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

COMPANIES ACTION NO. HBM 28 OF 2020

IN THE MATTER OF STATUTORY DEMAND dated 26th June, 2020 taken out by SURESH HANSJI t/a HANS FOOTWEAR ("the Respondent") against J KEVI ENGINEERING (FIJI) PTE LIMITED ("the Applicant") and served on the Applicant on 26th June 2020.

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 **J KEVI ENGINEERING (FIJI) PTE LIMITED** a limited liability company having tis registered office at Level 1, Sri Murgan Building, Nadi Back Road, Nadi, Vitilevu.

APPLICANT

AND **SURESH HANSJI t/a HANS FOOTWARE** having its principal place of business at 7 N.G Patel Road, Main Street, Nausori.

RESPONDENT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. R. Singh, for the Applicant
Mr. K. Siwan, for the Respondent

DATE OF HEARING : 17th May, 2022

DATE OF DECISION : 28th July, 2022

RULING

A. INTRODUCTION:

1. This Ruling pertains to the joint hearing held before me on 17th May 2022 in relation to;

   a) the Application preferred by the Applicant Company, namely, "J KEVI ENGINEERING (FIJI) PTE LIMITED" on 16th July 2020, seeking to **set aside the Statutory Demand** dated 26th June 2020 issued against it by the Respondent, namely, SURESH HANSJI a/as HANS FOOTWEAR, pursuant to section 516 of the Companies Act 2015, and

b) the Summons filed by the said Respondent on 23rd July 2020, seeking to **strike out** the said Application for setting aside the Statutory Demand, pursuant to Order 2 Rules 1&2, Order 5 Rule 3 and Order 18 Rule 18 of the High Court Rules 1988 and under inherent jurisdiction of this Court.

2. The aforesaid Application for setting aside Statutory Demand is supported by the Affidavit of **Kavinesh Narendra Reddy (Director)** sworn on 16th July 2020 and filed along with exhibits marked as "**A**" to "**O**", while the Respondent's Summons to strike out is supported by the Affidavit of **Suresh Hansji**, sworn on 22nd July 2020 and filed along with exhibit "**SH** 1" to "**SH 10**". The said Affidavit in opposition by **Suresh Hansji**, serves as the Affidavit in support for his Summons for striking out as well.

3. Subsequent to filing of reply Affidavits by the Applicant on 21st August 2020, the Respondent has taken the liberty of filing a further Affidavit on 01st September 2020 in response to the Applicant's said Affidavit in Reply along with a further exhibit marked as "SH-01" which is a purported Loan Agreement.

4. At the hearing held before me, having filed helpful written submissions, both the counsel made lengthy oral submission as well.

B. BACKGROUND:

The Applicant's position in brief

5. As per the Affidavit of KAVINESH NARENDRA REDDY (the Director) filed in support of the Application for setting aside Statutory Demand, it is averred, *inter-alia*;

a. That the Applicant Company is engaged in the business of Engineering Services and on 26th June 2020 it was served with a Statutory Demand by the Solicitors for the Respondent claiming a total sum of $ 155,797.00 , out of which $ 135, 000.00 being a loan, allegedly, obtained by the Applicant from the Respondent and the balance $20,000.00 being the amount paid to the Applicant by the Respondent for the installation of a Gate, which was, allegedly, not attended by the Applicant and thereby threatened to present a winding up Application, if the said sum is not paid un to the Respondent's Solicitors within 21 days. The said total amount also included $797.00 being the legal cost.

b. That the Company did not obtain any loan from the Respondent as claimed in the Statutory Demand and what the Respondent had in fact paid to the Applicant was for the Engineering services the Applicant had carried out for the Respondent over a period of time in the year 2019, thus the Applicant does not owe any monies and it is solvent with ability to pay its debts.

c. That, as averred in paragraphs 13 to 26 of the Affidavit in support, the Applicant Company rendered small Engineering works, structural designing and manufacturing services, sold goods, and provided consultancy service to the Respondent through

the Applicant's Director, who was engaged by the Respondent on various instances throughout the year 2019 subject to his fees. Applicant relies on exhibits marked as C, D, E, F1, F2, G, H, I, J, K, L, M, N and O in order to substantiate its position in this regard.

d. That out of the works it had agreed to carry out for the Respondent, the work mentioned in paragraph 26 of the Affidavit for the value of $70,000.00 was put on hold by the Respondent due to Co-Vid 19. Accordingly, the Applicant strongly disputes the alleged debt amounting to a total sum of $155,000.00.

