

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Companies Action No. HBC 349 of 2018

IN THE MATTER of a Statutory Demand dated 23rd October 2018 taken out by MY GROUP LIMITED t/a METROMIX CONCRETE (FIJI) (“the Respondent”) against CREATIVE POOLS (FIJI) LIMITED (“the Applicant”) and served on the Applicant on 24th October 2018

AND

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

BETWEEN : CREATIVE POOLS (FIJI) LIMITED

APPLICANT

AND : MY GROUP LIMITED t/a METROMIX CONCRETE (FIJI)

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Ms R. Lal for the Applicant
: Mr N. Sharma for the Respondent

Date of Hearing : 13 March 2019

Date of Judgment : 29 April 2019

JUDGMENT

1. This is the Applicant's (Creative) application to set aside a Statutory Demand (Demand) seeking an Order that the Demand dated 23 October 2018 taken out by the Respondent (Metromix) against Creative be set aside.
2. The application is made pursuant to section 516 of the Companies Act (Act) pursuant to the grounds set out in the affidavit of Babra Seema Dann - Ali (Babra).
3. Babra in her affidavit sworn on 13 November 2018 deposes as follows:
 - (1) She is the director of Creative
 - (2) Circa July 2017 Creative's director, Gerald Masih (Mashi) advised Metromix's Nadi sales department that it requires 110 cubic meters over 3 consecutive days to ensure Metromix would put together ahead the requisite material.
 - (3) Circa 14 August 2017, Creative contracted Metromix to supply 110 cubic meters for a pour over 3 consecutive days for the construction of a pool (the supply)
 - (4) Circa 15 August 2017 Metromix's agent or representative called Creative's Masih to advise they could not supply as there was currently no cement powder to make the cement for the supply.
 - (5) Circa 16 August 2017 Metromix supplied late in the day and Creative managed to utilize 3 trucks loads.
 - (6) Circa 17 August 2017, Metromix supplied what was not fit for the purpose.
 - (7) Circa 18 August 2017 Creative's Masih was advised that Metromix could not supply that day.
 - (8) Circa 19 August 2017 Metromix over supplied resulting in difficulties during the pour.
 - (9) As a result of the Client returning the job to Creative, it has incurred losses and additional cost.
 - (10) She says the Demand is unlawful as there is a dispute of debt.
4. Metromix by its affidavit in reply sworn on 6 February 2019 by Rehana Khan (Rehana) wherein Rehana deposes as follows:
 - (1) She is the accounts officer at Metromix
 - (2) Metromix admits that a purchase order was provided by Creative for 110 cubic meters, but Metromix advised Creative that delivery would be done as and when cement and/or ready mix would be available.
 - (3) On 14 August 2017, Metromix's Ma'anu informed Creative's Masih that there was still no cement as per requested for by the 15 August 2017 purchase order.

- (4) Metromix advised Creative that there was no commitment to supply due to the shortage of cement and deliveries would only be made where possible.
 - (5) Metromix denies there is any genuine dispute and Creative "is trying to mislead the Court as to their losses because the Respondent (Metromix) did not deliver the full 110 cubic meters of cement as requested and cannot be liable for something which it did not deliver".
5. Creative's Babra in her affidavit in reply, to the affidavit in opposition, sworn on 21 February 2019 deposes that there is no debt owing and Metromix is attempting to extort payment from Creative.
 6. The hearing commenced with Ms Lal submitting she is proceeding under s.517(1) (a) of the Act. She said there was a genuine dispute arising from
 - (1) The supply did not match what was ordered
 - (2) There was a break in the supply
 - (3) Some cement was not in compliance with the orders.
 7. Mr Sharma then submitted. He said there was no genuine dispute as Creative accepted all the cement supplied by Metromix. The Demand is only with regard to 4 deliveries.
 8. At this juncture Ms Lal confirmed that her client accepts these 4 deliveries were made.
 9. Mr Sharma continued that the total amount due was \$28,451.80 of which Creative paid approximately \$17,000. The balance due is \$11,863.49 and is the amount of the Demand.
 10. Ms Lal replied.
 11. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision.
 12. I note the Demand dated 23 October 2018 is made pursuant to s.515 of the Act. Section 515 states as follow:

Definition of inability to pay debts

Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be unable to pay its debts-

- (a) *If a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000 or such other Prescribed Amount then due, has served in the Company, by leaving it at the Registered Office of the Company, a demand requiring the Company to pay the sum so due*

("Statutory Demand") and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or"

13. Here the debt is more than \$10,000 and it is accepted that the Demand was left at Creative's Registered Office.
14. There is also, in my opinion no genuine dispute between Creative and Metromix about the existence or amount of the debt to which the Demand relates (s.517(1)(a)), as Ms Lal had confirmed Creative accepts the deliveries were made.
15. Section 517 (1)(b) would have entitled Creative to have the Demand set aside because it has an offsetting claim. To my mind this is what Babra is trying to establish in her affidavit. However as neither Creative nor their Counsel has raised this as either a substantive or an alternative reason for having the Demand set aside the Court is not entitled to consider this in its determination of the application.
16. In the event Metromix has succeeded in establishing there is no genuine dispute. The Court perusing each tax invoice in Annexure RH2 of Rehana's affidavit in reply notes the following:
 - (a) The customer order no (1842) is the same on each Metromix tax invoice (invoice)
 - (b) Each invoice states the same rate (403.00)
 - (c) Each invoice is addressed to Creative, has the date of delivery and the signature of the recipient.
17. In the result the Application to set aside the Statutory Demand is hereby dismissed. I shall order each party to pay its own costs of these proceedings.

Delivered at Suva this 29th day of April, 2019.



David Alfred
JUDGE
High Court of Fiji