

IN THE DISTRICT COURT OF COLOMBO

AFFIDAVIT IN REPLY IN TERMS OF THE COMPANIES WINDING-UP RULES UNDER THE COMPANIES ACT NO. 17 OF 1982

In the matter of HOTEL DEVELOPERS (LANKA)
LIMITED, C/o Colombo Hilton Sports Complex, 55 Echelon
Square, Lotus Road, Colombo

No : 217/CO

and

In the matter of an Application for the Winding-up by Court under
Part IX of the Companies Act No. 17 of 1982

NIHAL SRI AMERESEKERE of
No.167/4, Vipulasena Mawatha,
Colombo 10.

PETITIONER

I, NIHAL SRI AMERESEKERE of 167/4, Vipulasena Mawatha, Colombo 10 in the Democratic Socialist Republic of Sri Lanka, being a Buddhist, do hereby solemnly, sincerely and truly affirm and declare as follows:


1. I am the Affirmant above-named and the Petitioner in the above matter, and affirm to the facts herein contained from my personal knowledge and belief and from documents available with me.
2. a) My Petition in this matter was filed on Friday, 17.11.2006, and my Affidavit verifying the Petition of Saturday, 18.11.2006 was tendered to Your Honour's Court on Monday, 20.11.2006.
b) The matter having been supported by my Counsel before Your Honour's Court on Thursday, 23.11.2006, Your Honour's Court made Order thereon, and certified copy of the said Order was obtained on Friday, 24.11.2006.
c) As per my Registered Attorneys-at Law's Letter dated 24.11.2006 requisite Notices were sent to the Government Printer for publication in the Government Gazette, and the requisite Notice was published in the Daily News of Monday, 27.11.2006.
d) On Tuesday, 28.11.2006 my Registered Attorneys-at-Law tendered to Your Honour's Court Precept to Fiscal for service of Notice on Hotel Developers (Lanka) Ltd., (HDL), the Company sought to be wound-up.
3. A purported Affidavit dated 8.12.2006 of one Mohamed Nawaz Rajabdeen of 100/11, Horton Gardens, Colombo 7, had been received on Saturday, 16.12.2006 by the 'Caretaker' of the Office premises of my Registered Attorneys-at-Law, whilst the Office had been closed, and hence had been received by the Office of my Registered Attorneys-at-Law only on Monday, 18.12.2006.



4. As advised, I state that the aforesaid Affidavit, purporting to be an Affidavit in opposition by HDL, is defective and bad in law, and is further not in conformity with the imperative Companies Winding-up Rules under the Companies Act No. 17 of 1982, and hence ought be rejected *in-limine*.
5. Without prejudice to the foregoing fact that there is no valid Affidavit in opposition as required by law before Your Honour's Court, by this my Affidavit in reply being in compliance and in conformity with the Companies Winding-up Rules under Companies Act No. 17 of 1982, I set out the following in reply to the averments in the aforesaid purported Affidavit in opposition.
6. I deny all and singular the several averments in the said purported Affidavit in opposition, save and except those averments that are specifically admitted herein.
7. a) Replying paragraph 3 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraphs 3(b) and 4(b) of my Petition, supported by Documents marked P2(a) and P2(b) therewith.
b) Averments in paragraph 4(c) of my Petition have not been denied, and thus and thereby stand admitted, giving the lie to the aforesaid denial of averments in paragraphs 3(b) and 4(b) of my Petition.
8. Replying paragraph 4 of the said purported Affidavit in opposition, HDL being well and truly aware of the facts contained in averments in paragraphs 6, 7, 8, 9 and 10 of my Petition, supported by Documents marked P4, P5(a), P5(b), P6(a), P6(b), P6(c) and P6(d) therewith, could not have pleaded 'unawareness', and hence I refute and reject the averments in paragraph 4 of the purported Affidavit in opposition.
9. Replying paragraph 5 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraphs 11 and 12 of my Petition, supported by Documents marked P7(a), P7(b), P8 and P9 therewith, which facts are well and truly known to HDL.

I produce herewith marked "P15" a true copy of the Statement of Objections (without the voluminous documents annexed thereto, which would be tendered if Your Honour's Court so require), filed in HC (Civil) W.P. Case No. 1/98(2) by HDL and its Directors (including the present Secretary to the Treasury, P.B. Jayasundera, then HDL Chairman and then Deputy Secretary to the Treasury, D.Y. Liyanage, present HDL Director Ms. P. Maharaja and myself, as HDL Government Nominee Directors at that time), admitting, inter-alia, the aforesaid facts averred in paragraphs 6, 7, 8, 9, 10, 11 and 12 of my Petition.