The Respondent's Position in brief;

6. As per the Affidavit in response by **Suresh Hansji** , it is stated ;

a. That the Director of the Applicant Company had requested for a loan of $ 135,000.00 , stating that they were in a financial difficulty, by showing an advance deposit of $2,50,000.00 with his Solicitors for the sale of one of Applicant's properties at NADI Back road and accordingly he had released cheque **No- 6070** dated **14th June 2019** for $35,000.00 and Cheque **No-6172** dated **13th September 2019** for $ 100,000.00.

b. That he had also paid by cheque No-5995 dated **26th March 2019** a sum of $20,000.00, being the payment for the installation of a Gate, but it was not attended by the Applicant Company. (Para 13 (b) IV).

c. That the loan **Agreement that had been prepared by Respondent's previous Solicitors Messer's KS Law** was to be executed by the Director of the Applicant Company and as his Solicitor in Lautoka was said to be not available, it was agreed to execute it later. However, due to the good relationship both the parties had in good faith, he released the sum as stated in paragraph 13 (b) i) and ii) on the understanding that the Director of the Applicant Company will execute the loan Agreement later.

d. That he denies the claim in paragraph 10 and 11 of the Affidavit in support about the provision of such Engineering services to the Respondent by the Applicant, except for the installation of the Gate, which was confined only to making of the frame and the rest left undone.

e. That the pages 1 , 2, 3 & 5 of exhibit "C" annexed to the Affidavit in support, have been prepared in the absence of instruction from the Respondent.

f. That the Trailer supplied, as per exhibit page 4 of exhibit "C", was defective and it collapsed on reaching its destination as inferior quality steel had been used and the rest of the items were supplied by them.

g. That the Applicant charged him $32,000.00 without completing the defective job and as a result they had to hire another company to do it as evidenced by "SH 6" & "SH 6".

h. That as shown in pages 6 and 7 of exhibit "C", they neither hired a Truck nor obtained the Applicant's service to polish ET 200, which the Applicant had agreed to purchase from him, but it, was brought back by them from the Applicant.

i. That 3 invoices, annexed to the Affidavit in support marked as "J" (pages 1 to 3), dated 16th Dec 2019, 21st Dec, 2019 and 30th January 2020 respectively, are much after the loan in a sum of $155,000.00 was given to the Applicant prior to September 2019 and therefore the Applicant cannot take up a position that the said sum was paid by the Respondent to the Applicant for the Engineering work done.

j. That no consultancy services were ever provided by the Applicant to the Respondent.

C. **LEGAL FRAME WORK**;

Section 516 of the Companies Act 2015 ("Com Act") provides:

> *"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.*

Section 517 of the Companies Act states:

> ***"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."*

D. DISCUSSION:

The Summons for Strike Out

7. Before proceeding to consider the Application for setting aside Statutory Demand , I shall turn towards the timely Summons filed on behalf of the Respondent for striking out pursuant to Order 2 Rule 1 & 2, Order 5 Rule 3, Order 18 Rule 18 of the High Court Rules 1988 (HCR).

8. At the outset, I must confess that I am yet to come across or be referred to a judgment/ ruling, wherein a Court in Fiji has struck out an Application for Setting Statutory Demand made under section 216 of the Companies Act 2015, purely on account of an alleged irregularity occurred in terms of Order 2 Rule 1, due to the failure to follow the Order 5 Rule 3 of HCR in commencing the proceedings for setting aside a Statutory Demand.

9. It is my view, that if the Order 5 Rule 3 of the HCR 1988 has been observed in breach when filing an Application for Setting aside the Statutory Demand, this Court is still vested with power under Order 2 Rule 2 & 3 to allow any irregularity to be cured, without nullifying the entire proceeding or a steps taken in the proceedings.....

