

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

MISCELLANEOUS ACTION NO. HBM 8 OF 2021

IN THE MATTER OF STATUTORY DEMAND dated 5th February, 2021 taken out by ASHNEEL VIKASH CHAND and PRITI PRATISHMA (“the Respondents”) against WANANAVU GROUP OF COMPANIES LIMITED trading under the Business name and style of WANANAVU PLUMBING WORKS (“the Applicant”).

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.

BETWEEN

WANANAVU GROUP OF COMPANIES LIMITED trading under the business name and style of WANANAVU PLUMBING WORKS a limited liability Company having its registered office at 14 Edent Plaza, Martintar, Nadi, now operating from Shop 15, Mestry Plaza, Nadi Town, Nadi

APPLICANT

AND

ASHNEEL VIKASH CHAND and PRITI PRATISHMA both of Waqadra, Nadi, Technician and Dietician respectively

RESPONDENTS

APPEARANCES : Mr. F.I. Daveta with Mr. E. Dass for the Applicant
Mr. K. Siwan for the Respondents

DATE OF HEARING : 6th April, 2022

DECIDED ON : 27th May, 2022

PRONOUNCED ON : 01st June, 2022

DECISION

INTRODUCTION:

1. Before me, what primarily stands for decision, is the Application dated 24th February, 2021 and filed on 25th February, 2021 by the Applicant company “WANANAVU GROUP OF COMPANIES LTD” (the Company) in terms of section 516 of Companies Act 2015, seeking to set aside the Statutory Demand dated 05th February, 2021, admittedly, served on it on the same date, being issued by M/S Rams Law, the Solicitors for the

- Respondent-Creditors, namely **Ashneel Vikash Chand** and **Priti Pratishma** (the Respondents).
2. The aforesaid Application is supported by the Affidavit dated 24th February, 2021 sworn by the Director of the Company, Vijay Paramanandam, and filed together with documents marked as VP-1 to VP-5.
 3. While filing their joint Affidavit in response, sworn on 10th March, 2021, opposing the Company's Application for Setting Aside Statutory Demand, the Respondents have also filed a Summons dated 11th March, 2021 supported by the same Affidavit, seeking to strike out the said setting aside Application of the Company, on the basis of nullity; or it is an abuse of process pursuant to Order 2 Rules 1&2, Order 5 Rule 3, Order 18 Rule 18 and inherent jurisdiction of the Court.
 4. Subsequently, the Company through its Director, Vijay Paramanandam, has filed its Affidavit in reply sworn on 16th April, 2021 supported by documents marked as VP 6(a), (b) & VP-7.
 5. A combined hearing being held before me into the Application for Setting Aside Statutory Demand and the subsequent Summons for Strike Out, I have now been called upon to pronounce this decision after considering the contents of the record, oral and written submissions, which are also parts of record now.

BACKGROUND FACTS:

6. On or about 13th September, 2019, the Second named Respondent, namely, **Priti Pratishma**, purchased the Vehicle "**Kia Sorrento**" bearing Registration # VIPPY (unique number plate) from **Vijay Paramanandam** (Vijay Nand), the Director of the Company on payment of a sum of \$ 60,000.00, being the total purchase price. However, it was agreed, as per the Agreement marked as "**VP-2**", that the transfer of the vehicle will be done once the discharge letter is obtained from the Credit Corporation, Namaka, where the vehicle in question, along with some other assets of the Company had, admittedly, been Mortgaged by the Company. It was also agreed, as per **VP-2**, to the effect that "***If due to any reason, there is a problem in transfer a full refund should be made within a day***"
7. On the execution of the said Agreement marked VP-2 on 18th September, 2019 and the instant payment of full purchase price as aforesaid, the Respondents took the possession of the said vehicle which is, admittedly, used by the Respondents till date without it being registered and/ or insured in the name of the second named Respondent.
8. As the discharging of the Mortgage vehicle in question from Credit Corporation and transferring of the same unto the Second Respondent did not eventuate in terms of the

said VP-2 initial Agreement, despite repeated requests being made, the Respondents on or about 17th February, 2020 made a complaint to the Fiji Competition & Consumer Commission (FCCC) against the Director of the Applicant Company, Vijay Paramanandam, pursuant to which an **Undertaking Agreement** dated 1st April, 2020 marked as "AS-01" was entered into between Vijay Paramanandam and FCCC, which was represented by Ms. Senikavika Juita, who was the General Manager Operations thereof during the time material.

