

IN THE HIGH COURT OF FIJI
AT SUVA

HBE 61 of 2020

**IN THE MATTER of RPA GROUP
(FIJI) LIMITED**

AND

**IN THE MATTER of an application to
set aside a statutory demand, pursuant
to sections 516 and 517 of the
Companies Act 2015**

BETWEEN : RPA GROUP (FIJI) LIMITED

APPLICANT

AND : KHANIJA DEVELOPMENT PTE LIMITED

RESPONDENT

BEFORE : M. Javed Mansoor, J

**COUNSEL : Mr. F. Haniff with Mr. P. Suguturaga for the applicant
: Ms. N. Karan for the respondent**

Date of Hearing : 28 April 2022

Date of Decision : 3 November 2022

DECISION

COMPANY LAW

Statutory demand – Application to set aside – Whether application served within 21 days – Failure to file affidavit of service – Delay in raising objection – Demand in excess of actual debt – Sections 515, 516 & 517 of the Companies Act 2015

1. The applicant filed summons on 17 September 2020 to set aside a statutory demand dated 27 August 2020 by the respondent. The demand was for the payment of a debt of \$15,735.53. The applicant's summons is on the basis that there is a genuine dispute between the applicant and the respondent about the existence or amount of a debt to which the demand relates. The applicant sought an interim stay pending the determination of the application.
2. The application was supported by the affidavit of Ronesh Kumar, the applicant's managing director. The applicant disputed the demanded debt of \$15,735.53. Mr. Kumar said that the applicant was issued tax invoice number 0001 dated 5 March 2020 amounting to \$13,849.05 for hire of the trucks and the digger and another tax invoice number 0122 dated 20 April 2020 amounting to \$9,939.48.
3. These invoices were issued consequent to a contract the applicant and the respondent entered into on 8 January 2020. Mr. Kumar said that the contract was for the hire of two 6 wheeler trucks bearing registration numbers KG816 and KF244 and a 6 ton digger bearing registration number JY126. The contract set out the quantity description and the rates at which the trucks and the digger would be hired. The trucks were to be hired on a kilometer basis, while the digger was to be charged for hourly usage. The rates given in the contract are set out below:

Item	Quantity	Description	Rate
1	2	6 wheeler truck	\$0.53 VIP/km
2	1	6 ton digger	\$55.00 VIP/hour

4. Mr. Kumar said that although the trucks were to be hired at the fixed rate of \$0.53 Value Added Tax included price (VIP)/ kilometer, the respondent had

charged the company a higher rate for the trucks on 14 and 15 February 2020 and on 28 of February 2020. He said that although the digger was to be hired at a fixed rate of \$55.00 VIP/hour, the respondent had charged \$5,500.00 VIP/ month without disclosing the chargeable basis. Mr. Kumar said that the actual sum payable to the respondent is \$6015.08, and produced a reconciliation statement in support of his claim.

5. Mr. Raj Kuar Singh, director of the respondent, filed an affidavit in reply on 6 November 2020. He averred that the applicant agreed to pay \$5,000.00 for dry hire of the digger. He averred that the applicant's accountant admitted that there was a sum of \$15,735.50 owed to the applicant. Mr. Singh said that the vehicle number of the digger JT126 and not JY126, as stated by the applicant. His affidavit also pointed out that one of the tax invoices was dated March 2020 and not April 2020. The differences he highlights have no material bearing on the issue before court.
6. The applicant did not file a response to the affidavit in reply. Both parties made oral submissions at the hearing and also filed written submissions.

Did the applicant comply with section 516 of the Companies Act?

7. In their written submissions filed on 27 April 2022, the respondent submitted that that the applicant did not file its affidavit of service and, therefore, there is no evidence before court as to when the application was served. The respondent submitted that although the applicant filed summons on 17 September 2020, it was served on the respondent on 28 September 2020, beyond the required 21 day period. This position was not taken up on behalf of the respondent by Mr. Singh in his affidavit in reply. There was no evidence before court of the date on which summons was served on the respondent.
8. The applicant submitted that the application to set aside the statutory demand was filed more than a year ago, and that no objection in that regard was raised by the respondent. The applicant submitted that the respondent's objection should not be allowed to be raised at the stage of the hearing, and asked for a consideration of the merits of the matter.

9. Section 516 imposes a duty on the applicant to serve the application and supporting affidavit on the respondent within 21 days of receiving the statutory demand. An application is said to be made in accordance with section 516 of the Companies Act *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.

10. For the purpose of the present case it is not necessary to consider whether the phrase “only if” in section 516 (3) has the same coercive effect as 516 (2). Suffice to say that the respondent did not raise this matter in its affidavit in reply. The respondent had the opportunity to have raised the objection at the time of filing the affidavit in reply. The respondent did not do so in its affidavit in reply of 6 November 2020. The matter was raised at the hearing on 28 April 2020 and by the respondent’s written submissions filed a day prior to the hearing.

