

IN THE HIGH COURT OF FIJI AT ALUTOKA
COMPANIES JURISADITION

Companies Action No. 02 of 2023

IN THE MATTER of a Statutory Demand dated 23 September 2022
taken out by **GORDON PENFOLD** and **JACQUELINE NAIR**
("the Respondents") against **NULOOK WINDORS & DOORS**
(FIJI) PTE LIMITED ("the Applicant") and served on the
Applicant on 20 December 2022.

AND

IN THE MATTER of an application by the Applicant for an order to
set aside the Statutory Demand pursuant to **Section 516 of the**
Companies Act 2015.

BETWEEN

NULOOK WINDORS & DOORS (FIJI) PTE LIMITED a limited liability
company having its registered office at HLB Crosbie & Associates,
Chartered Accountants, Top Floor, HLB House,
3 Cruickshank Road, Nadi.

APPLICANT

AND

GORDON PENFOLD and **JACQUELINE NAIR** both of 3 Harrier Drive,
Ridgeview State, Nadi, Chief Shared Services Officer and
Executive Assistance respectively.

RESPONDENTS

Counsel : Mr Pillay W. for the Applicant
Mr Prasad N. for the respondents.

Date of Hearing : 17th July 2023

Date of Ruling : 17th August 2023

RULING

[1] The applicant made this application seeking the following orders:

1. The Honourable Court order and make a declaration the statutory demand dated 13 December 2022 taken out and made on behalf of the respondent be set aside.
2. The Honourable Court grant an interim injunction restraining the respondents from filing an application to wind up the applicant and/or from taking any steps, including but not limited to, publicly advertising anything relating to the winding up of the applicant

pending the hearing and determination of this application and/or these proceedings.

3. The Honourable Court grant a permanent injunction restraining the respondents from filing an application to wind up the applicant and/or from taking any steps, including but not limited to, publicly advertising anything relating to the winding up of the applicant.
4. The Honourable Court make any other orders it deems just, expedient, fit and/or necessary in the circumstances.
5. The respondent be ordered to pay the costs of and incidental to this proceeding and/or application on an indemnity basis.

[2] In its application for setting aside the statutory demand the applicant relies of the following grounds:

1. The applicant is a solvent company.
2. The demand for refund of \$78,660.00 pursuant to a payment made on an invoice bearing invoice number INV-000-23 dated 04 July 2022 issued by the applicant is wrong in fact and in law because the respondent has *locus standi* to issue a statutory demand against the applicant.
3. Invoice bearing invoice number INV-000-23 dated 04 July 2022 issued by the applicant was issued to a separate legal entity being Vinod Rohini Builders Pte Ltd and not to the respondents.
4. The applicant and Vinod Rohini Builders Pte Ltd had a contract for the aluminium and glazing works for the proposed residence of the respondents at Legalega, Nadi.
5. Although irrelevant to the issue of *locus standi* to issue a statutory demand against the applicant, the respondents are neither Directors nor Shareholders in Vinod Rohini Builders Pte Ltd.
6. The respondents have no privity to the contract between the applicant and Vinod Rohini Builders Pte Ltd.

7. The respondents have, unlawfully and without displaying any right to act for or on behalf of Vinod Rohini Builders Pte Ltd, purported to terminate the contract between the applicant and Vinod Rohini Builders Pte Ltd.
8. Furthermore, there is now a genuine dispute between the applicant and Vinod Rohini Builders Pte Ltd about the existence or amount of the debt to which the statutory demand relates to as the contract to perform the works for Vinod Rohini Builders Pte Ltd was not due for completion until December 2022 and the respondents and/or Vinod Rohini Builders Pte Ltd unlawfully and/or without any factual or legal basis have, contrary to the oral and/or written contract, terminated the contract with the applicant and that the matter required *viva voce* evidence to determine, *inter alia*, the validity of the termination of the contract.
9. The applicant has a claim to forfeit all moneys paid pursuant to number INV-000-23 dated 04 July 2022 for the unilateral breach of contract by Vinod Rohini Builders Pte Ltd and that such a claim requires the court to hear *viva voce* evidence to determine the prevailing factual circumstances and to make orders as to the rights and liabilities of the applicant and Vinod Rohini Builders Pte Ltd under the law of contract.

[3] Section 517 of the Companies Act 2015 provides:

- (1) This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following—
 - (a) that there is a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates;
 - (b) that the Company has an offsetting claim.

- (2) The Court must calculate the substantiated amount of the demand.
- (3) If the substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.
- (4) If the substantiated amount is at least as great as the statutory minimum amount for a Statutory Demand, the Court may make an order—
 - (a) varying the demand as specified in the order; and
 - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the Company.
- (5) The Court may also order that a demand be set aside if it is satisfied that—
 - (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
 - (b) there is some other reason why the demand should be set aside.

[4] The applicant's position is that the amount claimed by the respondents was not paid to the applicant but to Vinod Rohini Builders Pte Limited (VRBL) and also there was no contract entered into between the applicant and the respondents. From the documents other material available on record it appears that there had been no written agreement between the applicant and the respondents. The question here is whether the applicant was paid for aluminium and glazing work. The position of the respondents is that there was an understanding between them and the applicant to do the aluminium and glazing work for the respondents.

[5] Invoice No. INV-000023 dated 4th July 2022 had been issued by the applicant claiming \$82,800.00 to VRBL claiming 60% of the aluminium and glazing work and the 1st named respondent advised the bank on 7th July 2022 to transfer

\$78,600.00 to the applicant's account. It appears from these documents that the services of the applicant had been obtained by VRBL and the amount claimed by the applicant was paid directly to the applicant by the respondents. If there was an agreement between the applicant and the respondents there was no necessity for the VRBL to request for payments due to the applicant. The applicant could have made all its claims directly from the respondents.

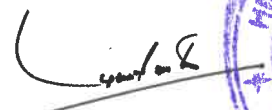
- [6] The learned counsel for the respondents relied on two letters Sharneel Chandra, The Principal Design Director of Habitat Design Ltd (JN 8) and Vinod Kumar, Director of VR Builders Pte Ltd (JN 9) dated 3rd February 2023 and 6th February 2023 respectively. The learned counsel for the applicant objected to these letters on the ground that both these letters are dated after the institution of these proceedings.
- [7] However, in these letters there are certain important facts that the court should take into consideration. In paragraph two of "JN 8" it is stated that the applicant worked for the respondents as a subcontractor and in paragraph 5 of the same letter it is stated that applicant's contract was terminated by the author of the letter, Sharneel Chandra on the basis that timeline for completion was not achievable. As per the document "AC 05" attached to the affidavit in support of the applicant the time limit set up to complete Factory Fabrication/Glazing was 19th December. In the letter "JN 8" the date termination of the applicant's contract is not mentioned and for reasons best known to the respondents a copy of the letter of termination was not tendered.
- [8] "JN 9" is the letter written by the Director of VRBL. In the said letter it is stated that Nulooks invoice to VRBL was raised in error but VRBL did not take any action to cancel it or to correct its mistake.
- [9] The two letters I have referred to above cannot be relied on and these letters have been prepared for the sole purpose of misleading the court.

[10] The main issue to be determined here is whether there was a contractual relationship between the respondents and the applicant and if so the contract was properly terminated by the respondents. These issues cannot be summarily decided in an application for setting aside a statutory demand but in a writ action.

[11] For the above reasons the statutory demand served on the applicant is liable to be set aside.

ORDERS

1. The statutory demand dated 13th December 2022 is set aside.
2. The respondents are ordered to pay \$2,500.00 as costs to the applicant.


Lyone Seneviratne



JUDGE

17th August 2023