9. By the said undertaking Agreement with FCCC, dated 1st April 2020 and marked as "AS-01", the Company's Director, Vijay Paramanandam, had, *inter-alia*, agreed to fully refund the purchase price of \$60,000.00 within 90 days from the date of the execution of the said Agreement in compliance with the clauses 6.1, 6.2, 7.0 and 8.1 thereof.
10. Thereafter, on a request made by, Vijay Paramanandam, through letter dated 22nd June, 2020 addressed to the FCCC, certain clauses as to the time frame for compliance in the said "AS-01" undertaking Agreement dated 1st April, 2020 was varied by the subsequent **variation Agreement dated 29th June, 2020**, which is marked as "**AS-02**".
11. By the said variation Agreement, the time frame for compliance by Vijay Paramanandam was extended for a further period of 2 months in order to facilitate the full refund of \$60,000.00. At the same time, both the initial "AS-01" and the varied "AS-02" Agreements placed the Respondents at liberty to continue to retain the possession of the Vehicle and for the usage of it, however, subject to certain conditions with regard to the proper maintenance of it, until the Vehicle is returned to Vijay Paramanandam on receipt of the full purchase price back from him.
12. Having failed in either securing the transfer of the Vehicle or obtaining the said consideration of \$60,000.00 back as initially agreed in terms of VP-2 Agreement or as per the Undertaking Agreement marked as AS-01 or as per the variation thereto marked as AS-02, the Respondents through their Solicitors M/s Rams Law caused the Statutory Demand in question dated 05th February, 2021 marked as "VP-4" be issued under section 515 of the Companies Act 2015. It is this Statutory Demand that has become the bone of contention in this matter.

LEGAL FRAMEWORK (For Setting Aside Statutory Demand):

13. Section 516 of the Companies Act 2015 provides

- (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.”*

Section 517 of the Com Act states:

- (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.”*

ANALYSIS:

Respondent’s Summons for Strike Out

- 14. Before proceeding to consider the merits of the Company’s Application for Setting Aside the Statutory Demand (the substantive application), I shall consider the Summons dated 11th March, 2021 preferred by the Respondents, purportedly, under Order 2 Rules 1 & 2, Order 5 Rule 3, Order 18 Rule 18 of the High Court Rules 1988 (HCR) seeking to strike out the Company’s Application for setting aside the Statutory Demand.
 - a. At the outset, I observe that If the Company’s Application for Setting aside the Statutory Demand hereof is to meet the hurdle of a Summons of this nature for Strike out or face the so-called preliminary objection raised with regard to the propriety of the mode adopted by the Applicant Company for the commencement

of the Setting aside proceedings, it is likely that the Companies Act of 2015 is bound to lose its autonomy on the face of the procedural rules found in the High Court Rules 1988.

- b. It is difficult to understand as to why the Respondents hereof, who took out the Statutory Demand (S.D), should have opted to prefer the purported Summons under Order 18 Rule 18 of the HCR, seeking to Strike out the Company's Application for Setting Aside, while they are, apparently, in a better position to have their impugned Statutory Demand defended purely on merits, that I will be discussing later in this Decision.
- c. In my view, this very act itself, on the part of the Respondents, is an abuse of process, it being the proliferation and a cause for the procrastination of proceedings, which is bound to waste the precious time and resources and, particularly, delay the adjudication of their own pending Application for Winding Up, which should be concluded within six months' time as per Section 528 of the Companies Act 2015, unless the time period is extended under sub-sections thereto.
- d. It is also my considered view that since both the Statutory Demand and the Application to set aside it are founded upon the Companies Act 2015 and Companies (winding up) Rules 2015, any attempts by the Respondents to defend their Statutory Demand or to Challenge its Setting aside Application made by the Company, should also be on sustainable grounds found within the four corners of the very same Companies Act 2015 and/ or winding up Rules.
- e. The procedural rules found in the High Court Rules 1988, which are primarily meant to convey the parties to their desired destinations on their laborious journey of civil litigation, should not be borrowed and made used to inhibit the adjudication of an action or an application founded squarely upon a different Act, unless the very Act provides for it.
- f. Even if it is assumed that the Striking Out process under Order 18 Rule 18 could be employed to deal with any irregularity occurred while making a Setting Aside Application under Companies Act, as the counsel for the Respondents argued, the Respondents hereof have not specified any one or more of the sub-rule on which they rely under Order 18 Rule 18 for striking out, which exercise in any event is within the discretionary power of the Court, irrespective of the ground/s, if any, adduced.
- g. The Respondents have not adduced and satisfied the Court that the Application of the Company:
 - a) *discloses no reasonable cause of action or defence, as the case may be; or*
 - b) *is scandalous, frivolous or vexatious; or*
 - c) *may prejudice, embarrass or delay the fair trial of the action; or*

