

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
COMPANIES JURISDICTION

COMPANIES ACTION NO. HBM 43 of 2019

IN THE MATTER of a Statutory Demand dated 27 September 2019 taken out by **AMIT PRASAD** (*"the Respondent"*) against **KADAR BUKSH TRANSPORT COMPANY PTE LIMITED** (*"the Applicant"*) and served on the Applicant on 27 September 2019.

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.

BETWEEN : **KADAR BUKSH TRANSPORT COMPANY PTE LIMITED** a limited liability company having its registered office at Lot 2 & 3, Kashmir Industrial Subdivision, Lautoka.

APPLICANT

AND : **AMIT PRASAD** formerly of Veisaru, Ba, Fiji Island, Electrician, now residing at 109 Aranui Road, Mount Wellington, Auckland, New Zealand.

RESPONDENT

Appearances : Mr W. Pillay for the applicant
Mr R. Charan for the respondent

Date of Hearing : 08 July 2020

Date of Ruling : 09 July 2020

RULING

[*setting aside statutory demand*]

Introduction

[01] This is an application filed in conjunction with an affidavit in support for setting aside the statutory demand dated 27 September 2019 (*“the application”* or *“KBL”*).

[02] By the application filed on 15 October 2019, Kadar Buksh Transport Company Pte Limited (*“the applicant”*) seeks the following orders:

1. *That the statutory demand dated 27 September 2019 and taken out by the respondent against the applicant be unconditionally set aside and/or set aside forthwith.*
2. *That there be an interim injunction restraining the respondent from filing an application to wind up the applicant and/or from taking any steps, including but not limited to, publicly advertising anything relating to the winding up of the applicant.*
3. *That the honourable court make any other orders it deems just, expedient and/or necessary.*
4. *That the respondent pay the costs of and incidental to this application on an indemnity basis.*

[03] The application is made under section 516 of the Companies Act 2015. That section provides:

“Company may apply

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.”

[04] The application is opposed. The respondent has filed an affidavit in opposition, to which there is no affidavit in reply.

[05] At the hearing, both parties orally made submissions, and also tendered their respective written submissions.

Background

[06] The background facts, according to applicant, are as follows:

- 6.1 Amit Prasad, the respondent filed a claim in the Magistrate's Court of Lautoka against Inia Matavutuka and the applicant (KBL) and obtained a default judgment against KBL in the sum of \$15,615.00 with interest and costs.
- 6.2 KBL filed a setting aside application in the Magistrate's Court. Considering that application the Magistrate made order staying the execution of the default judgment until the setting aside application is heard *inter partes*.
- 6.3 On 26 April 2016, the setting aside application came up before the Magistrate when there was no appearance for the plaintiff (Amit Prasad). The Magistrate struck out the cause (claim) for non-appearance of the plaintiff, on the application of the KBL's solicitor.
- 6.4 The respondent (who was the plaintiff in Magistrate's Court) filed an application for reinstatement of the claim, the substantive matter. On 4 April 2018, the Magistrate dismissed the plaintiff's (respondent's) application. However, he states in his ruling that what was struck out (on 26 April 2016) was the application to set aside the judgment and the original judgment comes into force again.
- 6.5 The respondent issued the statutory demand dated 27 September 2019 against KBL for payment of the judgment sum. The applicant applies to set aside the statutory demand.

Submissions

[07] Mr Pillay of counsel for the applicant company strongly argued that the judgment is not extant because the cause was struck out by the Magistrate on 26 April 2016 and subsequent reinstatement application by the respondent was also dismissed on 4 April 2018.

[08] Mr Charan, on the other hand, for the respondent contended that the respondent is a creditor within the meaning of the Companies Act. He has the *locus standi* requisite for the presentation of the petition (for winding up). His damages have been liquidated by a judgment. It was his submission that the current application, therefore, is misconceived and should be struck out with costs on indemnity basis.

