

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

Civil Action No.: HBE 17 of 2017

**BETWEEN** : **PACIFIC CIVIL & ENGINEERING DESIGNS LIMITED** a limited liability company having its registered office at Lot 10 Panaromic Road, Wailekutu ("the Creditor").

**APPLICANT**

**AND** : **NADI LAND DEVELOPMENT LIMITED** a limited liability company having its registered office at Lot 1, Queens Road, Martintar, Nadi or PO Box 11199, Nadi Airport ("the Company").

**RESPONDENT**

**Counsel** : **Ms. Durutalo A for the Applicant (The Company)**

**Mr. Bale A for the Respondent (The Petitioner)**

**Date of Hearing** : **6<sup>th</sup> July, 2017**

**Date of Judgment** : **7<sup>th</sup> July, 2017**

**JUDGMENT**

**INTRODUCTION**

1. The summons dated 23<sup>rd</sup> June, 2017 was filed for the setting aside of Statutory Demand served on the Company. The Company had filed an affidavit in support of the summons and in that summons admitted the receipt of the Statutory Demand on 7<sup>th</sup> October, 2016. The present action for Winding Up of the Company was filed on 25<sup>th</sup> May, 2017. There was an earlier action for the Winding Up filed but it was withdrawn subsequently and the present action (HBE 17 of 2017) filed subsequently, without service of another Statutory Demand. The present application for setting aside of the Statutory Demand is based on the argument that the Statutory Demand served on 7<sup>th</sup> October, 2016 cannot be basis of the present Winding Up action hence it is defective.

## ANALYSIS

2. The facts of this matter are not disputed. The setting aside of the Statutory Demand is based on alleged defect, by not serving a fresh Statutory Demand.
3. Companies Act, 2015 provides for setting aside Statutory Demand, and Sections 516 and 517 state 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. (emphasis added)*

4. The present application for setting aside of Statutory Demand is made in terms of Section 517 (5)(a) and or (b), of the Companies Act, 2015.
5. The Petitioner of the Winding Up (the Petitioner) did not file an affidavit in opposition, but objected to the present application and stated that this application for setting aside of Statutory Demand and stated that since the application was not made within 21 days from the service it should be dismissed *in limine*, in terms of Section 516(1).
6. The Company also rely on the Section 516(1) and (2) of the Companies Act, 2015 and state that since there is a requirement for 21 day time period from the service of the Statutory Demand for an application for setting aside of the same, the Petitioner should serve a fresh Statutory Demand. The Petitioner had withdrawn the earlier action for Winding Up. Both actions were based on the Statutory Demand served on to the Company on 7<sup>th</sup> October, 2016.
7. The counsel for the Company admitted that there is no provision in the Companies Act 2015 which stipulate time period for validity of a Statutory Demand or validity of the same in a withdrawn action for Winding Up.
8. By the same token, the counsel was unable to state prejudice or injustice by not serving a fresh Statutory Demand. The position of the Company is that they should be allowed another opportunity to reply to such fresh notice.

9. A Statutory Demand is served before institution of an action for Winding Up. The Company had 21 days from the service of Statutory Demand to apply for setting aside of the same. It should also be noted that no action for Winding Up could be instituted, until the expiration of 3 weeks in terms of definition of 'inability to pay debt' found in Section 515(a).
10. So, any application for setting aside of Statutory Demand should be made within 21 days from the service of the same in terms of Section 516(2) of the Companies Act, 2015. Admittedly, the Statutory Demand of the Petitioner was served to the Company on 7<sup>th</sup> October, 2016 and there was no application for setting aside the said Statutory Demand, within stipulated time.
11. So, this application for setting aside of the Statutory Demand served on 7<sup>th</sup> October, 2016 should be dismissed in limine for non-compliance of Section 516(2) of the Companies Act, 2015.
12. Without prejudice to what was stated above, Statutory Demand served is valid until it is set aside by an order of a court, in terms of the Companies Act, 2015. This is clear from Sections 518 and 519 of the Companies Act, 2015.
13. Section 518 of the Companies Act , 2015 state as follows  
*'518. A Statutory Demand has no effect while there is in force an order setting aside the demand.'*
14. It is presumed, that unless a Statutory Demand is set aside by the court in terms of the provisions contained in the Companies Act 2015, it is valid and its validity is not restricted to only one Winding Up action. So the argument that Statutory Demand served on 7<sup>th</sup> October, 2016 became invalid as Winding Up action was withdrawn cannot hold water. The withdrawal of Winding Up action, will not invalidate the statutory demand already served and remained unresolved. If a new Statutory Demand is served, by virtue of that earlier Statutory Demand becomes invalid, but this is an option for the Petitioner and not always mandatory.



15. The scope of setting aside of Statutory Demand is statutorily defined and time period for such action is also statutorily restricted.

### CONCLUSION

16. An application for setting said of Statutory Demand needs to be filed within 21 days from the service of the same. It had not been done by the Company. So this application needs to be dismissed *in limine*. The Company was unable to point out any injustice to them by not serving a fresh Statutory Demand. There is no requirement to serve another Statutory Demand, though Winding Up action HBE 9 of 2017 was withdrawn. The application for setting aside of Statutory Demand is dismissed in terms of Section 519 of the Companies Act, 2015.

### FINAL ORDERS

- a. Summons for setting aside of Statutory Demand is dismissed.
- b. The matter to take normal course. **The Senior Court Officer is directed to list the matter forthwith**, before the Chief Registrar and or Master for further directions.
- c. The cost of this application is summarily assessed at \$750.

Dated at Suva this 7<sup>th</sup> day of July, 2017



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**Justice Deepthi Amaratunga**  
**High Court, Suva**