

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBM 35 OF 2023.

IN THE MATTER of a Statutory Demand dated 18th July 2023 taken out by **3R SHIPPING AUSTRALIA PTY LTD** (the “Respondent”) against **MOVEMENTS INTERNATIONAL FIJI LIMITED** (the “Applicant”) and served on the Applicant on 20th July 2023.

AND

IN THE MATTER of an Application by the Applicant for an Order Setting Aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015

<u>BETWEEN</u>	:	<u>MOVEMENT INTERNATIONAL FIJI LIMITED</u>	<u>APPLICANT</u>
<u>A N D</u>	:	<u>3R SHIPPING AUSTRALIA PTY LTD</u>	<u>RESPONDENT</u>
BEFORE	:	Hon. A.M. Mohamed Mackie - J.	
COUNSEL	:	Ms. Kumar P. For the Applicant Company.	
	:	Mr. Siwan K. with Taufa F. For the Respondent Company.	
HEARING	:	On 15th April 2024.	
W. SUBMISSIONS_	:	Filed by the Respondent on 15 th April 2024.	
	:	Filed by the Applicant on 22 nd April 2024.	
RULING	:	Delivered on 12 th December 2024.	

RULING

A. INTRODUCTION:

1. This Ruling pertains to the hearing held before me on 15th April 2024 in relation to the Originating Summons (“the Application”) filed by the Applicant Company (“the Applicant”) on 08th August 2023 seeking, *inter alia*, the following Orders.

1. *THAT the Statutory Demand issued by the Respondent against the Applicant dated 18th July 2023 and served on 20th July 2023 be set aside;*
 2. *THAT the Respondent shall not file an Application for a Winding Up Order under the said Statutory Demand pending the hearing and determination of this Originating Summons;*
 3. *THAT the Applicant genuinely disputes the existence and amount of debt in the sum of AUD \$ 60,399.81 (Sixty Thousand Three Hundred Ninety-Nine Australian Dollars and Eighty-One Cents);*
 4. *THAT the Applicant has an offsetting claim in the sum of AUD\$59,677.58 (Fifty-Nine Thousand Six Hundred Seventy-Seven Australian Dollars and Fifty-Eight Cents).*
 5. *That the issuance of Statutory Demand against the Applicant is an abuse of process and the intent of the Winding up process.*
 6. *That the Applicant be granted extension of time to file and serve the Originating Summons and the Affidavit in support, if required.*
 7. *That the Applicant is solvent and able to pay its debts.*
2. The Application is supported by the Affidavit sworn on 7th August 2023 by **Ms. Latika Devi**, the Director of the Applicant Company, and filed on 08th August 2023, along with annexures marked as **“LD-1” to “LD- 34”**.
 3. The Respondent Company, having filed a scan copy of its Affidavit in opposition on 01st December 2023, subsequently, on 11th December 2023 filed the original thereof sworn on 30th November 2023 by Mr. ROLAND PRASAD, the Director of the Respondent Company, along with annexures marked as **“RP-1” to “RP-3”**, and the same was replied by the Affidavit of Ms. LATIKA Devi sworn on 21st December 2023 and filed on 22nd December 2023 along with annexures marked as **“LD-1” to “LD-2”**.
 4. At the hearing held on 15th April 2024, both the Counsel made oral submissions and the Respondent’s Counsel filed his written submissions as well. The Applicant’s written submissions was subsequently filed on 22nd April 2024.
 5. The Application was made pursuant to section 516 and 517 of the Companies Act 2015.
- B. PRELIMINARY OBJECTIONS:**
Respondent’s Objection on Jurisdiction:
6. In paragraphs 4 to 6 of his Affidavit in opposition, Mr. Ronal Prasad, the Director of the Respondent Company, claiming to be on the advice of his Solicitors and as per his belief, took up a preliminary objection to the effect that the Application for setting aside, not being filed in the correct jurisdiction, can be dismissed with indemnity costs in favour of the Respondent.
 7. The above objection has been fortified by the Counsel for the Respondent in paragraph 3.3 to 3.9 of his written submissions by stating, inter alia, THAT;

