

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBE 47 of 2021

IN THE MATTER of a Statutory Demand
Taken out by **NATUA CIVIL**
CONTRACTORS LIMITED against **VINOD**
PATEL WORKS LIMITED and served on it on
or about 14th September 2021.

AND

IN THE MATTER of an application by the
Plaintiff under section 516 of the
COMPANIES ACT 2015.

BETWEEN : **VINOD PATEL WORKS PTE LIMITED** a limited liability
Company having its registered office at Lot 2 Kura Place,
Laucala Beach Estate, Nasinu.

APPLICANT

AND : **NATUA CIVIL CONTRACTOR PTE LIMITED** a limited liability
Company having its registered office at Seaqaqa, Labasa.

RESPONDENT

Catch Words

Setting aside of statutory demand- demand not served to registered office- no substantial injustice- failure of parties to seek arbitration- mandatory arbitration clause- genuine dispute- abuse of winding up process. Sections 516, 517, of Companies Act 2015, and Companies (Winding up) Rules 2015, Rule 11. Arbitration Act 1965 Sections 2,3 and 5.

Introduction

1. Applicant by way of originating summons sought to set aside statutory demand in terms of Section 516 of Companies Act 2015. Applicant and Respondents had entered in to sub contract (the Agreement) relating to some works *inter alia* relating to storm water

drainage, piping on a construction site. The Agreement between the parties to this application, contained an arbitration clause. A dispute had arisen between the parties as to the work done and quality of the work and also remedial work/ additional works hence to payments due from Applicant. Respondent did not proceed to mandatory arbitration in terms of clause 8(2) of the Agreement. The issuance of statutory demand for a genuine disputed sum, was nothing short of abuse of process. Issuance of statutory demand to a solvent company is a serious threat, hence should not be taken lightly by all parties concerned. It should not be resorted to at once, unless the debt is clear. Winding up is not a suitable method, to recover debt when parties have voluntarily submitted to alternate dispute resolution through a contract, and that had not been explored by parties. Even if I am wrong on that, Respondent had issued statutory demand based on a Performa Invoice, which it had issued on 26.01.2021. This was genuinely disputed, as parties had numerous meetings and communications relating to amount due but there was no settlement of this. So Respondent had knowingly issued a statutory demand for a payment already in dispute between the parties. Statutory demand is accordingly set aside and Applicant is awarded a cost of \$2,000 assessed summarily.

Facts

2. On or about 8.5. 2020, the Applicant and the Respondent entered into a Sub-Contract (the Agreement) where the Respondent was engaged to do specific works relating to in terms of plans, drawings etc relating to drawings and specifications relating to 'stormwater catchment area'. Stormwater drainage plan high pint alignment set out', 'drain detail tables', 'pump station typical details and section bollards details;
3. According to the Agreement, the works under the Agreement, were to be completed in four working weeks by 14.6.2020 and the value of the said works was FJD 161,151 VEP.
4. There were specific drawings and specifications given in the Agreement and reference material in that described the works to be completed and it also contained provision for variations.
5. Clause 2 (6) of the Agreement dealt with the issue of variations under contract and stated;

Clause 2 (6)

Subcontractor will not carry out any work that is outside the said works specified herein or that would **constitute a variation of the said works, without prior written consent of the Contractor.** Any **unauthorised** work/variation by Subcontractor **will not be paid by the Contractor. (Emphasis added).**

6. In the affidavit in opposition Respondent stated that drawings and specification were only 'guidelines' and variations were approved by engineer on site employed by Applicant.

7. On or about May 2020, the works commenced in accordance to the Agreement and payments were raised by the Respondent by the way of Performa Invoices which were approved and then Tax Invoices were issued and payments were made according to the said Tax Invoices and following table gives details of such payments.