10. Replying paragraph 6 of the said purported Affidavit in opposition, I refute and reject the ambiguous and 'uncertain' attempted denial of the facts averred in paragraphs 13, 14, 15 and 16 of my Petition, supported by Documents marked P10(a), P10(b), P10(c) and P11 therewith, whilst at the same time the purported Affidavit in opposition having admitted matters averred therein as factually correct, and which facts are well and truly known to HDL.
11. Replying paragraph 7 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraphs 16 of my Petition, supported by Document marked P11 therewith, which facts are well and truly known to HDL.



12. Replying paragraph 8 of the said purported Affidavit in opposition,
- a) I refute and reject the denial of the facts averred in paragraphs 17, 18, 19 and 20 of my Petition, supported by Documents marked P11, P12, P13(a), P13(b), P13(c), P13(d), P13(e), P13(f), P13(g) and P13(h) therewith, which facts are well and truly known to HDL.
 - b) As per Documents P13(a), P13(b), P13(c), P13(d), P13(e), P13(f), P13(g) and P13(h), which are Letters to HDL from the Treasury setting out the terms and conditions of the monies loaned by the Government to HDL, the interest and capital of the said Loans are in default from 1998.
13. Replying paragraph 9 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraph 21 of my Petition, supported by Document marked P14 therewith, and state that the admission of document "P14" gives the lie to said denial in the purported Affidavit in opposition.
14. Replying paragraph 10 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraphs 22 and 23 of my Petition, supported by Document marked P11 (a Treasury Document) therewith, in that, the said facts
- a) are well and truly known to HDL and HDL's Registered Attorneys-at-Law to whom the said Document P11 was given by the State Attorney, in the proceedings in the Supreme Court referred to at paragraph 13(h) of my Petition.
 - b) are well within the knowledge of present HDL Director holding such Office since July 2004, namely, V. Kanagasabapathy, then Director General Public Enterprises (who retired from such Office on or about 19.10.2006 and thereafter continues as Advisor in the Treasury / Ministry of Finance), who handled / is handling this matter at the Treasury.
 - c) are well within the knowledge of present HDL Director holding such Office since July 2004, namely, K.V.N. Jayawardene, and who was a Member of both Committees appointed by the Secretary to the Treasury in August 2002 and August 2004 to endeavour to reach a Settlement, as referred to at paragraphs 13(e) and 13(f) of my Petition and Documents P10(b) and P10(c) marked therewith.
15. Replying paragraph 11 of the said purported Affidavit in opposition, I refute and reject the denial of the facts averred in paragraph 24 of my Petition, and whilst reiterating the foregoing paragraphs of this Affidavit, state that the averments in paragraph 24, as stated therein, are in the context of the facts stated in my Petition supported by Documents marked therewith.
16. Replying paragraphs 12, 13, 14, 15, 16 and 18 of the said purported Affidavit in opposition, I deny, refute and reject the same and reiterate that HDL has benefited immensely from my actions, as stated in my Petition, more particularly at paragraphs 6, 7, 11 and 12 thereof.
17. Replying paragraph 17 of the said purported Affidavit in opposition, whilst denying the same, I reiterate the averments in paragraph 23 of my Petition.

18. Replying paragraph 19 of the said purported Affidavit in opposition, I state that this itself is an admission of the amounts due
- a) to the Government by HDL which are defaulted, as per the averments in paragraph 19(a) of my Petition
 - b) to the Japanese contractors which are under Government Guarantees to be paid by the Government, notwithstanding the existing huge defaults by HDL to the Government, as per the averments in paragraph 19(c) of my Petition

and therefore gives the lie to the foregoing denials in the purported Affidavit in opposition of the averments in my Petition.

19. Replying paragraph 20 of the said purported Affidavit in opposition, I state that the Share Capital of HDL has got completely eroded by the accumulated loss upto 30.6.2005 of Rs. 6351.5 Mn. as stated in my Petition, and reiterate, *inter-alia*, paragraphs 3, 4 and 16 of my Petition .

