IN THE HIGH COURT OF FIJI AT SUVA
CIVIL/COMPANIES JURISDICTION

Companies Action No. 38 of 2024

IN THE MATTER of a Statutory Demand dated taken out by Avendra Singh of 20th day of August 2024 (the *Statutory Demand*) through their authorized agent Jamnadas & Associates (the Respondent) against **PERMAL CONSTRUCTION PTE LIMITED**, a limited liability company having its registered office at lot 1, Lalita Bhindi Street, Bhindi subdivision, Vatuwaqa Industrial, Suva. (The *Applicant*)

And

IN THE MATTER of the section 516 of the Companies Act No. 3 of 2015

BETWEEN: **PERMAL CONSTRUCTION LIMITED** a limited liability company having its registered office at Lot 1 Lalita Bhindi Street, Bhindi Subdivision, Vatuwaqa Industrial, Suva.

APPLICANT

AND: **AVENDRA SINGH** of 23 Aidney Road, Raiwaqa, Suva.

RESPONDENT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. Maharaj B. for the Applicant
Mr. Jamnadas K. for the Respondent

Dates of Hearing: 11.11. 2024

Date of Judgment: 26.11.2024

Catch words

Setting aside statutory demand- judgment sum– application – Notice of Motion- irregular institution of action- grounds for setting aside- Orders 4(1) , 5(3),5(5), 7(3) of High Court Rules 1988- Companies Act-Sections 514, 515, 516,517, 518, 529– insolvency- financial reports- scope of winding up-

JUDGMENT

INTRODUCTION

[1] Applicant seeks to set aside the statutory demand dated 20.8.2024, (the statutory demand) for winding up served on the Respondent. The debt on which Respondent served statutory demand is based on decision of Master. The court in that action had made some unless orders, and due to violation of such orders claim was struck off and interlocutory judgment was entered and assessment of counterclaim was ordered. Master's judgment was also served to Applicant's solicitors who represented Applicant in said action.

[2] Applicant is seeking setting aside of statutory demand on the ground of set off and also 'solvency'. Both grounds are rejected. There is no Appeal against Master's decision, as no leave to appeal sought within the stipulated time from the said decision of Master. Applicant had sought extension of time for leave to appeal, after statutory demand was served. This shows the bona fide and or genuineness of the alleged disputed sum.

FACTS

[3] The Applicant had commenced proceedings against the Respondent in Suva High Court Civil Action No. HBC No. 270 of 2018, and the Respondent had filed a Defence and Counterclaim against the Applicant.

[4] Master issued unless Orders against the Applicant but the orders were not complied and as result, Applicant's claim was struck out and interlocutory judgement was entered for the Counterclaim of Respondent. Applicant had not set aside the said interlocutory judgment and counterclaim was heard and awarded damages, interests and also costs. This order was also served to Applicant.

[5] 21.8.2024 the Statutory Demand was served based on the judgment sum in HBC 270 of 2018 for a sum of $72,217 in terms of Section 515 of the Companies Act 2015.

[6] Applicant had filed this application seeking to set aside statutory demand and also an application for stay of further proceeding in terms of the statutory demand dated 20.8.2024. At the hearing counsel for the Respondent gave an undertaking that he will not proceed with said statutory demand until this application is concluded. So there was no need for the court to make orders for an interim stay of proceedings based on the Statutory Demand.

[7] Applicant had not disputed the sum stated in the statutory demand and that it was made pursuant to order of court. (see paragraphs 6(j),(k), 7 of affidavit in support).

[8] Applicant's contention is that there is a 'meritorious appeal' and it is not

'insolvent'. (see paragraph 8 of affidavit in support).

[9] Correct position is there is an application seeking extension of time for leave to appeal and leave to appeal against said decision. These applications are yet to be heard and or determined.

