a liquidator on 5th March 2004. Since his appointment, the liquidator has so far provided 4 reports to the creditors; 2 in March and May of 2005 and the other 2 in June and October 2008 following a direction by the Court.

19. The reports are unsatisfactory, for instance, the preferential debt due to the Internal Revenue Commission, which would rank before all the unsecured creditors, is not known. It is also not known why 6 monthly reports as envisaged by section 305 (2) of the *Companies Act* were not prepared and sent to creditors or shareholders of the company. Second, there is evidence of conversion and the explanation by Rex Paki is unsatisfactory. Two motor vehicles registration numbers LAD 538 and HAH 381 have been transferred to and registered in the name of Rex Paki without the authority or knowledge of Nathaniel Poya. Third, the evidence discloses that the liquidator has not reported the fire on the Voco Point property to the Police or the Insurance Assessors. Fourth, there is no evidence before the Court that every known creditor was notified of the meeting or a public notice to all creditors was given according to section 293 (2) & (3) of the *Companies Act*. There is a copy of a notice of meeting dated 13th June 2008 before the Court, but how the creditors were notified is not known to me. The evidence is that only 25 out of 89 creditors attended the meeting. The purpose of the meeting, which

was to determine whether a new liquidator should be appointed, was not stated in the notice. Finally, a liquidator is required to have regard to views of the shareholders by whom a special resolution was passed for purposes of voluntary liquidation (see section 308 of the *Companies Act*). It was resolved at the shareholders meeting on 5th March 2004 that the liquidator is to give a report to the shareholders on any sale of assets. There is no evidence that the liquidator has given the shareholders interim reports of the sale of assets.

20. I am satisfied and agree with Nathaniel Poya that Rex Paki be terminated as the liquidator forthwith. I make the following orders:

1. The defendant's application is dismissed;
2. The plaintiff's application for the termination of liquidation of Voco Point Limited (In Liquidation) is dismissed;
3. Rex Paki is terminated as liquidator of Voco Point Limited (In Liquidation);
4. The Shareholder(s) are to propose 3 persons to the Court for appointment of a liquidator within 12 hours of the judgment;
5. Parties are to meet their own costs.

Gamoga Lawyers: *Lawyers for the plaintiff*
Mai Lawyers: *Lawyers for the defendant*