- d) *is otherwise an abuse of the process of the court.*
- h. Simply relying on Order 18 Rule 18 of the High Court Rule is not sufficient. One or more of the sub rules under Order 18 Rule 18 have to be pleaded and substantiated in order to enable the Applicant to respond accordingly. The Respondents in their dual- purpose Affidavit filed opposing the Setting Aside Application of the Company and supporting their purported striking out Application, have grossly failed to specifically plead and substantiate any sub-rule/s under Order 18 Rule 18 for the Applicant Company to duly respond and the Court to make its decision. Therefore, the Respondent's purported Striking out Application under this Order and Rule must necessarily fail.

Company's Application for Setting Aside the Statutory Demand

Preliminary objections

15. Learned Counsel for the Applicant Company Mr. E. Dass, in his written and oral submissions, has advanced an argument that the Statutory Demand dated 05th February, 2021 is defective, wrong and must be set aside as it contains the name of the first named Respondent, who was not a party to the initial Agreement marked as VP-2. Accordingly, counsel for the Applicant moved to invoke the jurisdiction of this Court under Order 2 Rules 1 & 2 of the High Court rules to set aside the Statutory Demand on the basis of irregularity.
16. In fact this initial Agreement has been entered into only between the Director of the Applicant Company and the second named Respondent **PRITI PRATISHMA**. The Respondents in paragraph 9 (d) of their common Affidavit in opposition for Setting Aside Application and in support of their Striking out Application, have clearly averred that as the Second named Respondent PRITI PRATISHMA was to give birth to her first child, it had been verbally agreed between the parties for the first named Respondent, **Ashneel Vikash Chand**, to continue with the Agreement. The Applicant Company's Director Vijay Paramanandam, has denied this position. However, it is observed that in paragraphs 9 and 10 of his supporting Affidavit for setting aside, he has tacitly admitted that he liaised with both the Respondents. Further, it is understandable, that the Second Respondent, being a female waiting to deliver her first child and due to other obvious circumstances, was justified in having the First named Respondent also included as a party to the Statutory Demand, which led him to be named as a party to the Application for Winding up too.
17. The inclusion of the first named Respondent, Ashneel Vikash Chand, in the Statutory Demand could not have misdirected or caused any prejudice to the Applicant. My considered view is that it need not necessarily affect the claim of the 2nd named Respondent, PRITI PRATISHMA. I find that this objection does not warrant any consideration and should be overruled.

18. Conversely, the learned Counsel for the Respondents Mr. Siwan, at the hearing, as pleaded and prayed for in their Summons for Strike out dated 11th March, 2021, has moved to Strike out the Setting Aside Application or to dismiss the same on the basis of Nullity; or abuse of process pursuant to Order 2 Rules 1&2, Order 5 Rule 3, Order 18 Rule 18 of the HCR by challenging the propriety of the Applicant's mode of commencement of the Setting Aside proceedings. Counsel argued that it is not in compliance with any of four (4) methods of initiating proceedings in the High Court as provided under Order 5 rule 1, which are Writ of Summons, Originating Summons, Originating Motions and Petition. Those modes are described under Order 5 R 2, 3, 4 and 5 and not reproduced here fearing verbosity. Learned counsel for the Applicant argued that since the Applicant has not followed relevant method, the Application for Setting Aside Statutory Demand has to be treated as a Nullity and abuse of process.
19. Neither in the Companies Act 2015 nor under winding up rules, the mode of commencement of proceeding to set aside a Statutory Demand is specifically prescribed, though one can find the rules that prescribe the mode of commencement of various other proceedings under Companies Act. The title of the Application filed hereof reads as "APPLICATION FOR SETTING ASIDE STATUTORY DEMAND", which accompanied a supporting Affidavit together with the documents pleaded therein.
20. The pivotal question that beg answer at this juncture is whether filing of an Application for Setting Aside by way of an Application in the above manner would constitute an irregularity in terms of Order 2 Rule 1 – (1) of the HCR, due to non-adherence to the Order 5 Rule 3 of the HCR, answer to which I would readily say "No".
- a. If the Applicant's alleged failure to follow the relevant Order and Rule (Order 5 Rule 3) in filing of the Application for setting aside Statutory Demand, is found to be an irregularity in the light of Order 2, Rule 1 & 2 of HCR, still the Court has the discretion to regularize it under very Rules subject to cost or otherwise, if it has caused any prejudice to the Respondents.
 - b. Though, the Company's Application for Setting Aside hereof was made by following a procedure that is foreign to the High Court Rules, it contained a concise statement of reliefs asked for and was supported by an Affidavit that averred all the facts and circumstances which were substantiated by documents annexed thereto, on which the Respondents were well informed and at a better position to file their response. What was lacking in the heading of the impugned Application was the mere wording as to "**Originating Summons**" and the absence of such a wording need not have in any manner misled or kept the Respondent Creditors in dark or caused any prejudice to it in the exercise of adducing its defense.
 - c. The position that the proceedings in respect of the affairs of the Companies are guided and governed by the Companies Act 2015 and Companies (winding up) Rules, seem to have escaped the attention of the counsel for the Respondents. Rules 7 and 8 of the Companies (winding up) Rules 2015 provide for as to what are the