[10] So the issues before this court are narrow;

a. whether pending application for extension of time for leave to appeal and or

b. Whether court should examine accounts of deemed insolvent entity, in setting aside statutory demand in terms of Section 516 of Companies Act 2015.

SETTING ASIDE OF STATUTORY DEMAND

[11] Section 516 of the Companies Act 2015 allows the Court to set aside a statutory demand and Section 517 of Companies Act 2015 deals with the scope of such application and Section 518 of Companies Act 2015 deals with the effect of setting aside order. They are as follows;

> "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.
>
> *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."

Effect of order setting aside Statutory Demand

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

[12] In terms of Section 516(2) an application for setting aside a statutory demand can only be made within 21 days after demand was served. There is no objection raised on this.

[13] An application for setting aside of statutory demand is a statutory right of a company in terms of Section 516(1) of Companies Act 2015. There is no specific procedure set out in Companies Act 2015 or Companies (Winding Up) Rules under that.

[14] Setting aside of statutory demand is in terms of statutory action hence Order 5 rule 3 of High Court Rules 1988 applies. It reads;

"Proceedings which must be begun by originating summons (O.5, r.3)

3. Proceedings by **which an application is to be made to the High Court or a judge thereof under any Act must be begun** by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorised to be made by some other means."(emphasis added)

[15] Rule 4(1) of Companies (Winding Up) Rules 2015, states;

> "4(1) Except as otherwise provided in the Act, the Regulations and these Rules, the general practice of the court, including the practices and procedure in Chambers, applies with any necessary modifications to the matters to which these Rules apply."

[16] Plaintiff had instituted this action by 'Notice of Motion'.

[17] Order 5 rule 5 of High Court Rules 1988 states,

> "Proceedings to be begun by motion or petition (O.5, r.5)
>
> 5. Proceedings may be begun by originating motion or petition **if, but only if, by these rules** or by or **under any Act** the proceedings in question are required or authorized to be so begun." (emphasis added)

[18] Plaintiff had instituted this action purportedly by way of "Notice of Motion" and this is irregular, but I do not intend to take strike off this application on said technical issue. This was not raised as an objection by Respondent.

[19] Due to this irregularity there is an additional issue as to the grounds on which Applicant seeks to set aside statutory demand. This is raised by Respondent in the submission.

[20] In the submissions filed by Applicant had relied on offsetting claim and insolvency as grounds of setting aside.

[21] In this action reading the affidavit in support does not show grounds on which this application is made in such situation it is important to state the grounds on which setting aside is made. It seemed Applicant is misconceived to think that it has 'meritorious grounds of appeal' when there is only an application seeking leave to appeal against Master's decision'

[22] Applicant had admitted that Master had ordered a sum above the threshold for winding up and this is annexed as PP6.

[23] Applicant had also admitted that this judgment was served on to its solicitor's office.

[24] So there is no genuine dispute or some other reason to set aside statutory demand based on the said decision of Master, as there is no stay of the said decision.

[25] Winding up process is not suitable for recovery of genuinely disputed debts. If debt is *bona fide* disputed such debts are not suitable for recovery through winding up actions. What is genuine dispute, depends on the circumstances of the case though the threshold is low. It should always be genuine dispute.

[26] There is no obligation on courts to find whether Company is in a position to

pay a sum exceeding $10,000 to allow winding up. In contrary, if the debt is more than $10,000 and there is no genuine dispute or set off there is a statutory right for a party to seek winding up action. There is a legal fiction created that such refusal to pay is deemed insolvent of the debtor company. (See Section 515 of Companies Act 2015).

[27] *Re Caybridge Shipping Co SA* [1997]1 BCLC 572 Oliver LJ held that unwilling debtor can state that the facts are disputed, hence that winding up process is not suitable. This is not a suitable ground to be considered as genuine debt. So the contention that Applicant is solvent is not a ground to be considered when there is legal fiction of 'deemed insolvent'.

