

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBM 19 OF 2023

IN THE MATTER of the **PARAMOUNT HOTEL COMPANY PTE LIMITED**

AND

IN THE MATTER of application by the Applicant for an Order setting aside the Statutory Demand pursuant to Section 516 and 517 of the Companies Act 2015.

BETWEEN : **THE PARAMOUNT HOTEL COMPNAY PTE LIMITED** a limited liability company having its registered office at Building 1, Lot 1, Queens Rd, Martintar, Nadi

APPLICANT

AND : **SIGATOKA BUILDERS PTE LTD** a limited liability company having its registered office at Office 1, Lot 2/Corner of Queens Road & Vunayasi Road, Nadi

RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. R. Charan, on instructions, for the Applicant
Mr. R. Singh, for the Respondent

DATE OF HEARING : 30th June, 2023

DATE OF JUDGMENT : 31st August, 2023

RULING

[Setting aside a statutory demand]

A. Introduction:

1. This is an Application, by way of an Originating Summons, preferred by the Applicant hereof on 27th March 2023 seeking to set aside the statutory demand notice dated 10th March 2023 and issued by the Respondent's Solicitors.
2. The aforesaid Summons is supported by an Affidavit sworn on 27th March 2023 by, **Vinodh Bhai**, a Shareholder and Director of the Applicant Company. The Respondent Company is demanding payment of \$178, 215.00, together with the legal costs of \$1,500.00. The Affidavit in support is filed along with annexures marked as "A" to "C".

3. In paragraph 1 of the said Affidavit in support, though it is averred that the deponent, in his capacity as a Shareholder and Managing Director, is authorised to swear the Affidavit in support, there is no such an authority annexed to the said Affidavit.
4. The Respondent Company, Sigatoka Builders Pte Ltd, has on 09th May 2023 filed its Affidavit in opposition sworn on 8th May 2023 by, **Sharon Narayan**, the Director of the Respondent Company, together with annexures marked as "A" to "D". The Applicant Company has on 25th May 2023 filed an **undated** Affidavit in reply sworn by Vinod Bhai, together with further annexures marked as "VB-1" to "VB-4".
5. In the meantime, the Applicant Company, with the prior leave of the Court, had on 3rd May 2023 filed a supplementary Affidavit, together with the, purported, authority dated 28th March 2023 from the Applicant Company, pursuant to which Mr. Vinod Bhai, claimed that he had the authority to swear and sign the Affidavit in support.
6. At the hearing, learned Counsel for the Respondent Company, in addition to his oral submissions made, filed the written submission along with the authorities cited and the learned Counsel for the Applicant also made oral submissions and filed his written submissions without any annexures. Counsel for the Applicant Company did not move to file any reply submissions in relation to the position taken up by the Respondent's Counsel on the admissibility of the Affidavit in support filed in the absence of an authority from the Applicant Company to swear the Affidavit.

B. Background:

7. The Applicant Company had engaged the Respondent Company for certain construction works for which the payments were to be made as per the schedule of payment marked as "B" and annexed to the Affidavit in opposition.
8. Parties are not at variance on the fact that when the construction was in progress, the Applicant Company had paid the Respondent Company the following sums of monies without any dispute being raised about the workmanship of the construction carried out by the Respondent.

On 10th June 2022 -----\$ 75,000.00.
 On 22nd July 2022 -----\$ 99,400.00.
 On 20th August 2022 -----\$ 98,100.00.
 On 30th August 2022-----\$ 87,200.00.

9. The Respondent issued the progress claim 6 on 18th November 2022, as per the annexure "C" to the Affidavit in response, stating that the sum mentioned therein will be due and payable after completion of the work. At this juncture, the Applicant Company raised the issue that the Respondent Company had not carried out the works in proper manner, hence monies are not due to the Respondent.

10. The Respondent alleges that the dispute over the workmanship of the construction was raised by the Applicant only when the Demand Notice (winding up Notice) was sent, which the Applicant moves to have set aside through this Application.

C. On Legal framework

11. Section 516 of the Com Act provides:

“Company may apply”

- 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.”*

12. Section 517 of the Com Act states:

“Determination of application where there is a dispute or offsetting claim”.

- 517 (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.*

D. Discussion:

13. The Court, under section 517 of the Companies Act, is empowered to set aside a statutory demand served on the company if it is satisfied either or both of whether there is a genuine dispute between the Applicant Company and the Respondent about the existence or amount of a debt to which the demand relates.
14. The dispute hereof appears to be in relation to the amount shown in the progress claim 6, which was to be due and payable on completion of the works by December 2022. The

amount claimed is in a sum of \$178,215.00 as per the relevant statutory Demand Letter. It is notable that there is no offsetting claim made.

