

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBE 63 of 2020

IN THE MATTER of a Statutory Demand dated 2nd September 2020 issued on
4th September 2020 by **FINANCE PACIFIC CORPORATION PTE LIMITED**

AND

IN THE MATTER of an application by **YOGESH GOKAL & COMPANY LIMITED**
for an Order setting aside the Statutory Demand dated 2nd September 2020
pursuant to section 516 of the Companies Act 2015

BETWEEN

YOGESH GOKAL & COMPANY LIMITED a limited liability company
having its registered office at 231 Rewa Street, Suva.

PLAINTIFF

AND

FINANCE PACIFIC CORPORATION PTE LIMITED a limited liability company
having its registered office at 211 Ratu Sukuna Road, Suva, Fiji.

DEFENDANT

Counsel : Mr. Rokodriu V. for the Applicant
Mr. Chand A. for the Respondent

Date of Hearing : 09th December 2020

Date of Ruling : 21st December 2020

RULING

(On the application to set aside the Statutory Demand)

[1] The plaintiff filed this Originating Summons (Expedited Form) seeking the following orders:

1. That the defendant FINANCE PACIFIC CORPORATION PTE LIMITED be restrained, whether by itself, or its Directors or its servants or agents or otherwise from presenting and/or advertising a Winding up petition against the plaintiff company based on the statutory demand dated 2nd September 2020 and received by the plaintiff on 04th September 2020 [“the said statutory demand”] pending the hearing and determination of this action.
2. That the statutory demand be wholly set aside.
3. A declaration that the sum claimed in the said statutory demand is genuinely disputed.
4. That an interim stay be granted to the plaintiff pending the determination of this action.
5. That the defendant pay all costs of these proceedings to the plaintiff on an indemnity basis within a prescribed period.
6. Any other orders, declarations and relief as seem just and equitable by this Honourable Court.

- [2] When this matter was taken up for hearing on the application to set aside the statutory demand an objection was raised by the learned counsel for the defendant that the application of the plaintiff is time barred.
- [3] 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 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.
- [4] Reading section 516 (2) and (3) together it is absolutely clear that the application for setting aside the statutory demand must be filed and served on the other party within 21 days.
- [5] It is common ground that in this matter the statutory demand was served on the defendant company on 04th September 2020 and the application for setting the said statutory demand was filed and served on 25th September 2020 which is the 21st day from the service of the statutory demand. Therefore, the objection taken by the defendant that the application for setting aside the statutory demand was out of time must be overruled.
- [6] The second objection is that the affidavit in reply filed on 04th December 2020 has been affirmed to by a solicitor of the defendant's solicitors, Valenitabua & Associates. It is settled law that a solicitor cannot depose an affidavit on behalf of his or her client unless the facts deposed to in the affidavit are within the personal knowledge of the solicitor.

- [7] All what is stated in the affidavit in reply have been deposed to by solicitor Adilina Valenitabua on instructions of the senior partner of Valenitabual & Associates and Grace Gokal who is the Managing Director of the plaintiff company.
- [8] The explanation offered by the learned counsel is that the two directors of the plaintiff company have got stranded in Europe and cannot be travelled to Fiji due to Covid 19 pandemic. However, the affidavit in support has been deposed to by Grace Gokal, the Managing Director. It is a scanned copy but the plaintiff could have followed the same procedure also in respect of the affidavit in reply.
- [9] For whatever the reason the affidavit in reply deposed to by the solicitor is liable to be rejected for the reasons given above.
- [10] Section 517 of the Companies Act 2015 provides:
- (1) This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following-
 - (a) that there is a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates;
 - (b) that the company has an offsetting claim.
 - (2) The Court must calculate the substantiated amount of the demand.
 - (3) If the substantiated amount is less than the statutory minimum amount for statutory demand, the court must, by order, set aside the demand.
 - (4) If the substantiated amount is at least as great as statutory minimum amount for a Statutory Demand, the Court may make an order-
 - (a) varying the demand as specified in the order; and
 - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the Company.
 - (5) The Court may also order that the demand be set aside if it is satisfied that-

- (a) because of the defect in the demand, substantial injustice will be caused unless the demand is set aside; or
- (b) there is some other reason why the demand should be set aside.

[11] In paragraph 7 of the affidavit in support it is averred:

Deuba Points is a sister company of the Respondent. The Applicant supplied steel to Deuba Points on the understanding that the total amount of invoice for the steel being \$110,000.00 was *quid pro quo* for all monies owed by the Applicant to the Respondent including the Statutory Demand amount of \$67,500.00.

[12] Every company incorporated under the Companies Act has a separate legal personality. Therefore it cannot be construed that the monies paid to the sister company could be set off against the amount due to the sister company. There is nothing on record to show that such an understanding existed between the applicant and the respondent. On the other hand the respondent has tendered a document titled “**Notice of Debt Acknowledgement**” signed by a Director of the applicant Company where the applicant company has admitted that this amount is due to the respondent company.

[13] In paragraph 9 of the affidavit in support the Managing Director of the applicant company states:

On 10th December 2018 I was informed by the Respondent’s Director that the Applicant owed the respondent a total of \$25,000.00 and it was rolled over at 45 interest for three months. However, there is no break-down of interest charged and the principal to ascertain conscionability, exorbitant or otherwise of the interest charged by the Respondent.

[14] Section 517 requires the court to calculate the substantiated amount of the demand when there is a genuine dispute as to the amount of the debt. Having a dispute as to the amount of debt alone is not a ground to set aside the Statutory Demand. The

court in such a situation has the power to set aside the demand only if the amount so ascertained is less than the statutory minimum amount.

[15] For the court to calculate the substantiated amount it must have evidence. The applicant company has failed to tender any document in support of the averments in the affidavit in support nor has it give any other reason for the court to act under section 517(5)(b) of the Act.


[16] For the above reasons the court makes the following orders.

ORDERS

1. The application to set aside the Statutory Demand is refused.
2. There will be no order for costs.



21st December 2020


Lyone Seneviratne

JUDGE