[28] A stubborn debtor without a genuine dispute as to debt can refuse payment even after order of the court. Such disputes may be due to financial reasons, mala fide, due to animosity between parties or any other reason for delay in order to delay a cash tripped entity creating more bad debts for future creditors.

Judgment Obtained By Breach Of Unless Order Of By Default And Alleged Set Off.

[29] In ***Diddy Boy Pty Limited & David Hawkins v Design Environment Pty Limited*** **[2009] NSWSC 14 (4 February 2009)** the New South Wales Supreme Court dealt with an application to set aside a statutory demand served by the defendant which was based on an amount due under a Local Court judgement which had been obtained by default. Here Macready As J stated the following at paragraphs 40 to 41:

> "Whatever might be the merits of this claim, there is one insuperable problem for the company and that is the question of setting aside the determination that has been dealt with by this Court. The plaintiff company has lost. They are now bound by the result as a matter of res judicata. **Even though it was a judgement by default it will, unless and until set aside, conclude between the parties the matters decided by its operative and declaratory parts** (see Res Judicata by Spencer-Bower & Turner paragraphs 46 and 79 and the cases there referred to).

The fact that there might be an appeal In the future Is of no help.
In *Barclays Australia (Finance) Pty Limited v Gaffikin Marine Pty Limited* 21 ACSR 235 McLelland CJ in Eq said:

> "The assertion that there is a **genuine dispute about the existence of the debt is in turn based on two grounds**. Of the first relies on the existence of the **undetermined appeal**, in which orders are sought by Dan (inter alia) that the proceedings brought by Gaffikin Marine be dismissed and that Gaffikin Marine pay the cost of those proceedings. If the appeal succeeds, it is possible that the costs orders of 16 July 1995 (including the order against

> Barclays, although it is not an appellant) may be set aside. The answer to this submission is that the **possibility that a presently existing and enforceable debt may be set aside in the future pursuant to a subsisting appeal does not give rise to a genuine dispute** about the existence of the debt within the meaning of section 459H; see eg Hoare *Bros Pty Limited v DCT* (1995) 16ACSR 213; ; 13 ACLC 358; *Wilden Pty Limited v Greenco Pty Limited* (1995 13 ACLC 1039. The position would of course be different if there were a stay of proceedings under, or stay of execution of, the costs order against Barclays, but there is not, and in the absence of any such stay and notwithstanding the pendency of the appeal, the costs orders of 16 July 1995 against Barclays (together with the judgement of 16 may 1996) unless and until set aside on appeal, operate as res judicata determining the matter of Barclays costs liability to Gaffikin Marine; see Spencer-Bower & Turner Res Judicata 2nd ed p 144; *Lahoud v B & M Quality Constructions* (22 July 1994, SC(NSW) McLelland C J in Eq, unreported)."

[30] In this action Applicant was served with the Statutory Demand, and the debt stated in that was based on judgment obtained due to default of unless orders of Master.

[31] After entering interlocutory judgment based on counterclaim AN assessment of damages were before Master and damage was assessed where both parties were represented.

[32] Since the Master's judgment is not stayed, alleged 'Set Off' cannot be considered as a ground for setting aside the statutory demand.

[33] The paramount consideration is that the dispute of debt is genuine. This depends on the undisputed facts. Plaintiff cannot create a dispute out of thin air. Plaintiff is estopped from denying the debt till Master's decision is set aside. There is no pending appeal against said decision of Master as Applicant had failed to seek leave to appeal till statutory demand was served.

[34] Applicant is misconceived in filing this application and allege that it is solvent. If so it can satisfy the judgment sum which it is stubbornly delaying and or refusing.

SOLVENCY

[35] A company can be wound up, by court, if it is insolvent in terms of Section 513(c) of Companies Act 2015. This is application of legal fiction for the purpose of winding up application in terms of Section 515(a) of Companies Act 2015.The word 'insolvent' is defined in Section 514 of Companies Act 2015. A 'Company is Solvent if, and only if, it is able to pay all its debts, as

and when they become due and payable'[1].