Natua Civil Contractors	
Description	Amount
1 st Claim Payment	76,546.75
10% Retention Held	(7,654.68)
Payment to Natua Civil(Respondent)	68,892.08
2 nd Claim Payment	40,000.00
10% Retention Held	(4,000.00)
Payment to Natua Civil(Respondent)	36,000.00
3 rd Claim Payment	55,000.00
10% Retention Held	(5,500.00)
Payment to Natua Civil(Respondent)	49,500.00
4 th Claim Payment	20,000.00
10% Retention Held	(2,000.00)
VPW Deduction for Damages	(13,334.99)
Payment to Natua Civil	4,665.01

8. There were variations in the works under the Agreement which were approved and paid by the Applicant which amounted to total of \$37,501.00.
9. The sum stated in the Agreement was \$147,845.00 hence the adjusted sum with variations was \$198,652.05
10. Respondent in Performa Invoice had admitted that \$165,000,000.was paid as totals for four claims.
11. Respondent issued Performa Invoice for \$ 118,967.25 on 26.01.2021. This is the identical sum claimed in the statutory demand issued on 14.9.2021.
12. According to the said Performa Invoice dated 26.01.2021, total claims received by Respondent was \$198, 652.05. (MS3, MS4 of Affidavit of Respondent).

13. On or about 27.5.2021, payment claim was made by the Respondent amounting to \$53,517.25 which was not approved by the Applicant and as a result, there were several meeting and discussions in the matter in relation to the Works between Tubemakers & Roofing (SP) Ltd (“The Principal”) the Applicant and the Respondent.
14. Annexed C in the Affidavit Support is a copy of the email dated 27.5. 2021 requesting payment of \$53,517.25 and very next day 28.5.2021replied and informed that the Principal had informed that there were no documentation to support that claim.
15. The Principal then arranged with WesEng Consultant Pte Limited (“WesEng”) to inspect the Works carried on the site and to prepare a report. WesEng inspected the Site on or about the 26.11. 2020 and prepared a Report dated 15.01. 2021.
16. On or about 22.01. 2021, the Principal, the Applicant and Respondent together with WesEng visited the site and carried out a joint inspection of the Works.
17. Respondent was requested for a quote of the rectification worked, as submitted by WesEng. The Applicant did also send emails to the Respondent advising of the defects. This defects works amounted to \$152,715.54 and the same was then submitted to the Principal for consideration of \$200,930.60 (VIP). Annexed in the Affidavit in Support as “E1”, “E2”, “E3”, “E4” and “E5” are the Emails correspondence in April, 2021 which indicate that parties had disagreements relating to works, defects and payments. They were not solved despite various correspondence.
18. Applicant had submitted a quote remedial work for \$200,930.60 (VIP), this being the cost of all rectifications works required to complete the Project. According to them Respondent had not complied with the specifications given to them in the works.
19. Respondent on or around 14.9.2021 had issued a statutory demand for \$118,967.25 which was the identical value of Performa Invoice issued by Respondent dated 26.01.2021.

Analysis

20. The Companies Act 2015, Section 516 allows an application to set aside statutory demand under certain Conditions. This is such an application. The factors to be

considered in such an application are set out in Section 517 of Companies Act 2015. Sections 516 and 517 of Companies Act 2015 state as follow

“Division 3 – Application to Set Aside a Statutory Demand

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 official 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)