Discussion

[09] A company may apply to the court for an order setting aside a statutory demand served on the company. Such an application can only be made within 21 days after the demand is served (s.516 (2)).

[10] 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 (see: s. 516 (3)).

[11] In this instance, the statutory demand dated 27 September 2019, has been served on KBL on 1 October 2019. The application together with the supporting affidavit had been filed in court on 15 October 2019, and the application and the supporting affidavit had been served on the respondent on 17 October 2019.

[12] It seems that the applicant has filed and served a copy of the application and a copy of the supporting affidavit on the respondent within 21 days as required by s. 516 (3). There was no issue raised on the compliance with this section.

[13] On application to set aside a statutory demand, the court must be satisfied of either or both of the two things – (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 (s.517 (1)).

[14] The Court may also order that a demand be set aside if it is satisfied that (a) because of a defect in 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 (see: s.517(5)).

[15] New Zealand Court of Appeal in *Industrial Group Ltd v Bakker* [2011] NZCA 142; (2011) 2011 20 PRNZ 413 (11 April 2011) said [at 24]:

"[24] We note that the statutory scheme is for applications to set aside statutory demands to be a summary proceeding. ...The section calls for a prompt judgment as to whether there is a genuine and substantial dispute. It is not the task of the Court to resolve the dispute. The test may be compared with the principles developed in cognate fields such as applications to remove caveats, leave to appeal an arbitrator's award and opposition to summary judgment."

[16] The respondent's demand is arising out of the judgment sum. The judgment had been obtained by default in the Magistrate's Court.

[17] Any judgment obtained by default may be set aside by the court or a Magistrate upon such terms as to costs or otherwise as the court or Magistrate may think fit (see: MCR, 032, R11).

[18] The applicant company made an application to the Magistrate to set aside the judgment. That application came on before the Magistrate for hearing on 26 April 2016, when there was no appearance for the plaintiff (the respondent here). The Magistrate struck out the cause for non-appearance of the plaintiff. It is significant to note that there was no decision on the setting aside application filed by the applicant company.

[19] Thereafter, the plaintiff made an application for reinstatement of the claim. That application was heard by the Magistrate and by his ruling dated 4 April 2018, he dismissed the plaintiff's reinstatement application for two reasons namely:

(a) What has been struck out [on 26 April 2016] therefore in my view is the application to set aside the judgment.

(b) Since the application to set aside the judgment has been struck out, the original judgment comes into force again and application by plaintiff makes no sense.

[20] The Magistrate's decision on the reinstatement application filed by the plaintiff is really confusing where he was of the view that what was dismissed on 26 April 2016 was the application to set aside the judgment. However, it is not clear why the setting aside application was struck out despite appearance of the second defendant (the applicant company).

[21] In the case of execution of a judgment or order, a company must be deemed to be unable to pay its debts – if during or after a period of 3 months ending on the

day on which the winding up application is made – (i) execution or other process issued on a judgment on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part (see: s.515 (b) (i)).

[22] There is no evidence that execution or other process issued on the judgment against the applicant company is returned unsatisfied in whole or in part.

[23] The statutory demand has been issued without attempting to issue other process to enforce the judgment. There had been no definite decision by the Magistrate on the application to set aside the default judgment filed by the applicant and on the application to reinstate the cause filed by the respondent. It is therefore confusing whether or not the default judgment is in existence.

Conclusion

[24] For these reasons, I am satisfied that there is a genuine dispute between the applicant company and the respondent about the existence of a debt to which the demand relates. I accordingly set aside the statutory demand dated 29 September 2019 with no order as to costs.

Result

1. Statutory demand dated 29 September 2019 be set aside.
2. There shall be no order as to costs.



M.H. Mohamed Ajmeer
9/7/20
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M.H. Mohamed Ajmeer
JUDGE

At Lautoka
09 July 2020

Solicitors:

Gordon & Company, Barristers & Solicitors for the applicant

Ravneet Charan Lawyers, Barristers & Solicitors for the respondent