> **Order 2 Rule 1 and 2 of the HCR 1988 state as follows.**
>
> *"1-(1) Where, in beginning or purporting to begin any proceedings or at any statge in the course of or in connection with any proceedings , there has, by reason of anything done or left undone, been a failure to comply with the requirements of the Rules , whether in respect of time, place , manner, form or content or in any other respect ,* ***the failure shall be treated as an irregularity and shall not nullify the proceedings , any steps taken in the proceedings, or any document, judgment or order therein.***
> *2- ....."*

10. In ***Balveer Singh & another V Radhabai aka Radha Bai- Civil Appeal No. ABU 115 of 2018 (High Court Case No- HBC 172 of 2015)*** His Lordship, Basnayake –J in paragraph 38 of His Lordship's Judgment, with the agreement of other Hon. Member judges , observed as follows;

> *"There is no doubt that the Rules are intended to provide certainty, clarity and ensure expeditious case management. However, procedural default alone should not preclude a claimant being denied the right to adjudicate his claim, if the default has not, or will not cause prejudice to the defendant which can be compensated by the payment of costs. At the heart of discretion given to the Court in Ord. 2 and Ord. 3 to extend the time and thereby overlook a time default, is balancing parties' rights, in the interest of justice".*

In paragraph 46 thereof His Lordship observed further as follows

> *"Whilst there is no doubt that the HCR and all rules of court are created for the smooth functioning of the system of justice, and to ensure certainty , transparency and clarity , too rigid an adherence to the Rules can result in unexpected , unintended and irreversible consequences. That is why the Rules themselves are self- regulating and*

provide an external remedy reserving to the judge, the necessary element of discretion to be applied on a case- by- case basis"

I find it appropriate to quote here what my predecessor Judge Hon. A.G. Stuart, had to say when his Lordship was confronted with a Striking out Application on the failure on the part of the Plaintiff to follow the Order 7 Rule 3(1) of the HCR 1988- in pages 9 and 10 of the Decision in **Attorney General of Fiji V Sadiq Khan, Civil Action No-HBC-163 of 2019**

"Time and time again in numerous decisions of the courts at every level, the point has been made that the purpose of the High Court Rules is to provide an orderly framework for the identification of and proper resolution of disputes. Compliance with the rules is important, not because it is an end in itself, but because doing so is seen as the best way of achieving that objective. Except in the case of deliberate disregard of the rules, or genuine and irremediable prejudice to a party arising from non-compliance, a court is unlikely to strike out proceedings for non-compliance. Instead it will give the party in default – often accompanied by an order for costs against it - the opportunity to correct the non-compliance so that the essence of the parties' dispute can be identified and decided. This is particularly the case where striking out the proceeding will still leave an issue to be resolved, and will therefore simply obstruct and delay the final resolution of that dispute. The present case falls into this category. Even if there is a serious defect in the plaintiff's originating summons such that the defendant is genuinely confused about what is being sought, striking out the summons will not resolve the issue of whether the FRA should be entitled to acquire part of the defendant's land to enable work to be carried out to enhance public safety. I am far more concerned about resolving that issue than pandering to nit-picking concerns about whether O.7., r 3(1) is perfectly and completely complied with. In any case it is apparent that the defendant is in no way confused about exactly what is being sought in these proceedings, and if there is any minute failure on the part of the plaintiff to comply with the letter of the rule (a failure that the defendant's counsel has not explained in the submissions, and that I cannot for myself discern) it has certainly not resulted in any prejudice to the defendant in the conduct of his defence. I do not accept that there is any non-compliance with the rule referred to, or that, even if there was, there is any need now to do anything about it".

11. The Respondent relies on Order 2 Rule 2 of the HCR 1988 to find fault with the Applicant for not following the Order 5 Rule 3 of the HCR to commence this proceeding.

12. Rules 7 and 8 of the Companies (High Court) Rules2015 provide for the Applications that are to be brought by way of Notice of Motions and the Applications that are to be brought by way of Summons. These Rules do not specify the form in which the Application for Setting aside to be made before the High Court.

13. Further, my attention is drawn to Rule 116 of the Companies (Winding up) Rules 2015 which reads as follows.

"116(1) No proceedings under the Act or these Rules are invalid by reason of any 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 the Court".

14. The Respondent has failed to show that prejudice or irremediable injustice has been caused to the Respondent on account of the mode adopted by the Applicant in commencing this setting aside proceedings, without adhering to Order 5 Rule 3 of HCR 1988.

15. Thus, this Court can arrive at a safe conclusion that the Order 2 and Rules under it need not necessarily stifle the proceedings in hand on account of alleged irregularity occurred owing to the method adopted in commencing the proceedings .

16. The next argument of the learned Counsel for the Respondent is that this Application of the Applicant should be struck out under Order 18 Rule 18 of the HCR-1988.

Order 18 Rule 18 of the HCR 1988 reads as follows.