11. The application to set aside the statutory demand was filed on 17 September 2020, within the 21 day period specified by section 516 of the Companies Act. Mr. Raj Singh did not raise issue over service of the application and supporting affidavit in his affidavit in reply filed on 6 November 2020. While it is correct to say that the applicant ought to have filed an affidavit of service to satisfy court of the date of service – especially as the relevant time periods are to be strictly observed – the matter was raised for the first time in the respondent’s written submissions filed on 27 April 2022, and at the hearing held on the following day. The hearing itself was long after the last affidavit was filed. The respondent had the opportunity to apply to set aside the applicant’s summons for irregularity, which has not been done. Such an application is made possible by Order 2 rule 2 of the High Court Rules 1988. The rule disallows an application to set aside for irregularity of proceedings unless it is made within a reasonable time. In my view the objection concerning the alleged delay in service of the application to set aside the statutory demand has not been raised within a reasonable time. The applicant must be taken as having complied with section 516 of the Act.

The dispute

12. Invoice number 0001 is for the sum of 13,849.05. This includes VAT of 1,143.50. A sum of 6,173.44 has been charged for a truck for running 1,664 kilometers. The applicant submitted that if the agreed rate of \$0.53 is applied, the charge would be \$881.92, as opposed to 6,173.44. The invoice discloses that one of the trucks was charged on an hourly basis for 27 hours and invoiced for 1,486.24. The applicant submitted that the contract provided for the trucks to be charged on a kilometer basis, and not on hourly usage. What has been charged, the applicant says, is far in excess of the actual amounts payable.
13. Invoice number 0122 shows a sum of \$4,439.48 in respect of truck usage. The invoice does not specify the basis of the charge. The sum invoiced for the digger was \$5,500.00. The digger was to be charged at the rate of \$55 an hour according to the contract. The invoice did not specify the hourly usage of the digger. The applicant submitted that he was overcharged in respect of this invoice as well.
14. The respondent submitted that the invoice was prepared on the basis of an email dated 16 June 2020 sent by the respondent and agreed by the applicant. The applicant submitted that the respondent's email was a clarification from the applicant. The email sent by one Abhikesh says, RPA recognizes the following invoices subject to verification and approval.
15. It was important for the respondent to have clearly shown the basis upon which the applicant was being invoiced for services provided under the contract. The applicant was entitled to know whether the agreed rates had been applied. The deed of agreement executed by the parties on 8 January 2020 shows that the respondent was required to give the applicant a detailed claim in respect of the services provided, towards the end of each month.
16. Section 515 of the Companies Act says *inter alia* that unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be unable to pay its debts if a creditor has served on the company by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due (statutory demand), and the company has not paid the sum or

secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice.

17. Once issued, a company must comply with a statutory demand within 21 days. Non-compliance with a statutory demand raises a presumption that a company is unable to pay its debts. The debt should be due at the time of demand. If the company complies with section 516 of the Act, it is entitled to argue *inter alia* that the debt is disputed. Section 517 of the Act makes provision for such a dispute to be raised. If a company refuses to pay because it genuinely believes that it does not owe the claimed debt, it cannot be presumed insolvent.
18. Mr. Singh did not shed any light in regard to the applicant's claim that higher charges were wrongly computed. He did not explain the basis on which higher rates were used in the respondent's invoices and their discrepancy with the contractually agreed rates. He claimed that the appellant agreed to the charge of \$ 5,000.00 for the digger. Such an agreement was not in evidence. He made no reference to the reconciliation statement provided by the applicant. At the hearing, the applicant's counsel said she was unable to explain the basis on which the respondent invoiced the applicant.
19. Section 517 provides *inter alia* that on an application to set aside a statutory demand, if the court is satisfied that there is a genuine dispute between the company and the respondent about the existence or the amount of the debt to which the demand relates, the court may set aside the statutory demand.
20. The applicant has satisfied court that there are sufficient discrepancies in the respondent's invoices, when compared with their hiring contract, to constitute a significant dispute. The applicant says it owes the respondent \$6,015.08. If a demand is overstated, it does not necessarily follow that the demand is invalid. Where there are errors, a court could exercise its discretion on whether or not to permit the demand to stand. Where the demand is said to be in excess, the proper thing would be for the company to pay what is owed and challenge the balance.

21. In this case, the inaccuracies are such that the debt will not exceed \$10,000.00, which is a requirement under section 515 of the Act for a company to be deemed unable to pay its debts. This is a fit case in which to set aside the statutory demand.
22. In these circumstances, the court sets aside the statutory demand.

ORDER

- A. The respondent's statutory demand dated 27 August 2020 is set aside
- B. The respondent is to pay the applicant costs summarily assessed in a sum of \$500.00.

Delivered at **Suva** on this 3rd day of **November, 2022**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge

Solicitors:

For the applicant: *Haniff Tuitoga*

For the respondent: *Sharan Law*