IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 18 of 2020
(High Court Civil Case No: 191 of 2019)

BETWEEN : **SKYGLORY PTE LIMITED**

Appellant

AND : **BHAWNA BEN**

Respondent

Coram : **Almeida Guneratne, J.A**

Counsel : **Ms. I. Lutu for the Appellant**

: **Mr. R. Singh with Mr. S. Fatiaki for the Respondent**

Date of Hearing : **03 August 2020**

Date of Ruling : **08 September 2020**

RULING

[1] This is an application by the Applicant-Appellant (hereinafter referred to as the Appellant) seeking leave to appeal the ruling of the High court dated 13 September 2019.

[2] The High Court in its said ruling made the following orders:

> *"(i) 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.*
> *(ii) The application of appellant, to have the statutory demand set aside, is struck out.*
> *(iii) The applicant shall pay $2000.00 as costs of this application".*

Relevant Background Context for purposes of determining the present Application

[3] On 24 May, the Respondent issued and served a Statutory demand on the Appellant for a monetary debt pursuant to Section 515 of the Companies Act (as amended) (the Act).

[4] The Appellant on 10 June, 2019 instituted proceedings against the Respondent for breach of contract and damages. Having disputed the Statutory demand in writing on 11 June, the Appellant filed an application on 12 June to have the said statutory demand set aside under Section 516 of the 'Act' (and therefore within time), in as much as the said statutory demand would have expired on 13 June, 2020.

[5] However, it was on 20th June, 2019 that the Appellant served its Application to set aside "the statutory demand" on the Respondent (that is, 8 days after filing the said application).

[6] When the matter had been taken for hearing before the High Court, the Appellant had moved for time to file an affidavit to explain the said delay in failing to comply with Section 516 of "*the Act*". The Respondent had raised a preliminary objection to that affidavit sworn to by a Solicitor in the Appellant's Solicitors' firm – apart from an earlier (preliminary) objection the Respondent had taken to "the late service" of the application to have "the statutory demand" of the Respondent set aside.

[7] At the hearing before me, learned Counsel for the Respondent sought pre-audience in raising a preliminary objection to the application (admittedly a renewed application for leave to appeal) in which regard Counsel relied on Rules of the Court of Appeal Act, the Practice Directions read with the terms of a government gazette dated 21 June, 2018 *"Court of Appeal"* (Amendment Rules) 2018.

[8] Counsel further argued that, those provisions are in line with the jurisdiction vested in a single Judge under Section 20(1) (g) of the Court of Appeal Act (Cap.12). Consequently, counsel moved for a dismissal of the Appellant's leave to appeal application.

[9] As against those submissions, learned counsel for the Appellant argued, placing reliance on Rule 16 of the Court of Appeal Act and proceeding to contend that Practice Directions cannot take away from what has been legislatively decreed therein on the principle of subsidiarity, in consequence of which Counsel submitted that, there was "no non-compliance" with any provisions of the Act itself and that, the preliminary objection must be over-ruled.

[10] Although I heard submissions on the said preliminary objection I prevailed on counsel to address me on the impugned order of the High Court in as much as I felt that, should the Appellant fail to assail the said order to the extent of obtaining leave against it in the first instance on the merits of that order, the said preliminary objection would be rendered redundant.

[11] Counsel for parties having agreed to my suggestion, submissions were made by them accordingly.

The Features in the Order of the High Court

[12] Two features called for examination in the said Order.

(1) The legality of the affidavit dated 19th August, 2019.

(2) The application of the Appellant to have the statutory demand made by the Respondent set aside being out of time.

Re: The Affidavit of 19 August, 2019

[13] His Lordship in the High Court rejected the said affidavit of "a legal assistant" attached to the Appellant's firm of solicitors.

Acceptability or otherwise of Supporting Affidavits in Litigation

[14] In a recent decisions of His Lordship, the Chief Justice, writing for the High Court rejected a supporting affidavit of "a solicitor's clerk" (vide: Habib Bank Limited v Mehmoob Raza, HBC 053 of 2005, 26 May 2020).

[15] In that decision, His Lordship surveyed a *cursus curiae* of the High Court before coming to that conclusion. I, myself took note of that in a recent ruling of mine (vide: Gulf Sea Food (Fiji) Ltd v ITLTB, ABU 079.2019.

[16] In none of those cases which His Lordship had looked at, could I see a supporting affidavit of a legal assistant (attached to and part of a Solicitor's firm) had been rejected.

