

In the High Court of Fiji
At Suva
Civil Action No. HBE 08 of 2017

Ba Holding Company Limited
Applicant

v

Bianka K Kumar trading as 4 K Construction
Respondent

COUNSEL: Mr K.Vuataki for the applicant
Mr I. Fa for the respondent

Date of Judgment: 28th July, 2017

Ruling

1. The applicant, by its originating summons filed on 20th March, 2017, seeks to set aside the statutory demand of 28th February, 2017, served on the applicant by the respondent.
2. Rakesh Prasad, Manager Projects of the applicant company in an affidavit in support states that the applicant subcontracted its "*Access to Quality Education Programme*", (AQEP) contract to the respondent, to repair six schools in the island of Koro. The Memorandum of Agreement signed by the parties on 7th December, 2016, required the respondent to carry out the "*Scope of works*" for a period of 8 months commencing on 28th November, 2016, in a sum of \$852,300.00 VIP for Nacamaki District School and \$646,200.00 VIP for Qalivakabau District School. The respondent was to be paid monthly payments divided equally into the contract sum less 10% retention after 12 months of covering defects liability period.
3. The affidavit continues to state that the respondent failed to perform its obligations under the contract. AQEP's Progress Report of 7th February, 2017, notes that the respondent has only performed "*2% of works*" at Nacamaki District School and "*0% of works*" at Qalivakabau District School. The applicant is required to pay the respondent \$17,046.00 for the 2% work done. The respondent owes the applicant \$42,954.00, as it paid the respondent a sum of \$60,000 to procure materials. The applicant gave the respondent notice on 13th and 15th February, 2017, to complete the works by 20th February, 2017. The respondent abandoned the works.

4. Anand Kumar, the Project Manager for respondent, in his affidavit in reply states that the applicant did not provide the approved drawings for the contract, till 31st January, 2017, two months after the contract was signed. Some buildings could not be done for that reason. The respondent has undertaken substantial works to building 1, which is 80% complete. The applicant unlawfully terminated the respondent's services before it could be completed. The Agreement requires that the respondent be paid monthly. A sum of \$60,000 was paid as mobilization costs, to be deducted from the first monthly payment. The respondent has incurred costs in a sum of \$103, 685.00. The applicant is insolvent. It has been unable to pay the Bond required under the contract and this has affected the respondent.
5. The affidavit in response filed on behalf of the applicant states that drawings were provided by the AQEP Engineers. School building 1 was supposed to be completed on 17th January, 2017. The respondent gave misleading excuses for slow progress. Upon site inspection, Engineers noted that 80% of works carried out by the respondent was not up to the required standard and had to be re-done at the applicant's costs. The respondent left the work site before 20th February, 2017, with all materials. She did not finish the first phase of works. The works carried out was rejected by the Engineers, upon inspection. Payments are performance based. The respondent has quoted \$177, 00.00 for school building 1 in Nacamaki District School, when only \$19,700.00 worth of works was approved by the Engineers. The respondent has been in breach of contract from the commencement of works. The applicant is solvent. The applicant has a Bank bond in place for the project.
6. The applicant, by ex parte notice of motion filed on 20th March, 2017, (made inter partes) also sought an injunction to restrain the respondent from presenting a petition to wind up the applicant company.
7. On 24th March, 2017, Mr Fa, counsel for the respondent sought 7 days to file affidavit in opposition. Mr Fa gave an undertaking not to present a petition for winding up the applicant. The matter was fixed for hearing on 18th April, 2017.

The hearing

8. On 18th April, 2017, counsel for the applicant Mr Vuataki filed written submissions, as he was indisposed. Mr Fa moved to file written submissions in reply, which has been filed. Both parties have filed further written submissions.

The determination

9. The parties had entered into a Agreement for the respondent to carry out construction works for a period of 8 months commencing on 28th November, 2016, in a sum of \$852,300.00 VIP for Nacamaki District School and \$646,200.00 VIP for Qalivakabau District School totaling \$1,498,500.
10. The respondent's claim for the sum of \$306, 062.04 is based on clause 3.i of the Agreement titled "***Value & Payment***" which provides that "***Payments will be made on monthly basis divided equally less 10% Retention***".(emphasis added)
11. The respondent, in the written submissions filed on her behalf submits that the claim was calculated on an aggregate of the monthly payments due for December, 2016, January, 2017 and 20 days in February, 2017, until termination of the agreement on 20th February, 2017, on the total value of the contract of \$ 1,498,500 less 10% retention and the "*deployment charge*",(the advance) paid by the applicant. The contentions of the applicant are not based on the Agreement.
12. The applicant submits that the respondent failed to perform its obligations under the contract. On 7th February, 2017, AQEP found the respondent to have only performed "*2% of works*" at Nacamaki District School and "*0% of works*" at Qalivakabau District School. A copy of AQEP's valuation of work is attached. The applicant was required to pay the respondent a sum of \$17, 046.00 for the 2% work done. The respondent owes the applicant \$42, 954.00, as it has paid the respondent a sum of \$ 60,000 advanced to purchase materials
13. On a consideration of the contentions of the parties, in my view, there is a genuine dispute as to whether the respondent is entitled to monthly payments in terms of the Agreement.

14. Section 516 of the Companies Act provides that a company may apply to Court to set aside a statutory demand served on the company within 21 days after the demand is served.
15. Section 517(1)(a) requires the Court to be satisfied that “*there is a genuine dispute.. about the existence or amount of a debt to which the demand relates*”, in an application to set aside a statutory demand.
16. Mr Vuataki, in his written submissions has cited several cases from the Australian courts. Section 517 of the Companies Act is *in pari materia* with section 459H(1)(a) of the Corporations Act, 2001, of Australia .
17. In *In the matter of Country Spring Water Company Pty Ltd*, [2013] NSWSC 1660 Black J cited the following passage from the judgment of Barrett J in *CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd*, [2003] NSWSC 728; (2003) 47 ACSR 100 as follows:

*The task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its s 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. **Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow.** The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.* (emphasis added)

18. In the present case, I am satisfied that there is a genuine dispute as to the amount that is owing to the respondent, which in my opinion has to be calculated by Court as provided in section 517(2).

19. *Orders*

- (a) These proceedings are listed before me for directions on 1st August, 2017, at 9a.m
- (b) Cost in the cause

A.L.B. Brito-Mutunayagam



A.L.B. Brito-Mutunayagam

Judge

28th July, 2017