- a. *The Applicant and/ or its Solicitors knew that both the parties have no trading of business in the Western Division of Fiji.*
 - b. *The Applicant's registered address is in Suva, whilst the Respondent Company is a Business registered in Australia.*
 - c. *All the deals of the business between the parties were a Suva – Australia deal with no deal at all at the Western Division.*
 - d. *The applicant, in its affidavit states that to avoid costs, they had filed the application at Lautoka High Court, they must have filed the application in Suva and then they should have filed an application to have the matter transferred to Lautoka.*
8. Counsel for the Respondent, has also drawn my attention to Order 12 Rules 7 and 8 of the High Court Rules 1988, which are on ***“Dispute as to the Jurisdiction”*** and ***“Acknowledgment of Service of Originating Summons”*** respectively.
 9. With regard to the above preliminary objection, I am inclined to agree with the position taken up by the Applicant's Counsel from paragraphs 16 to 20 of his written submissions. The reason being, that if the Respondent insists that the Application has been filed in the wrong jurisdiction, the Respondent's Solicitors could very well have made an Application under Order 12 Rule 7 of the HCR to obtain an appropriate order, or they could have made an application to transfer the matter to a Court in a different jurisdiction convenient to the Respondent and/ or its Solicitors. The Applicant is also at liberty to make an application to transfer the proceedings to another jurisdiction.
 10. Further, the Originating process rules in the High Court Rules 1988 do not specify that the Summons ought to be filed in the Applicant's Jurisdiction. Here the Respondent's Counsel objects to the jurisdiction, disregarding the fact that the action has been filed within a jurisdiction convenient to him and his firm, and not in a jurisdiction convenient to the Applicant Company or its Solicitors / Counsel. For the reasons stated above, I don't find any merit in this preliminary objection raised by the Respondent. Accordingly decide to overrule the same.

Applicant's Objections:

11. In the Affidavit in reply sworn by Ms. Latika Devi, on behalf of the Applicant Company, two objections were taken, firstly, with regard to the authority for Mr. Ronal Prasad to swear and sign the Affidavit in opposition, and secondly in relation to the “Without Prejudice” letters dated 2nd & 12th June 2023. In the written submissions filed by the Applicant's Counsel on 22nd April 2024, which eventuated one week after the filing of the Respondent's submissions on 15th April 2024, Counsel for the Applicant had not made any response to the Respondent's stance taken in its written submission with regard to those two objections.
12. The Respondent's Counsel from paragraphs 3.10 to 3.30 of his written submission has extensively dealt with those two objections raised by the Applicant Company, with convincing authorities on the subjects. I find it is appropriate to reproduce the salient parts of those submissions as follows.

Authority to Swear Affidavit – Applicants Objection.

“3.10 It has been a well settled law in Fiji on swearing of the Affidavits, either by clerks, Lawyers or the Directors.

3.11 The Court of Appeal in *R B Patel Group v Central Board of Health* [2023] FJCA 246; ABU032.2022 (30 November 2023) (SEE TAB ‘A’) very clearly, whilst considering the Rationale in *Paul v Director of Lands*, [2020] FSC 3 and *Denarau Corporation Limited v Deo* [2015] FJHC 112; HBC 32.2013 [24 February 2015] outlined the following;

43. As the Appellant argued in its reading of Order 41 r 5 (2), there is no expressed or implied requirement be it in the content, or in the form, under O, 41 r.1 (4), that there be authority annexed to the affidavit filed by a deponent in his ‘professional business or other occupational capacity.’”

44. The High Court in *Denarau Corporation Limited* (supra) while confirming its interpretation of section 40 of the Companies Act Cap 247 of the need for authentication of affidavits deposed by person other than a director or Secretary for reasons sated therein, did concede that there were some merit in the submission that the provisions of the High Court Rules (O. 41 r.5) do not require any authority to be annexed by the deponent swearing an affidavit in a professional, business or occupational capacity, by concluding as follows;

‘For my part, I would say it is preferable to show authority when a deponent swear on affidavit on behalf of a company because the deponent is giving evidence by affidavit.’”

