

IN THE HIGH COURT OF FIJI  
(WESTERN DIVISION) AT LAUTOKA  
EXERCISING 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.

**AND**

IN THE MATTER of an Inter-parte  
summons for Leave to Appeal and Stay  
of Winding Up.

**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** : Ms. N. Choo - for the Applicant  
: Mr. R. Singh - for the Respondent.  
**DATE OF HEARING** : 28<sup>th</sup> November 2024 (by way of written submissions)  
**WRITTEN SUBMISSION** : Filed by the Applicant on 26<sup>th</sup> November 2024.  
: Filed by the Respondent on 29<sup>th</sup> November 2024.  
**DATE OF RULING** : 27<sup>th</sup> February 2025.

**RULING**

## A. INTRODUCTION:

1. This ruling concerns an application for leave to appeal and stay of the interlocutory ruling dated and pronounced by this Court on 31<sup>st</sup> August 2023.
2. By the impugned ruling, this Court had dismissed an application preferred by the applicant, to have the statutory demand dated 10<sup>th</sup> March 2023 and issued by the respondent's solicitors, set aside.
3. By the said statutory demand, the respondent had demanded from the applicant a sum of \$178,215.00, being the alleged arrears of payments for the construction services provided by the respondent.
4. It is against the said ruling, the applicant on 20<sup>th</sup> September 2023 filed the summons in hand, supported by the affidavit of **Vinod Bhai**, sworn on 19<sup>th</sup> September 2023, which was accompanied by annexures marked as "A" to "C", seeking the following orders:
  1. *That leave be granted to appeal the impugned judgment of 31<sup>st</sup> August 2023,*
  2. *An Enlargement of time be granted to file and serve the proposed grounds of Appeal,*
  3. *The judgment dated 31<sup>st</sup> August 2023 and the commencement of Winding Up proceedings against the Applicant under the Companies Act of 2015 be permanently stayed until the final determination of the proposed Notice and Grounds of Appeal,*
  4. *That there be an interim stay against the commencement of Winding up proceedings under the Companies Act 2015 against the Applicant until the determination of this Application,*
  5. *That the time for filing and service of this application for leave and stay be abridged.*
  6. *That the Respondent pay the costs of this Application on indemnity basis,*
  7. *Any other orders that this honorable Court deems just.*
5. This summons states that it is made under section 12 (2) (f) of the Court of Appeal Act ("CA Act") (Chapter 12), Rule 26 (3) Rule 27 & Rule (34(1) of the Court of Appeal Rules ('CAR'), and Order 3 Rule 4 of the High Court Rules 1988.
6. The respondent on 25<sup>th</sup> October 2023 filed its affidavit in opposition, sworn by its Director **Ms. Sharon Narayan** on 24<sup>th</sup> October 2023, together with annexures "A" & "B". The applicant in turn filed its reply affidavit sworn by its Director **Mr. Vinodh Bhai** on 16<sup>th</sup> November 2023, together with annexures marked as "A" to "C".
7. Counsel for both parties, having agreed to have the hearing disposed by way of written submissions instead of an oral hearing, have filed their respective written submissions as aforesaid, for which I am thankful to both the learned Counsel.

**B. BACKGROUND:**

8. The applicant company had engaged the respondent company for certain construction works, for which the payments were to be made to the respondent as per the schedule of payments. When the construction was in progress, the applicant had, admittedly, made some payments in 4 installments commencing from 10<sup>th</sup> June 2022 till 30<sup>th</sup> August 2022 totaling to a sum of \$359,700.00.
9. When the respondent Company issued the subsequent progress claim on 18<sup>th</sup> November 2022, stating that the sum therein will be due by the end of the work, the applicant raised the issue that the respondent had not carried out the works in proper manner, hence the sum shown therein is not due to the respondent.
10. Eventually, the respondent issued the Statutory Demand letter dated 10<sup>th</sup> March 2023 on the applicant, pursuant to which the applicant filed its application before this Court on 27<sup>th</sup> March 2023 seeking to have the Statutory Demand set aside.
11. This Court, after entertaining the necessary affidavits and hearing the parties orally and by way of written submissions, by its impugned ruling dated 31<sup>st</sup> August 2023 dismissed the applicant's application for setting aside. It is against the said ruling, the applicant is before this Court seeking leave to appeal and stay as aforesaid.

**C. THE LAW:**

12. There is no appeal without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court (see CA Act, 8.12 (2) (f)).
13. The CAR, R 26 (3) provides: wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, it shall be made in the first instance to the Court below.
14. In the case of an Appeal from an interlocutory order, an application for leave to Appeal must be filed and served within 21 days, calculated from the date on which the judgment or order of the Court below was pronounced (see CAR, R 16 (a)). In this matter, the impugned ruling was pronounced on 31<sup>st</sup> August 2023 and the application in hand seeking leave to Appeal and Stay was filed on 20<sup>th</sup> September 2023, which was well within the prescribed time limit. Parties are not at variance in this regard.