18-(1) The Court May at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action , or anything in any pleading or in the indorsement , on the ground that-

a. *It discloses no reasonable cause of action or defence as the case may be; or*
b. *It is scandalous, frivolous, or vexatious; or*
c. *It may prejudice , embarrass or delay the fair trial of the action; or*
d. *It is otherwise an abuse of process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

17. As the Counsel for the Applicant pointed out, the Respondent has not specified the ground on which he relies under Order 18 Rule 18 to have this Application struck out, which power , in any way , is exercised on the discretion of the Court. No evidence adduced to show that the Application to set aside the Statutory Demand filed by the Applicant is frivolous, scandalous, and vexatious, is an abuse of process, does not disclose reasonable cause of action or is in fact irregular.

18. However, on the evidence adduced by the Applicant, as observed bellow, this Court is of the opinion that the Applicant has a reasonable cause of action and has demonstrated that there is a genuine dispute with regard to the purported claim made in the Statutory Demand dated 26th June 2020.

19. Accordingly, the Summons by the Respondent for striking out pursuant to the Order 18 Rule18 relied on by him should necessarily fail.

Service of the Application to Set Aside.

20. The next objection the Applicant had taken is with regard to the service of the Application for setting aside on the Respondent.

21. The Companies Act, section 516(2), states that an application may only be made within 21 days after the demand is so served, and subsection 3 of that section sets out that 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 on the person who served the demand on the company.

22. The statutory demand was served on the Applicant Company on 26th June 2020. The Applicant Company filed its Application with its supporting Affidavit on 16th July 2020. It was, reportedly, served personally on **Suresh Hansji** at 7:30 pm at his Residence, at Respondent's **Principal place of business** at 5:30 pm, at the Office of the Solicitors for the Respondent at 1:00 pm (a Friday) by pasting on the front door and on the **City agents** of Respondent's Solicitors at 3:40 pm, all on **17th July 2020**.

23. Parties are not at variance that the Application to set aside, together with the supporting Affidavit, was not only filed, but also served within 21 days. What is disputed is the time of service at Respondent's principal place of business and on Suresh Hansji at his Residence, being 5:15 pm and 7:00 pm respectively on **17th July 2020**. Service at the Respondent's Solicitors Office by way of pasting on the front door, and service at the office of the City agent are not disputed. The reason given for the after hour service at the Respondent's principal place of business and at Suresh Hansji's Residence is only a mere technical issue , which could not have caused any prejudice to the Respondent. The Respondent has duly acted by accepting the multiple mode of services. The argument advanced by the Counsel for the Respondent on this will not hold water.

The Main Issue:

24. The pivotal issue that begs adjudication before me is whether there is a genuine dispute between the Company and the Respondent about the existence or amount of the debt to which the Statutory Demand relates or the Company has an offsetting claim.

25. In **CGI Information Systems and Management Consultants Pte** Ltd v **APRA Pty Limited, [2003] NSWSC 728**, this case was cited by Mutunayagam, J in Gurbachan Singh's Steel Mills Ltd v Export Freight Services (Fiji) Ltd, it was stated:

> *"... the task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found upon the hearing of its section 459G application that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."*

26. The total amount of the alleged debt ,as per the impugned Statutory Demand in this matter, is $155,000.00, which is made of $135,000.00 being the loan, allegedly, given to the

Applicant and the balance $20,000.00, admittedly, paid to the Applicant for the installation of a Gate, which was not attended by the Applicant according to the Respondent.

27. The main document relied on by the Respondent to substantiate that the said amount of $135,000.00 was in fact paid to the Applicant only as a loan facility, is the purported "**Memorandum of Loan Agreement**" which found its way to the case record, not through the Affidavit in response by Suresh Hansju, but through another Affidavit in Response by Suresh Hansji, filed on 01st September 2020 to the Affidavit in **reply** filed by the Applicant on 21st August 2020. This has deprived the Applicant from duly challenging the said purported Loan Agreement brought in by the said Affidavit in Response. This, purported, Loan Agreement, which crept in to the record in the said manner, would probably have taken the Applicant by surprise, but appears to be of immense use for the Applicant in disputing the debt.

28. I find that so called Loan Agreement "SH-1", is nothing but a self-serving document, as correctly observed by the counsel for the Applicant, since it does not contain any evidential value, particularly, in the absence of the signature of the Applicant. Admittedly, it was not signed by the Applicant Company through the Directors or anyone authorized by the Applicant Company.