3.12 The Court of Appeal further concludes as follows;

58. The correct position of the law, as regards the filing of affidavits into court is that espoused by *Pillai v Barton* (supra) and approved in *Smak Works Pte Ltd v Total (Fiji) Pte Ltd* [2020] FJHC 781], per Stuart J

59. All affidavits filed in Court, need only to comply with Order 41 and under it, there is no requirement for any affidavits, excluding those exceptions under Order 4 Rule 5 (1), to be authenticated or deposed with a written authority in case of a company annexed to it.

60. In this instance, the affidavit of Mr. Deepak Rathod, the Chief Operating Officer of the Appellant, deposing as he did in his affidavit, of matters acquired on the basis of this knowledge and information available to him, does not need further authentication from the appellant”.

13. As per the above authorities, it is clear that the law in this regard stands settled. This amply guides me to arrive at the conclusion that the Applicants preliminary objections taken up to the effect that the Affidavit in Opposition of the Respondent is Defective, by reason of not having an authority from the Director to swear the Affidavit, does not hold water. The reason is that since the Director of the Company is none other than Mr. Ronal Prasad and he, by virtue of being the Director, cannot give himself an authority on behalf of the Company to swear the Affidavit in question.

14. The Court of Appeal of Fiji has made it very clear that, apart from the Director of the Company, if any other persons are swearing an Affidavit, then it might be prudent to have an authority annexed which must be executed by the Director.
15. On the strength of the above submissions, supported by case law authorities, I stand convinced that the objection raised by the Applicant, with regard to the Affidavit in opposition sworn and signed by Mr. Roland Prasad, has to be overruled and disregarded. I also agree with the submissions made by the Respondent's Counsel in relation to the said "Without Prejudice" letters and decide to overrule the objection raised in this regard by the Applicant's Counsel.

C. LEGAL PRINCIPLES & APPLICATION:

16. The Applicant applied to set aside the Statutory Demand pursuant to section 516 & 517 of the Companies Act 2015, which stipulate 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.

D. SUBSTANTIVE MATTER:

17. The pivotal issue that begs adjudication here is whether the Statutory Demand dated 18th July 2023 issued by the Respondent and served on the Applicant on 20th July 2023, for a sum of AUD \$ 60,399.81 (Sixty Thousand Three Hundred Ninety-Nine Australian Dollars and Eighty -One cents) being the alleged debt, should be set aside?

18. For the Applicant to become victorious in this Application, it has the duty of satisfying the Court either or both, **(a)** *That there is a genuine dispute between it and the Respondent about the existence or the amount of the alleged debt to which the demand relates, (b)* *That it has an offsetting claim against the Respondent.*
19. It is also open for the Applicant to show defect, if any, in the statutory demand, due to which a substantial injustice will be caused unless it is set aside; or there is some other reason as to why the demand should be set aside. The Applicant does not rely on any of these reasons for the purpose of its application in hand.
20. The parties are not at variance with regard to the mode adopted in making and serving the application, and in relation to the adherence to the time frame prescribed for the same as per the relevant sections of the Companies Act 2015. Thus, my exercise hereof is confined only to examine, as observed above, whether there is a genuine dispute as to the existence or amount of the alleged debt and/ or the Applicant has an off-setting claim against the Respondent Company.

