

30/01/19

Scan, email
upload +
file.

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 55 of 2018

BETWEEN : DIANNE WARNER

- Plaintiff

AND : YANJIAN TONGA LIMITED

- Defendant

BEFORE HON. JUSTICE NIU

Counsel: Mr. S. Fonua for applicant
Mr. W. C. Edwards Snr for respondent

Hearing: 25 January 2019
29 January 2019

RULING

Preliminary

- [1] The applicant, Dianne Warner (Warner), has applied to this Court under civil case no. 55/2018 for an injunction to stop Yanjian Tonga Limited from liquidating itself voluntarily. I do not think I have any authority to reopen that case to grant the order sought because I have already ordered on 30 November 2018 that that civil case be dismissed.
- [2] However, the hearing of the application was heard before me on 25 January 2019 and I shall treat it as having been made under a separate civil action or application.

recd 30/01/19

The application

- [3] Warner has been appointed liquidator of a company called Yanjian Group Co. Ltd (Yanjian Group) to try to recover a debt of \$3,380,335 owed by that company to one Lord Luani. Warner claims that the respondent, Yanjian Tonga Ltd (Yanjian Tonga), owes Yanjian Group \$2,278,087 by way of a loan it had taken from Yanjian Group and which it has not paid back to Yanjian Group.
- [4] Warner brought that claim against Yanjian Tonga in civil action no. CV55/2018 and I held that that claim had already been decided by the Lord Chief Justice in his judgment of 24 December 2017 in which he decided that Yanjian Tonga had not received the money, material and machinery it was to receive under the said loan. I made that ruling on 30 November 2018 and dismissed her claim.
- [5] Warner has appealed against my ruling and that appeal is yet to be decided by the Court of Appeal and she now applies for an injunction to stop Yanjian Tonga from going into liquidation voluntarily until her appeal is decided.
- [6] She says that if the respondent company is placed into voluntary liquidation her claim against it will become nugatory because it will dissipate its assets and thereby avoid paying its debt to her. She says she would suffer irreparable damage if the injunction is not granted.
- [7] In support of her application, she filed an affidavit by her counsel, Mr. Fonua, to the effect that Mr. Edwards, counsel for respondent, had advised him (a week after any ruling in this matter on 30 November 2018) that the Inland Revenue Department had demanded a tax liability of \$3 million from the respondent and the respondent would most likely go into voluntary liquidation because of it. That is the evidence upon which Warner basis her application to restrain the respondent.

Objection to application

- [8] The respondent filed its opposition to the application supported by an affidavit by its company director who is also the majority shareholder which stated that no discussion or resolution has been made by the company to enter into voluntary

liquidation but that there has been a default assessment made by the Inland Revenue against the company for \$2,550,911.21 and against which an objection has been filed by the company.

[9] The director expressed the company's concern that the applicant was unlawfully interfering with the company's business. She stated that in June last year, the liquidator had written to the Reserve Bank to stop the Bank from approving the purchase by the company of a tip truck from overseas for its quarry business upon the ground that the company owed money to Yanjian Group in respect of which she has been appointed liquidator. That was after the Lord Chief Justice had ruled in December 2017 that the company owed no money to Yanjian Group, against which ruling Lord Luani had taken no appeal.

[10] The director pointed out that despite rulings and orders that costs be paid by Lord Luani and the liquidator in the proceedings, no payment had been made for those costs. Those costs have come to a total of \$36,989.05.

Hearing

[11] At the hearing, Mr. Fonua for the applicant spoke to the points outlined in the application and I asked him if he had any case authority where the Court has held that a company was ordered not to put itself into voluntary liquidation. His Honour, the Lord Chief Justice, had directed in his minute of 14 January 2019 that Mr. Fonua was to provide "a case where the Court has issued an injunction preventing shareholders from exercising their statutory power to liquidate a company." Mr. Fonua said he had not found such case and was unable to do such search due to the breakdown of the internet caused by the damage to the cable link. He asked for an adjournment to enable him to find the case authority.

[12] Mr. Edwards for the respondent opposed the request for adjournment. He pointed out that such search ought to have been done by Mr. Fonua beforehand to ensure he had proper authority for the application for injunction before he proceeded to prepare and file the liquidator's application for injunction. He submitted that as the application has no legal basis it ought to be dismissed with costs and he asked that it be dismissed with costs forthwith.

Power to liquidate voluntarily

- [13] S.250(1) of the Companies Act provides that a company may be put into liquidation by the appointment as a liquidator of a named person. S.250(2)(a) provides that a liquidator may be appointed by a special resolution of those shareholders entitled to vote and voting on the question. No Court order is required for such appointment. The company is put into liquidation by the appointment by the shareholders of the named person. That is a statutory power given to the shareholders of a company to put the company into voluntary liquidation.

Duty to give public notice

- [14] Upon being appointed, the liquidator (voluntarily appointed under S.250(2)(a)) is required by S.264(2) to forthwith give public notice of his appointment, the date of commencement of liquidation and the address and telephone number to which inquiries may be directed by a creditor. That subsection also provides for other duties that the liquidator must perform.

Court may terminate liquidation

- [15] S.259(1) provides that 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 a company.

No provision to stop a voluntary liquidation before it is begun

- [16] There is no provision in the 400 sections of the Act to provide that a company cannot put itself into voluntary liquidation or that the Court has the authority to order that company cannot put itself into voluntary liquidation or that the Court has the authority to order that company cannot do so before it has done so.

No legal basis for the application and other relevant provisions of the Act,

- [17] Having considered those above stated provisions, which provisions give the creditors sufficient and proper safeguard against voluntary liquidation of a company, I am of the view that the Legislative had not intended that the Court could prevent a company, by the issue of an injunction, from going into voluntary

liquidation. If it had intended that that was to be done, it would have provided an authority in the provisions of the Act for the Court to do so, but it did not.

[18] Accordingly, I find that the application is misconceived. It has no legal basis upon which the Court can issue an injunction against the respondent not to put itself into voluntary liquidation.

Orders

[19] Accordingly, the application is dismissed with costs, to be taxed if not agreed.

NUKU'ALOFA: 29 January 2019.




L.M. Niu

JUDGE