29. By presenting such a half-baked and self-serving document and mainly relying on it in a proceedings of this nature, in order to substantiate its position that the debt due is arising out of a loan facility, the Respondent has wittingly or unwittingly made the task of the Applicant very much easy in disputing the alleged debt.

30. According to the Demand Notice, the Respondent's position as to how the debt arose was that a sum of $135,000.00 is on account of the loan granted to the Applicant and the balance $20,000.00 being the payment made for the installation of a gate, which remained unattended by the Applicant.

31. But, the Applicant's stern position from the inception was that the total sum claimed by the Respondent was nothing but the payments made by the Respondent to the Applicant for the various works done, goods sold and the consultancy services provided to the Respondent over a period of time in the year 2019.

32. The Applicant in paragraphs 9, 10, and 12 to 17 of its Affidavit in support has made averments describing the works it did for the Respondent. What I find in the Affidavit in response by the Respondent with regard to the paragraph 9 of the Applicant's Affidavit in support is only a mere denial.

33. Further, though the Respondent in paragraph 15 of his Affidavit in response denied the contents of paragraph 13 of the Affidavit in support, by averring in sub paragraphs 15 a), b) and c) that no instructions had been given by it to the Applicant for such works, the Respondent has tacitly admitted that some works, as claimed by the Applicant, had in fact been done by the Applicant.

34. The above position is further strengthened by his averments at the end of paragraph 15 b) of the Affidavit in response to the effect "the ***Applicant's Director insisted to do it himself and that too free of charge***" and in paragraph 15 c) to the effect "**no *documentation in support from the Applicant so as to say that the works were in fact carried out by the Applicant completely".*** This suggests that the Applicant has in fact done some work, apart from doing only the frame of the Gate, as alleged by the Respondent.

35. On plain reading of the paragraphs d), e), f) and g) of paragraph 15 of the Respondent's Affidavit in Response, it is very clear that the Respondent acknowledges several works being done by the Applicant Company on which the Respondent seems to have been not satisfied due to certain defects and /or shortcomings therein. In paragraph 16 a) and paragraph 19 of the Affidavit in Response too, the Respondent admits certain other works were done by the Applicant.

36. Thus, the position taken by the Respondent that the Applicant had done nothing by way of providing Engineering services, except for taking $20,000.00 for the installation of agate , which according to the Respondent was not fully attended by the Applicant, is defeated by the Respondent's own averments in its Affidavit in Response.

37. In paragraph 18 a),b) and c) of the Affidavit in Response, the Respondent takes up the position that all 3 exhibits marked as "J" are dated 16th & 21st December 2019 and 30th January 2020 respectively, which are much after a sum of $ 155,000.00 was given prior to September 2019.

38. Prior to taking up the above position, the Respondent should have proved that a loan of this amount was in fact given to the Applicant as averred by him. It is observed that the Respondent is at least not in a position as to on which date the purported loan was actually given. The Respondent's ill-fated Loan Agreement shows that it was to be entered into in the Month of September 2019, but the Cheque for $ 35,000.00 (marked as "SH-02") denotes the date as 1st June 2019.

39. The Respondent in its Statutory Demand, having taken up a position that the total debt of $155,000.00 was made of $135,000.00 being a loan given and the balance $20,000.00 being the payment for the Gate, later in paragraphs 18 a (, b) and c) of its Affidavit in Response takes up a position that the entire amount $155,000.00 was given as a loan to the Applicant. The Respondent cannot take up contradictory positions paving the way for suspicion, which at the end of the day favors the Applicant to substantiate its position in disputing the debt.

E. CONCLUSION:

40. When all the facts and circumstances adduced by both the parties are gathered and closely scrutinized in the light of the evidence before me, this court has no alternative, but to arrive at the conclusion that the alleged debt in this Statutory Demand is disputed and it is so disputed on valid grounds.

41. The circumstances hereof demand a reasonable cost being ordered in favor of the Applicant.

F. FINAL ORDERS

a. The Summons by the Respondent to Strike out the Application for setting aside Statutory Demand is dismissed.
b. The Statutory Demand dated 26th June 2020, issued by the Respondent's Solicitors, is hereby set a side.
c. The Respondent shall pay the Applicant $1,500.00, in 14 days from today, being the summarily assessed costs.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohammed Mackie
Judge

At High Court Lautoka this 28th of July 2022

SOLICITORS:
For the Applicant: **Messrs Patel & Sharma, Barrister & Solicitors**
For the Defendants: **Rams Law, Barristers & Solicitors**