

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 191 of 2019

IN THE MATTER of Statutory Demand dated 24th May 2019, served on
Skyglory Pte Limited on 24th May 2019.

IN THE MATTER of Skyglory Pte Limited, a limited liability company having its
registered office at 75-79 Cumming Street, Suva.

IN THE MATTER of an application made pursuant to Sections
513, 514 and 515 of the Companies Act.

BETWEEN

SKYGLORY PTE LIMITED accompany incorporated in the
Fiji Islands and having its registered office at 75-79
Cumming Street, Suva.

APPLICANT

AND

BHAWNA BEN trading as **BHARAT INDENTING HOUSE** a limited liability
company having its registered office at Lautoka, Fiji.

RESPONDENT

Counsel : Mr S. Singh for the Applicant
Mr S. Singh with Mr S. Fatiaki for the Respondent.

Date of Hearing : 29th August, 2019

Date of Ruling : 13th September, 2019

RULING

[1] The applicant filed this originating summons (expedited form) seeking the following orders:

- A. That the Statutory Demand in the sum of \$38,976.00 (Thirty Eight Thousand and Nine Hundred and Seventy Six Dollars) dated 24th May 2019 and served on 24th May 2019 on the applicant's registered office on 24th May 2019 be set aside forthwith;
- B. That the statutory demand in the sum of \$38,976.00 (Thirty Eight Thousand and Nine Hundred and Seventy Six Dollars) dated 24th May 2019 and served on 24th May 2019 on the applicant's registered office on 24th May 2019 be stayed until further directions of the Honourable Court forthwith;
- C. Such further and other relief as seems just and equitable to this Honourable Court.

[2] An objection was taken by the respondent challenging the legality of the affidavit in support filed on 19th August 2019 in evidence on the basis that the deponent of the affidavit is a solicitor of the Shelvin Singh Lawyers who are the applicant's solicitors.

[3] The question for determination here is whether a lawyer can depose an affidavit on behalf of his client. The same question arose before me in the case of **Bulileka Hire Services Ltd v Housing Authority** [2016] FJHC 322; HBC57.2011 (25 April 2016). In that case I made the following observations:

An affidavit is sworn evidence of facts before a court of law. A solicitor cannot, while representing his client before the court at the same time be his witness. The solicitor of a particular litigant can also be construed as his agent but the

relationship between the solicitor and the client is different to that of an agent and the principle referred to in the above principles relied on by the defendants. Solicitors act on the instructions of their clients. They cannot assume the status of the clients and do everything what is expected of them. In other words a solicitor cannot be a substitute for his client. The requirements which should be met by a litigant himself are different to that of his solicitor.

Order 41 rule 8 of the High Court Rules 1988 provides:

No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.

[4] For these reasons I hold that the affidavit in opposition filed on 19th August 2019 by the applicant cannot be accepted as evidence in these proceedings.

[5] The other objection taken by the respondent is that the application for setting aside the statutory demand was not served on the solicitors of the respondent within the period prescribed by section 516 of the Companies Act 2015.

[6] Section 516 of the Companies Act 2015 provides:

1. A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.
2. An application may only be made within 21 days after the demand is so served.
3. An application is made in accordance with this section only if, within those 21 days—
 - (a) an affidavit supporting the application is filed with the Court; and
 - (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.

[7] There is no dispute between the parties that the service of the application was done after the expiration of the period of 21 days prescribed by the Companies Act 2015.

[8] The respondent in support of his objection relies on the very recent decision of Amaratunga J in the case of **South Pacific Marine Ltd v Pricewaterhousecoopers** [2019] FJHC 118; HBE07.2019 (21 February 2019) where it was held:

The compliance of Section 516(3) of Companies Act 2015 is mandatory due to two reasons. First, the use of language 'only if' makes it mandatory. The grammatical

meaning of the said provision is that requirements are indispensable. Secondly, if it is not mandatory, the alleged debtor company, could use this provision of setting aside of the Statutory Demand, to postpone or delay winding up action. The legislature had prevented, it through usage of restrictive language. Purposive interpretation of section 516(3) of Companies Act 2015 makes it mandatory.