**D. GOVERNING PRINCIPLES:**

15. The principles relevant to an application for leave to Appeal against interlocutory decisions were discussed in **Abdul Hussein v NBF [1995] FLR 130, where Pathik J referring to Murphy J's** statement in "Niumann " said:

*“A useful summary of some of the matter which a judge may in practice consider on an application for grant of leave is to be found in the judgment of Murphy J in Niemann at p.141 which I adopt and they are as follows:*

***Whether*** the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;

***whether*** there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been ‘sorely troubled’;

***Whether*** the order made has the effect of altering substantive rights of the parties or either of them; and

***That*** as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party.”

#### **E. PROPOSED GROUNDS OF APPEAL:**

16. The applicant Company intends to Appeal the interlocutory ruling on the following proposed grounds:

1. *That the Learned Judge erred in fact and in law in not setting aside the Statutory Demand despite His Lordship’s clear observation at paragraph 15 of the Judgment that the invoice dated 6th January 2023 for the sum of \$160, 230.00 varied from the debt amount specified in the Statutory Demand for the sum of \$178, 215.00.*
2. *On the basis of Ground 1 of the Appeal herein, the Learned Judge further erred in law and in fact in failing to take into consideration that there was no justification by the Respondent as to the variation in the debt sum to that of the invoice. In doing so, he failed to observe the provisions Section 517 (1) of the Companies Act that a Statutory Demand must be set aside if there is dispute as to the existence or the amount of the debt to which the demand relates.*
3. *The Learned Judge erred in fact and in law and failing to properly determine from the Affidavit materials of Mr. Vinod Bhai and ignored the evidence that the Appellant had disputed the debt and in letter dated 23rd November 2022 had raised the issue of the defects and the debt in its entirety.*
4. *The Learned Judge erred in fact and in law at paragraph 19 that the Vinod Bhai had adduced new evidence in his Reply when in fact the evidence provided were in response to the allegations raised by Sharon Narayan in her Affidavit in Opposition.*
5. *The Learned Judge erred in fact and in law at paragraph 25 of the Judgment in dismissing the Setting Aside application purely on the grounds that Vinod Bhai failed to adduce proper authority to depose his Affidavit in Support failed to consider the application on its merits. In striking out the application His Lordship failed to take into consideration that:*
  - a. *Vinod Bhai being the Managing Director and Shareholder of the Appellant, in his capacity was not required to provide any authority to depose an Affidavit in civil proceedings;*
  - b. *That the Deponent Sharon Narayan of the Respondent Company in her Affidavit in Opposition had raised no objection as to the lack of Authority in Vinod Bhai’s Affidavit in Chief; and*
  - c. *That Order 41 Rule 1 (4) of the High Court Rules does not mandate a person deposing an Affidavit in a professional capacity to provide an authority to depose and only requires the address of the Company and the position held; and*
  - d. *Although the Supplementary Affidavit which was filed after the leave of the Court was granted, contained an Authority albeit with a mistyped date, the said authority was nonetheless sufficient evidence that Vinod Bhai was permitted to depose any affidavit in the said proceedings.*

*Notwithstanding, Order 41 Rule 4 of the High Court Rules further stated that an Affidavit may be filed or used in Court in evidence notwithstanding any irregularity in the form thereof;*

- e. That there was no formal application under Order 2 Rule 2 of the High Court Rules to strike out the Affidavit for irregularity by the Respondent Company, even if was raised, by operations of the same Order 2 Rule 1 an irregularity in the form of the application did not nullify the proceedings;*
  - f. That the Appellant had satisfied the Court that there were several issues relating to defective works arising from an alleged breach of the contract which would likely raise triable issues;*
  - g. The Appellant had adduced sufficient evidence to show that it was solvent and able to pay its debt.*
6. *The Learned Judge erred in fact and in law when he permitted the use of Sharon Narayan's Affidavit in Opposition despite evidence that she perjured in her Affidavit by saying she was one of the directors of the Company and had authorization to depose the Affidavit when this was not a true fact:*
- a. The Learned Judge ignored the annexure "VB1" at deponent Vinod Bhai's Affidavit in Reply filed on 25th May 2023 where company search records of Respondent showed that Sharon Narayan was never a Director of Respondent.*
  - b. The Learned Judge ought to have given weight to this evidence and rejected the Affidavit in Opposition on the grounds for lack of authority,*
  - c. The decision to strike out the application was manifestly flawed when Mr. Vinod Bhai being a shareholder and Director of the Company had annexed his Authority and Sharon Narayan who had no legitimate authority was allowed to be heard.*
7. *The Learned Judge erred in fact and in law in not taking into account that the Respondent Company indicated in her Affidavit material that they were prepared to mediate the dispute between the parties and on these basis failed to take notice that the suggestion of mediation by Respondent was an admission of a dispute between parties and the issuance of the Statutory Demand was not the appropriate cause of action by the Respondent.*