applications ought to be brought by way of Summons and what are the applications that are to be brought by way of notice of motion. These Rules do not specify the mode in which the application for Setting Aside Statutory demand is to be filed.

21. Various modes of commencing civil proceedings, as provided under Order 5 Rule I of the HCR, are mainly meant to facilitate the litigants to choose the most appropriate mode for them to commence proceedings depending on the nature of their dispute and the extent of pleadings needed for the better manifestation of it in order to put across their case clearly to the opposing party, which will facilitate them to set up their defense enabling the quick and easy disposal of disputes. While the Companies Act itself has an inbuilt mechanism, the users of the Companies Act need not be required to rely on any provisions of the HCR for the purpose of commencing proceedings to set aside Statutory Demand.
22. The sub section (3) of Section 16 of the Companies Act uses the term “An **application is made in accordance with this section**”. It does not prescribe any rule under HCR. I have come across several current and successfully concluded proceedings for the setting aside of Statutory Demand in this court, commenced by making Applications in the manner followed hereof.
23. Rule 116 of the Companies (High Court) Rules states that;

“ 116 (1) No proceedings under the Act or these Rules are invalid by reason of formal defect or any irregularity, unless the court, before which any objection is made to the proceedings, is of the opinion that substantial injustice has been caused by the defect of irregularity and the injustice cannot be remedied by any order of that court”.
24. The Respondents hereof have not averred in their Affidavit or shown through some documentary evidence that any injustice or prejudice has been caused to them owing to the alleged irregularity or the mode adopted in filing the Application for setting aside the statutory demand. Hence, the objection taken on behalf of the Respondents, that the proceedings are irregular and thus the Application should be dismissed, holds no water.
25. The decisions, found in the case law authorities cited and annexed on behalf of the Respondents to their written submissions, as I see, are not mainly based on the alleged failure to comply with the prescribed mode of commencement of the relevant proceedings, but on various other valid grounds.
26. Another objection taken up by the Counsel for the Respondent was with regard to the mode of service of the impugned Application for the Setting Aside on the Solicitors for the Respondents by pasting it on the front Door of their Firm, without directly serving on the Respondents. This, in my view, need not warrant serious consideration as it had been done in the manner required to be followed as per the instruction in the Statutory Demand and the Respondents have accordingly adhered to it and took part in the proceedings.

SUBSTANTIAL MATTER.

27. For the Applicant Company to have the Statutory Demand Set aside in terms of section 517(1), it should satisfy the court 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.*

Sub section (2) empowers the court to calculate the substantial amount of the Statutory Demand and if it finds that the substantiated amount is less than the statutory minimum amount for a Statutory Demand to be set aside as per sub section (3) thereof. If the substantiated amount found to be at least as great as the statutory minimum amount for a statutory demand court may make orders as per subsection (4) (a) and (b) .

Sub section (5) also empowers the court to set aside the Statutory Demand, if it is satisfied;

- a) *Because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or*
- b) *That there is some other reason why the demand should be set aside.*

28. For the court to engage in calculation of the substantiated amount as per section 517 (2) and to make appropriate orders under subsections (3) or (4) (a) and (b), it has to be satisfied (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.***

As the Applicant Company in this matter is not complaining of any defect in the Statutory Demand or that there is some other reason that causes substantial injustice to warrant the setting aside of the demand, the necessity for this court to consider sub section (5) will not arise.


29. The main tasks before the court is to ascertain **whether there is a genuine dispute as to the existence or amount of a debt to which the demand relates? And /or whether the company has an offsetting claim?**
30. The claim of the Respondents that the vehicle in question was sold to the second named Respondent by the Director of the Applicant company on 18th September, 2019 and she purchased it from him by paying a total sum of \$ 60,000.00 being the purchase price thereof and the possession of the vehicle was handed over to them on the same date for their usage are not at all disputed by the Applicant Company's director Vijay Paramanandam. Parties are also not at variance on her further claim that the Director of the Applicant Company had agreed to have the Mortgage for the vehicle settled in order to have the vehicle registered in her name as per the initial Agreement VP-2.