If the 21 day time is not applied to service of application and affidavit, a debtor may delay the winding up action of the creditor, without a valid ground. This can be done by filing an action for setting aside of the winding up notice but delay the service of the same application to the creditor, so that they will be kept searching for the grounds of the application for setting aside of Statutory Demand or they will be in two minds to proceed with the winding up action. Statutory Demand is required to give 21 days period for debtor company to settle it, or to face winding up action. So it is nothing but fair, to give same time period to serve an application for setting aside of Statutory Demand.

- [9] The learned counsel for the applicant relying on Rules 115 and 116(1) of the Companies (Winding up) Rules 2015 submitted that the court has the power to enlarge or abridge time prescribed by law and a formal defect will not invalidate the proceedings.

Rule 115 of the Companies (Winding up) Rules 2015 provides:

The Court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing or taking any proceedings.

- [10] On a careful reading of rule 115 it appears that under the said rule the court has power to extend or abridge time prescribed by the rules or by an order of court. There is nothing in this rule to say that the court has power to extend the time prescribed by the Companies Act 2015.

- [11] Rule 116(1) of the Companies (Winding Up) Rules 2015 provides:

No proceedings under the Act or these Rules are invalid by reason of any formal defect or any irregularity, unless the Court before which any objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[12] Originating summons seeking to have the statutory demand set aside was filed on 12th June 2019. The file was sent to me by the Civil Registry on 17th June 2019. I directed that the matter be mentioned on 18th July 2019 and sent it back to the Registry on the same day. The learned counsel for the applicant submitted that the Registry released it on 18th June 2019 and it was served on the respondent on 21st June 2019. Since the court has already made order refusing to accept the contents of the affidavit filed on 19th August 2019 as evidence, there is no material before this court to ascertain as to when the Civil Registry released the papers filed by the applicant for service. The submission of the learned counsel made at the hearing is not evidence.

[13] The question is whether the failure to serve the application to set aside the statutory demand falls within the meaning of irregularity under rule 116 of the Companies (winding Up) Rules 2015.

[14] In **South Pacific Marine Ltd v Pricewaterhousecoopers** (supra) it was also held:

There is 21 day time period to settle the debt and if not the creditor can take steps for winding up. The same time period is given for debtor to seek setting aside of Statutory Demand. These time periods are mandatory and Rule 116 of Companies (winding up) Rules 2015 has no application to mandatory provisions contained in Section 516 of Companies Act, 2015. Accordingly the preliminary objection is sustained and the action is struck off for non-compliance of the mandatory provision contained in Section 516(3) of Companies Act, 2015.

[15] What section 516 of the Companies Act 2015 says is an application is made in accordance with section 516 only if it is filed and served within 21 days of the service of the statutory demand. It is therefore, clear that, as observed by Amaratunge J. in the above case the provisions are mandatory and failure to comply such provisions is not a mere irregularity. For this reason, I am of the view that the applicant cannot rely on rule 116 of the Companies (Winding Up) Rules 2015 to circumvent the difficulty in not complying with the statutory provisions.

[16] The learned counsel for the applicant submitted that in the above decision the court has applied the law in a very strict and restrictive manner completely disregarding section 15(2) of the Constitution where it provides:

Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by and impartial tribunal.

- [17] The Constitution is the supreme law of the country but it is not the only law in any jurisdiction. Section 46 of the Constitution confers power and authority on the Parliament to enact laws. The right conferred upon the people by section 15(2) of the Constitution can only be exercised subject to the other laws enacted by the legislature. The applicant made this application pursuant to section 516 of the Companies Act 2015 and when it realised that the application was served on the respondent out of the time period prescribed by the said section expects the court to totally disregard the very provision of the law pursuant to which it brought this application to court.
- [18] When a legislation prescribes a time period within which a particular step to be taken the court has no alternative but to apply such provision strictly. There is no provision in section 516 or in any other section of the Companies Act 2015 which confers a discretion upon the court to extend or enlarge the period of time within which an application to set aside a statutory demand should be made.
- [19] For the above reasons the court makes the following orders.

ORDERS

1. The objections taken by the respondent challenging the legality of the affidavit filed on 19th August, 2019 and the objection that the application of the applicant has been filed out of time, are upheld.
2. The application applicant, to have the statutory demand set aside, is struck out.
3. The applicant shall pay \$2000.00 as costs of this application.




Lyone Seneviratne

JUDGE

13th September 2019