[36] If a company is unable to pay its debt exceeding $10,000, and such debt was due and payable, the company is deemed insolvent.[2] In such a situation court cannot allow evidence to adduce that company is solvent, through financial accounts. Once a legal fiction is created in law, that can only be rebutted by proving that the requirements for legal fiction, are absent or it is not applicable. If not an absurd situation can arise as legally 'deemed' fact, will be disputed through evidence making utility of 'deemed' provision a meaningless.

[37] So in my mind a company that refuses to pay an undisputed debt such as judgment sum can be issued with statutory demand. So solvency of such company is no longer an issue when it refuses to pay a debt over $10,000. So any legal entity that refuses to pay a court order for more than $10,000 can be served with a statutory demand for winding up.

[38] If there is no debt, or even if there is a debt, but it is neither due nor payable, such an instance cannot be considered as insolvent, and are examples where legal fiction cannot be applied. This is not the same as 'deemed insolvent' is allowed to be refuted by, evidence. In any event solvency of an entity cannot be easily determined from annual accounts without further analysis.

[39] There is no need for a company to be always able to settle all its debts. As long as debt is manageable the company cannot be considered insolvent. So the emphasis is on ability to pay debt as and when they are due, in terms of law. When there is a judgment of Master after assessment of damages, it was a debt that was due for payment.

[40] It is important that all the three requirements such as existence of debt, that it was due and it was payable, should be at the time of statutory demand was issued for winding up in terms of Companies Act 2015. Apart from the above, the debt should also be above $10,000, for legal fiction of insolvency is to be applied. Section 515(a) of Companies Act 2015, creates a legal fiction and according to that, a company is deemed unable to pay its debts if a creditor serves a notice of debt exceeding $10,000 in terms of said provision and the company was unable to settle the debt, to the reasonable satisfaction of such creditor.

[41] It is a misconception that any party can serve a company for an assumed debt of over $10,000 and failure to honour such can lead to winding up of the company. If so, it can lead to abuse of process, in order to obtain money that was not due and payable, and or less than statuary minimum of debt which clearly against the principles of recovery of debt, from winding up or notice of winding up.[3]

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[1] Section 514 (1) of Companies Act 2015

[2] Section 514(2) ibid

[3] 'In practice, winding up proceedings are clearly used for debt collecting purposes although formally the courts criticize such purpose, and where the strategy is not successful a creditor can be hit with

[42] By the same token, when there is a judgment and also time specified for leave to appeal had also expired, judgment creditor, is not preclude from serving a statutory demand based on the said judgment. It is an option available to judgment creditor among other things. This cannot be curtailed by court as legislature had allowed it in terms of Companies Act 2015.

[43] As much as a company cannot refuse to pay its debt obligations, they are not to be compelled to pay debts that were not due or payable, on the threat of winding up by way of abuse of process.

Sections 459 S, 459 C of Australian Corporations Act 2001-Presumption as to insolvency.

[44] Federal Court of Australia in *Soundwave Festival Pty Limited v Altered State* (W.A.) Pty Limited (No 1) [2014] FCA 466 (12 May 2014) held that scheme under relevant parts of their Corporations Act 2001 can 'operate harshly' even when there are arguable grounds for disputing the debt of statutory demand. This harshness is somewhat mitigated in Companies Act 2015 by not adopting Section 459 C as to presumptions as to debt, contained in Corporations Act 2001.

[45] Though Section 529 of Companies Act 2015 and Section 459 S in Australian Corporations Act 2001 are identical, the application of that significantly differs, due to absence of presumption of 'insolvency', in Fiji.