15. As per paragraph 4.4 of the Affidavit in opposition by the Respondent, it is stated that on 6th January 2023 the invoice No. 000472 for a sum of \$160,230.00 was issued for the works completed till 2nd December 2022 and the Applicant did not react to the same and neither raised any issue with the workmanship of the Respondent. It is not clear as to how this amount differs from the amount \$178,215.00 mentioned in the statutory demand notice.
16. In an Application to set aside a statutory demand, the Applicant must satisfy the Court either or both of that there is a genuine dispute between the Applicant Company and the Respondent about the existence or amount of a debt to which the demand relates.
17. The issue raised by the Applicant hereof is that the Respondent has not carried out the works in a proper manner, therefore monies are not due.
18. In order to decide the pivotal question whether (a) 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) The Company has an offsetting claim, the Court will only rely on the Affidavit evidence, supported by documentary evidence, if any, adduced by the Applicant through the Affidavit in support, which is considered as evidence in chief.
19. Learned Counsel for the Respondent has raised a timely objection to the effect that the Director cum Shareholder, Vinod Bhai, of the Applicant Company had not annexed the authority to swear the Affidavit in Support on behalf of the Company, thus the Court cannot rely on the evidence adduced in the said Affidavit in support. Counsel also argued that the Applicant can rely only on the evidence adduced in the Affidavit in support (Provided it is in Order) and not on the new evidence adduced in the reply Affidavit.
20. In order to substantiate his arguments, Counsel for the Respondent has drawn my attention to the decided case authority in ***Carpenters Fiji Pte Limited v Pleass Global Pte Limited – Suva High Court action HBM 19 of 2020***, wherein Justice V.D. Sharma has stated in paragraph 7 thereof as follows.

[7] I make reference to the case of Rajalingam v Rajalingam [2017] FJHC 111; HPP 35.2013 (13 February 2017), Justice Lyone Seneviratne stated as follows-

Faber v Nazerian (2012/42735) [2013] ZAGP JHC 65 (15 April 2013):

“The general rule which is well established in our law is that in Motion proceedings, the Applicant is required to make his or her case in the founding Affidavit and not in the Reply Affidavit. This Rule is on the principle that the Applicant stands or falls by his or her Founding Affidavit. The Rule is also based on the procedural requirement of the Motion proceedings which requires that the Applicant should set out the cause of action in both the Notice of Motion and the Supporting Affidavit. The Notice of Motion and the Founding Affidavit form part of both the pleading and the

evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the Founding Affidavit.”

and later in paragraph 10 and 11 stated that;

[10] The Applicant (CFL) appears to accept this flaw on his omission to annex the written authority when he annexed the purported authority in the Subsequent Affidavit of Kunaseelan Sabaratnam, filed on 20th of July 2020.

[11] However, in terms of the above quoted case authority Faber v Nazerian (2012/42735) [2013] ZAGP JHC 65 (15 April 2013), this case clearly stipulates the general rule that is established in the Law that the Applicant is required to make his/her case in the Founding Affidavit and not in the Replying Affidavit. This Rule is on the principle that the Applicant stands or falls by his or her Founding Affidavit. The Affidavit in Support deposed by Kunaseelan Sabaratnam in his capacity as the Director of the Applicant Company needed to annex a written authority empowering him to swear Affidavits on behalf of the Applicant Company, CFL. Once the written authority was annexed to the Founding Affidavit then only the Founding Affidavit of Kunaseelan Sabaratnam would have been procedurally completed to be used and tendered into evidence seeking for the Order for Setting Aside of the Statutory Demand.

21. It is observed that towards the end of paragraph 1 of the Affidavit in support sworn on 27th March 2023, the deponent, Vinod Bhai, states that he is duly authorized in his capacity as Shareholder and Managing Director to swear the Affidavit on Company's behalf. But, he has not filed a copy of such authority along with the Affidavit.
22. Although, he subsequently filed the purported authority, along with a supplementary Affidavit as per the leave of the Court, careful perusal of it reveals that it has been signed only on 28th of March 2023, which is one day after the swearing of the ill-fated Affidavit in support. This clearly shows that when the Affidavit in support was sworn and signed on 27th March 2023 there was no such an authority for the deponent to do so. Accordingly, the evidence adduced in the impugned Affidavit cannot be accepted and acted upon by the Court as evidence on behalf of the Applicant Company.
23. It is observed further, that the Applicant Company in order to cover up the lacuna in tendering its evidence in chief, has adduced some fresh evidence in its Affidavit in reply, which according to the above stated authority cannot be accepted to grant relief to the Applicant Company.
24. For the aforesaid reason, I hold that in the absence of authority to swear the Affidavit in support on 27th March 2023, the deponent could not have sworn the impugned Affidavit in support on 27th March 2023. The purported authority signed on 28th March 2023 could not have salvaged the impugned Affidavit in support. The Affidavit in Support sworn and filed by, Vinod Bhai, on 27th March 2023 is fatal and cannot be accepted as evidence in these proceedings.
25. For the reasons given above, I conclude that the Application by the Applicant Company to have the Statutory Demand set aside has to necessarily fail due to its failure to adduce the Affidavit evidence under proper authority given to the deponent Vinod Bhai.

26. I would, therefore, dismiss the Application on the aforesaid ground, which is fatal, with summarily assessed costs of \$1,000.00 payable by the Applicant to the Respondent.

E. Final Orders:

- a. Application to set aside the statutory demand is hereby dismissed.
- b. Applicant shall pay summarily assessed costs of \$1,000.00 to the Respondent.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 31st day of August, 2023.

SOLICITORS:

For the Applicant:

Messrs. R. Patel Lawyers.

For the Respondent:

Messrs. Patel & Sharma Lawyers.