IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 191 of 2019

BETWEEN

SKYGLORY PTE LIMITED a ccompany 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 with Ms Lutu I. for the Applicant Mr R. Singh with Mr S. Fatiaki for the Respondent.
Date of Hearing	:	29th January, 2020
Date of Ruling	:	27th February, 2020

RULING

(On the Application for leave to appeal)

[1] This is an application seeking leave to appeal the decision of this court delivered on 13th September, 2019.

[2] 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.

[3] The above application was objected to by the respondent on two grounds. They are;

(a) The deponent of the affidavit filed explaining the delay is a solicitor of the Shelvin Singh Lawyers who are the applicant's lawyers; and

(b) 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.

[4] The court upheld both objections and struck out the application to have the statutory demand set aside.

[5] The applicant leave to appeal the said decision on the following grounds:

1. The learned Judge erred in law in rejecting the affidavit of Benita Kumari for the evidence of the delay in serving the application for setting a side of the statutory demand outside the 21 days' time of section 516 of the Companies act 2015.

2. The learned Judge erred in law in applying his own dicta Bulileka Hire Services Ltd v Housing Authority [2016] FJHC 322; HBC57.2011 (25 April 2016) and rejecting the affidavit evidence of Benita Kumari when the matter deposed to by the deponent were purely within her knowledge and Order 41 rule 8 had no application to the facts before the court.
3. The learned Judge erred in law and in fact in not accepting that the delay in serving the application for setting aside of the statutory demand within 21 days time required by section 516 of the Companies Act was beyond the control of the applicant as the registry released the application for setting aside outside the 21 days time. The Judge accepted the papers were filed on 12 June within time and he also accepted that the file was sent to him on 17 June 2019 by the Registry which was out of 21 days time but came to the wrong conclusion that there was no explanation for the delay when the matter was *res ipsa loquitur*.
4. The learned Judge erred in law in not applying rule 116(1) of the Companies Winding up Rules to treat the failure to serve within 21 days timeframe as a formal defect or an irregularity and in not holding that the formal defect or irregularity did not invalidate the application for setting aside of the statutory demand filed by the applicant.
5. The learned Judge erred in law and in fact in wholly dismissing the application for setting aside of the statutory demand.
6. The learned Judge erred in law and in fact in imposing a costs order of $2000 against the applicant.

[6] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.
>
> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of

the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji** and **Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

> At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

> "....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

[8] Considering the nature of the present action the court is mindful of the fact that the only remedy available to the applicant is to appeal the decision of this court.

[9] In my decision I relied on my own findings in **Bulileka Hire Services Ltd v Housing Authority** [2016] FJHC 322; HBC57.2011 (25 April 2016). The applicant submits that I was wrong in relying on my own findings in Bulileka Hire Services case in deciding this matter. In that case this court held:

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

[10] From the above it is clear that the finding of this court was based on the provisions of Order 41 rule 8 of the High Court Rules 1988.

[11] Not only in Bulileka case even prior to that Fiji courts have followed the same principle. In the case of **State v President of the Fiji Islands** [2000] Fiji Law Rp 7; [2000] 1 FLR 241 (12 October 2000) the affidavits of the Chief Justice were objected to, on the ground,

inter alia, that the affidavits in question offended the spirit of Order 41 rule 8 of the High Court Rules 1988 where it provides that no affidavit is 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 or solicitor.

> The court observed that it was not appropriate for the 3rd respondent to swear in front of either the Chief Registrar or the Deputy Registrar (Legal). The administering of oath to a deponent who swears to the truth of the contents of his affidavit is a judicial process or proceedings [See section 2 Interpretation Act Cap. 7 and the offence of perjury, section 117(3) of the Criminal Procedure Code]. The non-identification of interests of deponents as against the person before whom he swears the affidavit, and the commissioner's independence from the deponent's cause are matters of some importance. I take the heed of Kay J's opinion on the need for "the security of an independent commissioner".
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> I will take heed of the affidavits for the purposes of the transfer application. However, both affidavits must be removed from the court file and fresh affidavits sworn before independent commissioners and then filed and served.

[12] For the reasons aforesaid I see no error in following the earlier finding of this court in determining the same issue in this matter.

[13] Section 516 of the Companies Act 2105 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.

[14] In the case of **South Pacific Marine Ltd v Pricewaterhousecoopers** [2019] FJHC 118; HBE07.2019 (21 February 2019) 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.

In that case the court also held:

> 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.

[15] As I have stated in my ruling Rules 115 and 116 of the Companies winding up Rules do not confer any discretion on the court to extend the time limit prescribed by section 516 of the Companies Act 2015.

[16] 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.

[17] Acting in breach of section 516 of the Companies Act 2015 cannot be construed as a mere irregularity. If the legislature intended to consider any breach of this provision is a mere irregularity it could have stated so in the Act. In my view failure to comply with the time limits prescribed by a statute is not an irregularity.

[18] The applicant submits that the delay was due to the Registry releasing the documents for service after the expiration of the period of 21 days. The applicant should have known that the 21 days period prescribed by the statue is to file and serve the application. However, the applicant filed its application to have the statutory demand set aside on the 19th day. It should have given sufficient time for the Registry to attend to the matter and release it for service within the period prescribed by the Act.

[19] For the aforesaid reasons the court makes the following orders.

ORDERS

1. The application for leave to appeal is refused.
2. The applicant is ordered to pay the respondent $2000.00 as costs of this application.

HIGH COURT CIVIL SUVA

Lyone Seneviratne

JUDGE

27th February 2020