Genuine Dispute:

21. It is on record, as an undisputed fact, that the Applicant and the Respondent companies were engaged in ongoing business activities since the year 2022 as substantiated by the document "LD-6" annexed to the affidavit in support of the Applicant Company.
22. It is also brought out by affidavit evidence of the Applicant Company that, out of the 20 invoices that had been issued by the Respondent Company on the Applicant Company, for a total sum of AUD \$60,399.81, except for invoice Nos- 0161, 0203, 0209, 0210 and 0248 for sums of \$279.99, \$ 1,212.50, \$ 1,176.63, \$ 1,110.00 and \$1,304.20 respectively, the correctness of the amounts in the remaining 15 invoices had been disputed by the Applicant Company, on or about 29th June 2023, with specific particulars thereto.
23. It was when the Applicant Company had in fact already disputed the said total sum of AUD \$ 60,399.81, claimed as per the aforesaid 20 invoices, the Respondent company issued the Statutory Demand dated 18th July 2023 and served it on 20th July 2023 on the Applicant Company.
24. On receipt of the said Statutory Demand on 20th July 2023, the Applicant Company promptly acted through its solicitors, who on 21st July 2023 sent a letter to the Respondent's Solicitors requiring to withdraw the Statutory demand dated 18th July 2023 as the Respondent and its Solicitors had prior notice and knowledge of the disputes raised on 29th June 2023 by the Applicant company for 15 invoices out of 20 invoices that had been issued.
25. The Applicant's Solicitors on 10th and 17th July 2023, as evidenced by the annexure "LD-2" to the affidavit in reply, had also followed up for any response, from the Respondent, to the specific disputes raised by the Applicant through its Solicitors'

letter dated 29th June 2023. The Respondent in paragraph 12 of its Affidavit in Opposition has admitted the receipt of these correspondence and particularly in paragraph 13 thereof, has admitted that it received the Applicant's Solicitor's e-mails following up on their comments to the disputes raised in the Applicant's solicitor's letter dated 29th June 2023.

26. The averment contained in paragraph 13 of the affidavit in Opposition by the Respondent Company's Director to the effect "*The Applicant did not agree to our proposal thereof, the only option was to issue a Statutory Demand as the Applicant did not agree our comments on the invoices*" itself demonstrates that there was an existing dispute between the parties before the issuance of the Statutory Demand in question.
27. No evidence whatsoever was proffered by the Respondent to demonstrate that the disputes raised by the Applicant's solicitors on 29th June 2023 in relation to 15 invoices issued by the Respondent, were addressed and alleviated by the Respondent. Instead, what the Respondent had done was issuing the Statutory Demand in question, without heeding to the request made by the Applicant's Counsel to withdraw the same in view of the existing disputes in relation to Respondent's 15 invoices issued on the Applicant, and in consideration of the dispute in relation to the Applicant's 28 invoices that had been issued on the Respondent, for which the Applicant alleges that no payments had been made by the Respondent, which has now become the subject of an off-setting claim by the Applicant.
28. If, the parties were unable to arrive at an agreement on the 15 disputed invoices that had been issued by the Respondent on the Applicant, of which the Respondent was aware, being duly notified in advance, the way forward for the Respondent was not issuing the impugned Statutory Demand, but proceeding for an alternative mechanism for the recovery of the alleged debt.
29. This Court stands convinced that there is a genuine dispute with regard to the amount claimed through the Statutory Demand hereof, which arises out of 15 invoices that had been issued by the Respondent Company on the Applicant Company. There is merit in the dispute raised by the Applicant Company. The issuance of Statutory Demand and proceeding for winding up is not a panacea for all types of disputes that crop up in the arena of business transactions.
30. In my view, this disputation of debt alone is sufficient for the Applicant company to have the impugned Statutory Demand, dated 18th July 2023 and served on 20th July 2023, set aside as prayed for in the prayer to the Originating Summons.

Off-setting Claim:

31. It is undisputed that on 12th May 2023, prior to the issuance of the impugned Statutory Demand dated 18th July 2023 by the Respondent on the Applicant, the Applicant had issued and served a Creditor's form 509H and form 7 affidavit in support accompanying the Statutory Demand pursuant to Rule 5.2 of the Corporation Act

2001 , Australia against the Respondent Company at its Registered office in Australia for a sum of AUD \$ 59,677.58 as shown by the annexure marked as “D-3” to the Affidavit in support.

