

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION No. HBM 14/2019

IN THE MATTER of BOMCO FOAM INDUSTRIES LIMITED

AND IN THE MATTER of an application for an order setting aside a statutory demand pursuant to s.516 Companies Act 2015

BETWEEN **BOMCO FOAM INDUSTRIES LIMITED** a limited liability company having its registered office at Main Street, Ba Town, Fiji
APPLICANT

AND **A.C.C. AUSTPAC CHEMICALS & COMMODITIES PTY LIMITED** a limited liability company having its registered office at Suite 3, Level 2, 122-126 Old Pittwater Road, Brookvale NSW 2100 Australia.
RESPONDENT

APPEARANCES : V Chandra for the Applicant
F Haniff for the Respondent

DATE OF HEARING : 21 August 2020

DATE OF JUDGMENT : 3rd September 2020

DECISION

1. In an originating summons filed on 17 April 2019 the applicant Bomco Foam Industries Limited applied for orders under section 517 Companies Act 2015 setting aside a statutory demand that had been served on the applicant. The affidavit in support, made by Manish Kumar Patel on the same date did not annex a copy of the demand, or say what it was for, how much was demanded, or when the demand notice was served.
2. Mr Patel's affidavit did say that the demand was dated 25 March 2019, and if it was served on that date the filing of the application to set it aside was outside the 21 day time prescribed by s.516 of the Act, which stipulates that the application must be filed and served within 21 days from the date of service of the notice.
3. I have expressed the view in previous decisions, including in my decision in **HBM 26/2020 Extreme Sport Fishing Ltd**, that compliance with the requirements of section 516 goes to jurisdiction of the court. Given the wording of the section, a

valid application that the court has jurisdiction to deal with is 'made' only if the requirements of the section are met. I also said:

I do not accept that this only becomes an issue if it is raised by the respondent, so that the failure by creditor to raise this issue, whether because of oversight or for some other reason, somehow confers jurisdiction on the court to deal with an application that the company is not permitted to make under s516.

4. It is therefore important for applicants to provide information in support of their application, including evidence of service of the application, that demonstrates that the requirements of section 516 are satisfied. Mr Patel's affidavit does not do that, nor is there an affidavit of service to show that the application was served within the requisite 21 days of the date when the statutory demand was served.
5. This to my mind is enough to dispose of the application. It appears on the evidence available to be out of time, and therefore must be dismissed. Although counsel for the applicant volunteered evidence from the bar of the dates when the demand and the application to set it aside were served, this was objected to by counsel for the respondent. Given that the application was made more than a year ago, it is too late now to be seeking the opportunity to file further evidence to repair gaps in the evidence that should not exist.
6. However, in case I am wrong in my interpretation of section 516 and how it is to apply, or in case it is held that I should have allowed the applicant time to file further affidavit evidence to demonstrate compliance with the time limits, it is appropriate in this case that I also address the merits of the argument presented by the applicant for the setting aside of the statutory demand.
7. As I have observed, the affidavit of Mr Patel for the applicant lacked important information about the statutory demand. It was also extremely brief. The only evidence, apart from the introductory information about Mr Patel's status and authority to make the affidavit, and the concluding submissions and pleas to set aside the demand, was in paragraphs 3 and 4 which stated:
 3. *The Applicant is in the business of manufacturing foam products in Fiji together with distribution and sale of foam products around Fiji.*
 4. *The Respondent is a company registered in Australia. As far as it is within my knowledge, the Respondent does not have a registered place of business in Fiji.*
8. This, it transpires, sets out the essence of the applicant's argument. As counsel for the applicant made clear, there is no dispute about the amount sought by the respondent in its statutory demand (according to an affidavit in response this is US\$97,153.80) or that this amount is owed by the applicant to the respondent. The sole basis upon which the Court is asked to set aside the demand is that a company not registered in Fiji is not entitled to issue a statutory demand, hence the relevance of paragraph 4 of Mr Patel's affidavit.
9. Mr Chandra for the applicant relied on section 517(5) Companies Act 2015 which provides:

