

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBE 22 of 2021**

**BETWEEN:**            **TRADE AIR ENGINEERING PTE LIMITED**  
**PETITIONER**

**A N D:**                **SAMBHU LAL CONSTRUCTION (FIJI) LTD** a limited liability  
company having its registered office at Main Street, Savusavu,  
Vanua Levu.  
**RESPONDENT**

Appearances:            Mr. Aman Ravindra Singh for the Petitioner (Respondent in this Motion)  
                                 Mr. Abhay K. Singh for the Respondent (Applicant in this Motion)  
                                 Ms. Ravuikadavu for Reddy Nandan Lawyers (for Supporting Creditor)

Date of Hearing:            30 September.2021  
Date of Ruling:            08 October 2021

## **R U L I N G**

### **INTRODUCTION**

1. Sambu Lal Construction (Fiji) Limited ("**SLCL**") is a general building contractor and, amongst other things, carries out building construction, repairs, maintenance, and joinery works. SLCL had a contract to construct a three-story building in Nasese for the Fiji National University. The company did subcontract to Trade Air Engineering Pte Ltd ("**Trade Air**") certain works air conditioning and ventilation works. Their subcontract was entered into in Suva.
2. It is alleged by SLCL that Trade Air's work was riddled with defective workmanship. As a result, SLCL terminated the sub-contract with Trade Air. It would appear that SLCL has not fully paid Trade Air for work completed by the latter.

### **STATUTORY DEMAND & APPLICATION FOR WINDING UP**

3. As a result, on 01 April 2021, Aman Ravindra Singh Lawyers issued a Statutory Demand on SICL pursuant to section 515 of the Companies Act 2015.
4. On 25 June 2021, Aman Ravindra Singh Lawyers filed an Application for Winding Up (Form D1) pursuant to Rule 8(2) of the Winding Up Rules together with an Affidavit Verifying Application For Winding Up (Statutory Affidavit).

### **SUVA ACTION**

5. SLCL did file an Originating Summons in Suva together with a Supporting Affidavit on 21 April 2021 to set aside the Statutory Demand issued by Trade Air on 01 April 2021.
6. Section 516(2) of the Companies Act provides that an application to set aside a statutory demand must be made within 21 days after the demand is served and section 516(3) provides that a copy of the application and the affidavit supporting it must both be served within 21 days.
7. It appears that SLCL could not serve the said Summons to Trade Air's lawyers as required by section 516(3) because of the Covid-19 lockdowns that were imposed during that time. This is an issue that will no doubt be addressed by the Suva High Court.

### **WINDING UP APPLICATION**

8. It appears that whilst the application to set aside statutory demand was pending in Suva, Aman Ravindra Singh Lawyers went ahead and filed the Winding Up application at the Lautoka High Court.

### **MOTION TO STRIKE OUT or STAY or TRANSFER**

9. On 09 August 2021, AK Singh Lawyers filed the Inter Partes Notice of Motion for and on behalf of SLCL. The motion seeks the following orders:
  1. that the current action be struck out due to non-compliance of rules and documents being filed out of jurisdiction; alternatively

2. that this action be stayed pending the hearing and determination of the Applicants application for setting aside the Respondent's statutory demand in Suva High Court vide Company Action No: 23 of 2021; alternatively
  3. that this action be transferred to Suva High Court and be consolidated with Suva Company Action 23 of 21;
  4. that the defendant pays costs of this action on an indemnity basis.
  5. any other orders that this Honorable Court deems just.
10. The Motion is supported by an affidavit of Hemant Kumar sworn on 02 August 2021. Mr. Kumar is the Operations Manager of SLCL.
11. Although Mr. Aman Ravindra Singh was given time to file an affidavit in opposition, they have not bothered to file any.

### COMMENTS

12. In Fiji, there are generally four grounds to set aside a statutory demand (see section 517 of the Companies Act) namely, whether there is a genuine dispute about the debt, whether there is a genuine dispute about the amount of the debt, whether the company has an offsetting claim, and if there is a defect in the statutory demand and if substantial injustice would occur if the demand is not set-aside.
13. In addition to the above, the court can also set aside a statutory demand if there is some other reason why the demand should be set aside (see section 517(5)(b)).
14. However, I am not here dealing with an application to set aside a statutory demand.
15. There are several things which Mr. Kumar highlights in his affidavit which he is advised, are sufficient to strike out, stay or transfer Trade Air's application. These are:
- (i) the fact that the Statutory Demand Notice was served by registered post and not at the registered office of SLCL.
  - (ii) that Trade Air did go ahead and advertised the Winding Up Application against SLCL in the Fiji Times on 24 July 2021
  - (iii) however, no winding up application or petition was ever served on SLCL. This is a non-compliance of rules 11 (1) and (4) Companies (Winding Up) Rules 2015. Rules 11 (1) states subject to this part, an application must be served on the

company unless it is made by the company. Rules 11 (4) states the **application must be served not later than 2 days before it is advertised in a newspaper** or published in the Gazette.