31. The Director of the Applicant Company has also, unreservedly, admitted that the said amount of money was received by him from the Second named Respondent and it was paid to the Credit Corporation only to reduce the burden of its overall Mortgage liability. As a result he has not been able to have the vehicle in question released from the Mortgage for the same to be registered in the name of the second Respondent as agreed in VP-2. Obviously, it is a failure on the part of the Applicant Company, either to have the vehicle released from the Mortgage in order to have it registered in the name of the Second Respondent or to pay the purchase money back as he agreed.
32. The fact that the Director of the Applicant Company obtained \$60,000.00 from the Second Respondent undertaking to transfer the vehicle unto the 2nd respondent is admitted in paragraph 8 a) and b) of his Affidavit in Reply and also as evidenced by the VP-2. This cannot be disputed by the Applicant Company. It is also not disputed by the Applicant Company that it failed either to have the vehicle released out of the Mortgage or alternatively to pay the Respondents the said amount of \$ 60,000.00 back as agreed in the initial agreement or as per the undertaking Agreement and / or variation thereto. Thus, in view of the above, the conclusion that one can be safely arrived at is that there is no genuine dispute between the Company and the respondents about the existence or amount of a debt to which the demand relates.
33. With the above firm finding arrived at on the existence of an undisputed debt and the amount of it on the weight of the evidence placed and also on both the direct and tacit admissions, what stands to be decided next is whether there is an **off-setting claim** for the Applicant Company as argued by the Counsel for the Applicant Company.
34. A pertinent question arises as to why the Respondents should pay for the usage of the vehicle after all having purchased it by paying the total price at once. It was the Director of the Applicant Company who brought in the predicament to the Respondents by not having the vehicle released from the Mortgage as per the initial agreement and subsequent undertakings of the Director of the Applicant Company.
35. The Director of the Applicant Company does not deny at all that the amount of \$60,000.00 is payable by him unto the Second named Respondent, owing to his failure to have the vehicle released from the Mortgage in order to register same in the second Respondent's name.
36. What the Second named Respondent demanding from the inception is either the Registration of the Vehicle in her name or the total money back as per the initial and subsequent undertaking Agreement since she is running the risk of the vehicle being confiscated by the Credit Corporation or losing the possession and usage of it due to an unforeseen accident, theft or robbery.

37. I find that the claim of the Applicant Company that the Second Respondent should pay for the usage of the vehicle is an **after-thought** advanced by the Applicant only after the receipt of the **Statutory Demand**, with the sole purpose of disputing the amount therein in order to avoid the winding up process.
38. **Neither** in the initial Agreement marked VP-2 entered into between the Director of the Applicant Company and the 2nd Respondent **nor** in the Undertaking Agreement dated 1st April, 2020 marked **AS-01** or in the Variation thereto dated 29th June, 2020 marked as **AS-02** both entered with the FCCC on the Company's own letter head, a condition for the Respondents to pay charges for the usage of the relevant vehicle was included. The Applicant Company has not at least taken up a position that there was a verbal agreement even for the payment of usage charges by the Respondents for the vehicle in question. The Applicant for the reason best known to it did not produce the AS-01 and AS-02 along with its Affidavit in Support. **Why should the Respondent pay usage charges, after all buying the Vehicle on full payment and without any fault on her part for this predicament?**
39. The Applicant Company has failed to satisfy the Court that there is a **genuine dispute** between the Company and the Respondents about the existence and the amount of a debt to which the Statutory Demand hereof relates and/ or that the Company has an **offsetting claim** in terms of Section 517 (1) (a) and (b) of the Companies Act 2015.

OUTCOME:

- a) The Summons dated 11th March, 2021 preferred by the Respondents, purportedly, under Order 18 Rule 18 of the HCR is hereby dismissed.
- b) The Application dated 24th February, 2021 preferred by the Applicant Company moving to set aside the Statutory Demand dated 05th February, 2021 is hereby dismissed.
- c) The said Statutory Demand dated 05th February, 2021 stands intact.
- d) The Applicant Company shall pay the 2nd named Respondent \$ 2000.00 within 21 days from today, being the summarily assessed costs.


A.M. Mohammed Mackie
Judge



At High Court Lautoka this 01st day of June, 2022

SOLICITORS:

For the Applicant: M/S Pillai Naidu & Associates, Barristers & Solicitors

For the Respondent: Rams Law