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.*

10. In making the submission that a company not registered in Fiji is not entitled to issue a demand notice, the applicant relied on the decision of Tuilevuka J in **Guangzhou Huato Real Estate Investment Company Limited v Century Holdings Ltd** [2017] FJHC 477; HBE15.2014 (29 June 2017). That case was a winding up petition made by the plaintiff, a company incorporated in China, against a local Fiji company. The proceedings were under the 'old' Companies Act (Cap 247), and the debt the non-payment of which was the foundation for the winding up petition was a loan of \$300,000 made by the Chinese company to the Fiji company. As in the present case, the proposition of the defendant in that case, which was accepted by Justice Tuilevuka, was that an unregistered company has no standing to institute proceedings in Fiji. Essentially the judge concluded that an unregistered company was a non-existent entity, and therefore could not issue court proceedings. The decision in Guangzhou of course was made in connection with the previous legislation, not the 2015 Companies Act that applies to the present case. It is also unfortunate that Tuilevuka J does not appear to have had the benefit of submissions on some of the issues referred to below.
11. If it is correct, this finding has some significant implications for Fiji. Although an overseas individual is entitled to commence proceedings in Fiji without restriction (subject only to issues such as the provision of security for costs), the finding in **Guangzhou** means that any incorporated entity doing business with Fiji or Fiji residents, is not entitled to take steps to enforce payment for loans made, or for goods supplied, or seek to enforce contractual arrangements, or sue for losses arising from fraud or tortious, or contractual misconduct, without first registering the entity in Fiji. Thus companies investing in Fijian businesses, or owning land in Fiji (i.e. not necessarily in business here) would be unable to enforce their rights of ownership (e.g. exercising shareholder rights, evicting trespassers) without being registered under the Act. Similarly, the owner of copyright (which under section 18 Copyright Act 1999 can include a body incorporated under the laws of a prescribed foreign country) would first have to register before it could take action to enforce its copyright against breach in Fiji. This seems to overlook the fact that carrying on business in Fiji (for which registration is necessary and is of course desirable so that Fiji legislation and authorities have application to and oversight of the activities of those entities) is a limited concept that does not cover all elements of commercial or private endeavour.
12. Section 3 Companies Act 2015 defines 'Carrying on business' and 'Foreign Company' as follows:

Carrying on Business" or "Carry on Business" means to have a place of business in Fiji which carries on business in Fiji, however, a person must not be regarded as Carrying on Business in Fiji for the reason only that the person—

- (a) carries on the business as a trustee in bankruptcy or a Receiver or Manager appointed by any Court;
- (b) acquired Property as a joint tenant or tenant in common whether or not the owners share any profits arising from the sale of the Property;
- (c) is or becomes a party to any action or suit or any administrative or arbitration proceeding, or effects settlement of an action, suit or proceeding or of any claim or dispute;
- (d) maintains an account at a Financial Institution;
- (e) effects any sale through an independent contractor;
- (f) creates evidence of any debt or creates a Charge on real or personal Property;
- (g) secures or collects any of the person's debts or enforces the person's rights in regard to any securities relating to such debts;
- (h) solicits or procures an order that becomes a binding contract only if the order is accepted outside Fiji;
- (i) conducts an isolated transaction that is completed within a period of 31 days, but not being one of a number of similar transactions repeated from time to time; or
- (j) invests any of the person's funds or holds any Property;

"Foreign Company" means—

- (a) a Company that is incorporated outside Fiji—
 - (i) which, on or after 1 January 1984, establishes a place of business within Fiji; or
 - (ii) which has, before that date established a place of business within Fiji and continues to have a place of business within Fiji on and after that date; or
- (b) an unincorporated body that—
 - (i) is formed outside Fiji;
 - (ii) under the law of its place of formation, may sue or be sued, or may hold Property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
 - (iii) does not have its head office or principal place of business in Fiji; and
 - (iv) which, on or after 1 January 1984, establishes a place of business within Fiji; or
 - (v) which has, before that date established a place of business within Fiji and continues to have a place of business within Fiji on and after that date;

In the context of foreign companies, the Act provides (section 56 & 57):

When a Foreign Company may Carry on Business in Fiji

- 56(1)** A Foreign Company must not Carry on Business in Fiji unless—
- (a) the Foreign Company has been granted a foreign investment registration certificate under the Foreign Investment Act 1999, and the certificate remains in force; and
 - (b) the Foreign Company is registered under this Part.
- (2) A Foreign Company shall not be deemed to have a place of business in Fiji solely on account of its doing business through an agent in Fiji at the place of business of the agent.