Defective Statutory Demand

21. Applicant submitted that the Statutory Demand was defective as it did not have the proper registered address of the Applicant Company. In the said Demand, the address stated is “Lot 2 Kura Place, LBE Nasinu”.
22. The registered address of Applicant was “Lot 1 Ratudovi Road, Suva”. This was admitted and the service was admittedly not made to registered address. Nevertheless, Applicant was able to file this application within stipulated twenty one day period. In the circumstance, was it a fatal defect?
23. In terms of Section 517(5) (a) of Companies Act 2015, a defect can amount to setting aside of statutory demand only if the Applicant is able to show that “substantial *injustice will be caused unless the demand is set aside*”.
24. Every defect that is not fatal. It is fatal if there will be substantial injustice to Applicant it can result in setting aside the demand. A technical defect which will not cause substantial injustice, hence cannot be fatal.
25. This was the intention of legislature and the rationale of that can be seen. If the statutory demand is set aside for technical defect, that will not cause substantial injustice, it will only result in access to justice being delayed. This is not the result legislature expected in expedited process such as winding up. Legislation had expressly excluded such defects in demand being fatal, in order to consider merits of the demand rather than using technical defects being used as delaying tactic just to delay inevitable, and frustrate a creditor.
26. In this matter Applicant had failed to show any injustice due to demand not being served to its registered address. In fact, there is none as they were informed timely by the demand and had also come to court seeking setting aside.
27. Non service of statutory demand in terms of Companies Act 2015 to registered office, may happen due to several reasons. Sometimes the registered office may be closed during normal working hours or due to ignorance of creditor its existence. Sometimes it is convenient for all the parties to serve the demand to usual place of business. If no substantial injustice such technical defect should not stand in the way from considering merits of the application on other grounds.
28. For completeness it is noteworthy that Companies (Winding up) Rules 2015 Rule 11 deals with the **service of winding up application** and it is mandatory for **winding up application to be served to registered office** unless there is no registered office. If there is no registered office, it can be served to a member or

officer of the company at the last known principal place of business of the company or principal place of business of the company. Even the court can give directions regarding service of winding up application.

29. Presence of such a provision as regard to service of an application for winding up and absence of such a mandatory provision as regards to statutory demand, is an additional reason to consider that defect in service is not fatal unless it can be shown substantial injustice.
30. In the circumstances I reject that the statutory demand was defective though it was not served to the registered office as there was no evidence of substantial injustice to Applicant, from that defect in terms of Section 517(5) (a) Companies Act 2015.

Arbitration

31. On 14.09. 2021, Respondent served a Statutory Demand seeking payment of \$118,967.25. This was the amount stated in Performa Invoice issued on 26.1.2021.
32. In paragraph 5(f) of the affidavit in opposition Respondent had admitted that it had raised issues regarding payments and had numerous meetings and it had not indicated that it would pursue arbitration.
33. According to the Respondent it had missed the opportunity for Arbitration. This is not the correct legal position. It can be invoked in terms of the Agreement.
34. Clause 8 (2) of the Agreement Stated:

“Clause 8 (2)

Disputes which may arise concerning this Contract that are not able to amicably resolved under Clause 58 within 21 Working Days or by any other means **shall be referred to arbitration under the Arbitration Act (Cap.38)**. A single **arbitrator shall be appointed** and payment of the costs associated with the arbitration shall be determined by the arbitrator. Notwithstanding this clause, the Contractor reserves the right to exercise its rights under the Termination of Contract.”(Emphasis is mine)

35. There is no clause 58 in the Agreement. Hence reference to Arbitration is unconditional when there is a dispute under the Agreement and cannot be solved amicably. This is preferred method, considering special nature of the claim, which can benefit from an arbitrator who has special knowledge about the type of special engineering work.
36. In terms of Section 5 of Arbitration Act 1965, any action can be stayed before delivering any pleadings. Though this provision deals with writ of summons it

can be applied to winding up action *mutatis mutandis*. Similarly since no action had commenced yet, Section 5 of Arbitration Act can be utilized for statutory interim relief sought under Section 516 of Companies Act 2015, as 'any legal proceedings' in terms of it.