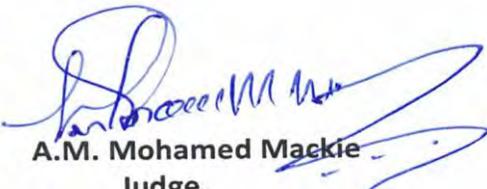
32. The said sum of AUD \$ 59, 677.58 said to have been arrived at by totaling the amounts shown in 28 invoices [invoices numbered as (i) to (xxviii)] in paragraph 38 of the Applicant’s written submission, which amount still, allegedly, remains unpaid by the Respondent.
33. Despite the above statutory Demand and the Affidavit in support were, reportedly, served on the Respondent company in Australia, the Respondent Company had not filed an application seeking to have the said Statutory Demand set aside till the expiry of 21 days statutory period on 2nd June 2023. Vide annexure “LD-6”.
34. Instead, what the Respondent had done was instructing its solicitors to send a letter to the Applicant’s Solicitors advising them that the Respondent had issued a Demand Notice to the Applicant on 10th May 2023 and also informing that since there are claims from both parties, the Respondent is willing to resolve the matter if the Applicant pays AUD \$ 722.23.
35. Further, on 12th June 2023, the Applicant’s solicitors have written to the Respondent’s solicitors and informed them that the Respondent’s Demand Notice dated 10th May 2023 is unwarranted as the Respondent had not provided any invoices to support its claim, while the Applicant had provided all invoices to support its claim as per its Statutory Demand and Affidavit ins support dated 10th May 2023.
36. However, the Respondent’s Solicitors had, subsequently, on 21st June 2023, e-mailed the relevant invoices unto the Applicant’s Solicitors for a sum of AUD \$ 60,399.81 as evidenced by the annexure “LD-5”. This is comprised of 20 invoices (invoices (i) to (XX) enumerated under paragraph 10 of the Applicant’s written submissions) out of which the correctness of 15 invoices is disputed by the Applicant. This has entitled the Applicant to have the impugned Statutory Demand set aside as observed above.
37. In view of the facts that the Applicant has made a claim against the Respondent on account of unpaid 28 invoices issued by the Applicant on the Respondent, and when this has not been refuted by the Respondent, and particularly when the Applicant has disputed the correctness of 15 invoices out of 20 invoices issued by the Respondent on the Applicant, it is not prudent for this Court to allow the impugned statutory demand to stand as it is, or to engage in the act of balancing the contentions of the parties.
38. The Applicant has, through its evidence by way of Affidavit in support and reply Affidavit has established the existence of a genuine dispute in relation to the claim made by the Respondent, and it has an off-setting claim against the Respondent on the invoices issued by it.

39. Under the aforementioned circumstances, I find it is an abuse of process on the part of the Respondent to have resorted to the process of issuing the impugned a statutory demand, which if allowed to stand could lead to the winding up of the Applicant Company that may be solvent and with ability pay its debts. Accordingly, I decide to allow the application to set aside, and considering the circumstances, also decide to impose a sum \$1,500.00, being the summarily assessed costs payable by the Respondent.

E. FINAL ORDERS:

- a. The Preliminary objection raised by the Respondent, in relation to the Jurisdiction, is hereby overruled.
- b. The objections raised by the Applicant, in relation to the authority to swear the Affidavit in opposition and with regard to the “without Prejudice Letters”, are also hereby overruled.
- c. The Application to set aside the Statutory Demand succeeds.
- d. The Statutory Demand letter dated 18th July 2023 issued by the Respondent and served on the Applicant on 20th July 2023, is hereby set aside.
- e. The Respondent shall pay the Applicant a sum of \$1,500.00 (One Thousand Five Hundred Fijian Dollars) being the summarily assessed costs within 28 days.




A.M. Mohamed Mackie
 Judge.

At High Court of Lautoka on this 12th day of December 2024.

SOLICITORS:

For the Applicant: Messrs. Lal Patel Bale Lawyers - Barristers & Solicitors.

For the Respondent: Messrs. Rams Law- Barristers & Solicitors.