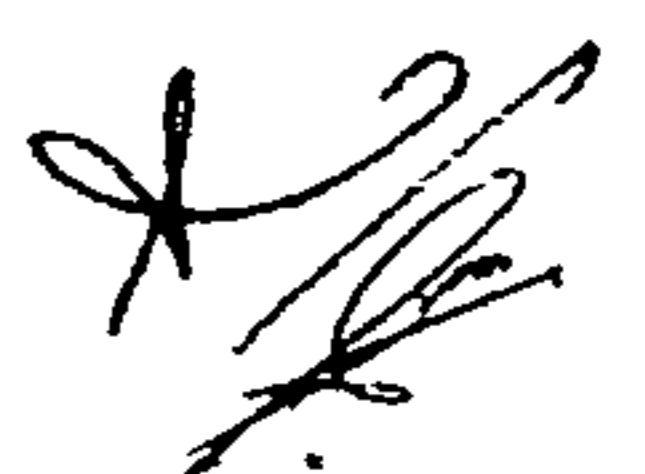
20. Replying paragraph 21 of the said purported Affidavit in opposition, I reiterate the averments in paragraph 23 of my Petition and state that,

- a) the Secretary to the Treasury is well and truly bound by the Cabinet Decision in October 2005 to wind-up HDL, and I further state that there has been no change of the Cabinet Decision after I filed my Petition, which fact is well and truly known to the Secretary to the Treasury and to the aforesaid HDL Director, V. Kanagasabapathy of the Treasury.
- b) curiously, whilst the purported Affidavit in opposition purports to have knowledge of what the views of Secretary to the Treasury are, at paragraph 10 of the purported Affidavit in opposition averments in paragraph 23 and other averments in my Petition, supported by Document P11 of the Secretary to the Treasury, have been denied in the purported Affidavit in opposition.
- c) what the Japanese creditors views are is not a matter of HDL, moreso particularly in the context of the averments in the Petition bearing out facts pertaining to the historical past of HDL and the fact that the amounts due to the Japanese creditors have been guaranteed to be paid by the Government.

21. Replying paragraph 22 of the said purported Affidavit in opposition, together with the Document marked "X" thereto

- a) the purported Affidavit in opposition had mischievously with deliberate intent attempted to mislead Your Honour's Court
- b) I reiterate the averments in the Petition, more particularly the averments in paragraphs 15 and 18 and state that HDL has been running at cognisable losses over the years defaulting interest on Loans and Capital since 1998 to the Governments as averred in paragraph 19 of the Petition supported by Documents marked P13(a), P13(b), P13(c), P13(d), P13(e), P13(f), P13(g) and P13(h) therewith.

- c) that the amounts shown as 'Owners Return' in Document marked X is grossly inadequate even to service the interests on the present total defaulted debt of over Rs. 8,000 Mn. (even at 10% p.a. Rs. 800 Mn. per year), and in addition thereto HDL has to re-pay the Capital of the Loans, more particularly to the Government i.e. the public of this country.
- d) Document marked "X" to the purported Affidavit in opposition contains unauthenticated data.
- e) Document marked "X" to the purported Affidavit in opposition has suppressed the facts that, in addition, HDL has to pay the rates for the Hotel Building and also meet the operational costs of the HDL Office, including making payments to HDL Directors.
22. Replying paragraph 23 of the said purported Affidavit in opposition, I state that this has no relevance whatsoever to the provisions under Part IX of the Companies Act No. 17 of 1982 in terms of which my Petition has been presented to Your Honour's Court.
23. Replying paragraph 24 of the said purported Affidavit in opposition, I state that this is an admission of what I have stated at paragraph 21 hereinabove, and vindicates the statements I have made to Your Honours' Court by my Petition, which the purported Affidavit in opposition had denied.
24. Replying paragraph 25 of the said purported Affidavit in opposition, I state that these are facts I have stated in paragraph 5 of the Petition, which have been admitted in the purported Affidavit in opposition at paragraph 2 thereof.
25. Replying paragraphs 26 and 27 of the said purported Affidavit in opposition, I deny the same and reiterate the averments in paragraphs 20 and 21 of my Petition.
26. Replying paragraph 28 of the said purported Affidavit in opposition, I reiterate the foregoing paragraphs of my Affidavit in reply and reiterate the paragraphs of my Petition, and state that
- a) in the given facts and circumstances, that it is warranted that HDL be wound-up in terms of provisions in Part IX of the Companies Act No. 17 of 1982, as prayed for in the Petition.
- b) without the serious effort to re-structure HDL as had been proposed by the Government, the present Directors of HDL are continuing to operate HDL, notwithstanding the bankrupt position of HDL, and colossal losses being accumulated, with huge defaults to the Government, with the present Directors of HDL enjoying financial and pecuniary personal benefits to the further detriment of HDL.
27. a) Replying paragraph 29 of the said purported Affidavit in opposition, I reiterate the averments in my Petition, more particularly those in paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 thereof and the Treasury Document marked P11 therewith, with Cabinet Approval given therefor as stated in my Petition, and state that this is a desperate attempt to somehow defraud the Government and cause grave and irreparable loss and damage to the public.
- b) I further state that the purported Affidavit in opposition had attempted to deliberately cover-up a major fraud perpetrated on the Government causing loss, detriment and damage to the Government.
- c) I respectfully state as advised that causing loss and damage to the Government or even an attempt to do so are Offences punishable under the Offences Against Public Property Act No. 12 of 1982.