#### **F. DISCUSSION:**

17. This ruling is pronounced in the absence of any oral hearing, however by relying on the contents of the written submissions filed and those of the affidavits and annexures filed by both parties.
18. In this ruling, I will not be going into the law in relation to setting aside of Statutory Demand, ( as to whether the debts was disputed or not ) as the application for same has been disposed by this court only on consideration of the propriety of the supporting affidavit filed by the Applicant for that purpose. I would rather only look at the proposed grounds of appeal touching on the propriety of the said affidavit, in order to determine whether there is a real prospect of success in the intended appeal by the applicant.
19. Learned Counsel for the applicant has filed an extensive written submission on the proposed grounds of Appeal, particularly on the propriety of the affidavit in support filed by the applicant's Director Mr. VINODH BHAI for the purpose of setting aside the statutory demand. Counsel argues that the Appeal raises an important question of law concerning the said affidavit in support.
20. Applicant's Counsel submits that the Court has made a serious error of law firstly by allowing the objection to be raised for the supporting affidavit, contrary to Order. 2 r.2 of the HCR and further more by totally relying on the case law authority submitted by the respondent's

Counsel i.e, *Carpenters Fiji Pte Limited v Pleass Global Pte Limited –Suva High Court Action No- HBM 19 of 2020.*

21. Applicant's Counsel has also alluded to several authorities to justify the admission of the impugned affidavit, which according to him could have been brought to the attention of the Court by the Respondent's counsel when he made the submissions and if he had done so, the result would have been different. Accordingly, applicant's Counsel submits that the grounds of Appeal on this point are arguable and with merits as the said affidavit was **not inadmissible**.
22. It is finally submitted that this Court ought not to have dismissed the application for setting aside on the alleged technicality when the correct approach would have been to admit the affidavit of Vinod Bhai in support of the application under Order 41 r 4 & 5 of the HCR.
23. Learned Counsel for the Respondent in his written submissions, having submitted that there is no any serious question to be tried on the grounds of Appeal adduced , alleges that the basic fact is that there is no evidence to show that the dispute to the debt was raised by the Applicant at the time of construction works by the respondent.
24. Respondent's Counsel submitted further that the onus is on the applicant to discharge the burden and establish that there is a genuine dispute in relation to the debt. I find that the submissions made on behalf of the respondent are mainly on the alleged failure of the applicant to adduce evidence on the defective/ incomplete works, and on the applicant's failure to dispute the alleged debt.
25. I, reiterate here that this Court, on the application for setting aside, had not gone into the merits thereof i.e. whether the debt was genuinely disputed or not. Instead, this Court has only went into the propriety of the supporting Affidavit sworn by Vinod Bhai, and having found that the deponent had no authority to swear it on the day it was sworn and signed , dismissed the application. Thus, the submissions made by the respondent's Counsel on the merits of the setting aside Application will not play a role before this Court at this juncture.
26. On a cursory look at the proposed grounds of Appeal and the contents of the legal submission made by the Counsel for the applicant, it appears to me that there is some substance in the submissions made, and the proposed grounds of Appeal are with merits to be argued at the Appeal, with leave being granted .It is not my duty at this juncture to delve deep in to the merits thereof.

### **STAY**

27. Counsel for the applicant also urges for the stay of the Orders made. In the even this Court grants leave to appeal, undoubtedly, the applicant should have some assurance that it will not be subjected to winding up until the appeal is heard and disposed.
28. If the stay is refused, the applicant Company will be vulnerable to face a winding up proceeding during the pendency of the Appeal, and if it finally becomes victorious, the Appeal

will be rendered nugatory, resulting serious prejudices to the applicant Company. Hence, in my view, granting of stay is justified.

**G. CONCLUSION:**

29. For the reasons set out above, I would conclude that the applicant has demonstrated that it has an arguable appeal, on the proposed grounds of Appeal adduced by it, against the ruling dated 31<sup>st</sup> August 2023. Therefore, I am inclined to grant leave to Appeal against the said interlocutory ruling.

30. Since I have granted to leave to Appeal, circumstances in this matter warrant the grant of stay as well as prayed for by the Applicant. No orders as to Costs made and the parties shall bear their own costs.

**H. THE RESULT:**

- a. Leave to Appeal against the Ruling dated 31<sup>st</sup> August 2023 is granted.
- b. The Ruling dated 31<sup>st</sup> August 2023, and the commencement of Winding up Proceedings are stayed until the final determination of the intended Appeal.
- c. The Applicant is granted 21 days to file and serve the Notice and proposed Grounds of Appeal.
- d. No costs ordered and parties shall bear their own costs.

**On this 27<sup>th</sup> Day of February 2025 at the High Court of Lautoka.**



  
A.M. Mohamed Mackie.  
Judge.  
High Court.  
Lautoka.

**SOLICITORS:**

**For the Applicant Company- Messrs. R. Patel Lawyers -Barristers & Solicitors.**

**For the Respondent Company- Messrs. Patel & Sharma Lawyers- Barristers & Solicitors.**