37. Section 5 of the Arbitration Act 1965 states:
"Power to stay proceedings where there is a submission
5. If any party to a submission, or any person claiming through or under him, commences **any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect if any matter agreed to be referred**, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, **apply to the court to stay the proceedings**, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."(Emphasis added)
38. Section 2 of Arbitration Act 1965 states, word 'submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not'. Accordingly parties to present action had made 'submission' in terms of the said Act.
39. Parties had voluntarily submitted to arbitration and in the light of Section 3 and 5 of the Arbitration act 1965 hence, the party autonomy should be given preference.
40. Both parties had submitted to mandatory arbitration in terms of Clause 8(2) of the Agreement from the words contained in clause 8(2). Hence it was an abuse of process to undermine party autonomy and to seek winding up on a Performa Invoice made on 26.1.2021.
41. This claim for payment was not accepted and promptly disputed by Applicant. It had admittedly resulted joint meetings between parties for several months without settlement. Lot of water had gone under the bridge by the time demand was made under on 14.9.2021.
42. When the meetings had not resulted settlement of the dispute, the next step was to seek arbitration, which was mandatory in terms of the submission of the parties prior to the dispute, in terms of Arbitration Act 1965. If not done any legal proceeding can be stayed.
43. The purpose of arbitration clause was to seek alternate dispute resolution before proceeding to court. This may be due to nature of the relationship between the parties and technical nature of the work and for the sake of expediency of the matter or for any other reason. This work should be given preference over a short cut to recover a genuinely disputed debt by way of winding up.

44. Respondent had failed to submit to arbitration and without that seeking winding up for a genuinely disputed sum is an abuse of process. So statutory notice should be set aside on this ground.

Genuine dispute of Claim of \$118,967.25

45. The claim made for \$118,967.25 by way of Performa Invoice dated 26.1.2021 was never accepted and no Tax Invoice raised on the said sum.
46. The Applicant denied owing the Respondent the alleged amount of \$118,967.25 hence parties sought to resolve the issue without success.
47. That the agreement amounted to \$147,845.00 (VEP) or \$161,151 (VIP), otherwise the terms and conditions of the Agreement still applied in relation to the scope of works and to the performance of the Respondent.
48. According to Applicant Respondent was to follow the drawings provided in the Agreement and any alterations to the same would require an approved variation from the Applicant. This fact is seriously disputed by Respondent who state that all variations were approved by Applicant's own engineer on site. These are serious issues that cannot be resolved in summary manner without further evidence, hence the demand was issued on genuinely disputed sum
49. Applicant admits Mr. Neil Daffen was involved with the Project, as he was the General Manager of the Applicant. There was no documents/ evidence provided to prove that there were approvals other than undisputed variations amounting to \$37,501.00.
50. In terms of the report prepared by WesEng, Respondent had not performed its services in accordance with the drawings provided in the Agreement. The Project was not completed in accordance with the Agreement and the drawings. The Applicant upon receiving the report by WesEng did send a list of defects, to the Respondent by the way of email of 19.4. 2021 which is annexed as E1 to the affidavit in support. Respondent in its affidavit in opposition at paragraph 13(a) had admitted them as 'Applicants (sic) defect list'. So there were serious issues relating to work of Respondent. So the payment due to Respondent was uncertain.

Conclusion

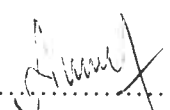
Respondent had abused the process of winding up for a genuinely disputed sum. Parties had meetings to settle Performa Invoice claim made on 26.1.2021. Ignoring these efforts Respondent had issued a demand on 14.9.2021 in terms of Performa Invoice issued on 26.01.2021 for an alleged debt of \$118,967.25. According to the Agreement between the parties it is mandatory for the parties to seek arbitration and this is

an additional reason to consider issuance of statutory demand as an abuse of process. Even if I am wrong on above, there is a genuine dispute between the parties to the alleged debt. The statutory demand dated 14.9.2021 is set aside. Considering circumstance of this case Applicant is awarded a cost of \$2,000 assessed summarily. The cost to be paid within 21 days.

Final Orders

- a. Statutory Demand dated 14.9.2021 is set aside.
- b. Cost of this application is summarily assessed at \$2,000.

Dated at Suva this 30th day of November, 2021.


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Justice Deepthi Amaratunga
High Court, Suva