16. Mr. Kumar also deposes that:

- (i) the Lautoka High Court does not have jurisdiction to entertain Trade Air's Winding Up application because the subcontract in question was entered in Suva and also because SLCL's registered office is in Savusavu.
- (ii) that the advertisement in the Fiji Times is affecting SLCL business and the company is at risk of losing some \$15,000,000.00 (fifteen million dollars) contract. The company employs 80 labours whose employment are at stake. Trade Air owes SLCL money, and all their claims are disputed.

17. The questions which SLCL puts to this Court for determination are:

- (a) whether Trade Air has a right to file winding up application when the setting aside Statutory Demand is pending in Court?
- (b) whether Trade Air could proceed with winding up on disputed facts?
- (c) whether Trade Air could issue Statutory Demand when it was wound up by the High Court?
- (d) whether Trade Air's statutory demand was valid when it was winded up?
- (e) whether Trade Air could advertise in the Fiji Times without serving the petition to SLCL with 2 clear days in breach of Rules 7, Rules 11 (1) and (4) of the Companies (Winding Up) Rules 2015.

18. There is nothing in the Companies Act which stipulates that the filing of an application to set aside a statutory demand should immediately put a stop to a creditor from proceeding with winding up (see Amaratunga J's views in **Pacific Civil & Engineering Design Limited v Nadi Land Development Limited** HBE 17 of 2017).

Without prejudice to what was stated above, Statutory Demand served is valid until it is set aside by an order of a court, in terms of the Companies Act, 2015. This is clear from Sections 518 and 519 of the Companies Act, 2015.

Section 518 of the Companies Act , 2015 state as follows

*'518. A Statutory Demand has no effect while there is in force an order setting aside the demand.'*

It is presumed, that unless a Statutory Demand is set aside by the court in terms of the provisions contained in the Companies Act 2015, it is valid and its validity is not restricted to only one Winding Up action. So the argument that Statutory Demand served on 7<sup>th</sup> October, 2016 became invalid as Winding Up action was withdrawn cannot hold water. The withdrawal of Winding Up action, will not invalidate the statutory demand already served and remained unresolved. If a new Statutory Demand is served, by virtue of that earlier Statutory Demand becomes invalid, but this is an option for the Petitioner and not always mandatory.

19. I agree with the above which, in my view, addresses questions (a) and (b) in paragraph 17 above.
20. As to questions (c) and (d), generally, once an order to wind up a company has been made by a Court, the Company is officially "closed". Its assets will be liquidated and distributed to creditors. The Official Receiver, generally, will be in control of the process of liquidation.
21. In the circumstances of this case, I believe that there was an Order to wind up Trade Air but that the said Order has since been set aside. The details of this a little murky as the affidavits filed do not set these out clearly and also because Trade Air's counsel is not in the least bothered to cause an affidavit to be filed to shed light on this. I am of the view that the question whether the statutory demand was nonetheless still invalid is best reserved for Suva on the setting aside application.
22. As to whether Trade Air could advertise in the Fiji Times without complying with the requirement under Rule 11 (1) and (4) of the Companies (Winding Up) Rules 2015 to serve the petition to SLCL within 2 clear days as required, this raises the question as to whether the requirement for service of the advertisement is merely directive or mandatory. No clear argument is raised on this. While I am aware of some authority under the Winding Up Rules of the old Companies Act (Cap 247), I am also aware of the code-like effect of the winding up provisions of the new Companies Act 2015. Whether this means that the current Rule 11(1) and (4) are directive or mandatory, I feel should be reserved for now until the setting aside application is dealt with.
23. As to the question of jurisdiction, the Companies Act confers jurisdiction on the High Court to deal with a winding up application. While the Act does not specifically say anything about territorial jurisdiction, I accept that as a matter of convenience, it will be appropriate in most situations that an application be filed in the jurisdiction where the cause of action arose.

24. Certainly, in this case, since the setting aside application was already afoot in Suva, and since the subcontract in question was entered in Suva, one would expect that the winding up application would be filed in Suva.
25. In the circumstances, I think that the more convenient approach in this matter is to:
- (i) stay the winding up proceedings pending the setting aside application in Suva
  - (ii) transfer the winding up proceedings to Suva to be called together with the setting aside application.
  - (iii) if the statutory demand is not set aside, then the winding up proceedings are to be revived, and the above issues re-opened.
26. The Petitioner (trade Air) is to pay the Respondent's (SLCL's) costs which I summarily assess at \$2,000 (two thousand dollars only).

Registry to liaise with Suva Registry and to forward this file to Suva to be called on the same date as the Suva file before the same Judge.



  
Anare Tuilevuka  
**JUDGE**  
Lautoka

08 October 2021