[46] Section 529 of Companies Act 2015 states

> "Company may not oppose application on certain grounds
>
> 529.- (1)In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court, oppose the application on a ground-
>
> (a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or
>
> (b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).
>
> (2)The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is Solvent." (emphasis is mine)

an adverse costs order' Law of Company Liquidation by McPherson & Key(4th Edition)(Sweet and Maxwell, 2018) p 83 (3-002)

[47] The fact that the Company had not sought to set aside statutory demand, is not to be used as to create any presumption as to 'solvency' of it, when exercising discretion regarding 'leave to oppose' winding up. It can be relevant fact but not determinative for this application.

[48] When the court exercising discretion, in terms of Section 529 of Companies Act, one cannot be on driving seat and impose presumption as to insolvency only because company did not or could not make an application within 21 days to set aside statutory demand.

[49] Australian Corporations Act 2001, had created a compulsory presumption,[4] but Fiji had left such provisions, indicating a clear deviation on that issue of presumption. Without considering this distinction application of Australian cases for the excise of discretion for leave to oppose cannot be done.

[50] So in my mind though legal provision contained in Section 529 of Companies Act 2015 and Section 549 S of Corporations Act 2001, are identical, the burden of the Company in order to seek leave in Fiji is quite different from similar provision under Australian Corporations Law, due to the absence of compulsory presumption in Australia.

[51] Though Section 259 is identical to section 459 S of Corporations Act 2004 of Australia there were additional presumptions contained in Section 459 C [8] in Corporations Act 2004 which is not part of Companies Act 2015.

[52] Federal Court of Australia in *Bank of Western Australia Ltd v Scotia Downs Pty Ltd* [2011] FCA 1302 (16 November 2011) held,

> "Having failed to set aside the statutory demand under s 459G the defendants are presumed to be insolvent and as such bear the onus of proving their solvency: s 459C(2) and (3). In order to discharge this onus the Court should ordinarily be presented with the fullest and best evidence of the financial position of the defendants."

[53] So in Australia there is statutory presumption, when the court exercises discretion to consider leave to oppose winding up;

> "459C **Presumptions to be made in certain proceedings**
>
> (1)This section has effect for the purposes of:
> (a) an application under section 234, 459P, 462 or 464; or
> (b) an application for leave to make an application under section 459P.
>
> (2) **The Court must presume that the company is insolvent** if, during or after the 3 months ending on the day

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when the application was made:

(a) **the company failed (as defined by section 459F) to comply with a statutory demand**; or
(b) execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of the company was returned wholly or partly unsatisfied; or
(c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a floating charge on such property; or
(d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such a charge; or
(e) a person entered into possession, or assumed control, of such property for such a purpose; or
(f) a person was appointed so to enter into possession or assume control (whether as agent for the charge or for the company).

(3) **A presumption for which this section provides operates except so far as the contrary is proved** for the purposes of the application". (emphasis added)

[54] When it comes to seek leave to oppose Australian entities have to rebut the presumption, hence evidence regarding solvency can be considered. This is not the position in Fiji in terms of Companies Act 2015.

[55] So, it is unsafe to apply the scope and or burden in relation to Section 459 S of Corporations Act of Australia, to Fiji though Section 529(1) and (2) of Companies Act 2001 is identical to said Australian provision.

[56] In Fiji winding up actions are required to be concluded swiftly and in such a situation there is no requirement to consider financial statements for insolvency of a company. It is illogical to expand the scope of setting aside application.

[57] If the contention of Applicant is accepted the utility of winding up action becomes impossible to apply

CONCLUSION

[58] Application for setting aside statutory demand is struck off. Alleged grounds such as set off and solvency of Applicant are rejected. Cost of this application is summarily assessed at $2000 to be paid on or before 31.12.2024.

FINAL ORDERS;

a. Application for setting aside statutory demand is struck off.

b. Applicant is ordered to pay cost of this application summarily assessed at $2,000 on or before 31.12.2024.

Deepthi Amaratunga
Judge

At Suva this 26th November, 2024.

Solicitors
Reddy and Nandan Lawyers
Jamnadas and Associates