Application for registration

- 57(1)** A foreign Company must within 28 days of establishing a place of business in Fiji, apply to the Registrar for registration under this Part using the Prescribed Form ...

13. The effect of these sections is to require any company or unincorporated entity that wishes to carry on business in Fiji must be registered. But 'carrying on business' in Fiji means to establish a place of business in Fiji which carries on business here. These sections do not say that a corporate entity that is not registered in Fiji is not

recognised as such, nor do they say that 'doing business' with Fiji or with Fijians is necessarily the same as carrying on business in Fiji, nor do they prohibit a company or unincorporated body that is not registered in Fiji from doing business with Fiji and Fijians. Indeed, it seems implicit in the some of the categories under the definition of 'carrying on business' where specific conduct on its own does not mean that a company is carrying on business, that the conduct is permitted. For example there is no suggestion that owning a share of land (clause (b)), having a bank account (clause (d)), selling goods in a once only transaction over the internet from overseas (clause (i) are illegal. So why should companies that are carrying out perfectly legitimate activities, in a perfectly legitimate way, be prevented from enforcing their rights because they have not done something that they are not obliged to do, i.e. register under the Companies Act? In the present case there is no evidence from which it can be said that the respondent company is in fact carrying on business in Fiji such that it might have an obligation to register locally.

14. A foreign company is a company or unincorporated entity that is incorporated or formed outside Fiji and establishes a place of business in Fiji. Again, there is no requirement for a company or firm based overseas and not establishing a place of business here to be registered under the Act. Furthermore, the wording that I have underlined in the definition of Foreign Company (above) implicitly recognises the application of foreign laws to confirm status to sue and be sued, and contradicts, with respect, the suggestion in **Guangzhou** that without registration such an entity has no status and does not exist.
15. I have not been able to find any provision of the Companies Act 2015 that expressly denies an overseas entity status to issue court proceedings in Fiji, let alone the right to issue a statutory demand to obtain payment of an undisputed debt, as in this case. Furthermore, if the impediments to enforcement apply in the way the applicant suggests, I would expect them to deter those seeking to do business with Fiji and its people, to our ultimate detriment.
16. A review of the High Court Act and Rules similarly does not show up anything that prohibits a company that is not registered in Fiji from issuing proceedings. O.5, r.6 headed Right to Sue in Person states:

- 6(1) *Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a barrister and solicitor or in person.*
- (2) *Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.*

Sub-rule (2) refers, as one would expect, to a 'body corporate', not to a 'company'. 'Person' is defined in the Interpretation Act 1967 as follows:

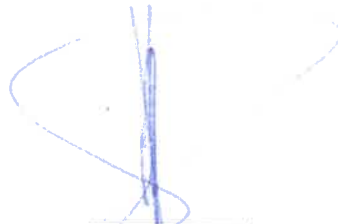
Interpretation of terms and application

- 2(1) *In this Act and in every other written law and in all public documents enacted, made or issued before or after the commencement of this Act the following words and expressions shall have the meanings hereby assigned to them respectively unless*

*there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:-
"person" and "party" include any company or association or body of persons, corporate or unincorporate;*

17. In addition to the case of **Guangzhou** counsel for the applicant also referred me to another decision of the High Court in **Sen v Patel** [2020] FJHC 281 (HBC 215/2015, 20 April 2020) in support of the applicant's argument. That was a case where the plaintiff sought – unsuccessfully - to enforce the terms of a written contract against an individual in lieu of the non-existent company that was named in the agreement. The court was not persuaded that the individual should be held personally liable under the contract in place of the 'company'. The reasoning behind that decision does not apply to the present case, where the evidence establishes to the requisite standard (in the absence of evidence from the applicant in response) that the respondent company is properly incorporated in Australia.
18. In conclusion therefore, in addition to the conclusion referred to in paragraph 6 above, I find against the applicant on its submission that the statutory demand issued by the respondent should be set aside because the respondent company is not registered in Fiji, and the application is accordingly dismissed.
19. I award costs against the applicant in the sum of \$1500.00 summarily assessed.




A.G. Stuart
Judge

At Lautoka this 3rd day of September, 2020

SOLICITORS:

**Millbrook Hills Law Partners, Nadi for the Applicant
Hannif Tuitoga Lawyers, Suva for the Respondent**