[17] "*Solicitor's Clerk*" has been applied to "litigation assistants" in some of those cases which His Lordship surveyed.

[18] For those reasons I looked at the impugned Affidavit of 19 August, 2019 to ascertain the status of the deponent therein – Benita Kumari – which the Respondent also has admitted to be "a solicitor of Shelving Singh Lawyers who are the Applicant's lawyers" (which the learned High Court Judge himself noted – vide: paragraph [3] of His Lordship's ruling in

February 2020 when refusing leave to appeal against the initial ruling of 13 September, 2019.

[19] The Learned Judge in his initial ruling of 13 September, 2019 had held thus:

"[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".

[20] I was unable to strike a chord with that thinking in as much as, how could the Appellant have deposed to what the said lawyer attached to the Appellant's solicitors firm have sworn to, in as much as, the matters deposed to contain legal issues as well?

[21] If, I were to pause there, if the issue was only what I have recounted above, I would not have hesitated to allow the Appellant's application.

[22] Given the fact that, I have not seen any authoritative precedent by the (full) Court of Appeal or the Supreme Court of this land laying down a proposition in interpreting and therefore resolving what has been said in paragraphs [20 and [21] above in this Ruling for which reason on that point I might have been prompted to grant leave.

[23] However, I could not have allowed the matter to rest there in view of the other objection the Respondent had taken to the Appellant's application to strike out the "*statutory demand for a debt*" for being "*out of time*" and therefore not being in compliance with Section 516 of the Companies Act (2015). It is not disputed that there was a delay of eight (8) days.

[24] Section 516 reads:

> *"516. (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".*

[25] At this point, I felt it would not be inappropriate to look at the High Court Rules which appeared to have some bearing on the matter.

Order 2 Rule 1(1) of the High Court Act (Cap.13A)

> "***EFFECT OF NON-COMPLIANCE***
> Non-compliance with rules (O.2, r.1)
> *1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein".*

Is there an apparent conflict between Section 516(3) of the Companies Act and Order 2 Rule 1(1) of the High Court Rules?

[26] A plain reading of the said two provisions left me with no doubt that there is a conflict. If so, how was the conflict to be resolved?

The Language in Section 516 of the Companies Act – Intention of the Legislature

[27] It is not disputed that the application of the Appellant to have "the statutory demand" set aside was made within the 21days mandated in Section 516(2) therein.

[28] It is also not disputed that, the said application was served on the Respondent after a delay of 8 days.

[29] Section 516(3) is explicit when it states that:

> *"(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".*

[30] The words "*only if*" and "*and*" in the said section made it mandatory that the application had not only to be filed but also to be served within 21 days.

[31] The intention of the legislature being clear in using the words "*only if*" which are words synonymous with "*must*" or "shall" and the use of the word "and" used in conjunction in *"3 (b)" with "3 (a)",* there was no room for any argument on "*substantial compliance".* The section contemplates "*strict compliance*".

The Maxims "*Generalia Specialibus Non Derogant"* and "*Generalius Specilia Derogant*"

[32] The first means (general provisions do not override special ones) and the second means "special provisions override general ones).

[33] Very much the two sides of the same coin the essence of which is to say that, a general statute must yield to those of a special one. This is also referred to as **the Rule of Implied Exception in statutory Interpretation**

[34] In that regard, in addition to being guided by the celebrated works on Statutory Interpretation by Maxwell, Craies, Bindhra and Bennion, I also looked at the thinking in **R v Greenwood** (per Justice Griffiths, Court of Appeal, Ontario (1992) 7 Ontario Reports (3d Ed.). (see also Sullivan and Dredger, Construction of Statutes, 4th Ed., Butterworths 2002 page 273).

Conclusion

[35] The High Court lays down procedure in general to civil matters. The Companies Act mandates a special procedure.

[36] Consequently, the provisions of Section 516 of the Companies Act prevailed over the High Court Act and Rules.

[37] Thus, whatever I said in regard to the supporting affidavit of the Appellant, Order 1 second limb of His Lordship's Order in the impugned judgment of 13 September, 2019 stands vindicated, to my mind, which leaves no "*prospects of success"* in appeal for which reason I refuse leave to appeal and proceed to make my orders as follows:

Orders of Court:

1. *Leave to appeal against the decision dated 13 September 2019 of the High Court is refused and accordingly dismissed.*
2. *The Appellant is ordered to pay as costs of this application a sum of $1,500 to the Respondent within 21 days of this Ruling.*

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL