

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 280 of 2019

IN THE MATTER OF A
STATUTORY DEMAND UNDER
SECTION 515 OF THE
COMPANIES ACT 2015 AND AN
APPLICATION FOR SETTING
ASIDE THE STATUTORY
DEMAND UNDER SECTION 516
THEREOF

BETWEEN : **YAMATO CARS & SPARES PTE LIMITED**

PLAINIFF

AND : **SUNIL PRAKASH**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. S. Gosai for the plaintiff**
Mr. E. Narayan for the defendant

Date of Hearing : **14 September 2020**

Date of Judgment : **31 October 2022**

JUDGMENT

COMPANY LAW

Statutory demand – Application to set aside statutory demand and for injunctive relief – Delay in filing application – Application to strike out – Sections 515 & 516 of the Companies Act 2015 – Order 18 rule 18 (1) of the High Court Rules 1988

1. The defendant applied to strike out the plaintiff's originating summons, by which orders were sought to set aside a statutory demand dated 19 July 2019 served by the defendant on the plaintiff under section 515 of the Companies Act 2015. The facts and the reliefs sought are almost the same as in HBC 281 of 2019. A separate judgment in that case is to be delivered along with the present matter.
2. The plaintiff filed originating summons on 22 August 2019 seeking the following orders:
 - a. "An injunction against the defendant restraining the defendant by itself or its servants or agents or howsoever from advertising the threatened winding up petition demanding a disputed sum of \$16,546.96 as demanded in a Statutory Demand dated 19 July 2019 from the plaintiff herein or a petition or any such other petition for the winding up of the plaintiff company until further orders of this Court;
 - b. An order setting aside a Statutory Demand dated 19 July 2019 served by the defendant upon the plaintiff demanding the payment of \$16,546.96 from the plaintiff company;
 - c. A declaration that the amount of \$53,000.00 already paid by the plaintiff to the defendant as rent is an overpayment;
 - d. A declaration that the sum of \$38,061.57 spent on the development of the defendant's property is an overpayment;
 - e. Such further and other relief as shall be just;

- f.* An order that the defendant do pay the plaintiff's costs on a full indemnity basis".
3. Francis Rajnesh Lal, a director of the plaintiff filed an affidavit in support of the plaintiff's originating summons. He said that the plaintiff in HBC 281 of 2019, Eveready Taxis & Tours Pte. Limited, is the parent company of the plaintiff in the present case. The defendant served the plaintiff's registered office a statutory demand under section 515 of the Companies Act to recover a debt of \$16,546.96 on 20 July 2019. Mr. Lal deposed that his solicitors replied the statutory demand by letter dated 24 July 2019 disputing the debt. The plaintiff's letter was replied by Patel Sharma Lawyers on 13 August 2019 stating they needed to obtain full instructions from their client and declared that the statutory demand remains in full force. Mr. Lal said the defendant's solicitors did not write back to the plaintiff's lawyers, having indicated they would; this assertion – as will be seen below – is incorrect as the defendant's lawyers did communicate thereafter by letter dated 22 August 2019.
 4. The dispute stems from a commercial lease agreement between the plaintiff and the defendant which was executed on 7 March 2018. In terms of the agreement, the plaintiff agreed to take on rent the defendant's premises located at Lot 5 Nakasi Road, Nausori. The monthly rental was \$3,000.00 excluding value added tax (VEP). He said the lease did not require a security bond. Mr. Lal tendered a copy of the commercial lease agreement said to have been signed by the parties in proof of his contention. He said the plaintiff spent its own funds in making various additions to the premises at a cost of \$38,061.57. The premises was developed in this way, he said, based on an oral agreement between the plaintiff and the defendant. The discussions also involved the plaintiff's associate company, Eveready Taxis & Tours Pte. Limited. The aggregate rent paid by the plaintiff between April 2018 and July 2019 was \$53,000.00. He said that by a verbal agreement the defendant waived the rent for March 2018. Mr. Lal said the demand was fraudulent as the plaintiff did not owe the defendant a debt.
 5. The defendant, Mr. Sunil Prakash, filed an affidavit in opposition on 7 October 2019. On the same day the defendant filed summons seeking an order for the

plaintiff's "statement of claim" to be struck out and/or stayed. The application was made pursuant to order 18 rule 18(1) (a) (b) (c) and (d) of the High Court Rules.

6. Mr. Prakash averred that he is the proprietor of the subject premises bearing crown lease number 573722, jointly with his daughter. He said that the plaintiff and the defendant entered into a commercial lease agreement on 7 March 2018 at a rental of \$4,000 (VEP), and not \$3,000.00 as claimed by the plaintiff. He, too, tendered a copy of the commercial lease agreement. He said that although the plaintiff was required to have paid a sum of \$68,000.00 for a period of 17 months between 7 March 2018 and 31 July 2019, the plaintiff paid only \$46,000.00 during the period. He gave a breakdown of the monthly rental payments that were received. Mr. Prakash said that he issued the plaintiff a statutory demand seeking a sum of \$16,546.96 in respect of the balance outstanding rental payments for the period 7 March 2018 to 31 July 2019.
7. The defendant said that when the plaintiff disputed the statutory demand, the defendant's solicitors sent the plaintiff a preliminary reply by their letter dated 13 August 2019, and, thereafter, by letter dated 22 August 2019, they denied the allegations in letter dated 24 July 2019 and requested documentary evidence to substantiate the plaintiff's claim. The defendant's letter shows that a copy of the commercial lease agreement was requested from plaintiff. Mr. Prakash says that although the plaintiff wrote back by letter dated 23 August 2019, they did not provide documentary evidence in support of their claim.
8. Mr. Prakash averred that the plaintiff had wrongfully changed the contents of the rental agreement. He stated that any purported development of the property done by the plaintiff was in relation to the requirements imposed by the Nausori Town Council and the Land Transport Authority concerning the plaintiff's business. The defendant denied that the plaintiff spent a sum of \$38,061.57 to develop the property, and said that there was no agreement between the parties to carry out such development work. The defendant denied that the rental for March 2018 was waived. Mr. Prakash also said that the plaintiff failed to make payment of rental for August and September 2019, amounting to \$8,000.00.

9. In his affidavit in reply filed on 22 October 2019, Mr. Francis Lal reiterated that the rent for the premises was \$3,000 (VEP) and that the agreement tendered by the defendant was fabricated. He said that a sum of \$5,453.04 was given as a loan to the defendant, and denied that it was paid as a bond for the lease. Mr. Lal admitted there was pending rent in a sum of \$8,000.00 as legal proceedings were on foot. He proposed that the outstanding rent amount be offset from the sum of 38,061.57 spent on developing the premises.
10. Mr. Lal also filed a supplementary affidavit in response to the defendant's summons for striking out, filed pursuant to Order 18 rule 18 (1) (a), (b), (c) & (d). He said that the summons is defective as it asks for an order for a statement of claim to be struck out, and that the defendant had failed to amend the summons having obtained leave to do so. This is not correct. The defendant filed a further summons on 6 November 2019 seeking an order to strike out the originating summons and affidavit in support filed on 22 August 2019.
11. At the hearing, the plaintiff submitted that the amounts claimed by the defendant were settled and possession of the property was handed over to the defendant on 31 December 2020. The plaintiff also submitted that it deposited a sum of \$10,000.00 to the defendant's bank account on 30 December 2019. The plaintiff submitted that it has complied with the requirements of the statutory demand.
12. In response, the defendant submitted that the statutory demand was served on 20 July 2019, and that an application to set aside a statutory demand is required to be filed within 21 days of its service. The defendant submitted that the plaintiff's application was filed out of time, on 22 August 2019, and, therefore, the plaintiff was not entitled to ask the court to set aside the statutory demand.
13. There are a number of matters in dispute between the parties. Crucial among the differences is the monthly rent payable for the premises that was occupied by the plaintiff. The plaintiff says the agreed monthly rent was \$3,000.00. The defendant contradicts by saying the rent was agreed at \$4,000.00. Each party has produced

its own lease agreement – with differing rental amounts – and accused the other of fabrication. These are serious charges. The defendant says that he has made a police complaint on the matter to the Nakasi police station.

14. The next dispute concerns the plaintiff's claim that it incurred expenses of \$38,061.57 to develop the defendant's premises to operate its business. The defendant says this was done with the defendant's verbal agreement. The plaintiff and the defendant were also at variance over the sum of \$5,403.04 given to the defendant by the plaintiff. The defendant's position is that this was payment of a bond covering the plaintiff and its associate, Eveready Taxis & Tours Pte. Limited. The plaintiff denies this contention and calls it a loan given to the defendant, and has asked for its return.
15. On the face of it there seem to be matters on which the statutory demand could be questioned. The evidence of the parties on these matters will need careful consideration to adjudicate the issues. However, the court is constrained by the plaintiff's failure to apply within the time period specified by the Companies Act to set aside the statutory demand.
16. Section 515 of the Companies Act says 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. The other situations in which a company is deemed to be unable to pay its debts are not necessary to be stated here.
17. Section 516 of the Companies Act 2015 states:
 - (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”.

18. The plaintiff does not deny that it failed to apply for relief within the prescribed time. The plaintiff’s counsel suggested that they were in discussions with the defendant’s solicitors. Except in saying that, there is no explanation for the omission. This is not an acceptable excuse. The statutory demand itself clearly stated that payment must be made within 21 days and that failure to do so would result in winding up proceedings against the plaintiff.
19. The language of section 516 of the 2015 Act in saying that an application may *only be made within 21 days* is compelling. Literally taken, the coercive effect of those words cannot be ignored by court. The word “only” would be redundant if the coercive purpose of that legislative proposition is to be disregarded. A contrary view, favouring the plaintiff, would render ineffective the statutory scheme that Parliament has devised to deal with companies that the law deems to be unable to pay their debts. The plaintiff clearly had its opportunity to oppose the statutory demand, but failed to do so within time. There is no reasonable explanation for this omission, upon which the court could indulge.
20. In these circumstances, the defendant’s application succeeds. This, however, does not mean the defendant is precluded from opposing an application for winding up with the leave of court and in the manner provided by the statute.
21. The plaintiff also submitted that there was a risk of the defendant advertising the company’s winding up unless an injunction was issued by court as prayed for in its originating summons. It was submitted that a winding up advertisement would be detrimental to the goodwill of the plaintiff. The plaintiff cited several authorities on injunctions, and submitted that there was a serious question to be tried necessitating the grant of an injunction in favour of the plaintiff.
22. The court does not agree. Granting an injunction, where the statute has prescribed method and time by which a demand could be set aside, may amount to nullifying the statutory provision. The circumstances in this case do not warrant the grant of an injunction.

ORDER

- A. The defendant's summons filed on 6 November 2019 to strike out the plaintiff's originating summons is allowed.
- B. The plaintiff is to pay the defendant costs summarily assessed in a sum of \$500.00 within 21 days of this decision.

Delivered at **Suva** on this **31st** day of **October, 2022**



M. Javed Mansoor
Judge

Solicitors:

For the plaintiff: *Jiten Reddy Lawyers*

For the defendant: *Patel Sharma Lawyers*