28. Replying paragraph 30 of the said purported Affidavit in opposition, I deny the same and state that,
- a) the purported Affidavit in opposition discloses that, facts in documents available with HDL, and which have been admitted by HDL previously, have been questionably denied.
 - b) that the Companies Winding-up Rules under the Companies Act No. 17 of 1982 have no provision for filing of a further Affidavit, which statement alone demonstrates the uncertainty and questionability of the averments in the purported Affidavit in opposition.
 - c) the purported Affidavit in opposition is not an Affidavit in opposition of HDL.
 - d) I am advised that the purported Affidavit in opposition is hopelessly misconceived and of no avail in law.
29. Replying paragraph 31 of the said purported Affidavit in opposition, I reiterate paragraphs 6, 7, 8, 9, 10, 11 and 12 of my Petition and state that
- a) the Documents tendered to Your Honour's Court are those relevant to the matter of my Petition.
 - b) the Settlement Agreements marked X1, X2 and X3 are Settlement Agreements Nos. 1, 2 and 4 respectively, without Settlement Agreement No. 3, all of which formed an inter-dependent and inter-related one composite Settlement in June 1995, with HDL a party thereto which immensely benefited thereby as set out in my Petition, with an Addendum signed thereto in October 1996, referred to in Documents marked P5(a) and P5(b) with my Petition.

I produce herewith marked "P16" and "P17", respectively true copies of the said Settlement Agreement No. 3 of June 1995 and the said Addendum of October 1996
 - c) in addition two other Settlement Agreements without being marked, referring to other matters have been annexed, without any reference thereto in the purported Affidavit in opposition.
30. I reiterate the foregoing and the averments in my Petition and state that,
- a) the purported Affidavit in opposition has not expressly traversed each and every averment of my Petition, and has deliberately evaded and avoided from doing so, and has falsely and knowingly denied, when to the knowledge of HDL the facts are as averred in my Petition supported by Documents annexed therewith; such false and knowing denials by themselves are detrimental to the interest of HDL, its shareholders, mainly the Government, and have been made to mislead Your Honour's Court.
 - b) the purported Affidavit in opposition has questionably failed to controvert the factual averments supported by HDL's own documents and that of the Treasury, that HDL is hopelessly bankrupt, and has failed to demonstrate that HDL is not bankrupt, and that its Share Capital has not got completely eroded, with colossal accumulated losses.
 - c) in any case, the purported Affidavit in opposition is not an Affidavit in opposition by HDL, the Company sought to be wound-up, which Company alone, and none other is entitled to file an Affidavit in opposition within 7 days of the date on which the Affidavit verifying the Petition is filed, in terms of the Companies Winding-up Rules under Companies Act No. 17 of 1982.
 - d) therefore, as advised, I respectfully state that the purported Affidavit in opposition is bad in law and ought to be rejected *in-limine* forthwith.

31. The foregoing clearly demonstrate that,

- a) the purported Affidavit in opposition is a deliberate and intentional act of camouflage to mislead Your Honour's Court
- b) there is no valid, lawful and acceptable Affidavit in opposition, as mandated by the Companies Winding-up Rules under Companies Act No. 17 of 1982
- c) thus and thereby the averments in my Petition presented to Your Honour's Court to wind-up HDL stand unrefuted and uncontroverted, and therefore stand admitted

and accordingly, I respectfully state as advised, that relief as prayed for in my Petition ought to be granted by Your Honour's Court.


The foregoing Affidavit having been read over and explained by me to the affirmant thereof and he having admitted to have understood the contents thereof affirmed to and signed at Colombo on this 19th day of December 2006



BEFORE ME



JUSTICE OF THE PEACE

 **S. NAVARTANAM**
Justice of the Peace
No. 25/10, Wipulasena Mawatha,
Colombo - 10.

006/12/19